



Civil Litigation in Israel in Theory and Practice

Those acquainted with Common Law, will recognize many of the foundational principles of the Israeli legal system, alongside other formal and unwritten rules unique to Israel.

OUTLINE

The State of Israel has an independent, adversarial legal system, modeled after the Common Law tradition. Disputants are free to define the scope of their dispute and the court will adjudicate only on the basis of their pleadings and the evidence they present.

In determining the outcome, the court will apply the law, consisting of primary legislation enacted by parliament, subsidiary legislation such as regulations and legal precedent. All judicial proceedings in Israel are bench trials as there is no right to trial by jury.

In past years the Israeli legal system has deviated from Common Law to Civil Law principles. One example is the Revision, which also envisages a much more active role for the judge. Another example is the continuous effort by parliament to codify civil substantive law.

Israel is a highly litigious country with the highest numbers of lawyers per capita, and an overwhelming number of claims filed each year crowding its court system. According to the Courts Administrator, 854,000 new claims and appeals were filed in 2018 – roughly 1 claim per 10 people. The result is a tendency to use legal proceedings (both in the court system and alternative dispute resolution forums such as arbitration) as a way of solving disputes.

THE STRUCTURE OF THE ISRAELI LEGAL SYSTEM

The Israeli judiciary is comprised of a general court system and specialized tribunals. The general court system is comprised of the Supreme Court, 6 District Courts (one in each judicial district) and 28 magistrate courts spread out over the different districts.

Additionally, there are permanent specialized tribunals with limited subject matter or personal jurisdiction such as labor courts, administrative courts, military courts, religious courts, family Courts, the Antitrust Tribunal and the Standard Form Contracts Tribunal.

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Israeli civil procedure is partial to written submissions and affidavits (subject to cross examination), rather than oral arguments and testimony. However, a recent revision to the Civil Law Procedure Regulations (“the **Revision**”) has tipped the balance in favor of direct examination and oral summation. The Revision will take force on 6 September 2020 and will apply prospectively to claims initiated after the Revision entered into force.

first instance for most civil disputes, having subject matter jurisdiction over claims for relief valued under ILS 2.5 million. The magistrate courts are usually presided over by one judge.

District courts have appellate jurisdiction over the magistrate courts, and they serve as a residual trial court of first instance when the magistrate courts and specialized tribunals lack jurisdiction. The district courts are usually presided over by one judge in their capacity as trial courts, and three judges in their capacity as appellate courts.

The Tel Aviv and Haifa District Courts each have a specialized economic division. These economic courts are granted exclusive subject matter jurisdiction within the court over economic claims (such as shareholder disputes or derivative actions). Judges with relevant knowledge and experience preside over each court.

The Supreme Court is the highest court in Israel. It serves both as an appellate court for the district courts and as a High Court of Justice with powers of judicial review. The decisions of the Supreme Court are final and are not subject to appeal.

As a High Court of Justice, the Supreme Court has material jurisdiction over petitions for judicial review of legislative and administrative action, including limited review of decisions of the specialized tribunals. While in some cases the High Court of Justice is in fact the court of first instance, it is not a trial court and it applies administrative rules of evidence, rather than the civil law rules of evidence.

According to the Courts Administrator, the average length of regular civil proceedings in the magistrate courts is 11 months (including claims that are disposed of before final judgment). The average length of regular civil proceedings initiated in the district courts is 17 months (including claims that are disposed of before final judgment).

JURISDICTION AND EXTRATERRITORIAL SERVICE OF PROCESS

The current Civil Law Procedure Regulations establish that a prospective plaintiff seeking to initiate proceedings against a prospective defendant located outside of Israel, must request leave of extraterritorial service of process from the court. By power of the service of process under such leave, the Israeli court acquires jurisdiction over a foreign defendant.



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The court will grant leave of service only if the plaintiff meets several cumulative conditions:

- The plaintiff must demonstrate adequate cause of action, specifically that the cause of action is a serious matter worthy of adjudication. In practice, a claim is considered to demonstrate an adequate cause of action for the purpose of granting leave of service if it is not devoid of merit prima facie.
- The plaintiff must demonstrate that the Israeli forum is the most appropriate forum for the adjudication of the dispute. If the court finds that there is a more appropriate forum available to the parties (forum non conveniens), it might decline the request.
- The plaintiff must demonstrate that their claim falls under one of the grounds for service of

process enumerated in the Civil Law Procedure Regulations. The Regulations include a comprehensive list of grounds for extraterritorial service, such as that the claim concerns a property located in Israel, or the claim concerns a contract subject to the laws of Israel. All the grounds require some connection between the claim and the State of Israel which justifies the court assuming jurisdiction over the claim.

The Revision broadened the scope of the grounds for service of process concerning torts. The regulations in their current formulation stipulate that the court may grant leave of service if the complaint is based on an act or omission that occurred within Israel.

The Revision authorizes the court to grant leave of service also for damage incurred by the plaintiff in Israel from a product, service or conduct of the defendant, provided that the defendant could have anticipated that the damage would be caused in Israel, and that the defendant, or a person affiliated with it, is engaged in international commerce or the provision of international services of a significant scope.

adjudicating class actions in Israel is outlined in the Class Action Law, 5766-2006 and the Class Action Regulations, 5770-2010.

The Class Action Law limits the causes of action that can be certified as a class action. In practice, class actions may be certified for a series of civil causes of action grounded in contracts law (such as in the event of breach of contract) or in torts law (such as in the event of a breach of a statutory duty). A prominent cause of action, with respect to contracts law and tort law, is grounded in the duty of a party to act in good faith, as will be discussed in a subsequent chapter.

- One approved cause of action relates to claims in connection with the Consumer Protection Law, such as misleading customers regarding material aspects of a transaction, e.g. the nature of the asset or service; the date of its delivery or provision; the usual or customary price of the asset or service; transaction cancellation terms and more.

This cause of action includes claims against a dealer concerning a matter between the dealer and the consumer, whether they have engaged in a transaction or not. A “dealer” is defined broadly in the Consumer Protection Law, and it includes any dealer that sells an asset or provides a service in their regular course of business.

The Class Action Law allows for the certification of class actions against any seller, supplier, manufacturer, importer or marketer of any product or service concerning a matter between the dealer and the consumer, whether the product or service was for consideration or not, including matters that preceded the actual engagement, and even if the engagement never materialized.

- In recent years, there has been a significant increase in private enforcement of the Antitrust Law through the filing of class actions. There has been an increase in the number of class actions conducted before courts in Israel that raised claims by power of the Antitrust Law, such as allegations of excessive pricing and allegations relating to international cartels.

A declaration of a breach of the Antitrust Law by the Antitrust Commissioner serves as *prima facie* evidence in all legal proceedings, and thus facilitates class actions against the subject of the

Class actions filed against foreign international corporations have become a frequent occurrence in Israel in the past years

This clause in the Revision came into force in December 2018 and applies prospectively to claims initiated after the clause took force.

Even if the court does grant leave of extraterritorial service, the defendant may move to quash the leave granted, arguing that any of the above conditions were not met.

CLASS ACTIONS

Class action lawsuits have become a frequent occurrence in Israel in the past years, including class actions filed against foreign international corporations. The legal framework for filing and

declaration.

- Other prominent causes of action stem from the law of unjust enrichment, and standard form contracts which will be discussed in a subsequent chapter.
- A popular cause of action in recent years is unlawful invasion of privacy, especially in cases where information regarding customers is collected and stored.

Under Israeli law, a class action is adjudicated in two stages:

- The certification stage – where the court decides whether to allow the class plaintiff to lead a class action on behalf of the class they purport to represent.
- The adjudication of the action itself – which is similar to the adjudication of any other civil claim in Israel.

The certification stage begins with the plaintiff filing a motion to certify the class action. The motion to certify must demonstrate that the claim meets the cumulative conditions required in order for the court to certify the motion:

- The plaintiff must have a personal cause of action concerning the subject of the motion, and their cause of action must have a reasonable chance of success.
- The class action raises material questions of law or fact that are common to all the members of the represented class;
- There is a reasonable chance that said mutual questions will be decided in favor of the represented class in the adjudication of the claim.
- A class action is the fair and effective mechanism for resolving the dispute.
- There is a reasonable basis to assume that the petitioners will duly and properly represent the interests of the represented class.
- There is reasonable basis to assume that the interests of all class members will be represented and managed in good faith.

The respondents are entitled to respond to the motion to certify. The class plaintiff is then entitled to reply to the respondents' response.

Following the filing of the parties' submissions, the court will usually set a preliminary hearing, for the purpose of simplifying and expediting the adjudication of the motion to certify, or in order to try to amicably resolve the dispute. At times, the court

might propose that the parties submit to mediation.

In most cases, should mediations or the preliminary hearing fail to bear fruit, the court will schedule evidentiary hearings, wherein the affiants on behalf of both parties are subjected to cross-examination (unless the parties agree to forgo cross-examinations).

The evidentiary hearings are typically followed by written summations, following which the court decides on whether to certify the class action.

If the motion to certify is granted, the court will decide the legal questions that will be adjudicated and will define the class to be represented by the class plaintiff. Furthermore, the certified claim will be considered as the complaint. The defendants must then submit a statement of defense, and the complaint will be adjudicated like any other civil claim.

A court's decision to certify a class action can be challenged by leave of appeal filed to the relevant court of appeal. A decision to deny the motion to certify, on the other hand, can be appealed by right

A court's decision to certify a class action can be challenged by leave of appeal filed to the relevant court of appeal. A decision to deny the motion to certify, on the other hand, can be appealed by right. In contrast, the court's decision in the claim itself (following the granting of the motion to certify) can be appealed by right to the relevant court of appeal.

The Class Action Law sets out a unique procedure for the approval of settlements, which are subject to the court's approval. The parties must publicize a notice to the public with the terms of the proposed settlement. Furthermore, a copy of the proposed settlement must be sent to the Attorney General, the Courts Administrator and the relevant regulator (such as the Custodian

of Consumer Protection). These officials, as well as any member of the represented class, and any entity or government body that operates to further public goals in fields relevant to the motion, may file objections to the proposed settlement.

In addition to the above procedure, the Law also provides that the court should receive an opinion from an expert in the fields relevant to the motion to certify, analyzing the advantages and disadvantages of the settlement. In practice, the court often uses its discretion to refrain from appointing such expert.

obligations that are not expressly (or even implicitly) set out in the agreement between the parties.

The duty of a party to act in good faith was set in the Israeli Law of Contracts and applies to all the contractual stages – the negotiations, the execution of the agreement and its termination.

Over the years, the application of the principle extended beyond the Law of Contracts and, in accordance with well-established and binding Israeli case law, the principle of good faith applies to all areas of private law.

An indication of the prominence of the good faith principle in Israeli law, as elaborated above, can be seen in the fact that one of the conditions that should be met for the court to certify a motion to submit a class action or derivative action is that the motion was submitted in good faith.

Unjust enrichment is a recognized and well-established cause of action under Israeli law

The court will only approve the settlement if it finds that the settlement is fair, reasonable and proper, considering the interests of the represented class. In the event that the settlement is reached during the certification stage, the court must also find that the prerequisites for certifying the motion are fulfilled.

NOTEWORTHY PROCEDURES AND PRINCIPLES IN ISRAELI LAW

Good faith

A great emphasis is placed on the principle of good faith under Israeli law. The duty of a party to act in good faith is often sufficient to tether a party to liability (or rights), and sometimes even to create duties towards another party harmed by conduct in bad faith – even if the obligations in this context are not expressly included in the original agreement between the parties.

In practice, the courts consider themselves authorized to provide broad interpretations of the language of the contract and enforce contractual

Unjust enrichment

Unjust enrichment is a recognized and well-established cause of action under Israeli law. It is often used by the injured party in situations where there is difficulty proving damages (or where it is impossible to do so), but where the injured party can show that there is enrichment resulting from a breach of contract.

Under such circumstances, a party might be required to reimburse the other party for its enrichment.

Under Israeli law, a plaintiff must prove 3 cumulative elements in an unjust enrichment claim:

- Enrichment by the opposing party;
- Said enrichment is the result of action(s) taken by the plaintiff; and
- Said enrichment is unlawful.

Standard Form Contracts

A standard form contract is a contract with a uniform formulation intended for many engagements. For the most part, the contract is drafted by one party or at its request in order to be used in agreements between that party and their customers. The contract is usually presented to the customer as a finished product that cannot be negotiated.

Israel enacted a law aimed to protect customers who entered a standard form contract – the Standard Form Contracts Law, 5743-1982. The law stipulates that in circumstances where – considering the entirety of the contract's provisions and the context

of the engagement – a specific clause of a standard form contract is found to be exploitative or affords an unfair advantage to a service provider, the court is empowered to invalidate it.

In practice, numerous claims are filed under this cause of action, alleging that the provisions set out in agreements dictated by service providers are exploitative and, therefore, are not binding.

Many class actions are also based on claims alleging the invalidity of clauses in standard form contracts such as user agreements. ■

ABOUT TADMOR LEVY & CO.

Tadmor Levy & Co. is a premier Israeli law firm with a global perspective, dedicated to providing top-tier legal services to clients operating in all sectors of the economy.

The firm is comprised of a highly skilled and professional team of over 100 lawyers and interns. Many of the firm's partners and associates are multi-lingual and have studied or are admitted to practice in overseas jurisdictions.

The firm's Litigation and Dispute Resolution practice group is consistently recommended by international legal publications and directories, including Legal 500, Chambers and Partner, and by domestic legal directories.

The firm has a reputation for excellence and provides its clients with tailor-made solutions and top-quality service.

ABOUT THE AUTHOR

Yechiel Kasher is partner and head of the firm's Litigation and Dispute Resolution practice group.

Yechiel is widely recognized as one of Israel's leading and most prominent litigators in the fields of civil and commercial litigation. Boasting a litigation career of over 31 years, Yechiel is consistently ranked in the top tiers of international and Israeli ranking guides.

With extensive experience and knowledge in all aspects of civil and administrative law, Yechiel's practice includes commercial and corporate litigation, class action, shareholder litigation (for both domestic and foreign clients), antitrust and competition law, banking and payment methods, infrastructure and energy, real estate and construction.

The combination of Yechiel's skills in various

practice areas, together with his experience in diverse business sectors and his incomparable passion for the profession, provides the firm's clients with the highest of legal services. His talents are evident from his roster of clients, which include notable industry leaders as well as some of the biggest names in the Israeli and international business community.

Yechiel leads and is personally involved on most of the litigation handled by the practice group. He routinely appears all judicial instances and tribunals in Israel, including countless appearances before the Supreme Court. In addition, Yechiel regularly serves as an arbitrator and mediator.

Yechiel track record includes spearheading the defense in some of the most significant class action lawsuits in Israel, and the representation of clients in highly complex arbitrations and in precedential petitions before the Israeli Supreme Court.

Alongside his litigative career, Yechiel has also taught Negotiable Instruments and Corporate Law at the Tel Aviv University School of Law.

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