

The Rise of Class Actions in Israel



After reading the title of this article, you may very well be asking yourself “why should I waste my time reading about

class actions in a Levantine country of approximately 8.5 million residents, no larger than the state of New Jersey?”

If you too identify with this skepticism, please keep the following in mind: over the past several years, Israel has experienced a significant (and, perhaps, alarming) “class action boom.” A growing number of inter-

national corporations have found themselves in the midst of Israeli class actions. To put it bluntly, if you advise a corporation that conducts business in Israel, directly or indirectly, Israeli class actions are more relevant than you might think. We hope that with the information and guidance of this article, you will not be caught off-guard.



■ Ron Peleg is a litigation partner at Meitar Liqornik Geva Leshem Tal. Mr. Peleg regularly defends multinational companies in complex litigation, particularly class actions. He also specializes in the field of pharmaceutical law. Mr. Peleg is the DRI International Country Chair for Israel and consistently selected as a leading practitioner by Who's Who Legal Product Liability Defence & Life Science. Noam Gilon is a litigation associate at Meitar Liqornik Geva Leshem Tal. Mr. Gilon represents clients in complex litigation cases in a variety of fields, including class actions, product liability, contract law, and corporate law. Prior to joining Meitar, he served as a law clerk to the Honorable Justice Dr. Yoram Danziger of the Supreme Court of Israel.

Introduction

Israelis take pride in many things: our cuisine (everyone can appreciate quality hummus, tehini and falafel), our world famous historical sites, and our beautiful sandy beaches. More recently, Israel has prided itself on its status as a “high-tech nation”—a global leader and exporter of technological innovation across an array of fields—from software development and IT, through biotechnology and pharmaceuticals, agricultural technology, the automobile industry, and life science.

A less well-known fact is that Israel is not only a global leader in technology and innovation, but it also boasts a “flourishing” legal industry. At one lawyer per 120 residents, Israel has, by a wide margin, the world’s highest lawyer-per-capita ratio (in comparison, the US has nearly one lawyer per 230 residents). It should probably then not come as a surprise that among the countries that permit plaintiffs to file class actions (or similar collective actions), Israel also has a remarkably high rate of class actions filed—on average, more than five new class actions are filed daily (amounting to more than 1500 new class actions every year).

Surely, justified class actions are legitimate means to achieve important rationales, including the need for private deterrence. That being said, the sheer amount of class actions filed in Israel strongly suggests that only a minority of the class actions are genuine attempts fulfill these rationales, while the remainder are merely attempts to reap the economic incentive offered by the class action mechanism.

The ramifications of Israeli class actions have extended far beyond Israel’s borders. Since 2012, no less than 30 Fortune 200 Companies were named as direct defendants by Israeli class action plaintiffs. This number is rising steadily, as Israeli class action lawyers are in a constant search for their next class action “jackpot.”

The goal of this article is twofold. First, we will attempt to outline this phenomenon and its significance. Second, we will provide practical insights that we consider crucial for every lawyer advising a corporation that, directly or indirectly, conducts business in Israel.

Israeli Law: A Short Overview

We cannot dive directly into a discussion of Israeli class actions before offering a brief outline of Israeli law in general. Here are six basic facts every defendant facing a class action in Israel should know.

First, Israel has a well-developed common law legal system, which has imported

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many American legal doctrines and principles over the years. While Israel has no formal constitution, the Israeli legislature has enacted several “Basic Laws” that are interpreted as having constitutional status. These protect a set of fundamental rights, such as freedom, equality, property, and dignity.

Second, Israel has a three-tiered court system, consisting of magistrate courts, district courts and the Supreme Court. The district court is the court of first instance with respect to any class action seeking more than US\$710,000 in damages.

Third, all cases (including class actions) are bench trials.

Fourth, discovery procedure under Israeli law is relatively lenient compared to the US procedure. Israeli civil procedure does not provide for depositions, nor for large-scale e-discovery.

Fifth, unlike many jurisdictions outside the US, Israeli judges are generally not inclined to order the payment of significant costs and attorney fees by the losing party.

Sixth, Israeli civil procedure does not allow summary judgments. The Israeli alternative is dismissal *in limine*, which is granted very rarely as it is perceived as denying the plaintiff’s day in court, and accounts for only 1 percent of Israeli class action resolutions.

The Rise of Class Actions in Israel

The Israeli Class Action Law was enacted in 2006, drawing heavily upon the accumulated American experience with class actions, albeit with certain adaptations and adjustments. Ever since, Israeli class actions evolved quite independently, while the number of class actions filed in Israel per annum has grown by 5,300 percent. Several key factors have contributed to this massive growth spurt.

The first factor is the record number of Israeli lawyers, coupled with the prospect of lucrative compensation: the average attorneys’ fees awarded to lawyers representing class action plaintiffs stand at 15 percent of the total settlement. The economic incentive to file class actions is strengthened by the fact that filing class actions entails no significant risk on the part of the plaintiff. As mentioned above, plaintiffs are unlikely to be required to pay the defendants’ costs even if the class action is deemed frivolous.

The second factor is the pro-plaintiff tendency displayed by certain Israeli courts. This, combined together with the relatively low standard of certification applied by certain Israeli courts—*i.e.*, plaintiffs must only show the action stands “a reasonable chance”—has led to a high certification rate (over 40 percent). Consequently, class action plaintiffs are fully aware that they have good chances of success, and very little to lose.

The third factor is the absence of alternative mechanisms for collective actions, such as Multi-District-Litigation (MDL).

The fourth factor is the “breach of autonomy” doctrine, which will be discussed below. In light of this doctrine, not only do plaintiffs face a low standard of certification, they do not even need to allege that they were materially damaged.

Lastly, with respect to international defendants, another key factor comes into play. Israeli class action plaintiffs are eager to name foreign corporations as defendants, as such foreign corporations are perceived both as having deep pockets and as more willing to reach a quick settlement at relatively high nuisance value (given the costs of managing litigation abroad). Often, in order to “drag” foreign corporations into Israeli proceedings, Israeli class action plaintiffs will file “copycat” class actions, based almost entirely on facts, media reports, and legal claims from abroad (this of course raises jurisdictional issues, which we address below).

This is not to say that there are no instances where naming a foreign defendant may be justified—some class actions genuinely and legitimately strive to foster the accountability of foreign corporations that provide goods and services in Israel towards Israeli consumers. Such foreign corporations may indeed, depending on the circumstances, be reasonably viewed as having subjected themselves to the jurisdiction of Israeli courts.

The rise in the number of class actions filed has also resulted in a higher level of sophistication of the class actions filed. If a decade ago the vast majority of class actions were premised on allegations of relatively simple consumer deception or false advertising, a growing number of recent class actions include complex product liability claims (particularly involving pharmaceutical products), securities claims, and antitrust claims. As we shall see below, this rise in sophistication does not necessarily imply that class actions have become increasingly well-drafted or well-grounded.

Against this backdrop, the current Israeli legal atmosphere is that product recalls, newspaper articles, research papers, regulatory decisions, and foreign claims may all serve as triggers for a class action in Israel. Considering this atmosphere, foreign defendants often ask “may a class action be brought against me even if I am fully compliant?” Unfortunately, the answer is almost always “yes.” The immediate follow-up questions is then “well, the court will surely dismiss such an action, wouldn’t it?” Here too, the most precise

answer would have to be “the court may very well be attentive to the action, even if compliance is proven *prima facie*.” Indeed, plaintiffs will nevertheless attempt to base their class action on a variety of laws and doctrines, ranging from general consumer protection and contract law, to tort law and unjust enrichment.

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What does this mean? Must foreign corporations live in fear of Israeli class actions being filed against them? The short answer is no. The longer answer is that just as a foreign corporation should not refrain from conducting business in other jurisdictions that allow for class or collective actions—such as Australia, Ireland, Canada, and Brazil—the possibility of class actions in Israel should not discourage foreign corporations from doing business in Israel. Rather, the possibility of class actions should encourage foreign corporations to take the appropriate precautions, preferably as part of comprehensive global strategy intended to defend effectively against parallel class actions filed in different jurisdictions.

Perhaps the best precaution is to recognize the shift that Israeli class action jurisprudence has caused. Nowadays, Israeli courts may be less concerned about formal compliance with regulatory demands, and may focus on promoting fair business practices, including good faith and full transparency (towards both consumers and regulators). At the end of the day, these are very strong shields against the threat of Israeli class actions.

What other adjustments can a foreign defendant make? Take for example a scenario in which an international corporation is carrying out a worldwide recall. In this scenario, the corporation may very well want to consider how the recall can be carried out while minimizing the chances of a class action in Israel (and all other relevant foreign jurisdictions). This means careful attention to detail—of particular importance are scope, wording, and timing with respect to the recall—which may affect the potential plaintiff’s ability to use the recall as the basis for his next class action.

Similarly, if an international corporation faces legal challenges abroad—for example, investigation by regulatory authorities—it may prove useful to devise a strategy aimed at confining the challenge to the laws and factual circumstances applicable outside of Israel, thus preventing spill-over that would likely translate into an Israeli class action.

What Can I Expect After a Class Action Has Been Filed?

Have you just been served your first Israeli class action? Congratulations! Welcome to the club. Now it’s time to plan an effective defense strategy. Despite the general atmosphere, foreign defendants can successfully defend against Israeli class actions, and have done so in the past. Experience shows that the key is understanding the process, and this section aims at pinpointing several major highlights.

Israeli class actions have two distinct stages. The first is the certification stage, in which the court decides whether the action should be certified as a class action. A court’s decision to certify is subject to appeal as of right (if certification is denied) or to appeal with the court’s leave (if certi-

fication is granted) to the Supreme Court. If the action is certified as a class action, it will then be tried to its full extent, ending in a final judgment (which is also subject to appeal). The second stage, is, however, not common, as most certified class actions are settled shortly after certification. Therefore, our focus will be on the certification stage.

Before we dig deeper, it is important to note that, typically, the certification stage of a complex class action concerning a foreign defendant can take as long as four to five years (not including appeals). In some of the cases that we handled, the certification stage alone lasted for ten years or more. This is of particular importance when the Israeli action is one of many class actions around the globe against the same defendant, as it affords the defendant sufficient time to devise a worldwide strategy, and shows that it may be possible to manage the Israeli class action legitimately until all other class actions around the world have been resolved.

The Importance of the Certification Stage

For a claim to be certified as a class action, it must meet four main requirements. First and foremost, the plaintiff must show that the claim has a “reasonable chance” of being resolved in favor of the class (a standard that is applied rather leniently by some judges). Additionally, the plaintiff must meet three requirements, which are also dictated by the US Federal Rules of Civil Procedure—commonality, typicality, and adequacy (note that in contrast with the US Federal Rules of Civil Procedure, the requirement of numerosity is not a requirement under Israeli law).

Practically speaking, the certification stage is undoubtedly the most crucial stage of any class action for two main reasons.

First, certification requires the parties to dive into the merits of the case. This means that the plaintiff’s initial motion to certify the claim as a class action will be supported by factual affidavits and expert opinions (where relevant), and accordingly, the defendant’s answer to the motion to certify—typically submitted within three months—will have to be supported by affidavits and expert opinions, as well. This is, of course, a source of concern for foreign defendants, not only because prepar-

ing a well-drafted answer with affidavits and expert opinions entails considerable investment of resources, but also because it requires the defendant to commit to a specific line of defense at a very early stage (for example, at a time when factual investigation might still be ongoing in other jurisdictions).

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Second, the certification stage is very much an “all-or-nothing” ordeal. The combination of the pro-plaintiff tendency of many judges, together with certain judges’ lenient application of the standard of certification, results in good odds of certification. While certification is subject to appeal (with the court’s leave) and followed by a full trial which may theoretically result in a favorable resolution

despite certification, we would not recommend betting on these horses: once a class action has been certified, the presiding judge has signaled what he or she believes is the appropriate final outcome, and the overwhelming majority of certified cases are settled shortly thereafter.

Preliminary Issues: An Additional Layer of Defense

During the early phases of the certification stage, both parties may raise preliminary issues that will need to be resolved by the court. Broadly speaking, these preliminary issues are important because they offer an opportunity to explore an additional set of defense arguments. And note, this additional set consists of substantive arguments, which need to be taken very seriously and should not be discarded as mere technicalities.

The most prevalent preliminary issue that is pertinent to foreign defendants is jurisdiction. An Israeli court has two main paths through which it can “acquire” international jurisdiction over a foreign defendant. The first is if the foreign defendant has a representative in Israel—be it a branch, a franchisee, a subsidiary, or at times even a distributor. Courts are liberal in asserting jurisdiction in this manner, and contesting jurisdiction gained in such a way is generally inadvisable because (a) odds of success are slim and (b) it may be viewed by the presiding judge as a superficial attempt to avoid addressing the merits of the claim. There are of course certain exceptions, and the prospects of contesting jurisdiction should be evaluated on a case-by-case basis.

Alternatively, the plaintiff may request the court to grant leave for service outside the jurisdiction. This option requires the plaintiff to prove a linkage between the foreign defendant and the Israeli forum and to overcome *forum non conveniens* arguments. Generally, contesting jurisdiction asserted in this manner has higher chances of success.

Regardless of the manner in which jurisdiction was asserted, contesting jurisdiction may take several months (not including appeals). This potential advantage should, however, be balanced against the possibility that the contest would come off as insincere and possibly irritate the court.

Another preliminary issue worth mentioning is class action consolidation. It is not uncommon for several identical class actions to be filed on the same day by “zealous” class action plaintiffs. In such circumstances, Israeli civil procedure requires that the competing class actions be consolidated—whether by dismissing all of the class actions but one, or by merging several class actions. Not only does this process require time, it in fact pits the rivaling plaintiffs’ lawyers against each other, often driving them to point out the weaknesses of each other’s class actions in order to convince the court to favor their own. This provides useful insights that can be used by the defendant in the later phases of the trial.

The Motion to Certify

The typical class action lawyers in Israel are quite different from what you might find in the United States. Most Israeli class actions are filed by small firms, consisting of no more than two or three lawyers. These firms are often “serial class action lawyers,” who file two, three, or more new class actions each month.

Because Israeli class action lawyers do not put all their eggs in one basket (quite the contrary), they typically allocate much less time and resources per class action in comparison with American firms specializing in class actions. This means that most class actions are *not* meticulously drafted, factually elaborate masterpieces based on hours of in-depth legal research. Accordingly, Israeli class actions will almost never be supported by expensive, top-tier expert opinions.

This startling point is a considerable advantage for most foreign defendants, since drafting a serious, well-grounded answer supported by top tier experts almost automatically puts pressure on the plaintiff, forcing him to acknowledge that a quick payoff is likely not in the cards.

What Happens After I File My Answer?

After the defendant files its answer, the plaintiff has an opportunity to submit an answer pleading. This is usually followed by one or two pre-trial conferences held shortly thereafter. These pre-trial conferences are a major key to the success of any class action defendant. This will usually be

the parties’ first opportunity to hear what the judge thinks of their chances. Often, judges will use this platform to suggest (or, at times, pressure) settlement negotiations, with or without formal mediation. Making a good initial argumentation and being highly attentive to the court’s remarks is essential.

The pre-trial phase is followed by the evidentiary phase, which usually consists of

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several days of witness cross-examination. This phase is then followed by the parties’ summations (usually in writing), and a decision will then be handed down in the following months.

Why Is There Silicon in My Milk?

Israeli law has another unique feature, which is of particular relevance to class actions—the “breach of autonomy” doctrine. According to this doctrine, an individual’s autonomy, or right to make his own life choices, is a head of damage in tort by and of itself. In fact, by virtue of this doctrine, Israel is the only place in the world where a plaintiff may be compensated for “breach of autonomy” even in the absence of any material physical or monetary damage.

The doctrine was first established in a landmark decision of the Supreme Court in 1999. In that case, doctors conducted an operation on a patient’s shoulder during a foot surgery without her prior consent, causing permanent damage to her shoulder. While the court ruled that the doctors were not liable for the physical damage,

it added that the doctors ought to compensate the patient for the breach of her autonomy.

This doctrine has since evolved and its use has become widespread, specifically in the consumer class action context. Indeed, many class action plaintiffs considered this doctrine ideal for class actions, as it lowers the plaintiff’s burden to show “commonality” of damages – which is one of the factors a court considers in deciding whether or not to certify a class action. One famous example is a class action against Israel’s leading dairy producer, alleging that the milk it produced contained small traces of silicon. The class action plaintiffs did not argue that the silicon traces caused any physical harm; instead, they argued that the undisclosed silicon presence breached consumer autonomy. The court, surprisingly enough, accepted this argument.

What happens when the Supreme Court signals that it is willing to recognize class actions even in the absence of material damage? You guessed it—a wave of class actions was ushered in by autonomy-hungry plaintiffs. Some of the class actions filed thereafter were actually quite far-fetched—imagine a lactose intolerant businessman who purchased a soy latte from a prominent coffee chain, only to find out, two weeks later, that all the soy lattes sold by the very same chain contain minute traces of dairy milk, which are completely harmless to him from a medical point of view. Under the “breach of autonomy” doctrine, the businessman may argue that his autonomy to refrain from consuming lactose was breached, even in the absence of any medical damage or discomfort.

This example illustrates a serious concern of abuse of the “breach of autonomy” doctrine. Indeed, one of the major side effects of the “breach of autonomy” doctrine is that class actions seeking hundreds of millions (and even billions) of dollars are filed day in and day out, too often without any real merit. The immediate implication is that although these class actions lack any material substance, foreign defendants are still forced—both in their financial statements and vis-à-vis the media—to deal with ostensibly significant litigation exposure. These concerns have become so real that an acting Supreme Court Justice

dubbed “breach of autonomy” as a “wild horse” that must be “restrained.”

Settlements

Settlements are an integral part of Israeli class actions. In fact, history shows that no less than 75 percent of Israeli class actions will end up in a settlement.

Israeli class action law recognizes two different types of settlements: “settlements per se” and “withdrawals” (the latter, as a rule of thumb, are only relevant when it is clear that the plaintiff’s case is weak or unfounded). The main difference between the two types of settlement is that settlements per se give rise to *res-judicata*—thus guaranteeing that no similar class actions will be submitted—but entail significantly higher monetary compensation.

All settlements are subject to court scrutiny. The review process, which usually takes several months and may be quite rigorous, is somewhat akin to the provisions of the United States Class Action Fairness Act of 2005. All in all, more than 90 percent of settlements are ultimately approved. It is important to point out that the approval process requires the parties to notify the public of the settlement details. Keeping these details classified is not an option under Israeli law.

Usually, settlements do not entail admission by the defendant. In fact, many settlements explicitly state that they are not to be construed as an admission of fact or of liability. Similarly, settlements do not necessarily require the defendant to compensate class members, as many settlements provide for the donation of a fixed sum to a public cause rather than a direct compensation of class members.

When it comes to foreign defendants, settlement is often part of an orchestrated global strategy. This leads to another common question—if I settle elsewhere, do I necessarily need to settle in Israel, as well? Legally, the answer is no: settlements reached outside of Israel are *not* binding in Israeli proceedings, and *cannot* be held against the foreign defendant. On the psychological and rhetorical levels, however, reaching a settlement elsewhere may signal an admission of fault or be perceived as a discrimination of the Israeli class. Therefore, the ramifications of a foreign

settlement should be evaluated on a case-by-case basis.

Conversely, what if the foreign defendant’s global strategy is to refrain from settlement at all costs? Such a strategy can be successfully implemented in Israel. While courts are eager to promote settlements when possible, settlement is always completely voluntary, and a party will not be forced to settle against its will. That being said, experience teaches us that timing—and specifically the timing of negotiation commencement—is a key factor in securing a favorable settlement. A party that seeks to enter into negotiations too early or too late may signal that it has much to lose. Thus, if the global strategy were to change unexpectedly, the foreign defendant may find itself striving for settlement from a disadvantageous position. In order to avoid this, a foreign defendant should carefully time any shifts in strategy, and be on the lookout for advantageous positions in which it enjoys significant leverage.

Conclusion

As we have seen, a unique blend of factors—including a large number of lawyers and a general pro-plaintiff tendency—have turned Israeli class actions into a force to be reckoned with. This, however, should not intimidate foreign defendants, because there are tools they can employ to achieve an acceptable outcome. While the Israeli trend is an alarming one, knowing what to expect and making the appropriate adjustments will go a long way in preventing the next class action, or, alternatively, defending it in an effective manner. We hope that this article will raise awareness, and allow foreign defendants to foresee, manage, and mitigate their potential exposure. 