

THE GLOBALIZATION OF CLASS ACTIONS

NATIONAL REPORT: ISRAEL



By:

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The authors wish to express their deepest gratitude to Shirley Avner – Advocate, Section Manager, Department of Civil Legislation, and Coordinator of Class Action Affairs, Ministry of Justice, Israel – for her invaluable assistance in the preparation of this report. We are also grateful to Merav Avital-Magen, Associate, Securities Litigation Department, Wilson Sonsini Goodrich & Rosati (WSGR.com), for her helpful comments on drafts of this report. The usual disclaimers apply.

I. ISRAEL'S CIVIL LITIGATION SYSTEM

Israel's civil litigation system derives primarily from that of England and Wales. During their 1917-1947 mandatory rule, the British instituted a modern system of civil litigation tightly modeled on the contemporary English system. Although it has undergone substantial changes since Israeli independence in 1948, in its core philosophy, concepts and legal methodology the Israeli civil litigation system remains a close relative of its English peer. As in the case of England, accordingly, Israeli law has traditionally eschewed group litigation, viewing the civil justice system as an arena appropriately reserved for individual litigants seeking to uphold their private interests, not of others.¹

Beginning in the late 1970s, at the same time, Israeli civil law has undergone a gradual process of codification modeled on continental European, and particularly German, law. A comprehensive civil justice codex is currently being deliberated by the Israeli legislature – the Knesset. In the area of group litigation, continental influences are also evident, notably in the role granted to public sector and civil society organizations in representing public interests through *inter alia* class actions.

II. FORMAL RULES FOR REPRESENTATIVE AND NON-REPRESENTATIVE GROUP LITIGATION

Civil litigants have sought to pursue representative and non-representative group litigation in Israeli courts from the early years of the country's independence onwards. Three distinct phases in the evolution of formal rules for group litigation in Israel can be identified:

- (1) A post-independence period where the only possible (and contested) legal basis for group litigation was Rule 29 of the Israeli Rules of Civil Procedure (RCP), which the newly independent state inherited from the English system (a period corresponding to 1948-1988);

¹ See: Stephen Goldstein, *Class Actions in Israel*, 13 INT. COMP. LAW 45 (1990).

- (2) The progressive inclusion of class action provisions in sector specific legislation (a period which commenced with the amendment to the Israeli Securities Law in 1988), and;
- (3) The legislation of a general Class Action Law, 5766 – 2006, in March 2006.

1948-1988: Rule 29 of the Israeli Rules of Civil procedure

Civil litigants seeking to pursue representative action in Israel could originally appeal solely to Rule 29 of the Israeli RCP – which are based on the English CPR – in an attempt to find a legal basis for their action. Rule 29 provides:

“29. One on behalf all interested persons

(a) Where the number of those interested in one cause of action is large, a portion of them – at the request of a plaintiff if they are plaintiffs, or at the request of a defendant, if they are defendants, and with the permission of the Court or the registrar – may represent in that cause of action all the interested persons. If the other interested persons were not aware of filing of the cause of action, the Court or registrar will notify them of the filing by personal service or by public notice if personal service is deemed impractical by the Court or registrar for any reason, according to the facts in each individual case.

(b) Anyone represented by the cause of action as provided by (a) may request the Court or registrar to make him a party to the cause of action.”²

A provision identical in language to Rule 29 is found in Rule 21 of the Rules of Procedure of the Labor Courts – which in Israel are organized as a separate, specialized structure operating pursuant to their own rules of procedure.³

In terms of non-representative group actions, Rules 29 and 21 of the Israeli RCP permit joinder of plaintiffs and defendants. Subject to the Court or the registrar’s permission, where there is “one cause of action” plaintiffs and defendants can be enjoined on the basis of liability “whether joint or several or alternative – based on one event or

² Rule 29 of the Rules of Civil Procedure – 1984. The rule traces its origin to English Rules of the Supreme Court (RSC). The equivalent, though not identical, English rule is Order 15.12 RSC.

³ See Rule 21 of the Rules of the Labor Court (Procedural Rules) – 1991. A similar provision is found in Rule 22 of the same rules.

one transaction or a series of events, or as the result of any of the above, and as to which the filing of separate causes of actions there would arise a common question, either of fact or law.” No other procedural mechanisms for no-representative group litigation exist in Israel.⁴

Until 1988, Rules 29 and 21 provided the only formal rules on which litigants could, in principle, rely in an attempt to pursue representative group litigation. In practice, however, Israeli courts have historically been highly ambivalent on the fundamental question of whether Rule 29 constituted a legal basis upon which representative actions could be pursued at all. In its first major interpretation of Rule 29, *Frankisha Merkla v. Rabinowitz* [1969], the Israeli Supreme Court adopted a restrictive view, ruling that despite the difference in wording between Rule 29 and Order 15.12 of the English rules of procedure (the former containing no language restricting its use to persons having “the same interest in any proceedings” as required by the latter) the Israeli rule should be construed in light of its English counterpart, so that only interested persons that have “an identical interest” or “a joint interest” could rely on Rule 29.⁵

In line with the English precedent, therefore, the Israeli Courts established that Rule 29 could not be employed to recover damages in tort claims held severally by the individual class members. At the same time, the Court in *Merkla* distinguished between damage actions on behalf of an entire class (which it rejected) and class actions for declaratory judgments establishing a defendant’s liability to the entire class or injunction relief (which it was prepared to accept).⁶ The *Merkla* Court, in other words, restricted the use of Rule 29 to instances where all claimants possessed “an identical interest” in the action, rejected the possibility that it could be relied upon to obtain damages in tort

⁴ See: Judge Moshe Telgam, *Class Actions – Implementation in Israeli Judicial Decisions*, 7 HAMISHPAT 11 (2001) (Hebrew)

⁵ 86/69 and 79/69 *Frankisha Merkla v. Rabinowitz* [1969] P.D. 23(1) 645

⁶ The dictum indicating that declaratory relief may be granted on behalf of an entire class, whereas actions for damages would not, was delivered by Justice Cohen, stating that: “The situation might have been different if the defendants had not sought damages; if they had sought, for example, a declaratory judgment that the entire series of transactions was accomplished by fraud, then perhaps there would have been a basis to permit a representative action – since in declaratory relief the interests of all “those interested” is equal and identical...If they had not sought damages (which by their nature are different in amount from plaintiff to plaintiff), but rather for an injunction, which by its nature, acts in equal measure on all those injured, then the representative action would have been proper...” (Id. at 648-9). As Goldstein observes, a decade later in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. and Others* [1979] 3 All E.R. 507, the English Chancery Division delivered a surprising interpretation of the English rules in line with the Israeli dictum. See: Stephen Goldstein, *Supra* note 1 at 49.

actions, but stating that reliance on the rule “may” be made to obtain declaratory or injunction relief where such relief would apply equally and identically to all members of the class.

In adopting a restrictive, but not entirely prohibitive, approach to the question of whether Rule 29 could be employed to pursue representative actions, *Merkla* left open a circumscribed space which resulted in decades of conflicting judicial interpretations.⁷ The ambiguity was only laid to rest in *The State of Israel v. E.S.T. Management and Manpower Ltd. [2003]* where, by a narrow majority, the Israeli Supreme Court ruled conclusively that Rule 29 may not be invoked to file representative group actions.⁸

1988-2006: Sector-specific group litigation mechanisms

The major revision to the Securities Law (1968) undertaken in 1988 heralded the launch of a second phase in the development of formal rules for representative action in Israel; a phase drawing strongly on American class action rules, rather than the diminishing links with English civil procedure. As Goldstein noted soon after the insertion of the first sector-specific set of class action provisions into Israeli primary law, the adoption of a specialized class actions provision for violation of securities law was not intended by Israeli policy-makers to preclude the possibility of a more general scheme.⁹ Neither was it seen as a prelude to one. Rather, the inclusion of a class action mechanism was undertaken *inter alia*, as part and parcel of a broader thrust aimed at the modernization of Israeli securities law.

⁷ In the 1990s, in particular, the question of whether to approve requests for representative group actions on the basis of Rule 29 produced conflicting judicial opinions, with some judges favoring a restrictive approach (for example: *Jerusalem County Court 4005/96 Amos Givon, Miriam Barzani and Others v. Sha'arei-Tzedek Medical Center and Others*) while others viewing the Rule as a valid basis for approval of representative actions (for example: *Jerusalem County Court 109/94 The Israeli Student Association v. The Hebrew University in Jerusalem; Tel-Aviv County Court 1808/00 Eiran Hochberg v. B.L.L. Securities*). For detailed commentary see: Judge Moshe Telgam, *Class Actions – Implementation in Israeli Judicial Decisions*, *Supra* note 4.

⁸ *Leave to Appeal 3126/00 The State of Israel v. E.S.T. Management and Manpower Ltd. [2003] P.D. 57(3) 220*. The majority of the Court disapproved of the notion that Rule 29 could, without amendment, be relied upon to allow the submission and management of modern class actions. In contrast, the minority view – shared by then Chief Justice Barak – was that as long as the matter was not taken up by the legislature, Rule 29 could be used as a general legal basis for class actions. The E.S.T decision was confirmed by the Israeli Supreme Court in [] 5161/03, where the Court also stated that it was its hope that the matter be addressed by the Knesset in primary legislation. On the E.S.T. judgment see: Michael Kreine, *Class Actions in Israel – On A Cross Road*, 1 DIN U'DVARIM 449 (2005) (Hebrew).

⁹ Stephen Goldstein, *Supra* note 1 at 61.

The amendment to the Securities Law proved to be the first in a series of legislative acts incorporating class action provisions modeled after Rule 23 of the U.S. Federal Rules of Civil Procedure – complete with opt-out provisions and certification requirements – into sector-specific Israeli law. Indeed, between 1988 and 2005, such provisions were inserted into either existing or new legislation, as follows:

- The Prevention of Environmental Hazards (Civil Suits) Law (1992)¹⁰
- Amendment to the 1988 Business Restrictions Law (1992)
- Amendment to the 1981 Consumer Protection Law (1994)
- Amendment to the 1981 Banking (Consumer Services) Law (1996)
- The Equal Pay for Equal Work Law (1996)
- Amendment to the 1981 Oversight Over Financial Services (Insurance) Law (1996)
- The Companies Law (1999)¹¹
- The Equal Rights of People With Disabilities Law (1998)
- The Oversight Over Financial Services (Pension Funds) Law (2005)

The entry into force of the new Class Actions Law, in 2006, has replaced the entire corpus of sector-specific provisions noted above with a general class actions law. Accordingly, the proceeding sections of this report focus on the debates, provisions, interpretation, figures and analysis relating to the 2006 Law. However, given the newness of the existing group litigation legal framework in Israel, earlier judicial interpretation and learned commentary on the now defunct statutory provisions remain an important source to bear in mind vis-à-vis the new regime.

¹⁰ The Prevention of Environmental Hazards (Civil Suits) Law is unique among the sector-specific provisions in that it adopted an opt-in mechanism for inclusion in a class.

¹¹ Among numerous reforms to Israeli corporate law, the comprehensive 1999 Companies Law class action provisions superseded those originally included in the 1988 Securities Law.

2006: The Class Actions Law

The passage of the Class Actions Law, 5766 -2006 by the Knesset, on March 12th 2006 (herein “the 2006 Law”), was the cumulative outcome of several motivating factors, some long-standing and others serving as more immediate tipping-point factors.

Beginning in the early to mid 1980s, American born or trained Israeli legal academics and senior law reform civil servants within the Israeli Ministry of Justice, have initiated and worked on proposals for a comprehensive scheme for class actions – inspired primarily by the U.S.’s experience. In the long run, this small group, numbering no more than a dozen individuals, acted as a loose “epistemic community” (or “vertical information network” to use Anne-Marie Slaughter’s term), following developments abroad and “keeping the flame alive” in academic and policy circles.¹²

Since the end of the Cold War and the liberalization of the Israeli economy in the latter half of the 1980s and early 1990s, the country has experienced extensive growth in the number and vociferousness of consumer, civil rights and environmental interest groups. Coupled with the experience gathered in group litigation by members of the influential Israel Bar Association and various business constituencies under the sector-specific legislation over a period of nearly two decades, there has been a gradual, but steady broadening of civil society stakeholders interested in advancing group litigation mechanisms in the country.

Against this background, from the late 1990s in particular, there has been growing dissatisfaction with the system of sector-specific rules for representative actions. As the number of sector-specific mechanisms grew from 1988 onwards, lack of uniformity in interpretation produced increasingly jarring outcomes in litigation, which were identified and criticized by Israeli academics.¹³ At the same time, the limited scope of the sector-specific arrangements meant that broad causes of action could not be relied upon by

¹² On the concept of “epistemic communities” and their role in legal and policy reform, see: Peter Haas, *Epistemic Communities and International Policy Coordination* 46 INTERNATIONAL ORGANIZATION 1 (1992). Anne-Marie Slaughter identifies horizontal and vertical information networks – which bring together regulators, judges, legislators and academics in their respective issue areas – as important sources of cross-national transfer of legal concepts and knowledge. See in particular: ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) at 36-64.

¹³ See: Stephen Goldstein and Yael Efron, *The Development of Class Actions in Israel*, 1 ALEI MISHPAT 27 (2000) (Hebrew); Stephen Goldstein and Yael Efron, *Class Action Mechanisms and Derivative Claims in the New Corporation Act*, 32 MISHPATIM 461 (2002) (Hebrew).

prospective plaintiffs, and that certain categories of potential defendants enjoyed immunity from possible representative action. Thus, for instance, the class action mechanism inserted into the 1981 Consumer Protection Law, permitted plaintiffs to request certification of a class action only with regards to causes of action listed in the 1981 law itself, barring reliance on broader causes of action in contract or torts. More egregious still, for many, were the effective immunities from litigation granted under the sector-specific legislation to the state and its agents (notably local authorities) particularly in relation to unlawful collection of municipal and city taxes, and parking fines.¹⁴ These lacunae and the perverse outcomes they produced, it was argued by Israeli academics and policy makers at the Ministry of Justice could only be properly remedied by a statute that would provide a uniform and comprehensive legal framework for representative actions.

The publication of Lord Woolf's *Access to Justice* reports in 1995 and 1996, also constituted an important external spur to change; helping to place the idea of similarly minded reforms on the agenda of Israeli legal policy entrepreneurs, provide respected international validation which helped legitimize existing initiatives, and eventually persuade both governmental actors and legislators of the wisdom of a comprehensive representative action law.¹⁵

Still, in the late 1990s and turn of the Millennium proposals for comprehensive class action legislation in Israel encountered strong objections and generated heated debates both within the Israeli Ministry of Justice itself – where the Attorney General was for many years vehemently opposed to the idea of a general class actions law – and between lobbyists for governmental agencies and business interests, on the one hand, and plaintiff lawyers, consumer, environmental and civil rights groups, on the other hand.

Two additional factors played a more immediate, tipping-point role in the birth of the 2006 Law. First, in conclusively rejecting the possibility that Rule 29 RCP could be used to file general class action suits, and explicitly inviting the Knesset to legislate in

¹⁴ Stephen Goldstein and Yael Efron, *The Development of Class Actions in Israel*, Id.

¹⁵ Lord Woolf's review of the rules of civil procedure in England and Wales, and subsequent recommendations regarding improvement access to justice, reducing costs of litigation and speeding up the administration of justice have had an important and lasting impact on the Israeli the civil justice system. Other areas influenced by Lord Woolf's reports – ACCESS TO JUSTICE: INTERIM REPORT (Lord Chancellor's Department, June 1995) and ACCESS TO JUSTICE: FINAL REPORT (London: HMSO, 1996) – and subsequent English reforms, include the progressive development of ADR mechanisms in Israel, new "fast track" civil procedure rules and case management procedures.

order to correct what it viewed as a lacuna in Israeli civil procedure, the Supreme Court's decision in *The State of Israel v. E.S.T. Management and Manpower Ltd.* [2003] helped galvanize domestic change agents, and create a sense of urgency, which was previously absent, regarding the need for comprehensive legislation. This sense was exacerbated by the explicit judicial statement in *E.S.T.* that where the Knesset to avoid clarifying the issue in primary legislation, the Court would be required to revisit the issue, opening the possibility of a reversal of the *E.S.T.* judgment.

And second, in 2006 Member of Knesset Reshef Chen (of the centrist Shinui Party) proposed a comprehensive class actions law as a private member's bill. To the existing legislative proposals circulating within the Ministry of Justice, therefore, was added an initiative from within the Knesset. The emergence of two drafts – one in the executive and the other in the legislative branch – shifted the terms of the debate away from the question whether to adopt a comprehensive law, towards the more bounded and detailed discussion of which proposal to adopt. In fact, the text of the 2006 Law represents, to a great degree, a merging of the private member's bill and the governmental legislative proposal put forward by the Ministry of Justice – texts which were quite different, and which generated a prolonged and intense public debate.

The combination of the *E.S.T.* judgment and initiation of a private legislative proposal to complement, and compete with, preexisting Ministry of Justice drafts, in other words, created a classic policy window – an opportunity for action on a given initiative, where a defined problem, a possible solution and politics combine to make the adoption of a proposed solution.¹⁶

Noteworthy, also, is the extensive survey of comparative law and learned commentary on group litigation in different jurisdictions undertaken by Ministry of Justice officials during the process of drafting the governmental version of the bill. Apart from the role of Lord Woolf's reforms in England and Wales, Israeli officials involved in

¹⁶ On the concept of policy windows see: JOHN W. KINGDON, *AGENDAS, ALTERNATIVES AND PUBLIC POLICIES* (1984)

preparing the legislation, emphasize the importance of comparable laws and commentary in the English-speaking world, most notably Canada, the U.S. and Australia.¹⁷

The governmental architects of the 2006 Law viewed the drafting of the new legal framework as an opportunity to correct both the lack of detailed rules which characterized Rule 29 RCP, and the lacunae and inconsistencies that emerged from the piecemeal legislation of sector-specific arrangements in the preceding two decades. The desire to remedy these faults is reflected throughout the Law but particularly in the language of Section 1 of the 2006 Law, which provides as follows:

“Goal of the law

1. The goal of this law is to set uniform rules in the matter of the submitting and managing of class actions, in order to improve the defense of rights, and in doing so to particularly promote these:

- (1) Actualizing the right of access to the court house, including the types of the population that find it difficult addressing the court as individuals;
- (2) Enforcing the law and deterring its violation;
- (3) Giving proper assistance to those harmed by the violation of the law;
- (4) Efficient, fair and exhaustive management of suits.”

To understand how Israeli policy makers have sought to achieve these goals, and with what actual results, we turn to examine the substantive provisions of the Law, data pertaining to its implementation, and finally to the ongoing debates regarding group litigation in Israel.

III. THE PROCESS CONTEMPLATED BY THE FORMAL RULES

Causes of action

Contrary to the wishes of the most ardent proponents of group litigation in Israel, the 2006 Law did not adopt a completely open arrangement whereby plaintiffs could pursue any and all causes of action. Rather, the drafters of the new Law preferred the adoption of

¹⁷ The drafting of the 2006 Act’s provisions on judicial approval of settlements, for instance, was strongly influenced by DEBORAH R. HENSLER ET AL., CLASS ACTIONS DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAINS (2000).

a more limited, incremental model – allowing the filing of suits only for causes of action listed in the Second Addition to the Law.

In doing so, the architects of the 2006 Law sought to embed in the new arrangement an incremental, evolutionary dimension, whereby new causes of action in specific areas could, over time, be added to the list, after careful deliberation.¹⁸ In addition, the list-model preserves a degree of continuity with the earlier sector-specific arrangements, which permitted the use of representative suits only in the causes of action created under the particular statute in question.

Accordingly, Section 3(A) of the Law employs a negative conception, providing that: “No class action will be submitted unless it is a suit as specified in the second addition or in a matter set in an explicit instruction of the law, which allows for the submitting of a class action”. At the same time, Section 30 provides that the Minister of Justice may, with the approval of the Knesset’s Committee for Constitutional and Legal Affairs and after consulting with the Minister of Finance, “add to the Second Addition”. The intention of the Law is to allow for the future expansion of the list of causes of action under the Second Addition, and the use of the word “add” (rather than “change”) clearly indicates that the Minister of Justice may not remove causes of action already included in the Addition.

Under the Second Addition, a plaintiff may request that a court certify a claim as representative vis-à-vis the following causes:

- A consumer suit against a supplier, whether for a cause of action under the Consumer Protection Law or other applicable legislation (such as faulty products legislation) in both pre-contractual and contractual relations;
- Claims against insurers, insurance agents or asset management companies, in both pre-contractual and contractual relations;
- Claims against banking corporations, in both pre-contractual and contractual relations;

¹⁸ The legislative history of the 2006 Act demonstrates a clear preference for a conceptualization whereby a separate examination will be undertaken for possible additional causes of action in different areas of the law, taking into account difficulties in enforcement of the cause of action without recourse to representative action, and the availability of alternative means to ensure such enforcement.

- Claims under any cause of action created by the Business Restrictions Law
- Claims under any cause of action stemming from the ownership, holding, purchase or sale of a security or unit trust
- Claims relating to environmental damage, directed against the polluter;
- Claims for any cause of action under the Law Prohibiting Discrimination in Products, Services, Access to Places of Entertainment and Public Buildings (2000);
- Claims for any cause of action under the Equal Employment Opportunities Law (1988), the Equal Pay for Equal Work Law (1996);
- Claims for any cause of action under chapters D, H and H1 of the Equal Rights for People With Disabilities Law (1998), under the provisions relating to accessibility for persons with disabilities in the Planning and Construction Law (1965), and under the Television Broadcasting (Subtitles and Sign Language) Law (2005);
- Claims for causes of action in employer-employee relations (construed broadly) and under minimum wage laws, except where the employee and employer in question operate under a collective labor agreement;¹⁹
- Claims against a state agency for return of unlawfully collected moneys, including taxes, fees, or other mandatory payments.²⁰

Although the newness of the Law means that the exact scope of the Second Addition is yet to be authoritatively interpreted by the courts, there is little doubt that the list of possible causes of action for which a request for certification as a representative action

¹⁹ Under the Israeli Labor Court system there exist special dispute resolution mechanisms in unionized places of employment. The restriction which bars representative actions under the 2006 Act in cases involving employer-employees disputes where collective labor agreements exist (i.e. in unionized places of work) stems from the decision of the National Labor Court in *1210/10 Bibring v. El-Al Israeli Airways Ltd.* P.D.A 38, 115 which ruled that the appropriate means of resolving labor disputes in unionized situations is through the labor-specific “collective dispute” mechanism, rather than through representative actions.

²⁰ The inclusion of this provision in the Act was achieved only after intense debate in the Knesset and the granting of special protections designed to shield state agencies from representative action. Proponents of the measure to allow representative actions against state agencies (including government ministries and local authorities) for return of unlawfully collected revenues encountered fierce opposition in the legislature, and managed to achieve the insertion of this provision only after agreeing to extensive derogations and special protections for state agencies (see below).

can be made is extremely broad; amounting to a comprehensive arrangement, at least formally. Indeed, according to the leading Israeli commentator on civil procedure, Stephen Goldstein, the only significant type of claims that fall outside the ambit of the new framework are claims in tort under the general Israeli Tort Ordinance (1968) – as opposed to tortious causes of action under specific legislation – as well as such tortious claims where the defendant does not produce or supply goods or services.²¹ Far from being an unintended omission, Goldstein argues, the exclusion of such claims from the scope of the Second Addition is deliberate and correct; reflecting a legislative position whereby these types of claims should not be handled by means of representative action, at least not of the opt-out variety.²²

Still, efforts to add new causes of action to the Second Addition by means of legislation are already afoot, and the possibility that the list-model would, at some point in the future, be replaced by a simple “catch all” provision that will obliterate the existing difference between the representative group action and other procedural mechanisms, cannot be ruled out.²³

The Israeli Supreme Court has interpreted the temporal scope of the new Law to apply to causes of action created prior to the entry into force of the 2006 Law.²⁴

Filing a request for certification

Subject to restrictions relating to causes of action and standing, the process contemplated by the formal rules begins with a set of requirements directed towards a party which seeks to submit a request for certification of a claim as a representative action.

Under Section 5(A) of the Law, whoever intends to request court approval for certification must first examine the Ledger of Representative Actions (herein “ledger”) managed by the Court Administration Service, to ascertain whether a request for approval of an identical or similar claim is already pending. Where such a request is pending, or

²¹ Stephen Goldstein, *Comments on the Representative Actions Act 2006*, 6 ALEI MISHPAT 7 (2007) at 8 (Hebrew).

²² *Id.* at 8.

²³ At the time of writing a Private Members Bill proposing an expansion to the Second Addition that would remove most of the restrictions on the submission of representative actions relating to collective bargaining agreements, is pending before the Knesset.

²⁴ Request for Appeal 7028/00 *I.B. I. Trust Fund Management Ltd. and Others v. Alacint Ltd. and Others* [2006] (unpublished).

has been approved, the party intending to make the request for certification must include details of the earlier action in its request.²⁵ A request for certification must be in writing and must attach the filed suit.²⁶

Court jurisdiction to hear requests for certification is determined under Section 5(B), depending on the prospective defendant and the remedy requested. Ordinarily, a request for certification is to be filed with the Court which has the local and substantive jurisdiction to hear the claim, with substantive jurisdiction determined according to the total sum claimed by the suit on behalf of all class members, normally the District Court (*Beit Mishpat Mechozi*).²⁷ Where the request for certification pertains to a prospective suit against a decision of a state authority, and the remedy requested includes restoration of moneys collected by a state authority (including taxes, fees or any other mandatory payment), substantive jurisdiction lies with the Court for Administrative Matters. Similarly, suits pertaining to labor issues fall under the jurisdiction of Israel's specialized Labor Court system.

Conditions for certification

Like the sector-specific legislation it replaced, the 2006 Law contains a certification requirement and procedural mechanism for determining whether or no a claim would be certified as a representative action by the Court.²⁸ In effect, therefore, Israeli law establishes a two-stage process for the management of representative proceedings, an initial gate-keeping state in which the court is required to determine whether a class action is the appropriate procedural instrument with which to manage the claim, and a second, substantive stage, in which, if certified as a class action, the claim is managed, settled or decided in accordance with the specialized procedures provided by the Law for class actions.

Section 8(a) provides that a Court may only certify a claim as representative, if it finds that all the following conditions are met:

²⁵ Section 5(A)(2).

²⁶ Section 5(A)(1). Sub-section (A)(1) also provides that the Minister of Justice may issue additional instructions as to the required format of the request, details which must be included in the request and any documents which need to be attached to the request. The Minister is yet to promulgate such rules.

²⁷ Section 5(B)(1)

²⁸ Section 8 of the Act.

- “(1) The suit raises substantial questions of fact or law common to the class, and there is a reasonable possibility that the decision regarding those will be in favor of the class;
- (2) A class action is the efficient and appropriate means of resolving the dispute in the circumstances of the case;
- (3) There exists a reasonable basis to assume that the interests of all the members of the group will be properly represented and managed; the defendant may not appeal or request to appeal a decision in this matter;
- (4) There exists a reasonable basis to assume that the interests of all the members of the group will be represented and managed in good faith.”

These conditions are cumulative and in the absence of one of them the Court is instructed to disallow a request for certification.

The provision raises a number of noteworthy points. First, unlike the sector-specific arrangements which required that the suit raise common questions of law *and* fact, as a condition for certification, Section 8(a)(1) requires only that the suit raise substantial questions of law *or* fact, thus deliberately relaxing this condition for certification.

Second, although the second condition contained in Section 8(a)(1) – namely that there exist a reasonable possibility that the decision regarding those will be in favor of the class – was included in only some of the sector-specific legislation that preceded the 2006 Act, Israeli courts have in practice made this a standard requirement for all requests for certification of class actions, in all sectors. With regards to the standard of proof required, the Israeli Supreme Court has stated that the certification stage constitutes a preliminary process which ought not to be turned into a substantive deliberation on the merit of the claim. Accordingly, the standard required to satisfy this preliminary condition is not one of a balance of probabilities, but a lower threshold of “a reasonable possibility of success”.²⁹ The standard is therefore similar to that required to obtain interim relief.

Third, the condition found in Section 8(a)(2) represents an important case management consideration; reflecting the fourth goal set by the 2006 Act (as stated in Section 1) – namely the efficient and appropriate management of civil suits. Here, the

²⁹ See: Civil Appeal 6567/97 *Bezeq – Communications Company Ltd. v. The Estate of Eliyahu Gat* P.D. 52(2) 713; Civil Appeal 4556/94 *Tanatz v. Zilbershatz* P.D. 49(5) 774 at 787. For commentary see: Alon Klement, *Guidelines for Interpretation of the 2006 Class Actions Law*, 49 HAPRAKLIT 131 (2007) (Hebrew).

Court is directed to decide whether, given the size of the prospective class and scope of the common questions involved, the management of the claim is best undertaken within the procedural framework of a class action, or whether there exists a superior procedural mechanism – such as a joinder of individual claims – that would be better suited to manage the case at hand. According to Klement, a class action is likely to be chosen by the Israeli court, as the most efficient and appropriate means of managing the suit, where the size of the prospective class is so large as to make joinder impractical, where the management of separate suits would be wasteful of court resources, or where separate claims may produce conflicting decisions. In contrast factors that may mitigate against the choice of a class actions instrument include instances where the efficiency of dealing with a class is hampered by the existence of substantial questions that are not common to the group, or where the court finds that the filing of a request for certification of a claim as representative is intended to unduly intimidate or pressure the prospective defendant.³⁰

Fourth, it has been long established in Israeli jurisprudence that in order to act as representative plaintiff, a plaintiff should both possess a personal and genuine interest in the claim and be free of any significant conflict of interests with the class.³¹ Whereas under the sector-specific arrangements which preceded the 2006 Law, however, the court was directed to ascertain whether the representative plaintiff was likely to represent the interests of the class adequately and fairly, the language of Section 8(a)(3) seeks to expand the condition of appropriate representation to cover the prospective class counsel as well. Accordingly, the requirement for certification is that the court be persuaded that “there exists a reasonable basis to assume that the interests of all the members of the group will be properly represented and managed”. The broader language chosen by the legislature is intended to reflect the reality where class action litigation in Israel (as in other jurisdictions) is primarily driven by plaintiff lawyers, with the representative

³⁰ Alon Klement, *Ibid.* at 145-146.

³¹ Hashalom Court (Jerusalem) 1464/00 *Matan Ben-Dror v. Jerusalem Co-Op*, (2003) (1) 2647. In this context Israeli courts have held that it is sufficient to show that the plaintiff is capable of managing the claim through an attorney that will guide him professionally and manage the proceedings on his behalf and on behalf of the class. As long as the plaintiff is not “fictional”, has a genuine interest in the claim and holds a basic understanding of its management, the fact that it is the class attorney, rather than the representative plaintiff, who possesses the expertise necessary manage the claim, does not constitute a bar to the appointment of the plaintiff as representative. See: Hashalom Court (Tel-Aviv-Jaffa) 2457/01 *Robert Landberg v. The State of Israel* (2002) (3) 3187.

plaintiff often acting as a *de facto* “straw man” in the proceedings. Indeed, the broad language requiring appropriate and fair representation of the interests of all class members throughout the process and by both representative plaintiff and class counsel is reinforced in Section 8(a)(4) – which again uses general language requiring that, as a condition for certification, there exists a reasonable basis to assume that the interests of all the members of the group will be represented and managed in good faith.

Finally here, the second sentence of Section 8(a)(3) provides that the defendant may not appeal or request to appeal a decision on the court’s determination concerning whether or not there exists a reasonable basis to assume that the interests of all the members of the group will be properly represented and managed by a prospective representative plaintiff or his counsel. The reason for the inclusion of this specific restriction on defendant’s rights of appeal in the 2006 Law stems from the notion advanced by the architects of the governmental bill that it is none of the defendant’s concern whether the interests of the class would be properly represented in the suit, but solely of the class members themselves.

Certification subject to substitution of the representative plaintiff or class counsel

Under Section 8(c)(1), a Court may certify a claim as representative, even where the conditions under Section 8(a)(3) or 8(a)(4) are not met, where it finds that these conditions can be fulfilled by adding a new representative claimant or class counsel, replacing the existing representative or its counsel with another, or through an alternative means. Where such a decision is made, the Court must issue an order containing directions that would guarantee the representation and management of the class members’ interests are undertaken properly and in good faith. The Court may also replace a representative claimant with another for lack of standing.³² In practice, the Israeli Supreme Court has interpreted the certification standard to require the plaintiff to demonstrate a *prima facie* cause of action and fulfill the other requisites listed in Section 8 as a condition for certification.

A Court may also give its approval to certification, subject to changes being made in the terms of request for certification. Indeed, under Section 13 of the Law the Court

³² Section 8 (C)(2).

handling a request for certification possesses broad discretion to make any changes to the request it deems to be appropriate for the fair and efficient management of the procedure.

Defining the class

Where a court grants a certification order, it must define the class in whose name the action is to be pursued, and may also define sub-classes within the general class where it finds that there are questions of law or fact that are common to some of the class members but not to others.³³ Under Section 10(A) the Court enjoys broad discretion to define the class as it sees fit, subject only to the caveat that a person whose cause of action was created after the certification of the action may not be included in the applicable class.

This does not mean that once a class is defined by the Court it may not be altered. Subject to the caveat in Section 10(A) the Court may permit any plaintiff that was not included in the class as originally defined, to join the class within a specified period of time determined by the Court.³⁴

Withdrawal from a representative action and replacement of a representative plaintiff or class counsel

A requester, a representative plaintiff or class counsel may not withdraw from his request for certification or representative action without the Court's permission. In addition, Section 16(A) of the Law expressly forbids a requester, representative plaintiff or class counsel from receiving any direct or indirect benefit from the defendant or anyone else in relation to their withdrawal from the suit.³⁵

Where the Court allows a representative plaintiff or class counsel to withdraw from the suit, or where the Court finds that a representative plaintiff or class counsel is incapable of continuing their functions for any reason, the Law provides for the possible replacement of either or both, without prejudice to the existing suit. This provision

³³ Section 10(C). The section further provides that where the Court does define a sub-class, it may appoint a representative plaintiff and class counsel specifically for the sub-class "if it finds this to be necessary to ensure that the interests of the sub-class are represented and managed appropriately."

³⁴ Section 10(B).

³⁵ This provision is fortified by the requirement that a request to withdraw be accompanied by an affidavit submitted to the Court in which full disclosure must be made of "all the substantive details that relate to the withdrawal". Section 16(B).

reflects the legislator's intention to ensure claims that are appropriate in their goals and suitability as class actions do not falter for the mere reason of having a specific representative plaintiff withdraw or be deemed incapable of filing and managing the claim.³⁶

Where all the representative plaintiffs (if there is more than one) or class counsels withdraw or are deemed incapacitated by the Court, Section 16(D) provides a three-stage procedure for replacement.³⁷

First, the Court may simply issue an order permitting another plaintiff and counsel, within a specified period of time, to request to assume the functions of representative plaintiff and class counsel respectively.

Second, where no request for such permission is forthcoming within the timeframe allotted by the Court, the Court will order that a notice be published to that effect. Following the publication of such notice, any person who was qualified to act as a represent plaintiff at the time when the original request for certification was filed (i.e. a person who fulfills all four requirements under Section 4(A) of the Law) may, within forty-five days of the publication of the notice, request to be appointed representative plaintiff. An attorney may make a similar request for the function of class counsel, within the same period of time.

Finally, where no replacement representative plaintiff comes forth, or where a request for appointment of a replacement is not approved by the Court, the Court is required to dismiss the claim.³⁸

Claims against state agencies and sensitive sectors of the economy

Using Rule 29 RCP as a legal basis, proponents of civil rights and greater governmental accountability in Israel have long sought to establish a right to file and pursue representative group actions against the state and its agents. The chief argument advanced in support of this view has been pithy and potent: the rule of law requires that the state and its agents not be placed above the law, but be treated equally with all other legal

³⁶ See: Alon Klement, *Supra* note 29 at 131.

³⁷ Section 16(D).

³⁸ The same provisions apply, with the necessary changes, to sub-classes (Section 16(E)).

entities in the land, following the Israeli maxim: “the law applies to the state as it applies to every other legal person”.

In contrast, opponents – notably the Attorney General – have long countered that this view is unduly simplistic, that the state ought to be distinguished from other legal entities in this context, and that a number of factors should legitimately exclude the possibility of legal action against the state by means of representative suits. First, it has been argued, in Israel there exists an alternative, superior mechanism for protecting the kind of public goals that representative actions are intended to attain in other jurisdictions – namely direct petitioning of the Israeli Supreme Court, sitting as the High Court of Justice (Hebrew: *Beit Hamishpat Hagavoha Le'Tsed*; also known by its Hebrew initials: “*Bagatz*”), in matters pertaining to the legality of actions and decisions of the state.³⁹ Even beyond *Bagatz*, opponents argue further, the inability to bring class actions against the state does not undermine the existing rights of Israeli litigants to sue the state – on par with any other entity – for any individual damage caused. And finally, a specific argument has long been made against allowing the possibility of compelling state authorities to return unlawfully collected dues, taxes, fees or other mandatory payments. Permitting the use of class actions for this purpose, opponents argue, would not only wreck havoc on public administration (particularly in local authorities) but would be contrary to the interests of the public, as funds collected by state authorities are used to serve public interests, and not for private gain.

It is against the background of this protracted debate (which in some respects involves elements idiosyncratic to Israeli government and legal order) that the provisions relating to claims against state authorities in the 2006 Law need to be understood. These provisions, in fact, represent a compromise between proponents and opponents where, on the one hand, representative action against the state has been included in the list of causes of action which can be pursued by means of representative suits,⁴⁰ while on the other hand, the Law contains a number of instruments designed to address the concerns voiced by opponents by granting the state two main sets of protections – one set which it shares

³⁹ On the Israeli Supreme Court and the institution of the High Court of Justice see: ITZHAK ZAMIR AND ALLEN ZYSBLAT, *PUBLIC LAW IN ISRAEL* (1996).

⁴⁰ The final item in the Second Addition of the Act, item 11, accordingly provides that a request for certification of a claim as representative may be made vis-à-vis claims against a state agency for return of unlawfully collected moneys, including taxes, fees, or other mandatory payments.

with another category of potential litigants, sectors of the economy deemed by the Law to constitute sensitive areas meriting special protection, and another set reserved solely for the state.

Under the sector-specific provisions concerning representative action, introduced in 1996 to the Banking (Consumer Services) Law (1981) and the Supervision of Insurance Transactions Law (1981), the risk that pursuit of a class action against a bank or insurer would lead to serious harm to consumers or the public at large could be taken into account by a Court in making a decision whether or not to authorize the certification of the claim. The 2006 Law preserves and extends this logic. Section 8(B)(2) provides that:

“In case a request for approval was submitted against a body which provides an essential service to the public, a banking corporation, stock exchange, clearing house or insurer, and the court is convinced that the very fact of the process being run as a class action is expected to cause severe harm to public in need of the defendant’s services or the public in general, as a result of harming the financial stability of the defendant, versus the benefit to the group members and the public expected from it being managed in this way, and the harm cannot be prevented by way of approving the changes as aforementioned in clause 13, the court is allowed to take that into consideration when deciding whether to approve a class action.”

In addition, under Section 20(D)(2) of the Law – which governs the award of monetary compensation to successful plaintiffs – where the Court decides in favor of the class or sub-class, either fully or partially, it may take into account (in deciding on the sum of compensation or the manner in which such compensation is to be paid), *inter alia*, to also take into consideration “the harm that may be caused, following the payment of the compensation, its scope or manner of payment, to the defendant, to the public in need of the defendant’s services or the public in general, as a result from harming the financial stability of the defendant, versus the expected benefit to the group members or the public.”

The granting of this special set of protections to a particular category of defendants – which we may call a “critical services” category – was meant by the Israeli

legislator not as a means of safeguarding the interests of a privileged class of potential defendants, but as a reflection of concern for the adverse consequences which a group of consumers or the public as a whole may suffer as the result of the financial undermining of the critical service offered by the defendant. Accordingly, the provision seeks to balance the possibly conflicting goals of deterring large, concentrated industries (such as public utilities, banks or insurers) from abusing their powerful position in the market, which at the same time allowing for situations where loss of a large class action may result in the financial instability of such a market behemoth, with highly adverse consequences for a particular group of consumers, the public as a whole, or even the national economy.

More controversially, substantially identical provisions are accorded to “the state, a state agency, local authority, or statutory corporation”, extending a set of protections (which were previously confined to sectors of the economy deemed by the legislator as particularly vulnerable) to a broadly defined category of state agencies.⁴¹ Indeed, the privileged status accorded to the state by the 2006 Law does not end with the granting of protections on par with those conceded to critical industries and services (such as utilities, financial infrastructure and other critical facilities). A further set of provisions address the specific concern long articulated by opponents of representative action against the state – namely the perceived need to limit the ability of a class to obtain the refunding (“restoration”) of moneys unlawfully collected by the state, on the one hand, while permitting representative action to compel the state to cease such unlawful collection of taxes, tariffs, fees, or any other mandatory payment, on the other.

Accordingly, Section 9 of the Law lays out a specific set of provisions concerning claims for restoration of funds collected by a state authority:

“A request to Approve in a restoration suit against an authority - special instructions

9.

(a) If a request for approval in the claim was submitted as specified in detail 11 in the second addition (in this law – a restoration suit against an authority), the court will not discuss it but after a 90 day period from the time the request for approval was submitted has passed, and the court is

⁴¹ Sections 8(B)(1) and 20(D)(1).

allowed to extend this period due to reasons that it will register (in this clause – the determining date).

(b) The court will not approve a class action in a restoration suit against an authority, if the authority has declared that it will cease the collection that caused the request for approval, and it was proven to the court that it has stopped said collection no later than the determining date [i.e. within the 90 day period or longer period set by the Court under sub-section (a)].

(c) If the court has decided as aforementioned in small clause (b), it is allowed –

(1) Despite the instructions of clause 22, to order a compensation for the supplicant, while taking into account the considerations mentioned in clause 22(b);

(2) To determine a fee to the authorized representative in accordance with the instructions of clause 23.”

The language of Section 9 demonstrates a clear legislative intent to balance conflicting interests; avoiding suits against state agencies that would compel the (monetarily, administratively and politically) costly return of public funds to tax payers, while at the same time making use of the threat of a class action to deter state agencies from continuing unlawful collection of funds and incentivize correction of unlawful extraction of funds by the state. At the same time, it is noteworthy that the provisions of Section 9 are without prejudice to the ability of individual litigants to seek restoration of unlawfully collected funds via individual claims.

Opt-out and Opt-in

The basic logic underlying the 2006 Law (like that of Rule 23 in the U.S.) is the need to protect diffuse rights and deter powerful market – and to a lesser degree state – actors from abusing their power, by allowing effective action where the harm caused to individual members of the class is too small to allow individual action but the collective damage is large or egregious enough to merit group action. Accordingly, the standard method of inclusion in a class is one of “opt-out”, where a member of the class who wishes to exclude himself from the binding decision of the Court must do so actively.⁴² Barring such a positive act, any judicial determination or settlement arrangement

⁴² Under Section 11, a member of a class defined by the Court under Section 10(B) may exclude himself from the class within 45 days of the published notice, or a longer period of time if the Court so orders.

approved by the court will bind all members of the class and constitute a *res judicata* vis-à-vis them all.

At the same time, the recognition that the opt-out arrangement represents a reversal of the normal course of common law civil procedure – where the individual litigant is master of his own claim – and that, where possible, the prior and express consent of litigants to be bound should be obtained, is found in the 2006 Law. Indeed, Section 12 of the Law establishes an “opt-in” procedure in which mass claims may still be processed by means of a representative suit, but only where individual litigants actively join the class certified by the Court. Section 12 provides broad guidance for the type of claims that the legislature contemplated in this context. The Court may only certify an opt-in representative action where: (1) a reasonable likelihood exists that individual claims for the cause of action pursued by the representative claim would be filed by a substantial part of the members of the class in whose name the claim has been filed; (2) the sum of individual damage claimed for each member of the class is substantial, “notably in claims for bodily harm”, and; (3) it is reasonably possible to identify and notify members of the class.⁴³ The model reflects the view of the legislator that use of the class actions mechanism may be appropriate even in cases where the individual harm caused is large enough to make individual claims practicable, where considerations of procedural efficiency and the risk of contradictory decisions prevail.

Still, important differences exist in the management of opt-in and opt-out proceedings. Most significantly, in handing a decision on certification of an opt-in claim, the court must outline the scale of costs which may be imposed on each member of the group who joins the group of his or her own volition. The rationale for this requirement is clear, allowing each potential member to weigh the advantages and risks of joining the claim, and make an individual determination whether to opt-in. It is noteworthy, finally here, that the 2006 Law excludes the possibility of an opt-in arrangement with regards to representative claims in the areas of securities litigation and anti-trust, since the opt-in mechanism for claims in these areas was viewed as unsuitable. In contrast, in the area of environmental protection, where potential litigants are typically corporations and civil

⁴³ The opt-in method of class membership may involve the Court ordering that litigants joining the class participate in covering the costs of litigation (Section 12(C)).

society organizations, the 2006 Law provides for inclusion in class membership only through an op-in arrangement.

Judicial determination

Unless settled by the parties, with the approval of the Court (see section VIII below), the completion of the process envisaged by the formal rules involves the judicial determination of the Court. Under Section 24 of the Law a judicial determination generally binds all members of the class, and the Court decides on allocation of remedies to members of the class (see section IX below).

IV. WHO MAY REPRESENT IN REPRESENTATIVE LITIGATION?

Prior to the 2006 Law, both claims under Rule 29 and (in accordance with Rule 23 to the U.S. Federal Rules of Civil Procedure, on which they were all modeled) the sector-specific class action mechanisms, permitted only an individual possessing a personal cause of action to submit and pursue a representative claim on behalf of a class. Thus, the power of representation was reserved exclusively to an individual litigant who was himself eligible to become a member of the applicable class. This principle was declared by Israeli courts to be “uncontroversially necessary” and repeatedly affirmed.⁴⁴ Accordingly, where the courts found a representative plaintiff to be lack a personal cause of action, a fundamental precondition for their pursuit of the claim was deemed to be missing, “and the ground pulled from underneath their feet.”⁴⁵

Representation by a person eligible to be a member of the class

While the 2006 Law has ended its exclusivity, a clear preference for the individual litigant possessing a personal cause of action remains. Section 4(A)(1) of the 2006 Law preserves the primary place in “the right to represent” to the individual litigant, providing

⁴⁴ See for example: Hashalom Court (Tel-Aviv-Jaffa) 15553/01 *Jacob Zlotenik v. Elbar Company Cars* (2003)(1) 2864; ; Hashalom Court (Tel-Aviv-Jaffa) 2437/00 *Yuval Keichal v. Bezeq Communications Company*(2003)(1) 2943; Case 5712/01 *Barzani v. Bezeq Communications Company* P.D. 56 (6) 922.

⁴⁵ For a critique of this approach in the Israeli context see: Michael Kreine, *Supra*, note 8 at 473-4.

that a person who has a cause of action permitted under Section 3(A) may request certification of a representative claim in a suit that raises substantial questions of fact or law common to the entire class, in the name of that class.

Representation by a Public Agency

Section 4(A) does not end there, however. Departing from the history of exclusivity the remainder of the provision grants powers of representation to two additional categories of actors: “a public agency” listed in the First Addition of the Law (Section 4(A)(2)) and “an organization” as defined in Section 2 of the Law (Section 4(A)(3)), even where these actors do not possess an individual cause of action.⁴⁶

Section 4(A)(2) provides that a public agency may, in a cause of action permitted under Section 3(A) and in one of the areas of its public operations, request certification of a representative claim in a suit that raises substantial questions of fact or law common to the entire class, in the name of that class. As such, the notion that the class action represents an instrument for the advancement of public interests, is manifested in an extension of the right to submit and pursue such actions to non-individual litigants.

At the same time, the term “public agency” is, for the purposes of the Law, carefully defined and circumscribed by means of a closed list in the First Addition of the Law. Indeed, although earlier drafts of the 2006 Law proposed a broader list of public agencies – such as the Commissioner for Protection of Consumers, the Comptroller of Banks and the Comptroller of Insurance, the Securities and Exchange Commission and the Anti-Trust Authority – at present the only public agencies permitted to act as representative plaintiffs are: (1) The Commission for the Equal Rights of Disabled Persons; (2) The Agency for the Preservation of Nature and the National Parks, and (3) The Equal Opportunities in Work Commission.

Although highly circumscribed at present, the Minister of Justice may expand the list, with the approval of the Knesset Committee for Constitutional and Legal Affairs, and discussions aimed at doing just so are ongoing at this time.

⁴⁶ The language of Section 4 indicates a clear intent by the legislator that the list of actors eligible to represent is a closed one. Section 4(A) opens with the statement: “*These* are permitted to submit a request that a Court approve a representative action, *as specified as follows*” (emphasis added).

Representation by an Organization

In addition to state agencies listed under the First Addition, Section 4(A)(3) provides that “an Organization” may, in a cause of action permitted under Section 3(A), and in one of the areas of public operations in which the Organization is engaged, request certification of a representative claim in a suit that raises substantial questions of fact or law common to the entire class, in the name of that class. Unlike the provisions relating to a public agency, however, Section 4(A)(3) includes an additional barrier to representation by an Organization, providing that an Organization may only represent where the Court is convinced that, in the circumstances of the case, “there exists difficulty” in having the request submitted by an individual litigant under Section 4(A)(1). Thus, although the new Law introduces the possibility of representation by an organization which has no individual cause of action, the language of Section 4(A) indicates a further preference for the individual litigant, and circumscribes the ability of civil society organizations to act as representative plaintiffs. This limitation was in fact introduced late in the drafting of the Act, as a precautionary step on the part of the bill’s opponents. Both the Ministry of Justice and civil society organizations are strongly opposed to this restriction, arguing that in reality the most worthy actions are advanced precisely by public interest organizations, notably in the areas of the environment and labor rights, rather than by individual litigants or state agencies. Indeed, the possibility of amending the 2006 Law so as to remove the restriction is currently being debated in Israel.

What is the scope of the term “Organization” under the 2006 Law? The term is defined in Section 2 of the Law, and includes a broader and non-exhaustive category of entities compared with those falling under the public agency category. Under Section 2, an Organization is defined, for the purpose of the act, as: a corporation – other than a statutory corporation – or charitable trust which exists and operates continuously for a period of at least one year, for the purpose of promoting one or more public goals, and whose assets and income are used exclusively to promote these public goals. In addition, the activities of the Organization must not be on behalf of or affiliated with a political party or other political body.

V. NUMBERS: SUBMITTED AND CERTIFIED GROUP LITIGATION CASES

Due to the newness of the new legal framework and, with it, the data collection requirements instituted by the 2006 Law for class action claims, reliable statistical information on the number of class action suits submitted and certified is still lacking. Still, a number of quantitative indications can be cited. A review undertaken by officials at the Ministry of Justice in 1999 (i.e. prior to the E.S.T. judgment and the 2006 Law) revealed that the majority of requests for certification submitted were in the area of consumer protection, followed by miscellaneous claims under Rule 29, with claims under the Securities Law and Companies Law coming third. Moreover, figures provided by the Israeli Court Administration Service (in response to the request for data made by the authors of this report) indicate rapid growth in the number of claims certified as representative in the last three years, albeit from a low starting point: 28 certified claims in 2005; 62 in 2006 and; 147 for the period ending in September 2007.

VI. NOTIFICATION PROCEDURES

Unlike the earlier sector-specific arrangements, the 2006 Law imbibes an explicit recognition of the right of class members to be notified as to the existence and development of representative proceedings. The notification procedures in the 2006 Law can be seen as dividing into three categories: (1) notification requirements regarding members of the class; (2) notification of official agencies that may be involved in the management of a representative action, and (3) a number of miscellaneous provisions relating to notification. In all three, it is the court that plays a determinative role, subject to a number of legislative guidelines.

Notification of class members

Section 25 of the Law, titled “publication of notices to class members”, contains a number of instructions pertaining to notification.

Section 25(A) provides a list of specific outcomes in the proceedings the occurrence of each of which must be accompanied by published notification to the members of the class is a representative action. These are:

- A judicial decision to certify an action as representative;⁴⁷
- A judicial decision to approve the withdrawal of all representative plaintiffs or all class counsels;
- A judicial decision determining the incapacity of the representative plaintiffs, or their counsel, to continue in their respective positions, under Section 16(D)(4) of the Law;
- A judicial decision to dismiss a representative action, under Section 16(D)(5) of the Law;
- The filing of a request to approve a settlement or compromise arrangement, under Section 19 of the Law;⁴⁸
- The determination of the court in the representative action, including orders and decisions given by the court in pursuance of the provisions in Sections 22 (award

⁴⁷ Notification under this provision (Section 25(A)(1)) must specify the details listed under Section 14 of the Act, namely: (1) definition of the class and any sub-classes; (2) the identity of the representative plaintiff and the class counsel; (3) the causes of action and questions of law and fact common to the class; (4) the requested remedies.

⁴⁸ Notification under this provision (Section 25(A)(3)) must specify the details listed under Section 19(C)(1) and 19(C)(2) of the Act. Section 19(C)(1) requires the court to specify: (1) the definition of the class to which the settlement arrangement applies; (2) the causes of action, questions of law and fact common to the class, and the requested remedies as specified in the request for certification of the action as representative or as defined by the court under Section 14 of the Act, depending on the circumstances of the case. Section 19(C)(2) provides that in making a decision about whether to approve or reject a proposed settlement arrangement, the court must take into consideration, *inter alia*: (1) the gap between the remedies proposed by the settlement and those which members of the class would have likely won should the court have ruled in their favor; (2) any objections to the proposed settlement and the decisions regarding these objections; (3) the stage of the proceedings; (4) the expert opinion given by the examiner under sub-section (B)(5); (5) the risks and probabilities involved in the continuation of the representative action, versus the advantages and disadvantages of the proposed settlement; the impact of the settlement decision on the causes of action and remedies of the members of the class affected by the approval of the proposed settlement.

to a representative plaintiff), 20 (proof of eligibility for a monetary award), and 23 (award of fees to the class counsel).

Apart from these specific directions regarding publication of notification to members of the class, Section 25(B) provides an additional, general power whereby a Court may order the publication of any notification where it finds that such a measure “necessary to the management of proceedings and the fair and efficient representation of the class.”⁴⁹

Under the 2006 Law, the Court managing a representative action is also given broad discretionary powers regarding the format, contents and method of publication of notices to members of the class. Notices drafted by litigants under Sections 25(A) and 25(B) must be brought to the attention of the Court and receive its approval before they may be published.⁵⁰ It is the Court, also, which determines the timing and method of publication of notices to members of the class, and which decides which of the parties to litigation will be responsible for covering the costs of publication.⁵¹

Notification of officials

All the sector-specific arrangements which preceded the 2006 Law included a notification provision, whereby the representative of the class was required to notify the Attorney General in writing that a request for certification of a representative action has been filed with a Court.

This requirement is absent from the 2006 Law, and in its stead Section 6 of the Law contains two sets of provisions regarding notification. First, under Section 6(A) where a request for certification has been filed, the requester must send written notice to the Director of the Court Administration Authority regarding the filing of the request,

⁴⁹ Section 25(B).

⁵⁰ Section 25(D).

⁵¹ Under Section 25(E) the Court may order different methods of publication of notices to different members of the class, taking into account, *inter alia*, (1) the costs involved in the method of publication and its efficiency; (2) the size of the monetary award or other remedy which each class member may receive if the suit is determined in favor of the class, or conversely the harm that may be caused to each member of the class if their claim is rejected; (3) the estimated number of members in the class, and the ability to identify and locate them with reasonable effort and expense; (4) the ability to serve a personal notification to each member of the class with reasonable effort and expense, including by means of regular communications between the class counsel and members of the class; (5) any features inherent to the particular class in question, including language.

appending to the notification a copy of the request for certification and a copy of the complaint. These documents are required by the Law primarily for the purpose of record keeping in a special ledger created by the Law in order to better gather data on requests for certification filed with the courts. And second, Section 6(B) of the Law authorizes the Minister of Justice to issue orders regarding, *inter alia*, rules concerning notification requirements. The Minister is authorized to issue such orders either generally or with regards to different “types of request for certification”, and to differentiate between notifications to be made to any given agency or specific position holder.

Furthermore, under Section 6(B) any court handling a request for certification may issue an order requiring that notice be given to anyone it deems regarding the request for certification, including an order that a copy of the request for certification be sent to whomever the court has determined.

Miscellaneous notification provisions

The Law contains two additional notification requirements which arise under certain circumstances where case management decisions are made.

First, Section 10(B) provides the courts with a degree of flexibility in determining the scope of class membership by permitting the court to add members to a class it initially defined, as long as the cause of action of persons so added arose prior to the certification of the relevant representative action. Where such a decision is made, the Court making the decision must issue an order specifying how service of notice to the added members would be made. Moreover, the Court may order that notice be published informing the remainder of the class, or any other stakeholder it deems necessary, as to the addition of new members. In both cases, a copy of the notice must be sent to the Court Administration Manager and recorder in the representative action ledger.

Second, where, under Section 12(C) the Court orders that joining a class will be by means of the opt-in procedure, and that each class members will carry part of the cost involved in pursuing the group action, the Court is also required to issue an order specifying the means by which notification of this decision will be made to the prospective class members.

VII. CASE MANAGEMENT PROCEDURES

The Israeli legal framework for group litigation generally lacks specialized, formalized, detailed case management procedures, leaving a broad degree of discretion for the managing Court to direct the course of litigation, subject to the applicable statutory provisions and their authoritative interpretation. That having been said, there are three noteworthy case management issues relating specifically (though not necessarily exclusively) to representative suits which may be usefully identified.

Non-party participation in proceedings

A potentially important feature of the new legal framework established by the 2006 Law is the ability of public authorities and civil society organizations to participate in case proceedings. Under Section 15, the Court may permit a member of the class, public agency or organization, which are not the representative plaintiff, to take part in the deliberations where it finds that such involvement is necessary for the fair and efficient management of the representative claim. Even prior to the 2006 Law the Attorney General was authorized – based on the Israeli rules regarding his status – to obtain an audience before a court hearing a representative suit and make his views known in the matter where the outcome of the suit could impact a public right or other public matter. In practice, a representative of the Attorney General would occasionally appear before the court at different stages in the proceedings, notably to oppose proposed settlement agreements which were viewed by the Attorney General as contrary to public interest. Section 15 of the 2006 Law extends a similar right of participation to other public sector and even civil society actors. Like the Attorney General, a public agency or organization recognized for this purpose by the Minister of Justice, may, with the courts' permission, take part in representative proceedings to which they are not a party.

Disclosure of documents

Under what conditions and to what extent should courts order the disclosure and production of documents in proceedings for certification of a claim as representative?

Israeli courts, like their peers abroad have struggled with these questions, viewing them as requiring an often complex balancing of conflicting party interests. On the one hand, the requester is normally found in a situation of informational deficit which undermines his ability to satisfy a key condition for certification (i.e. the existence of a reasonable possibility of a decision in favor of the class, as required by Section 8(a)). Yet, on the other hand, a judicial order that the defendant produce extensive documentary or other evidence places a heavy onus on the defendant, and may be abused by plaintiffs either as a means of compelling an unmerited settlement or by encouraging the filing of frivolous suits with the hope of “fishing” for evidence against the defendant at a later stage in the proceedings.

Israeli courts have sought to address the dilemma by permitting disclosure of documents pre-certification but circumscribing the scope of ordered disclosure to the minimum necessary to satisfy the preliminary evidentiary condition for certification. In this context it is useful to note President (Emeritus) of the Supreme Court, Justice Barak’s statement in the important *Tasat v. Zilbershatz* [1996] judgment:

“Indeed, the class action mechanism ought not be treated as an unwanted stepson [in Israeli civil procedure]. It ought to be seen as an important instrument for the realization of individual and general rights. At the same time, we must be careful to avoid the abuse of this instrument. Herein lies the great importance of the preliminary stage in the class action, namely the certification (full or partial) stage. This is the corridor through which litigants may be admitted to the main room; that is, to the substantive deliberation on the case. The corridor is not to be turned into a permanent adobe. The certification process ought to be serious and efficient. It must not become a factor which deters worthy litigants from submitting claims. At the same time, it is appropriate for it to be a factor that denies unworthy litigants the possibility of continuing as representative plaintiffs. Accordingly, disclosure at the preliminary stage is important. It helps the court decide whether or not to approve the claim as representative. Yet unrestrained use of disclosure may cause great harm. We must remember that disclosure for the purpose of certification and disclosure for the purpose of the substantive deliberation of the case are not synonymous. Disclosure which is necessary for the substantive deliberation, but which is not essential at the certification stage, must not be permitted at the certifications stage.”⁵²

⁵² Civil Appeal 4556/94 *Tasat v. Zilbershatz*, P.D. 49(5) 774 at 786.

Justice Barak's dictum in *Tasat* has been elaborated in the leading case on the subject of document disclosure, *Yifat and Others v. Motors Gas and Others* [2003]. According weight to the need of a plaintiff to obtain disclosure at the pre-certification stage, the Supreme Court held in *Yifat* that for the purpose of determining whether or not to issue an order for disclosure of documents, a request for certification ought not be equated with ordinary preliminary or interim measure requests, since denial of a request for certification effectively puts an end to the claim.⁵³ Accordingly, disclosure at the certification stage of the proceedings would be permitted so as to allow the court to make an informed determination regarding certification, subject three sets of conditions: (1) disclosure will be limited to those sources necessary to make a determination on certification, not the substance of the claim; (2) in order to prevent wasteful and frivolous requests whose purpose is to burden and intimidate the defendant, the court must ascertain that the requester has established an "initial evidentiary basis" for his claims, and that the requester demonstrate that he possesses a personal cause of action in the claim; and (3) the order for disclosure should contain any limitations needed to ensure confidentiality of the defendants information, and in particular any trade secrets.⁵⁴

Appointment of a funds distribution manager

The issue of proof of harm and how to determine the type and extent of harm caused to each member of the class, has occupied Israeli judges and legal scholars for a considerable period of time, even prior to the enactment of the 2006 Law. In order to prevent situations where certification is denied merely on the grounds that proof of individual harm would be too uncertain or difficult, Section 20(b) of the 2006 Law introduces the possibility of the court appointing a "funds distribution manager" following the award of a judicial decision in favor of the class. The purpose of this novel option is to transfer an often numerical and complex, but essentially technical process, into the hands of a technical expert, thus freeing up judicial time. In essence, therefore, the procedure for deciding on a class member's eligibility for an award is divided into

⁵³ Accordingly, the Court held, a decision rejecting a request for certification amounts to a decision which can be appealed by right, unlike preliminary and interim decisions.

⁵⁴ For a discussion and critique of these conditions see: Alon Klement, *Supra* note 29. See also: Request for Civil Appeal 10998/03 *Moshe Schveig, Adv. v. General Health Services* [2004] (1) 1135.

two consecutive phases: in the first, the court determines the principal questions of liability and remedies, whereupon the question of distribution of individual monetary awards is transferred to the funds distribution manager, who performs his technical duties under court supervision.

VIII. SETTLEMENT PROCEDURES

Request for approval of a settlement agreement

As in other jurisdictions (notably the United States), the majority of civil suits in Israel, including representative suits, are eventually resolved by means of a settlement, rather than a judicial decision. As in the United States, similarly, Israeli legislators have been concerned to ensure that the settlement of representative actions not provide opportunities for abuse, notably where there is a risk that the interests of the representative plaintiff or class counsel would be unduly privileged over those of the class members.

Accordingly, under all of the sector-specific legislative arrangements which preceded the 2006 Law, and now under Section 18 of the Law, proposed settlement agreements between the parties must be brought to the prior attention of the Court, and are subject to the Court's approval.

The 2006 Law introduced several innovations into Israeli law regarding settlement agreements in representative actions. These are divided into a preliminary stage of a request for approval of a settlement agreement (governed by Section 18) and a subsequent procedure for approval of a settlement agreement by the Court (Section 19).

Section 18 contains a number of instruments designed to promote transparency and fairness at the preliminary stage when a proposed settlement agreements is placed before the Court.

Section 18(G) contains instructions as to the type of terms that may not be included in a proposed settlement agreement. A proposed agreement may not contain any causes of action, members of the class or other parties which were not included in the request for certification or original representative action. Similarly, the proposed settlement may not contain instructions regarding compensation for the representative

plaintiff or counsel fees. Instead, the parties to a proposed settlement agreement may make a recommendation to the Court regarding such awards.⁵⁵

A request for approval of any settlement agreement must be accompanied by affidavits signed by counsels for the plaintiffs and defendants in which “due disclosure of all substantive details that concern the proposed settlement” are submitted to the Court.⁵⁶

The 2006 Law substantially expands the role of public interest actors by requiring that they be notified about proposed settlements. Notice of the request for approval of a settlement agreement must be published in accordance with the provisions of Section 25 (see section VI in this report), and a copy sent to the Attorney General, the Director of the Court Administration Authority, and any other person ordered by the Minister of Justice or the Court. In practice, the requirement that the Attorney General be notified of any proposed settlement is significant, since under the sector-specific arrangement for representative actions contained in the 1999 Companies Law, the Attorney General has made regular use of its power to object to proposed settlements as being contrary to the interests of class members or the public at large.⁵⁷ It remains to be seen whether the Minister of Justice will require that notification be sent to additional actors.

The list of actors permitted to formally object to the proposed settlement agreement under Section 18 is similarly broad, and includes not only any member of the class, but also the Attorney General, a public authority or an organization approved by the Ministry of Justice for this purpose. All these may, within forty-five days from the publication of the notification regarding the proposed settlement, submit a detailed objection to the Court regarding the terms of the proposed settlement, including the recommended award to the representative plaintiff and counsel fees.⁵⁸

Finally, in an important development, Section 18 introduces into Israeli law the possibility of a member of the class opting out of the proposed settlement agreement at the proposal stage. Sub-section 18(F) provides that: “A member of the class who is not interested in being included in the settlement agreement proposed may, within the period of time provided under sub-section (D) [i.e. forty-five days from the publishing of the

⁵⁵ Section 18(G)(1) and (2).

⁵⁶ Section 18(B)

⁵⁷ See: Stephen Goldstein, *Supra* note 20 at 20.

⁵⁸ Section 18(D). Where such an objection filed, the representative plaintiff or defendant may submit a response to the objection, within a period of time determined by the Court (Section 18(E)).

notice or a different period of time decided by the Court] request that the Court allow him to exit the class to which the settlement agreement will apply.” While it remains to be seen whether use of the term “request that the Court allow him” is interpreted as being discretionary (i.e. that the Court may prohibit a member from existing the class) or not, the inclusion of this provision in the Law substantially strengthens the bargaining power of ordinary members of the class, since the exit of numerous class members from the class at this stage may make the proposed settlement agreement negotiated by the representative plaintiff and counsel with the defendant unworkable for the defendant.

Judicial approval of a settlement agreement and the “settlement examiner”

Apart from the provisions relating to the filing of a proposed settlement agreement, Section 19 of the Law establishes detailed rules designed to ensure proposals for settlement filed by the parties to a representative action are thoroughly examined, and if necessary revised or rejected, before receiving judicial approval. In essence, Section 19 contains four instruments for this purpose.

First, the Court is prohibited to from approving a settlement agreement: “unless it finds that the settlement is proper, fair and reasonable in view of the interests of the class members...and the resolution of the dispute by means of a settlement represents the most efficient and fair means of determining the matter in the circumstances of the case.”⁵⁹ The use of the negative suggests that the onus is on the parties to demonstrate that the proposed settlement is in fact proper, fair and reasonable; a condition strengthened by the requirement imposed on the Court in sub-section 19(C) to issue a reasoned opinion where it approves (or rejects) the proposed settlement.

Second, the Court is ordinarily barred from approving a settlement agreement before receiving a written opinion from a “settlement examiner”.⁶⁰ The examiner must be a disinterested person who possesses expertise in the field pertaining to the representative

⁵⁹ Section 19(A). Where the request for a settlement is filed prior to the certification of the claim as representative, the Court is also ordered not to approve a settlement agreement unless it finds that there are questions of law or fact that are common to all members of the group and that the resolution of the dispute by means of a settlement represents the most efficient and fair means of determining the matter in the circumstances of the case.

⁶⁰ The Court may refrain from appointing a settlement examiner where it decides that, for special reasons that must be recorded, the opinion of a settlement examiner is not required.

action in question (such as consumer rights, securities, environmental damage etc.).⁶¹ The examiner is entitled to receive from the Court and the parties materials relating to the settlement proposal; may summon the parties in order to hear their position on any matter pertaining to the proposed settlement; and may propose any amendments to the potential settlement.⁶² In its opinion, the examiner must comment on the advantages and disadvantages of the proposed settlement agreement for all class members, commenting specifically on any matter pointed out to him by the Court. The examiner is required to submit the report within sixty days of receiving a copy of the request for approval of the settlement agreement. The Court must share the examiner's opinion with the parties, and these have thirty days in which to file a written response to the opinion with the Court.

Third, after receiving the opinion of the examiner and any objections from the parties, the Court must issue a reasoned decision whether to approve or reject the proposed settlement. Under Section 19(C), in its decision the Court must define the class to which the settlement agreement will apply; explain the causes of action, questions common to the class and requested remedies; as well as outline the main features of the settlement agreement.⁶³ Moreover, in issuing a reasoned decision whether to approve or reject the proposed settlement agreement, the Court is directed, under Section 19(C)(2) of the Law, to relate to the following factors:

- (1) The gap between the remedy proposed by the settlement agreement and that which members of the class would have been entitled to receive had the Court have found in favor of the class;
- (2) Any objections filed in opposition to the proposed settlement agreement and the Courts' decisions regarding these objections;
- (3) The stage of the proceedings at which the decision whether or not to approve the settlement agreement is made;
- (4) The opinion of the examiner;

⁶¹ Section 19(B)(2) provides that a person who was recommended to the Court by one or more of the parties, who submitted an objection to a settlement proposal, or who counseled one or more of the parties, may not be appointed as an "examiner" by the Court.

⁶² Section 19(B)(3).

⁶³ Section 19(C)(1).

- (5) The risks and opportunities involved in the continuation of litigation, versus the advantages and disadvantages of the settlement agreement;
- (6) The causes of action and remedies vis-à-vis which the decision to approve the settlement agreement will create a judicial decision affecting the members of the class to which the agreement will apply.

The detailed instructions under Section 19(C)(1) and (2) are clearly meant to ensure careful judicial supervision of settlement agreements proposed by the representative plaintiff, defendants and their counsels. The purpose of the close scrutiny intended by the legislature is to ensure the protection of the interests of class members, the fairness of the proposed settlement, as well as considerations of efficiency in disposing of the dispute. The opinion submitted to the Court by the settlement examiner is notably advisory, rather than binding in nature.

Finally, sub-section 19(D) provides the Court with an additional instrument to determine the shape of settlement agreements in representative action. Under this provision, the Court may – where it finds it necessary “in order to protect the interests of the class members to which the settlement applies, in order to ensure the enforcement of the law or in order to supervise the execution of the settlement” – notify the parties to the proposed settlement that the Court’s approval of the settlement agreement is subject to certain conditions which the Court has wide discretion to set.

IX. REMEDIES

As indicated in Section II above, the traditional judicial reading of Rule 29 RCP, established by the Israeli Supreme Court in *Frankisha Merkla v. Rabinowitz [1969]*, distinguished between declaratory and monetary damage remedies, indicating that the former may be granted to a group in a representative action, while the latter could not.

The existing legal framework in Israel makes no such distinction. In fact, under the 2006 Law both declaratory and monetary remedies may be available to class members, and the Law contains detailed provisions governing the award of monetary

damages to class members, as well as the means of deciding on the allocation of such damages, and proof of entitlement to monetary compensation.

Under Section 20(A), where the Court finds in favor of the class or sub-class, either fully or partially, it may order the “allocation of monetary compensation or other remedy”.

The remainder of the provisions of Section 20 draw together previously disparate Israeli rules meant to guide the Courts on how to divide remedies among members of the class. Specifically, the Court is directed in three ways.

First, that order for payment of monetary compensation, or another remedy, can be made directly to each individual member of the class whose eligibility to such remedy has been proven, in the amount and manner the Court decides.

Second, that the Court may order that each member of the class prove his or her eligibility to monetary compensation or another remedy. This is subject to the important caveat that in making such an order the Court should be careful not to unnecessarily burden the parties and members of the class.

And third, that the Court may order that the defendants pay a total sum of damages from which members of the class will receive individual compensation as a proportion of this collective sum. Under this provision, where some members of the class either relinquish their compensation, fail to prove their eligibility or cannot be located, the remaining sum would be allocated to the other members of the class in proportion to the harm each has sustained (subject to the rule that a class member may not receive higher compensation than that which is owed to him) and where funds remain unallocated they shall be reverted to the public purse.

Regarding proof of damages, sub-Section provides that the Court may not award monetary damages without proof of harm for all causes of action listed under the Second Addition to the Law, with the sole exception of claims under item 9 of the Addition [Claims for any cause of action under chapters D, H and H1 of the Rights of Persons With Disabilities Law (1998), under the provisions relating to accessibility for persons with disabilities in the Planning and Construction Law (1965), and under the Television Broadcasting (Subtitles and Sign Language) Law (2005)]. This does not prevent the

Court from awarding monetary compensation for non-monetary harm caused by the defendant (such as bodily harm or environmental damage).

X. FUNDING

Proponents for the introduction of representative action mechanisms into the Israeli legal system have long feared that in the absence of special incentives litigants and lawyers in the country would be so reluctant to assume the risks and costs of representative litigation so as to render any legislative provisions in the area a dead letter. To address this concern, Israeli policy makers have built into legislative arrangements two main incentive mechanisms: the possibility of awarding representative litigants a special, court mandated, monetary award going beyond the individual damage sustained by the representative plaintiff, and secondly the establishment of a public fund to help finance representative action. The former mechanism is addressed in the following section on costs, remuneration and fees, while the latter represents the focus of this section.

Concerned that the unavailability of contingency fee arrangements in Israel would render dead any representative action legislative provisions that would rely purely on the powers of the free market to incentivize and finance the pursuit of representative actions, the drafters of the 1988 amendment to the Securities Law (the first sector-specific legislation to introduce a representative action mechanism into Israeli law) created the possibility for representative plaintiffs to obtain financial support from the Israeli Securities Authority for the purpose of funding a securities class action under the Securities Law. This innovation represented the most substantial deviation by the Israeli law from Rule 23 of the U.S. Federal Rules of Procedure, on which the 1988 provisions were modeled.⁶⁴ In practice, between 1992 and 2006 the Israeli SEC provided partial funding for a total of 34 claims.

⁶⁴ Interestingly, while all the later sector-specific legislation included provisions for awarding representative litigants a special, court mandated, monetary award going beyond the individual damage sustained by the representative plaintiff, the establishment of a public fund to finance representative action remained an exclusive feature of the Securities Act, and was not extended to other sector-specific arrangements until the passage of the general framework by the 2006 Act.

The 2006 Law preserves and extends the concept of public financing to assist representative plaintiffs in bringing forward certain actions. Content to leave the arrangement for representative action in securities litigation as is, the new Law provides that the Israeli Securities Authority will continue to provide funding for suits in this sector.⁶⁵ For all other causes of action, Section 27(A) provides that: “A fund is hereby established to finance representative actions and whose purpose it is to assist representative plaintiffs to bring requests for certification of a representative action where the filing and examination of such requests carries public and social importance.”

The fund is managed by a nine-member board, appointed by the Minister of Justice, from a specified list of governmental, business and civil society constituencies.⁶⁶ The chair of the fund must not be a state employee.

The establishment of a general fund to finance representative actions constitutes a further indication of the legislative intent behind the 2006 Law to actively encourage the filing of representative actions “of public and social importance”, and that this encouragement should include non-market, public mechanisms.

At the same time, there is growing ambivalence in Israel about whether earlier assumptions that non-market incentives are essential to overcome plaintiff (and especially lawyers) reluctance to make use of representative action tools are in fact correct. As the figures in this report indicate, since the mid to late 1990s in particular, Israeli lawyers have demonstrated growing confidence in submitting class actions under the sector-specific legislation where no public funding is available.

XI. COSTS AND FEES

⁶⁵ See Sections 27(G) and 34 of the Law.

⁶⁶ Apart from the chair of the fund, who does not represent a specific constituency, Section 27(B) provides a closed list of constituencies who will each have one representative on the board: (1) a representative of the Consumer Protection Agency; (2) a representative of the Anti-Trust Authority; (3) a representative of the banks oversight office; (4) a representative of the pension funds oversight office; (5) a representative of the Ministry for the Environment; (6) a representative of the Commission for the Equal Rights of Disabled Persons; (7) a representative of the Attorney General; (8) a representative of the general public who has knowledge and experience in the area of the funds operations. At the time of writing the board is yet to be appointed.

More so than any other dimension, the economics of incentivizing “good” representative claims (understood as protecting legitimate individual rights, advancing public good, or improving the efficiency of the justice system) and deterring bad ones (understood as frivolous, self-serving, or wasteful) lies at the heart of Israeli debates about representative actions. The general picture that emerges from an examination of the rules on the books and the practice of Israeli Courts, in this context, is an inconsistent one. Whereas judicial statements – including the important *Analyst Mutual Funds Management v. Arad Investments* [2002] judgment⁶⁷ – emphasize the importance of substantial monetary rewards as a means of incentivizing the public service undertaken by some representative plaintiffs and their attorneys, Israeli courts have historically tended, and continue to make relatively miniscule awards to representative plaintiffs and class counsel.⁶⁸

The 2006 Law contains two separate provisions regarding the award of costs (or more accurately “remuneration” in the Hebrew), one pertaining to the representative plaintiff (Section 22) and the other to the class counsel (Section 23). Both sets of provisions make the award of compensation/attorney costs a matter for the managing court alone to decide, including in cases of settlement or where a request for certification is denied following an announcement by a public authority that it will cease unlawful collection of funds.⁶⁹ Under the 2006 Law, court fees for representative suits are to be set by the Minister of Justice.⁷⁰

Section 22 provides as follows:

“Compensation to a representative plaintiff

22. (a) In case the court has ruled a class action, all or some of it, in favor of the group, all or some of it, including by way of approving a settlement, it will order the payment of a compensation to the representing plaintiff, while taking into account considerations as aforementioned in small clause

⁶⁷ Civil Appeal 8430/99 *Analyst Mutual Funds Management v. Arad Investments* P.D. 56(2) (2002) 247. Note that the case predates the 2006 Law, and dealt with the class actions provisions found in the 1999 Companies Law.

⁶⁸ See: Judge Moshe Telgam, *The Representative Action – considerations in deciding on counsel fees and awards to representative plaintiffs*, 4(1) SHA’AREI MISHPAT 227 (2005) (Hebrew).

⁶⁹ In the latter circumstance, the court is still authorized to make a special award to the would be representative plaintiff and/or class attorney. See Section 22 (C)(1).

⁷⁰ At the time of writing discussions about (a) whether or not a fee should be charged for a request for certification of a claim as representative, and (b) the rate of fees are ongoing.

(b), unless it has found, for special reasons to be recorded, that it is not justified under the circumstances of the case.

(b) When determining the scope of the compensation, the court will take into account, among others, these considerations:

(1) The effort the representing plaintiff has made and the risk he took upon himself when submitting the class action and managing it, especially if the aid requested by the class action is a declarative aid;

(2) The benefit that the class action has given the group members.

(3) The public importance of the class action.

(c) The court is allowed, in special cases and for special reasons to be recorded –

(1) To rule for compensation to the supplicant or the representing plaintiff, even if the class action was not approved or if no decision was given in the class action in favor of the group, according to the case, while taking into account consideration as aforementioned in small clause (b);

(2) To rule for a compensation to an organization taking part in the debates of the class action according to the instructions of clause 15, if it has found that it is justified in light of the effort it has taken and how much it had contributed by his aforementioned participation in the debates.”

With regards to Attorney remuneration, Section 23 of the Law displays similar, though not identical, considerations. The Section provides as follows:

“The fee of an authorized representative
23.

(a) The court will determine the fee of the authorized representative for handling the class action, including in the request for approval; the authorized representative will not receive a fee which is higher than the aforementioned sum determined by the court.

(b) When determining the scope authorized representative’s fee according to small clause (a), the court will take into account, among others, these considerations:

(1) The benefit the class action has brought to the group members;

(2) The complexity of the procedure, the effort the authorized representative has invested and the risk he had taken upon himself in the submitting of the class action and managing it, as well as the expenses he had invested to do so;

(3) The public importance of the class action;

(4) The manner in which the authorized representative managed the procedure;

(5) The gap between the sued aids in the request for approval and the aids the court had decided upon in the class action.

(c) The court is allowed to determine, for an authorized representative, a partial fee, at the expense of the total fee, even before the clarification procedure of the class action is finished, if it has found that it is justified

under the circumstances of the case, and as much as possible, taking into account considerations as aforementioned in small clause (b).”

In the leading case concerning the award of compensation to a representative plaintiff and costs to class attorneys, *Analyst Mutual Funds Management v. Arad Investments*, the Israeli Supreme Court outlined a number of important principles of interpretation vis-à-vis both issues.

With regards to awards for representative plaintiffs, President of the Supreme Court, Justice Barak outlined a two-prong point of departure. First, Justice Barak stated, any compensation for the representative plaintiff going beyond what would have been owed to him by virtue of his membership in the class, is to be seen as “special compensation” which represents a deviation from the normal principle whereby the plaintiff is to receive compensatory damages alone. Second, in making such a special award, it is to be remembered that the award granted to the representative plaintiff is taken from the general pool allocated to the entire class, so that any increase in the size of the compensation to the representative plaintiff involves a corresponding reduction in the award to ordinary class members. This conceptual context having been set, Justice Barak, laid out the following guiding criteria for determining whether to award “special compensation” and if so of what magnitude:

- (1) Special compensation should be awarded where, in filing and pursuing the claim, the representative plaintiff undertook special effort or assumed genuine risk, or where in the absence of the incentive provided by the award of special compensation the claim would not have been filed on account of the small amount of individual damage involved;
- (2) The amount of special compensation ought to reflect the degree of effort or risk involved (in terms of time invested, costs and personal effort expended);
- (3) The amount of special compensation ought to reflect the importance of the contribution made by the claim to the protection or advancement of worthy personal or general goods. At the same time, the size of compensation awarded ought to deter the filing of frivolous or vexatious suits;

- (4) The amount of special compensation awarded to a representative plaintiff must not so “erode” the compensation made to ordinary class members as to defeat the purpose of the class action; and finally,
- (5) The amount of special compensation awarded to the representative plaintiff ought to take into account the size of award which he or she are entitled to by virtue of their membership in the class. The smaller the amount forthcoming by virtue of membership in the class itself, the larger the special compensation ought to be, and vice versa.

Regarding the award of costs to the class counsel, *Analyst* affirmed that it is in the power of the court to override any fee agreement made between the class attorney and his clients. Moreover, the court stated shortly that courts ought to award “reasonable” costs, taking into account the degree of effort expended by the class counsel, out of pocket expenses paid, and the total sum of awarded to the class as a whole.

It is noteworthy, moreover, that Israeli courts have tended to draw parallel principles regarding the award of special compensation to a representative plaintiff and class attorneys. In *Lior Warsal v. Ramat-Gan City Council* [2007], for instance, Tel-Aviv county court judge Kovo stated that: “The considerations to be taken into account in making awards to a representative plaintiff apply also to the award of fees to the representative claimant’s attorneys. In addition, the sum of fees awarded must be reasonable in a manner that will not create an incentive for frivolous proceedings or become an undue burden on the shoulders of the class.”⁷¹

In practice, thus far at least, Israeli courts have adopted a restrictive approach to the award of compensation to both representative plaintiffs and class counsels. In the *Analyst* case (which involved judicial approval of a settlement) the Court awarded the representative plaintiff a sum equal to 8% of the settlement total, while the class counsel fees amounted to 9%. More severely, in a case where representative action saved residents of Tel-Aviv 525,000 NIS during the 2006 calendar year in illegally claimed parking fees, plaintiff asserted that the total saving achieved by the suit should take into account similar sums for the four following years (i.e. 2.6 million NIS) and that the sums

⁷¹ Judge Kovo, Deputy President of the Tel-Aviv County Court, in: Administrative Proceedings 139/2006, Tel-Aviv Country Court, *Lior Warsal v. Ramat-Gan City Council* [2007] at paragraph 7.

awarded to the representative claimant and class counsel ought to be 5% and 10% of this sum, respectively.⁷² The presiding judge rejected plaintiff's assertion that the future savings secured by the suit ought to be taken into account stating that "even if a future saving to drivers is indeed achieved, I do not see it as significant", awarding 5,000 NIS to the representative claimant (less than 1% of the acknowledged public benefit created by the suit) and 35,000 NIS fees to the class counsel (less than 7%). Indeed, in *Ronen Cantor and Erez Minnes v. The State of Israel – The Tax Authority* [2007] the Tel-Aviv county Court refused to make any award to two representative plaintiffs where it found that their claims: "did not discover an independent cause of action, did not raise new legal issues, and amounted in practice to a 'cut and paste' exercise" relying on earlier suits filed and determined by the Supreme Court.⁷³

Regarding the award of fees to the representative claimant's attorney in the case, Judge Gadot, stated that: "to my mind, from the moment when the legal issues in the case were raised, deliberated and adjudicated upon by the [earlier decision of the] Supreme Court, there is no basis in these [later] pleadings to justify the award of large counsel fees."⁷⁴ More generally, in *Acadia Software Syetems Ltd. v. The State of Israel* [2007] Justice Bodrik stated, *obiter dictum*, that as well as taking into account the considerations of effort and risk listed in Sections 22(B)(1) and 23(B)(2), in determining the size of award granted to representative plaintiffs and counsel fees the Court should weigh an additional factor, namely: "the need to avoid 'over encouragement' of filings of representative suits. In any event it is appropriate that the assessment of the award should create a balance between the conflicting needs of encouraging and restraining the filing of representative actions."⁷⁵

⁷² Administrative Proceedings 139/2006, Tel-Aviv County Court, *Lior Warsal v. Ramat-Gan City Council* [2007].

⁷³ Judge Gadot, Tel-Aviv County Court in Cases 1750/03 and 1751/03 *Ronen Cantor and Erez Minnes v. The State of Israel – The Tax Authority* [2007] at paragraph 8.

⁷⁴ Justice Gadot, Id. at paragraph 12. In fact the attorney fees awarded to the plaintiffs' counsels amounted to a total of 30,000 NIS (plus VAT).

⁷⁵ Judge Bodrik, Tel-Aviv County Court in: 019983/06 *Acadia Software Systems and Fint Computers and Multimedia v. The State of Israel – The Customs and Stamp Duty Administration* [2007]. Judge Bodrik also noted that to his mind the two considerations, effort and risk, should be seen as separate and weighted separately.

XII. THE DURATION OF LITIGATION AND BURDEN ON THE COURTS

The question of whether the use of representative action mechanisms impose a net burden on the courts, or whether the advent and employment of these procedural instruments produces a net improvement in efficiency of the civil justice system in Israel is an unsettled one. On the one hand, there are those who contend that the filing of requests for certification and subsequent management of claims as representative suits imposes a considerable additional burden on an already strained judicial system. Proponents of this view point in particular to cases where the individual damage caused is so small that in the absence of the representative action instrument no claims would likely have been brought before the courts. In response, advocates of representative suits suggest that the instrument permits the efficient adjudication of claims and ensures consistent rulings, which reduces the number of court proceedings downstream. This, particularly in cases where the individual damage caused to members of the class is large enough to have resulted in a large number of individual claims. Moreover, proponents of class actions assert that by producing a deterrent effect against potential violators and allowing for the more effective protection of diffuse rights and public goods, the mechanism advances the real *raison de'etre* of the Israeli civil justice system, namely the protection of valued rights and the improvement of the quality of justice and society.

While the newness of the current system makes an informed examination of these competing positions impossible at this stage, it is noteworthy that since the passage of the 2006 Law a considerable number of requests for certification of representative actions are filed every week, a substantial rise in the number of such actions as compared with the

previously existing legal regime. In most cases, the claims filed are of the type which would not have reached the courts in the absence of the representative action mechanism.

XIII. ONGOING DEBATES ABOUT GROUP LITIGATION

Current debate about group litigation in Israel is divided into two qualitatively different categories. One set of discussions is concentrated on a small number of aspects of the new legal framework created by the 2006 Law, which do not challenge in any serious way the essential desirability or general functioning of the new system. Thus, for instance, a concrete debate concerns the question whether or not to remove the restrictive requirement set out in Section 4(a)(3) of the Law according to which an organization which does not have an individual cause of action in the claim would only be permitted to file a representative suit where the court becomes convinced there exists real danger that a private litigant is unable to do so. Similarly, a debate is currently underway regarding court fees. Specifically, the question is whether a request for certification of a claim as representative should require the payment of a court fee, and if so what rate will achieve the desired balance of ensuring accessibility while deterring unwarranted requests for certification.

The second, more fundamental debate (one which is longer standing but has been exacerbated following the enactment of the 2006 Law) pertains to the attitude of Israeli courts to representative actions. Indeed, one of the most potent criticisms directed at the courts by the Israeli legal community is the allegation that the courts unduly restrict and discourage the filing of representative claims by reason of uncertainty about how the

procedure is meant to be used, fear of the consequences for defendants and members of the class, or because of concern that anything but an attitude of discouragement will open the floodgates to a deluge of large and cumbersome proceedings which will overwhelm the courts. There are those, both within the courts and outside them, who contend that the restrictive attitude of Israel courts (if it is so) is appropriate and desirable. It is the duty of the court as the custodian of the Israeli justice system, they argue, to ensure that only meritorious claims that are managed with a high degree of professionalism by the claimant will merit the judicial time and other public resources necessary handle such a complex procedure. In contrast, there are those who argue that Israeli judges have adopted an unduly conservative, restrictive attitude towards representative actions, that they underestimate the broader public benefit in terms of deterrence which a more permissive approach will generate, and that it is up to the legislator, the public of litigants and the free market – not the courts – to shape the use of the representative action mechanism.

XIV. ASSESSING THE COSTS AND BENEFITS OF GROUP LITIGATION

Although it is premature to draw any firm conclusions about the operation of the new Israeli legal framework, we are of the opinion that the gradual development of representative action mechanisms is having an important, though difficult to quantify, impact on the behavior of economic actors in Israel. Businesses are weary of facing the financial and other costs involved in defending against a determined representative litigant (or more accurately his counsel); a growing risk which is influencing corporate

conduct. In the public arena, on the other hand, the hope that the enactment of a general representative action instrument would improve the performance of state agencies and help promote a range of desired public goods (from protection of the environment to greater respect for the rights of disabled people) has so far failed to materialize in any significant manner.
