Israel: The New Law on Class Actions

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Introduction

A year ago, the Class Action Law, 5766–2006,1 was enacted in Israel. A class action is defined in the new Law as:

"An action that is conducted on behalf of a group of people, who have not authorised the representative plaintiff for this purpose, and which raises material questions of fact or law which are common to all the members of the class."2

The class action is intended, primarily, for situations in which a large corporation injures a group of people, in such a manner that each individual suffers small damage, which would not justify the filing of a claim by him. However, the total of the cumulative damage to the injured parties is extensive. The class action enables consolidation of the interests of all the injured parties and creates an incentive for filing the suit. The class action is, therefore, an important tool for enhancing the enforcement of rights, in the event that an individual claim would be an impractical and inefficient procedure.3 In addition, the class action has an important deterrent effect, due to the large amount claimed therein. It is particularly important in areas where there is insufficient enforcement and the administrative supervision is conducted in a partial manner. Thus the class action serves not only the private interest of the injured parties, but also, the social–public interest.4

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1 Sefer Hachukim (the Class Action Law), 264 (hereinafter "the Law" or "the New Law").

2 Class Action Law, s.2.

3 See, for example: Civil File (Tel Aviv) 1957/03 Ar-On Investments Ltd v The First International Bank of Israel, Takdin District Court Judgments 2006 (1) 8560. In that case, the bank charged some 15,000 customers with interest higher than that agreed. Only by virtue of class action proceedings the Supervisor of Banks intervened and the customers were ultimately compensated.

However, together with its advantages, the class action also has disadvantages. The major one is the possibility that this powerful instrument could be abused for the filing of false claims, with the aim of extorting money from the defendant, for reasons of revenge, or in order to achieve an unfair settlement. Another problem is the huge economic harm to the defendant, in the event that the action is determined in favour of the class. Such a decision, even if it is correct, could cause the financial collapse of the defendant, and also injure other innocent parties like the defendant’s employees or creditors. Moreover, misuse of the proceedings might damage the members of the group themselves, because of the fiction of representation upon which the class action is based. After all, the representative plaintiff did not receive any authorisation to file the claim from all the other injured parties.

The class action tool is not new in Israel. The class action appeared even before the enactment of the new Law, in several fields, such as the fields of securities, consumer protection law, restrictive trade practices, banking, insurance, etc. However, these arrangements have raised a number of problems that made it necessary to replace them with a unified modern law.

The new Class Action Law is indeed an important law, which formalises in a comprehensive manner the institution of class actions in Israel. As will be shown below, the law is detailed; it engages in many complex questions, and in general, it determines fair and appropriate arrangements. The major problem today is not the Law, but the attitude of the courts to class actions. The situation is that most of the applications for a certification of an action as a class action are being dismissed; and the few certifications that are being issued are being overturned on appeal or settled in light of the defendant’s desire to end the proceedings against it. The impression from this data, as well as from the dismissal reasons that are being given by the courts, is that the courts prefer to deny applications even in cases where they should be allowed. The judges are afraid of the certification of unjustified class actions, they are afraid of the enormous damage that could be caused to the defendant, and they are afraid of a situation in which the real winner of the proceeding is the representative’s lawyer. In addition, we cannot deny that the class action is a proceeding which imposes an onerous burden on the court. Naturally, this situation is convenient for corporations and businesses that might...

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be potential defendants. The question to be asked is what will the impact of the
new law be on the attitude of our courts.
Hereinafter we shall review the main thrust of the new Law, and we shall try to
assess whether the new law will create a real change in the prevailing situation.

Subject matters in which class actions may be filed

The Law contains a closed list of subject matter, in which class actions may be
filed.\(^{10}\) Nevertheless, the Law authorises the Minister of Justice to add additional
causes.\(^ {11}\)

The Law sets forth the following causes:

1. A claim against a “dealer”, as defined in the Consumer Protection Law,
in connection with a matter between the dealer and a customer, whether a
transaction was made between them or not. The broad wording permits the
filing of a class action against a vendor, supplier, manufacturer, importer or
marketer of a product or service, with regard to the relationship between
it and a customer, whether with or without consideration, including in
a matter that preceded the engagement, and even if no engagement was
actually made. The customer need not necessarily be a private consumer,
but also a commercial entity. This wording is much broader than the
wording that existed prior to the enactment of the Law, which was limited
solely to the narrow causes of action set forth in the Consumer Protection
Law.
2. A claim against an insurer, insurance agent or provident fund management
company, in connection with a matter between it and an insured customer
or member, whether a transaction was made between them or not.
3. A claim against a bank, mortgage bank, foreign bank, credit card company,
or any other banking corporation, in connection with a matter between it
and the customer, whether a transaction was made between them or not. It
is worth noting that the limitation of the causes to the relationship between
the bank and the customer prevents the filing of class actions by guarantors
or other third parties injured by the bank.
4. A claim with a cause of action pursuant to the Restrictive Trade Practices
Law.
5. With regard to securities: a claim with a cause of action arising from the
ownership, possession, sale or purchase of a security, including a unit in a
joint investment mutual fund.
6. A claim against an entity which caused an environmental nuisance.
7. A claim against an entity whose occupation is the supply of a product or
public service or the operation of a public place, in respect of discrimination
based on race, religion, sexual orientation, etc.

\(^{10}\) Class Action Law, s.3(a) and the Second Addition to the Law.
\(^{11}\) Class Action Law, s.30.
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8. A claim whose cause of action is the non-protection of equal rights for people with disabilities.
9. A claim whose cause of action is the violation of labour laws, discrimination at work and harm to an employee.
10. A claim against a government authority for the refund of amounts collected unlawfully, such as taxes or charges.

The above list shows that the scope of the subject matters in which a class action may be filed is quite broad. The Law includes references to a wide variety of fields and issues, while describing the causes of action in wide terms and avoiding narrow definitions. In this matter, the Law made an important progress in comparison to the laws that were in force prior to its enactment. It is indeed possible that now, not only will more applications be filed, but also it will be more difficult for the courts to dismiss applications on grounds of unauthorised subject matter.

The representative filing the action

The Law determines who is entitled to file an application in the court for the certification of a class action (the “representative”)12:

— A person (including a corporation)13 who has a personal cause in the subject matter of the action.
— Public authorities in a matter pertaining to their public purposes. For example: the Commission for the Equality of Rights for People with Disabilities; the Authority for the Preservation of Nature; and the Commission for the Equality of Opportunities at Work.
— An organisation which acts to advance a public purpose, such as organisations for consumer protection, in a matter pertaining to its public purpose.

The Law reflects a combination of the American approach, where an individual is entitled to file a class action, with the European approach, where the authority lies with organisations or public entities.14

Conditions for approving the application

The class action is conducted in two stages. At the first stage, an application is filed in the court for the certification of the action as a class action. Only if certification is received will the second stage take place, namely, the hearing and adjudication of the action on its merits.15

12 Class Action Law, s.4(a).
13 Interpretation Law, 5741–1981, s.4.
14 Above fn.8, p.305.
15 Class Action Law, s.3(b).
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The Law determines a list of cumulative conditions for the certification of the class action by the court. These conditions are very much similar to the conditions that were contained in the class action arrangements which were in force prior to the enactment of the new Law. These conditions are as follows:

1. The representative has a personal interest in the action (unless it concerns an application that is filed by a public authority or a public organisation). Past experience proves that the condition of the existence of a personal cause of action serves, in many cases, as an obstacle to certification, in view of the stringent interpretation made thereof by the courts. The courts have repeatedly stressed, that the representative has no acquired right to file the application, but he has to receive the court’s permission, and therefore a “severe burden of proof” is imposed on him. The courts have not stopped examining the claim form itself, but required the representative to submit different kinds of evidence, in order to become sure of an apparent existence of a justified cause of action. All of this is done despite the fact that this is only the preliminary stage of certifying the application, and not the main hearing proceeding of the case.

2. The action raises material questions of fact or law which are common to all the members of the class. The drafts in existence prior to the enactment of the new Law, in the various laws, discussed common questions of “fact and law”. For the sake of simplification, the new Law contains an alternative condition, which is not cumulative. It is sufficient for there to be common factual or legal questions.

3. There is a “reasonable possibility” that the common questions will be determined in favour of the class. This condition relates to the required level of proof at the stage of certification. Notwithstanding the moderate wording, which requires, at this preliminary stage, only a “reasonable possibility”, past experience has proven that the requirement to prove reasonable chances of success as a condition for the certification of the claim has constituted a cause for the denial of many applications. The courts, due to their fear of certifying class actions, have been stringent in their application of this condition, to such an extent that the stage of certification has become, in

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16 Class Action Law, s.4(a)(1).
17 Further Civil Hearing 5712/01, \textit{Barazani v Bezeq, Takdin Supreme Court Judgments 2003 (1) 847}, where it was ruled, in regards to the Consumer Protection Law, that even if the representative shows a misleading publication, this is not sufficient. The representative must show that he himself was actually misled as a result of his personal reliance on the misleading publication. The bewilderment is even greater, since case law in the field of securities, ruled exactly the opposite. See, \textit{Shemesh v Reichert}, above fn.4, pp.329–320.
19 Above.
20 Class Action Law, s.8(a)(1).
21 Class Action Law, s.8(a)(1).
practice, the stage of proof of the factual and legal arguments included in the claim, notwithstanding the cautious wording of the section.  

4. A class action is the most efficient and fair way to determine a dispute, given the circumstances of the matter. This section, in effect, comprises two cumulative conditions: fairness and efficiency. The Law does not specify what the considerations are which will guide the court in its examination of the given condition, however, we may assume that the intention is to considerations which appeared in the legislation preceding the new Law, such as: the size of the class; the scope of the questions common to the members of the class, as compared with the scope of the questions which are not common thereto; the scope of the estimated personal damage for each one of the members of the class; other possible ways of determining the dispute, etc. Situations may occur in which other ways would be fairer or more efficient, as compared to the use of a class action proceeding, such as filing separate claims that would lead to the receiving of an adequate remedy in an ordinary proceeding. In contrast, the class action will be deemed to be the fairest and most efficient way when the large number of the members of the class gives rise to a lack of a practical possibility of joining them all as litigants; or when the harm caused to each individual is too small to justify the filing of a personal claim by him.  

5. There is a reasonable basis to assume that the interests of the members of the class will be represented and conducted in an appropriate manner, and in good faith. However, the court may certify a class action even if this condition has not been satisfied, if the matter can be resolved by joining or replacing the representative or his lawyer. In contrast to the draft that existed in the various laws prior to the new Law, where only the representative himself was examined, the new Law is drafted in broader terms and so applies to the representative’s lawyer as well. The reason is that in many cases, it is actually the lawyer who initiates and steers the proceeding, and not the representative himself. As to the appropriate representation: the courts ruled that the representative must not be an expert in the field of the action, and it is sufficient that he has a real economic interest in the action. The courts examine if the representative would be able to act with all the energy needed to manage the action, and if there would not be a conflict of interests between him and other members of the group. As to the condition of good faith, the courts have warned more than once against taking advantage of the class

22 Above fn.8, p.54.  
23 Class Action Law, s.8(a)(2).  
24 Class Action Bill Memorandum, above fn.6, p.22.  
25 Class Action Law, s.8(a)(3) and (4).  
26 Class Action Law, s.8(c)(1).  
27 Nevertheless, also pursuant to the legal situation preceding the new Law, the courts would often examine the representative’s lawyer. See the Class Action Bill Memorandum, above fn.6, p.24. Shemesh v Reichert, above fn.4, p.326.  
28 Shemesh v Reichert, above fn.4, p.302.  
29 Tatzat v Zilbershatz, above fn.4, p.788. Shemesh v Reichert, above fn.4, pp.302–303.
action proceedings in order to file suits for reasons of revenge, vexation, or in order to achieve an unfair compromise. A lack of good faith was also recognised in cases in which the court had the feeling that the real person actually standing behind the action was not the representative himself, but a third party who had ulterior motives for filing it. Another question arises as to a representative who becomes a “serial representative” by filing many class actions. Here it was ruled that such a fact will not cause the dismissal of the application, as long as the representative acted in good faith and did not intentionally cause the damage himself, in order to use it for filing a class action.

6. When one of the elements of the cause of action is damage, the representative shall be required to show that he was allegedly damaged. The representative is not required to prove the damage of all the members of the class at this preliminary stage, because such a demand would block the possibility of the filing of class actions with causes of this type. Similarly, in an application which is being filed by a public organisation or a public authority, they are required to show that damage was allegedly caused to the member of the class or to the entire class.

7. Even if all of the above-mentioned conditions are satisfied, it is possible that, ultimately, the class action will not be certified. In applications against an entity which provides a vital service to the public (e.g. a communication company), a bank, a credit card company, the Stock Exchange, a clearing house or an insurer, if the court is satisfied that serious damage could be caused to the public which needs the services of the defendant, or to the general public, as a result of harm to the economic stability of the defendant, as compared with the expected benefit for the members of the class and the public, then the court is entitled to take this into consideration, and not certify the action. The said section raises several problems. First, should the balance of damages, which is set forth in the section, be used by the court at this very preliminary stage of the approval of the application, or does it only have justification at the final stage of the action, at the time of determining the amount of compensation? If such considerations are taken into account at this very preliminary stage, it could constitute a serious impediment to certification of the action and create a consumer trap. In addition, the section

30 Miscellaneous Civil Application 8232/03 (Tel Aviv) Lock v United Mizrahi Bank, para.50, available at www.court.gov.il.
31 Lock v United Mizrahi Bank, above fn.30. In this case, the person interested in the class action was the son of the representatives, who was the one to use the money borrowed by his parents. Miscellaneous Civil Application 2158/02 (Tel Aviv) Alma’alem v Bank Discount, para.5, available at www.lawdata.co.il. In this case it was a company specialising in examining bank accounts, that handled the representative’s banking affairs.
32 Tatzat v Zilbershatz, above fn.4, p.789. Miscellaneous Civil Application 2079/02 (Tel Aviv) Reizel v Bank Leumi Le-Israel, para.7, available at www.lawdata.co.il.
33 Class Action Law, s.4(b).
34 Class Action, s.8(b) and (c).
also gives rise to a practical problem: how should the court be convinced that there is a danger to the defendant’s stability? Is it necessary to prove a fear of insolvency, or would a lower level of risk be sufficient? Needless to say, if the aim is to encourage the filing of class actions, then this condition should be interpreted in a narrow sense, and it should only be recognised, if at all, in exceptional cases.

In conclusion, the above summary shows that a representative, who wishes to achieve a certification for filing an action as a class action, must deal with a lot of difficulties, some of them unjustified. The feeling is that the courts prefer to dismiss applications, even when they are justified; and therefore the courts hang on one condition or another, interpret it severely, and dismiss the application because of its non-fulfilment. Since there is no real difference between the conditions set in the new Class Action Law and those that were contained in the laws that existed prior to the enactment of the new Law, there would not be any change in the prevailing situation, unless the courts change their attitude.

Definition of the class

With regard to the determination of the people included in the class, the Law recognises two methods.

The first method is the opt-out method: the class shall include anyone who meets the definition of the class, as declared by the court, provided that such person did not announce his wish not to be included in the class.

The other method is known as the opt-in method: the court has the jurisdiction to determine that the mechanism for belonging to the class is the joining mechanism. According to this method, the class will only comprise people who expressly stated their desire to be included therein. This jurisdiction is conferred on the court only in special circumstances. For example, if there is a reasonable possibility that personal actions would be filed whose cause of action is identical to that of the class action, by a significant part of the members of the class; or if the action is for a significant amount of compensation for each of the members of the class, for example, in respect of bodily injury. The opt-in mechanism provides a solution for cases where there is justification for consolidation of the claims and for conducting them together, however, the fiction of consent is not sufficient, for example, because the personal damage of each of the members of the class is significant. In
any event, a condition for a class action by way of joining is the ability to identify and locate the members of the class, and to notify them of the certification of the class action.

**Payment of financial compensation**

If the hearing of the action on its merits (the second stage) culminates with a ruling in favour of the class, the courts have a number of possibilities regarding the determination of the remedy. The court may order:

- Payment of compensation to each of the members of the class who proved entitlement to the remedy.
- Payment of total compensation to the class as a whole, and the manner of the calculation of the share of each member of the class.
- Should the court find that financial compensation to the members of a class is not practical, whether because it is not possible to identify them and to make the payment at a reasonable cost, or for any other reason, the court may order the grant of any other remedy to the class, or to the general public. This alternative gives the court the authority to grant a “creative” remedy, such as the establishment of a special fund out of which payment shall be made to injured parties who shall prove their claim, or a public welfare foundation.

The court may not award compensation without proof of damage, other than in a claim in respect of the non-protection of equal rights for people with disabilities. Nevertheless, the court may award compensation in respect of damage which is not pecuniary damage.

With regard to the determination of the amount of the compensation, the Law determines that the court may take into consideration the damage which may be caused to the defendant, to the public which needs the services of the defendant, or to the general public, inter alia, as a result of harm to the economic stability of the defendant, as compared with the expected benefit for the members of the class and the general public. As a consequence of exercising this discretion, the court may order the reduction of the compensation in relation to the damage which actually occurred. As stated above, the court may take into account similar considerations, when it comes to decide whether to certify the class action (the first stage). However, at this stage of determining the compensation, as distinct from the stage of the certification of the action, the court may also take into account the damage that may be caused to the defendant itself, due to the payment of the compensation, and this is true for all types of defendants, not only the state or defendants which provide a vital service to the public.

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40 Class Action Law, ss.20–21.
41 Compare *Daar v Yellow Cab Co* 67 Cal. 2d 695, referred to in Civil Appeal 3126/00, *Israel v E.Sh.T. Project Management and Personnel Ltd*, Piskei Din 40 (3) 220, 247.
42 See above fn.33 and accompanying text.
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This issue of the balance of damages may give rise to the practical problems mentioned above.43 However, it would appear that at this stage of the determination of the amount of the compensation, this is an appropriate consideration. It would be preferable for the court to certify the action and to rule in favour of the class, while reducing the compensation due thereto, rather than the current situation, in which the court fears the economic collapse of the defendant and therefore prefers, at this very preliminary stage, to deny the application.44

Withdrawal from representation45

A representative or his lawyer may not withdraw from his position, without the court’s approval. The reason for this lies in the fear that the defendant will entice the representative and make him tempting offers, in order to cause him to withdraw from the representation, which would cause the abandonment of the interest of the other members of the class. In addition, the Law expressly prohibits the representative from receiving any benefit from the defendant or from any other person, in connection with his withdrawal, other than with the court’s approval.

In the event of such a withdrawal, it would not affect the continued conducting of the representative proceeding by another person, in his place. Only if no other person is found who wishes to serve as the representative shall the court order the dismissal of the application or the action.

Compromise46

The Law prohibits a compromise between the parties, unless with the court’s approval. The fear is against a conspiracy between the representative and the defendant, which would cause the representative to gain personal benefit from the compromise, at the expense of the other members of the class.

The court shall not approve a compromise arrangement unless it found that the arrangement is appropriate and fair, and that the end of the proceeding by way of a compromise is the fairest and most efficient way to resolve the dispute, given the circumstances of the case. In this regard, an innovation has been determined in the Law: the court shall not approve a compromise, other than after receiving an opinion from a special examiner, appointed for this purpose, with expertise in the field. This is an innovative arrangement, because in the normal course of events, the court does not appoint experts to give opinions, other than in professional matters, of which the court has no knowledge. The new arrangement, however, concerns an examiner who would engage in the legal and factual evaluation of the state of the case, and would thus be of assistance to the judge adjudicating upon the case. The question is whether the need for an expert would indeed be conducive

43 See above fn.34 and accompanying text.
44 Above fn.7, p.51.
45 Class Action Law, s.16.
46 Class Action Law, ss.18–19.
to the court, or whether it would become an onerous and superfluous burden, which could provoke disputes on secondary questions, such as the determination of the examiner’s identity, the procedure for the hearing of the dispute by him, the parties’ response to the examiner’s decision, etc.

Remuneration for the representative

So as to create an incentive for the filing of class actions, the Law recognises the possibility of paying a special remuneration to the representative, who devoted his time and efforts to conducting the proceeding. Accordingly, the Law sets forth that if the action is determined in favour of the class (at the end of the second stage), including by way of a compromise, then the court shall order the payment of remuneration to the representative plaintiff, unless it found, under special circumstances, that such payment is not justified. In its determination of the payment of the remuneration, the court shall take the following considerations into account:

- the work put in by the representative, and the risk which he took upon himself, in particular if the remedy sought is a declarative remedy;
- the benefit caused to the members of the class;
- the degree of public importance of the action.

The Law, which seeks to encourage the filing of class actions, states that in special cases, the court may award remuneration to the representative also in cases where the court did not certify the class action, or did not rule in favour of the class, while taking the said considerations into account.

The section gives the court absolute discretion with regard to the amount of the remuneration due to the representative, without determining a binding minimum threshold which could not be reduced by the court (for example, a particular rate of the amount awarded in an action or reached in a compromise). The absence of such a determination creates a concern that the courts might award too low remuneration, which would significantly reduce the incentive for filing class actions and for defending the public interest.

Fees of the representative’s lawyer

Given that in many cases, the person actually standing behind the class action is the representative’s lawyer, it is important to supervise the incentives and the fee which the lawyer will receive. The Law therefore sets forth that the court shall

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47 Class Action Law, s.22.
49 Class Action Law, s.23.
50 Above fn.48, p.906.
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determine the fee due to the lawyer, and it prohibits the lawyer from receiving an amount in excess of that determined by the court. In its determination of the amount of the fee, the court shall take the following considerations into account:

- the benefit which the class action has brought to the members of the class;
- the complexity of the proceeding, the work put in by the lawyer, the risk which the lawyer took upon himself, and the expenses which he incurred;
- the degree of public importance of the class action;
- the manner in which the lawyer conducted the proceeding;
- the discrepancy between the remedy sought in the application for certification, and the remedy ultimately awarded by the court.

Given that class action proceedings take such a long period of time, the court is authorised to set a partial fee for the lawyer, on account of the total fee, even prior to the completion of adjudication of the action (the second stage). This may occur if the court finds it to be justified, given the circumstances of the matter, and insofar as practicable, taking the said considerations into account. The lawyer is also entitled to remuneration in the course of a compromise arrangement, but not in cases in which the application was denied (at the end of the first stage).

Similar to the issue of remuneration to the representative, also with regard to the fee of the representative’s lawyer, the Law grants the court absolute discretion regarding the amount of the lawyer’s fee, and it does not set a minimum threshold. Should the courts award low amounts, as have happened more than once in proceedings conducted pursuant to the new Law, it will significantly reduce the incentive for lawyers to take on class action suits.

**Expenses and financing of the proceedings**

According to Israeli law, the party that loses the trial bears the costs of the party that wins. However, in the Class Action Bill Memorandum and in the Bill, it was proposed to depart from this practice, so as not to deter potential plaintiffs. It was therefore proposed to determine that if the court denied the application or the action on its merits, each party would bear its own costs. The court, however, would have the authority to rule otherwise, if it found, for example, that the filing

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51 Class Action Law, s.19(f). See also s.18(d) and (g)(2).
52 Just recently, in a judgment handed down immediately after the enactment of the new Law, the court praised the lawyer, and gave a long list of reasons why this was a suitable case to award him a high fee. However, despite this, the court eventually awarded the lawyer 2% of the amount of the claim, and only 1% to the representative: *Ar-On Investments Ltd v The First International Bank of Israel*, above fn.3. It would, perhaps, be possible to understand these amounts if they were being paid out of the total amount of compensation awarded to the members of the class, but in the said judgment, it was determined that this amount would be paid by the defendant bank, in addition to the total amount of the compensation and without prejudice thereto.
53 Class Action Bill Memorandum, above fn.6, s.20.
54 Class Action Bill, above fn.4, s.23.

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of the application was not justified, in which case the defendant’s costs would be imposed on the representative filing the application or should the court find that one of the parties or its lawyer had been conducting the claim with a lack of good faith or that they had prolonged the proceeding unnecessarily, in which case the other party’s costs would be imposed thereon.

In the final draft of the Law, the said section regarding the costs was omitted, and this, too, could significantly reduce the incentive for filing class actions.55

One important question is whether the filing of an application for the certification of a class action pursuant to the new Law will be charged with a court fee. Up until the enactment of the Law, class actions had been exempt from the fee, except in the field of securities, where it was calculated according to the personal damage of the representative and not to that of the entire group.56 The new Law does not formalise this subject, but it authorises the Minister of Justice to formalise it in the regulations,57 an act which has not yet been done.

Indeed, the charge may serve as an impediment to futile claims with no chances of success. The charge, if it is calculated according to the amount of the claim, may also solve the problem of the specification of astronomical sums in the statements of claim, sums which deter the courts from certifying the actions. While it is true that according to the new Law, a large difference between the amount actually awarded and the amount set forth in the statement of claim, would be a consideration in the determination of the amount of the fee of the representative’s lawyer,58 still, it is doubtful whether it would actually lead to a reduction of the amounts being claimed. On the other hand, the imposition of a charge, in particular if it is for a significant amount, could deter injured parties from choosing the class action proceeding, and thus the purpose of the Law would be frustrated. If the aim is to guarantee accessibility to the courts, including for those types of population who find it difficult to apply to the court as individuals, as declared in the section of the purposes of the Law,59 then this issue of the charge should be considered with extreme caution. A possible solution could be a payment of a fee by the representative, calculated according to his personal damage, at the preliminary

55 The Law relates to the issue of costs only in a number of short provisions: s.12(c) with regard to a class action by way of joining, authorises the court to determine that each joining party shall participate in the costs of conducting the class action; s.20(b)(2) determines that should the court order each member to prove his entitlement to the remedy, then it may award costs to each member due to the efforts entailed therein; and ss.19(b) and 20(b)(1), which authorise the Minister of Justice to determine the fee and the expenses of an appointed person in charge of determining the entitlement to the remedy, and of the examiner of the compromise arrangement, whom the court is entitled to appoint in accordance with the said sections.
56 Application for Civil Appeal 7633/98 Discount Israel Shukei Hon Vehashkaot v Shemesh, Takdin Supreme Court Judgments 1999 (3) 886.
57 Class Action Law, s.44.
58 See the text following fn.50.
59 Class Action Law, s.1.
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stage of the filing of the application; and an additional fee paid by the rest of the members of the class, only if the claim is determined in favour of the class.60

One of the most important innovations in the Law is the establishment of a foundation for financing class actions, under the auspices of the Ministry of Justice. The foundation’s job is to assist the representatives in the financing of class actions which are of public and social importance.61 The foundation’s budget shall be determined in the Annual Budget Law, in a special plan which is included in the budget of the Ministry of Justice. The Minister of Justice is responsible for determining the criteria for granting financing to the various representatives. In any event, assistance from the foundation will not be given in order to finance class actions in the field of securities, because in these cases, financing is given by the Securities Authority.62

Summary and conclusions

The Class Action Law was enacted in order to encourage the filing of appropriate class actions and to remove procedural impediments.63 The Law perceives the class action not as a procedural arrangement of the filing of claims, but, first and foremost, as a tool for promoting public–social interests. Accordingly, the Law’s perception is that the consideration and the advancement of the public interest should be at the heart of the court’s discretion throughout all the stages of the proceeding. At the same time, the Law attempts to contend with the risk of the exploitation of the class action in order to make private profit, without achieving benefit for the public. The Law takes into consideration the interests of the defendants as well, and tries to balance between them and those of the public.

The main problem which is anticipated is not with the Law itself, but with the manner of application thereof by the courts. To date, the attitude of the courts to the tool of class action is very conservative, which explains a dismissal of applications even in cases where they should be allowed. The question is whether the Law will give rise to a change in the courts’ attitude. Only by understanding the goals of the subject and by removing the judges’ fears with regard to granting certification, will steps be made towards advancing this subject. Hopefully, the new Law will be instrumental in rehabilitating the status of the class action in Israel, and in creating broader access to the courts, in relation to these actions.

A first move in this direction was made last June in the case of Reichert v Shemesh64 regarding a misleading prospectus of a company. For the first time in Israel’s history, the Supreme Court gave a final judgment in favour of the plaintiff in a class action. We would like to believe this is the beginning of a new era in the field of class actions in Israel.

61 Class Action Law, s.27.
63 Class Action Bill Memorandum, above fn.6, p.14.
64 Civil Appeal 345/03 Reichert v Shemesh, available at www.court.gov.il.