

The steady evolution of class action suits in Israel

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The robust expansion of the Israeli legal market in the last twenty-five years is derived from various local and international trends, including substantial growth in international litigation as well as modern and sophisticated forms of class and group actions. The Israeli legal market has evolved to respond to the needs of a modernised consumer society by, among other things, adapting and encouraging modern and sophisticated forms of class and group actions, similar to US-style class actions. Ruth Loven, Yigal Arnon & Co reports.



Developments in the Israeli legal market are consistent with world-wide trends such as globalisation, on the one hand, and modernising consumer society, on the other. Neither have passed over Israel. As more multinational conglomerates entered the Israeli market and established a presence and business in Israel, International Class Actions litigation became a separate and distinct area of expertise, and it features unique aspects of dispute resolution both in substance and in procedure.

The Israeli Class Actions Law 2006 permits the filing and adjudication of class actions, and defines a class action as 'an action managed in the name of a class of people, who have not empowered the class plaintiff for this purpose, and which raises material questions of fact or law that are shared by all members of the class' (prior to the enactment of the Law, class actions were available in very specific and limited fields and causes of action).

The Law provides for an 'opt-out' mechanism, namely, any person or entity which falls under the class definition becomes a member of the class, unless they provide a withdrawal notice (while the court may, under special circumstances, apply an 'opt-in' mechanism). It sets forth a closed list of issues and subjects with respect to which a class action may be filed, including claims against manufacturers or dealers of various products and services, insurance providers, banking corporations, competition law related claims, environmental claims, labour law claims, antispam regulation, unlawfully collection of tax or other mandatory payments, and more.

The filing of a class action is subject to the court's approval and discretion, and is subject to meeting several criteria, which are similar (although not identical) to those of the US Federal Rule of Civil Procedure 23: the action must raise material questions of fact or law that are shared by all members of the class; there must be a reasonable possibility that the legal or factual questions will be decided in favour of the class; a class action must be the efficient and fair way of resolving the dispute under the circumstances of the case; and there must be a reasonable basis to assume that the interest of all members of the class will be represented and managed properly and in good faith.

These requirements are examined by the court in the scope of a preliminary motion to approve the action as a class action (motion for class certification), in which the court examines whether the forgoing requirements are met. At such preliminary stage, the court examines the alleged cause of action on its merits with respect to both legal and factual aspects.

The number of class actions filed each year has increased exponentially since the enactment of the Law in 2006. Pursuant to unofficial statistics, in 2007 there were approximately 131 class action law suits filed in Israel. This number has increased every year and in 2016, there were approximately 1,500 class actions filed in Israel. 2017 was the first year that presented a minor decrease in the number of class actions filed, totalling 1,441 actions. Based on unofficial statistics, in 2017 approximately 55% of class actions resulted in voluntary dismissal, approximately 20% resulted in class settlements (namely, settlement agreements binding all members of the class who did not exercise their right to "opt-out" of the settlement), 11% resulted in denying the motion for certification as a class action, 7% resulted in granting the motion for certification as a class action and approximately 3.5% resulted in a "cessation notice", which allows a public authority to cease from collection of tax, toll or other mandatory payment resulting in the conclusion of the class action without restitution of past payments collected (remaining 3.5% resulted in either a dismissal or a final judgment on the class action).

The Law has resulted in a significant increase in consumer rights' protection and enforcement and has influenced the policies and conduct of large companies in Israel. It also led to the recognition of novel theories of consumer damages, which are not necessarily recoverable in other legal systems. In one of the most interesting class actions in Israel to date, it was discovered in 1995 that an Israeli manufacturer of various food products added silicone (dimethylpolysiloxane) to its low-fat long-life milk product to prevent its foaming, in violation of official standards and in contradiction of certain statements it made. There was no question that the addition of this substance did not pose a threat to the well-being of the consumers. A motion for certification of a class action was filed and the class action was certified and approved in a decision of the Israeli Supreme Court in 2003, for compensation of the class members for injury to their 'autonomy of will'. This was a precedent-making decision that ruled that even this type of damage is recoverable in a class action in the appropriate cases.

Class Action often shed new light on common practices, such as jurisdictional and governing law provisions in uniform contracts. In general, commercial parties enjoy freedom of choice under Israeli law, and they may stipulate on most jurisdictional issues such as the dispute resolution mechanism, choice of competent courts and applicable law. Until recently, the same rule applied to the business-consumer relationship also, however, recent case law suggests that the freedom of choice in such relationship may be more limited. Israeli courts have recently ruled that a provision in the uniform Terms

of Service of certain international service providers, which provides that disputes shall be brought before the courts of the service providers' place of business are unlawful and non-binding, and thus do not exclude the consumers' right to bring a class action in Israel (for an Israeli consumer class). This question is currently pending before the Israeli Supreme Court.

Consumer class actions filed in Israel for the past 20 years can roughly be divided into four 'generations'. The first involves conventional consumer rights class action concerning misrepresentation, consumer fraud, breach of contract, product liability and product defects, and so forth. The second involves sophisticated consumer rights class action based primarily on certain provisions of the Israeli Consumer Protection Law 1981 and regulations, which provide more robust consumer protection than the standard international benchmark protections. For example, class actions concerning unique termination rights vested upon consumers; unique mandatory notices to consumers in certain circumstances; unique labelling requirements and more.

In the third generation, antidiscrimination class actions go way beyond conventional antidiscrimination laws (which prohibit discrimination based on gender, age, race, religion, sexual orientation for example) and seek to challenge business practices. For many years, these have been perceived as totally legitimate and lawful, such as granting discounts or other benefits to women only; or price differentiation between different groups of consumers. These considerations are not characterised by their gender, age, race, religion, sexual orientation for example.

Finally, in the fourth generation, the law involves sophisticated privacy and data protection class actions that seek to challenge current data protection practices and big data operations, *inter alia* of multinational companies.

Although all four generations currently exist side by side, the third and fourth have emerged in recent years only and have become state of the art in Israeli class actions. Second, third and fourth generations may be of particular import to multinational companies as they sometimes rely on novel Israeli concepts, which a multinational company had not encountered in other jurisdictions.

Against the foregoing background, there are some useful tips for multinational companies engaged with the Israeli market, to minimize risks of class actions. It is advisable, for example, to consider potentially applicable Israeli labelling requirements as well as unique duties to disclose.

As well, in the event of product defects or product safety issues emerging outside of Israel, it is advisable to seek guidance with respect to potentially required or desired actions in Israel, both vis a vis consumers and regulators. Moreover, it is advisable to consider seeking advice whether a particular activity is subject to certain provisions of the Israeli *Consumer Protection Law* 1981 and regulations, and in the appropriate cases how such operations may be reconciled with this legislation.

Additionally, it is important to consider seeking advice with respect to price differentiation schemes relevant to Israeli consumers, independent from potential Antitrust issues. Seeking advice with respect to Israeli data protection requirements is also important.

As a start-up nation, Israeli class actions sometimes demonstrate start-up features that might at first blush appear unorthodox to multinational companies. Even so, they may create substantial exposure to their operations in this jurisdiction, which can be successfully minimized with the appropriate advice and strategy.

The online link to the article can be found [here](#).