

Comment

**PREREQUISITES TO CLASS ACTION CERTIFICATION:
A COMPARISON OF NEW ISRAELI LAW AND RULE 23(A)
OF THE FEDERAL RULES OF CIVIL PROCEDURE**

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I. INTRODUCTION AND HISTORICAL BACKGROUND

This paper will discuss the threshold requirements for a suit to be certified as a class action according to Section 8 of the new Israeli Class Actions Law, 2006. Section 8 will also be compared to United States Law, specifically Rule 23(a) of the Federal Rules of Civil Procedure. Before commencing with the main subject of the paper, a brief history of Israeli class action procedure is warranted.

Class actions are not a new phenomenon in Israel. They were recognized in subsidiary legislation many years ago, as discussed below.¹ However, it is only

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¹ See *infra* text accompanying footnotes 2-3.

in recent years—with the enactment of subject-matter-specific laws under which class actions could be instituted—that a significant increase in the number of petitions for class actions is evident. Moreover, despite the drastic increase in the number of petitions filed, at the end of the day only a small number of these claims win the court’s approval for class certification. This phenomenon can be explained, *inter alia*, by (i) the daunting conditions imposed by Israeli law in order for a claim to be certified as a class action; (ii) the fact that some courts tend to be strict with class actions and, (iii) the fact that some courts have a negative view of this process and may, therefore underestimate the need to effectively enforce provisions of the law on companies and/or large bodies.

After the First World War, the territory that is now the State of Israel became subject to a British League of Nations Mandate. During this Mandatory Period, the British authorities introduced rules of civil procedure closely patterned after their counterparts in England.² While these rules have undergone changes since the establishment of the State of Israel in 1948, they still bear a very close resemblance to those prevailing in England. Thus, Rule 29 of the current Israeli Rules of Civil Procedure, 1984, traces its origin to the similar, albeit not identical, English Rule 19.6 of the current Civil Procedure Rules of the English High Court.

Until 1988, Rule 29 was the only legal vehicle permitting class actions in Israel. A 1969 Israeli Supreme Court ruling prohibited Rule 29 from being employed to recover damages in actions based on tort claims held severally by individual class members. Rather, it was only applicable to actions for injunctions or declaratory relief.³ More recently, the Israeli Supreme Court has ruled that Rule 29 may not be invoked to file a class action in its modern sense.⁴ The Court decided by a narrow three to two majority—with the former President being in the minority—that Rule 29 cannot be used for individual tort damages actions.⁵ As discussed later, this ruling triggered the search for, and ultimately the adoption of new legislation regulating class action procedure.

In the absence of a trans-substantive Israeli class action law, subject-matter-specific class action provisions have been adopted piece-meal in various legislative enactments over the years. The result was two-fold: First, there were conflicting provisions due to the variety of the legislative enactments involved; and

² Amos Shapira & Eran B. Taussig, *GROUP ACTIONS IN ISRAEL – NATIONAL REPORT* (the International Law Association, 2006).

³ See CA 86,79/69 *Frankisha Markeka and Co. v. Rabinovitch* [1969] IsrSC 23(1) 645.

⁴ Leave to CA 3126/00 *The State of Israel v. E.S.T. Management and Manpower Ltd* [2003] IsrSC 57(3) 220.

⁵ Rule 29 may only be invoked to lodge an ordinary claim in which all plaintiffs have given power of attorney to a single plaintiff.

second, in important areas of activity that were not covered by any of these enactments, there was still no provision for class action proceedings.

In 1988, the Israeli Securities Law underwent a major revision, resulting in the adoption of a class action provision for Securities Law violations.⁶ This proved to be the first in a series of legislative enactments incorporating U.S.-style class actions in specific areas of Israeli Law. From 1992 until 1997, class action provisions were adopted by the Israeli Legislature in the Environmental Protection Law (Civil Actions), 1992;⁷ the 1992 Amendment to the Business Restriction Law, 1981;⁸ the 1994 Amendment to the Consumer Protection Law, 1981;⁹ the 1996 Amendment to the Banking Law (Customer Services), 1981;¹⁰ the Equal Pay Law, 1996,¹¹ and the 1996 Amendment to the supervision of Insurance Transactions Law, 1981.¹² Fairly recent in this long string of legislation was Israel's comprehensive Corporations Law, 1999,¹³ in which class action provisions superseded those of the 1988 Securities Law Amendment. There are some differences among these various provisions that have frequently created clashes in their interpretation and implementation. Nonetheless, in general they all follow the pattern set by the first such enactment—the 1988 Amendment to the Securities Law. The recent enactment of the new, comprehensive Class Actions Law precludes any need for examination of earlier provisions in the framework of this Comment.

The new comprehensive Israeli Law concerning class action proceedings was adopted on March 12, 2006, triggered by the *E.S.T.* case mentioned above, wherein the Supreme Court held that Rule 29 cannot be relied upon to file a class action in its modern sense.¹⁴ The Supreme Court urged the Israeli Parliament to promulgate a new law to remedy the then-existing inappropriate state of class action procedure. The new law replaced all of the aforementioned provisions.¹⁵ It allows the filing of class actions only for causes of action enumerated in the second

⁶ Securities Law, 1968, S.H. 541, p. 234. The relevant amendment was published in S.H. 1261, p. 188 (1988).

⁷ Environmental Protection Law (Civil Actions), 1992, S.H. 1394, p. 184.

⁸ Business Restriction Law, 1981, S.H. 1258, p. 128. The relevant amendment was published in S.H. 1445, p. 48 (1994).

⁹ Consumer Protection Law, 1981, S.H. 1023, p. 248. The relevant amendment was published in S.H. 1474, p. 252 (1994).

¹⁰ Banking Law (Customer Services), 1981, S.H. 1023, p. 258. The relevant amendment was published in S.H. 2054, p. 279 (1996).

¹¹ The Equal Pay Law, 1996, S.H. 158, p. 230.

¹² Supervision of Insurance Transactions Law, 1981, S.H. 1021, p. 208. The relevant amendment was published in S.H. 1634, p. 212 (1997).

¹³ Corporations Law, 1999, S.H. 1711, p. 189.

¹⁴ *E.S.T.*, IsrSC 57(3) 220.

¹⁵ The provisions in the previous laws that are still valid were modified by the new law: see ICAL, §§ 32-43.

addition to the law,¹⁶ which—unlike prior legislation—provides a broad framework for most subject-matters in the law. The new law is very specific and deals with most aspects of class action proceedings, *e.g.* settlement of class actions;¹⁷ class counsel's fees;¹⁸ plaintiffs' reward;¹⁹ *res judicata*;²⁰ establishment of a governmental fund to finance class actions;²¹ limitation of actions²² and the establishment of a Class Action Registry.²³

This much anticipated new Israeli Class Actions Law, 2006 [hereinafter ICAL] was legislated in the wake of a long and exhausting struggle between lobbyists for the industrial community on the one hand, and jurists and citizens' rights associations on the other. It is generally agreed that the adoption of the ICAL has significantly improved the legal situation in Israel. Nonetheless, the provisions relating to claims against State authorities in the ICAL, in fact, represent a compromise between proponents and opponents²⁴ where, on the one hand, class action against the State has been included in the list of causes of action which can be pursued by means of class actions,²⁵ while on the other hand, the Law contains a number of instruments designed to address the concerns expressed by opponents by granting the State two main sets of protections: one set which it shares 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.²⁶

Prior to the adoption of ICAL, most class actions were brought against insurance companies, bank corporations, and communications corporations. The new Law

¹⁶ Section 3(a) states: "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. . . ." It is noteworthy that § 30 provides that the Minister of Justice may, with the approval of the Israeli Parliament's Committee for Constitutional and Legal Affairs and after consulting with the Minister of Finance, "add to the Second Addition".

¹⁷ Class Actions Law, 2006, S.H. 2054, p. 264, § 19.

¹⁸ *Id.* § 23.

¹⁹ *Id.* § 22.

²⁰ *Id.* § 24.

²¹ *Id.* § 27.

²² *Id.* § 26.

²³ *Id.* § 28.

²⁴ See comments of the Chairman of the Committee for Constitutional and Legal Affairs of the Israeli Parliament during the process of enactment of ICAL, KNESSET PROTOCOL (Mar. 1, 2006) 81-82, available at <http://www.knesset.gov.il/Tql/mark01/h0032717.html#TQL>.

²⁵ The final item in the Second Addition of the Law, 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.

²⁶ See discussion, *infra*, Section II.B.4

has significantly broadened the scope of potential causes of class actions.²⁷ Therefore, one can now expect such suits to be filed regarding environmental and human rights issues.

The primary goal of this Comment is to evaluate the prerequisites to class action claim certification under ICAL, Section 8, analyzing the purposes which the new law seeks to achieve, and to compare and contrast the new law to Rule 23(a) of the United States Federal Rules of Civil Procedure.²⁸ The Comment will outline basic interpretation guidelines for threshold requirements of Section 8. It should be noted that, as a new law, there has been limited interpretation of ICAL by the Israeli Supreme Court. In addition, it will address, at the periphery of this Comment, to several other procedural aspects under the ICAL.

II. CLASS CERTIFICATION ACCORDING TO THE NEW ISRAELI CLASS ACTIONS LAW

A. Section 8 of the New Israeli Law

All previous Israeli legislation dealing with class action proceedings (except Rule 29), included certification procedures similar to those adopted in the United States. ICAL also incorporates such a certification procedure in Section 8(a), whereby a court may certify a claim as a class action only if convinced that the following conditions have been met:

- 8(a)(1) The suit raises material 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;²⁹
- (2) A class action is the efficient and appropriate means of resolving the dispute in the circumstances of the case;

²⁷ Due to the brevity of this Comment, it is not possible to address the new causes of action added by the ICAL. Nevertheless, it should be noted that the new Law now permits the use of class action proceedings for mass tort litigation. As discussed, this option was not permitted in Israel before the enactment of ICAL. *See* ICAL, § 3(a).

²⁸ FED. R. CIV. P. 23 [hereinafter Rule 23].

²⁹ This sub-section calls for two notes. First, this requirement is more relaxed than the requirement in the preceding laws, in which the legislature required that the suit raise common questions of law *and* fact, as a condition to certification. According to § 8 of the ICAL, the suit must raise material questions of law *or* fact. Second, even though the second condition of this prerequisite (“there is reasonable possibility that the decision regarding those will be in favor of the class”) was only incorporated in some of the subject-matter-specific class action laws preceding the ICAL, Israeli Courts have held that they would nevertheless apply it even if absent from the relevant law. *See, e.g.*, CA 6567/97 Bezeq – The Israel Telecomm. Corp. Ltd. v. The Estate of Gat [1998] IsrSC 52(2) 713; CC 2376/00, 3515/00 (Jer) Urim Kibbutz v. The State of Isr. [2004] Dinim-DC 34(3) 242; CC (Jer) 3074, 5538/01 Zimroni v. The Econ. & Cultural Enter. for Civil Servants Co. Ltd. [2002] Takdin-DC 2002(1) 438.

- (3) There exists a reasonable basis to assume that the interest of all the members of the class 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 interest of all the members of the class will be represented and managed in good faith.³⁰

A court may also certify a claim as a class action if it finds that the interest of all members of the class are likely to be managed properly and in good faith³¹ following a replacement of the proposed named plaintiff or class counsel or if another class plaintiff or class counsel is added. Of course, the court may replace a named plaintiff for lack of standing.³²

According to a decision of the Israeli Supreme Court, the plaintiff has to show that his claim *prima facie* discloses a cause of action, and fulfill all other prerequisites of a class action before winning certification.³³ The court held that the purpose of imposing a higher standard of proof (the court will *not* dismiss a class action so long as the statement of claim shows a reasonable likelihood that the plaintiff may succeed)³⁴ than in a preliminary motion to dismiss for failure to state a claim in a “simple” civil proceeding, is that the class action procedure is different from regular litigation, in terms of, among other things, the extensive ramifications for the represented class, the defendant, and the public as a whole.³⁵

B. Analysis of Section 8(a) Conditions as Compared to Rule 23(a)

The preliminary starting point of this Section 8(a) analysis is that its prerequisites should be interpreted so as to facilitate certification of valid suits and deny

³⁰ It should be mentioned, at least in summary, that in addition to these threshold requirements, the plaintiff must state a cause of action mentioned in the Second Addition to the law and must have standing according to § 4(a) of the law. These issues exceed the scope of this Comment.

³¹ ICAL, §§ 8(a)(3), 8(a)(4).

³² *Id.* § 4.

³³ *See, e.g.*, Leave to CA 4474/97 Tezet v. Zilbershatz [2000] IsrSC 54(2) 577; E.S.T., IsrSC 57(3) 220. This rule was cited also after the legislation of the new Israeli law. *See* Labor Appeal 1154/04 Gross v. The State of Israel—Defense Ministry [2007] (not published).

³⁴ CA 2967/95 Magen and Keshet v. Tempo [1997] IsrSC 51(2) 312, 329-30. The extent to which the burden of proof is higher remains vague, but the court ruled that the plaintiff has to convince the court, according to the appropriate likelihood measure, and not merely according to the facts argued in the pleading, that he *prima facie* fulfils the above-mentioned prerequisites.

³⁵ *Id.*; Stephen Goldstein & Yael Ephron, *The Development of Class Action in Israel*, 1 ALEI MISHPAT 27 (2000).

certification of frivolous suits. Also, according to the first Section of ICAL, its goal is to determine uniform procedural rules for filing and managing class actions in order to safeguard the rights of potential plaintiffs.

Both Section 8(a) of ICAL and Rule 23(a) constitute two types of prerequisites. First, those prerequisites relating to the claim itself and whether it may be effectively managed as a class action; and second, those prerequisites relating to the plaintiff and class counsel. If one or more of the first category of conditions is not fulfilled, the claim should not be adjudicated as a class action. On the other hand, as mentioned above, if one or more of the second category is not satisfied, then the court has discretion to replace the named plaintiff or the class counsel or add another plaintiff or class counsel to those who initially brought the claim.³⁶ American courts have a similar duty. According to the Manual for Complex Litigation, courts have a continuing duty to ensure that class representatives “understand their responsibility to remain free of conflicts and to vigorously pursue the litigation in the interests of the class, including subjecting themselves to discovery.”³⁷ Courts may have to replace a class representative if “the representative’s individual claim has been mooted or otherwise significantly altered. Replacement may also be appropriate if a representative has engaged in conduct inconsistent with the interests of the class or is not longer pursuing the litigation.”³⁸

1. Claim Related Prerequisites³⁹

According to Section 8(a), three conditions are required in order to secure the suitability of the claim as a class action. First, the claim must raise material questions of fact or law common to the class. Second, there must be a reasonable possibility that these questions will be determined in favor of the class. Third, a class action must be the efficient and appropriate means of resolving the dispute.

³⁶ § 8(c) of ICAL. The rationale is clear: the Israeli Legislature tried to discourage defendants from unduly objecting to the propriety of the named plaintiff or class counsel. If the defendant and his counsel are aware that such objections will only result in the replacement of the plaintiff or class counsel, they might choose to allocate their resources more effectively. Given that the arguments of the defendants against the named plaintiff and class counsel are suspiciously *prima facie* due to their contradicting interests, a court’s discretion to replace the plaintiff and class counsel, even if there is no objection from the defendant, is appropriate. See e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370 (1995).

³⁷ MANUAL FOR COMPLEX LITIGATION, Fourth, § 21.26, 276-77 (2004).

³⁸ *Id.*

³⁹ ICAL, §§ 8(a)(1), 8(a)(2).

a. The Claim Raises Material Questions of Fact or Law
Common to the Class

While this prerequisite is similar to those found in ICAL's predecessors, there is a key distinction in that the new law requires raising material questions of fact *or* law, while previous legislation required both. This newly relaxed standard relieves a significant burden formerly imposed upon the named plaintiff.⁴⁰ Clearly, it is possible to also have questions that are not common to the class.⁴¹ Usually the common questions address the liability of the defendant, while the damages claimed by each represented plaintiff are varied.⁴² If such is the case, the court will determine whether the advantage of managing the case as a class action for the common questions outweighs the disadvantage emanating from the diversity of the plaintiffs with regard to questions not held in common.⁴³ This balancing determination should be made while the court examines the prerequisite of whether a class action proceeding is the most efficient and appropriate means of resolving the dispute. This condition will be discussed in more detail in Section II.B.1.c., *infra*.

This prerequisite resembles Rule 23(a)(2), in that it requires "questions of fact or law common to the class."⁴⁴ At first glance, it appears that the U.S. Rule merely requires that common questions exist, while the new Israeli Law requires *material questions*. Closer inspection, however, reveals that this distinction is not the case, at least with regard to Rule 23(b)(3) claims.⁴⁵ This Rule dictates that

⁴⁰ Nevertheless, proving that the claim raises material questions of fact or law common to the class may still prove difficult, particularly in the preliminary stage of class certification, e.g., when there may be more than one instance of malfeasance and each such instance may have injured a part of the represented group.

⁴¹ This is the case according to U.S. court rulings. See, e.g., *Stewart v. Abraham*, 275 F.3d 220, 51 Fed. R. Serv. 3d 1145 (3d Cir. 2001), *cert. den.*, 122 S.Ct. 2661, 153 L. Ed. 2d 836 (U.S., 2002); *Port Auth. Police Benev. Ass'n, Inc. v. Port Auth. of N.Y. & N.J.*, 698 F.2d 150 (2d Cir. 1983); *Like v. Carter*, 448 F.2d 798 (8th Cir. 1971); *Tonya K. by Diane K. v. Chicago Bd. of Educ.*, 551 F. Supp. 1107 (N.D. Ill. 1982); *In Re Plastics Additives Antitrust Litig.*, 2006 U.S. Dist. LEXIS 69105 (2006).

⁴² ICAL, § 20 entitles class members to prove their damages after final judgment in favor of the class has been entered. See also Stephen Goldstein, *Class Actions – What and Wherefore?*, 9 MISHPATIM 416, 429-30 (1979); Leave to CA 4556/94 *Tezet v. Zilbershats et al.* [1996] IsrSC 49(5) 774, 788. See similarly, *Mersay v. First Republic Corp. of Am.*, 43 F.R.D. 465 (S.D.N.Y. 1968); *Troutman v. Cohen*, 661 F. Supp. 802, 811 (E.D. Pa. 1987); *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985).

⁴³ For further discussion, see Leave to CA 8268/96 *Shemesh v. Reichart* [2001] IsrSC 55(5) 276, 297-98; CA 1977/97 *Barazani v. Bezeq—The Israeli Communication Corporation* [2001] IsrSC 55(4) 584, 612-13; *Tezet*, IsrSC 49(5) at 787.

⁴⁴ FED. R. CIV. P. 23(a)(2).

⁴⁵ This may be the most important kind of a class action because it enables those with small claims for whom individual litigation would be economically irrational to band together in group litigation against a common adversary. See Stephen B. Burbank and Linda J. Silberman, *Civil Pro-*

when dealing with certain types of claims, the court must ensure that the common questions predominate over questions that only affect individual members, such as the extent of each member's damages. Satisfying this requirement sometimes calls for a broad inquiry into such matters as the number of subclasses that will be necessary, variations in state law that may affect the claims of class members from different states, and the simplicity or complexity of the class members' individual issues. When adjudicating Rule 23(b)(3) class actions,⁴⁶ courts generally apply the Rule 23(a)(2) requirement and the predominance prerequisite together.⁴⁷ The Israeli Legislature has established a similar rule for the certification of all class proceedings.⁴⁸ Nonetheless, while under both systems one has to demonstrate that common issues predominate, one need not prove that all questions are common, or even that all material questions are common.⁴⁹

b. Reasonable Possibility that the Decision Regarding the
Common Questions Will Be in Favor of the Class

This prerequisite was found in only some of ICAL's predecessors.⁵⁰ Nevertheless, the Israeli Supreme Court has ruled that it would be implemented even when it is not expressly stated in the relevant law.⁵¹ There has been significant conflict among members of the Committee for Constitutional and Legal Affairs of the Israeli Parliament with regard to this prerequisite in ICAL.⁵²

According to Rule 23, the court is not entitled to examine a claim's likeli-

cedure in Comparative Context: The United States of America, 45 AM. J. COMP. L. 675, 684 (1997); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (U.S. 1985).

⁴⁶ It is important to note that although predominance and superiority prerequisites are formally applicable only to Rule 23(b)(3) certification, some courts have found ways to "smuggle" them into (b)(2) certification analysis. *See, e.g.*, *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998); *Bratcher v. Nat'l Standard Life Ins. Co. (In re Monumental Life Ins. Co.)*, 365 F.3d 408, 417-18 (5th Cir. 2004); *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 144-45 (D. La. 2002); *Barnes v. American Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998); Edward F. Sherman, *Complex Litigation: Plagued By Concerns Over Federalism, Jurisdiction and Fairness*, 37 AKRON L. REV. 589, 603-4 (2004).

⁴⁷ HERBERT B. NEWBERG & ALBA C. CONTE, *NEWBERG ON CLASS ACTIONS*, §§ 3:10, 4:22 (4th ed. 2002).

⁴⁸ A significant difference derives from the small size of the State of Israel and from the fact that Israeli courts do not usually need to address issues of choice of law. This may change one day, when multi-national class actions are filed in Israel.

⁴⁹ Goldstein, *supra* note 42, at 421.

⁵⁰ It did not exist in the Corporation Law (1999), which was perhaps the most important piece of class actions legislation prior to the ICAL.

⁵¹ Gat, *IsrSC* 52(2) at 719.

⁵² *See, e.g.*, Protocol No. 8 of the Knesset Committee (Sep. 22, 2005) available at www.Knesset.gov.il/protocols/data/rf/huka/2005-09-22.rtf.

hood of success when deciding whether or not to permit a class action. The United States Supreme Court has ruled, in the famous case of *Eisen v. Carlisle & Jacquelin*, that “[a] federal court may not conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”⁵³

Conversely, the Israeli Supreme Court has ruled that the court is *obligated* to conduct a preliminary inquiry into the merits of the claim. As mentioned above,⁵⁴ the burden imposed upon a plaintiff is heavier than in a “simple” civil proceeding, wherein a court will not dismiss a class so long as on its face, a claim may succeed.⁵⁵ The purpose of this requirement to look further into the merits in the class action context is to protect potential defendants from frivolous suits,⁵⁶ which can impose high costs on a defendant.⁵⁷ These suits were also known as “judicial blackmail” suits.⁵⁸ This problem has been well-known in the United States for more than half a century.⁵⁹ According to legal scholars, this phenomenon arises mainly from the extensive discovery process imposed upon defendants under Federal Law, regardless of whether or not the suit has merit,⁶⁰ and from the fact that the initial costs of class action management are higher for the defendant than for

⁵³ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). See also *Miller v. Mackey International Inc.*, 452 F.2d 424, 428 (5th Cir.1971); *Cannon v. Texas Gulf Sulphur Co.*, 47 F.R.D. 60 (S.D. N.Y. 1969); *Mersay v. First Republic Corporation of Am.*, 43 F.R.D. 465 (S.D. N.Y. 1968). Nevertheless, it should be noted that some of the federal courts ruled differently. See Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 HOFSTRA L. REV. 51 (2004).

⁵⁴ See *supra* text accompanying footnotes 33-35.

⁵⁵ *Magen & Keshet*, IsrSC 51(2) 312.

⁵⁶ See, e.g., DEBORAH R. HENSLER, *et al.*, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 15-16 (2000); Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003); *McCandless v. Great Atlantic & Pacific Tea Co.*, 697 F.2d 198 (7th Cir. 1983); *Bovee v. Coopers & Lybrand*, 216 F.R.D. 596 (D. Ohio 2003).

⁵⁷ NEWBERG, *supra* note 47, §15:29; Thomas E. Willging *et al.*, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 142-43 (1996); Neil L. Rock, *Class Action Counsel as Named Plaintiff: Double Trouble*, 56 FORDHAM L. REV. 111, 115 (1987); John C. Coffee, Jr., *Understanding the Plaintiff’s Counsel: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); Tim O. Brandi, *The Strike Suit: A Common Problem of the Derivative Suit and the Shareholder Class Action*, 98 DICK. L. REV. 355 (1993). These references deal also with “strike suits”—a parallel phenomenon known in shareholder derivative suits.

⁵⁸ See, e.g., *Ruiz v. American Tobacco Co.*, 1998 WL 313357 (D.P.R. 1998); *American Products Inc. v. Windsor*, 521 U.S. 591, 624-25 (U.S. 1997); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1089-90 (6th Cir. 1996); William H. Pryor, *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuit*, 74 TUL. L. REV. 1885, 1895 (2000); Richard O. Faulk, *Armageddon Through Aggregation? The Use And Abuse Of Class Actions In International Dispute Resolution*, 10 MSU-DCL J. INT’L L. 205 (2001); Silver, *supra* note 57.

⁵⁹ See, e.g., *Cohen, Ex’x v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949).

⁶⁰ Brandi, *supra* note 57, at 370.

the plaintiff.⁶¹ The discovery rule enables the class counsel to harass defendants to the point of disrupting day-to-day management of a defendant corporation.⁶² In addition, frivolous class actions may unduly damage a defendant's reputation and, consequently, the value of its market share. Frivolous suits may thus be employed to pressure a defendant to compromise, even when that same defendant would have prevailed at trial. Given such a scenario, a defendant will often make the economic choice to pay in order to minimize these costs. This strategy thwarts two of the main goals of class action proceedings: enforcement of the law and deterring its breach.⁶³ The goal of enforcement of the law is achieved by harnessing the private interests of the named plaintiff and class counsel to an ultimate public benefit.⁶⁴ Nonetheless, the Israeli Supreme Court has repeatedly determined that the preliminary certification stage should not be transformed into an extensive deliberation regarding the crux of the matter.⁶⁵ Therefore, the chances of success, which should be proven by the plaintiff, are not the same as those required at the end of the proceedings and a "reasonable likelihood of success" is enough.⁶⁶

c. Class Action is the Efficient and Appropriate Means of Resolving the Dispute

This prerequisite was required by only some of ICAL's predecessors.⁶⁷ This condition enables the court to weigh the pros and cons of class action certification as compared to other procedural options such as plaintiff's joinder or adjudicating the individual claims separately. Also, the court may consider within the scope of this requirement, whether penal or administrative laws cannot obtain the same goals more efficiently than a class action proceeding.

⁶¹ Coffee, *supra* note 57, at 677. Unlike in the American system, in which the basic rule is that each party pays his or her own litigation expenses, in Israel the loser usually pays the winner's expenses. Therefore, plaintiffs have less to lose when filing a class action in the United States. This may play in the calculations of lawyers considering whether to bring frivolous lawsuits.

⁶² See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975).

⁶³ See Stephen Goldstein, *Class Actions in Israel*, 13 INT. COMP. LAW 45, 65 (1990); Moshe Bar-Niv (Boronovski), *The Boundary of Consumer Class Action*, YIUNEY MISHPAT 19(1), 251 (1994); E.S.T., IsrSC 57(3) at 287-88.

⁶⁴ See, e.g., HENSLER, *supra* note 56, at 71-72.

⁶⁵ Tezet, IsrSC 49(5) at 787; Gat, IsrSC 52(2) at 720.

⁶⁶ Nevertheless, it is still possible that even this lower burden imposed on the plaintiff will prevent the certification of a claim as a class action when it should have been certified. Therefore, it has been suggested by the Israeli Supreme Court that whenever the information and evidence are clearly in the hands of the defendant, the burden of disproving the chances of success is transferred to the defendant. See, e.g., *Leave to CA 4474/97 Tezet v. Zilbershatz* [2000] IsrSC 54(2) 577.

⁶⁷ Two prominent examples are § 35(b) of the Consumer Protection Law (1981) and § 210(3) of the Corporation Law (1999).

Another aspect that should be examined with regard to the “efficient and appropriate means” is the connection between the utility of adjudicating the claim as a class action for common questions to the class and the costs involved in adjudicating the non-common questions separately. The more the utility of a class action outweighs the cost, the more likely it is that a class action will be the preferred course of action for adjudicating a dispute.

In contrast to the U.S rule,⁶⁸ the ICAL does not expressly require a duty to examine the size of the represented class.⁶⁹ Nevertheless, I believe that this “numerosity” condition should be examined as a part of the “efficient and appropriate means of resolving the dispute” determination. If the size of the represented class is relatively small, it may indicate that the claim should not be adjudicated as a class action. On the other hand, if there are many class members and it is hard to identify them, usually this condition will be fulfilled, as it would be impossible to adjudicate the case otherwise.⁷⁰ According to U.S. rulings, the numerosity requirement is not isolated and the class action is appropriate when it is impractical to join all class members as parties in a single action.⁷¹ Thus, the Rule 23(a)(1) requirement is indeed an efficiency requirement, similar to Section 8(a)(2) of ICAL. In the American experience, the utility of using the *numerosity* factor is limited as there is enormous disparity among the courts as to the proper size of a class sufficient to satisfy the Rule 23(a)(1) prerequisite.⁷² It is not necessary to precisely identify the members of the represented group before certifying the claim as a class action.⁷³ Any other view would impose an enormous burden on the plaintiff at an early stage of the litigation.

In addition to Rule 23(a)(1), when dealing with Rule 23(b)(3) classes, it is also required to show that a class action is superior to other available methods for

⁶⁸ Rule 23(a)(1). Also according to the Rule, the plaintiff need not prove the exact number or identity of class members. See NEWBERG, *supra* note 47, § 3:5.

⁶⁹ While some of its predecessors did. See, e.g., § 210(3) of the Corporation Law (1999) and § 35(b)(2) of the Consumer Protection Law (1981).

⁷⁰ See, e.g., Linda Silberman, *The Vicissitudes of the American Class Action*, 7 TUL. J. INT’L & COMP. L. 201, 205 (1999); Sylvia R. Lazos, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308, 311 (1985); *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 338 (1980); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

⁷¹ NEWBERG, *supra* note 47, § 3:3.

⁷² On the one hand, classes with as few as fourteen plaintiffs have been upheld while others with more than 300 class members were denied. See NEWBERG, *supra* note 47, § 3:3, footnotes 12-17.

⁷³ A similar opinion is stated in the MANUAL FOR COMPLEX LITIGATION, *supra* note 37, § 21.222, 270. See also Rules Advisory Committee Notes, 1966 Amendments to Rule 23, 39 F.R.D. 69, 99 (1966). Of course, it is of critical importance to define the class since individual class members must receive the best notice practicable and have an opportunity to opt-out.

adjudicating the controversy.⁷⁴ This criterion also seems to have a similar rationale to the ICAL prerequisite mentioned in Section 8(a)(2). According to Rule 23(b)(3), in determining whether the superiority requirement is met, the court must take into account four factors:⁷⁵

(A) “[T]he Interest of members of the class is in individually controlling the prosecution or defense of separate actions.”⁷⁶ According to this factor the court should check if there is any litigation pending by or against individuals. The interests of the individuals in conducting separate lawsuits may be so strong as to call for a denial of the class action.⁷⁷ This factor is important due to the fact that class actions may deprive individuals of their ability to bring their own lawsuits and thereby harm their financial interests and undermines their individual autonomy.⁷⁸ This concern has been noted in Israel, which also has an adversarial legal system, according to which every person is most qualified to represent his case.⁷⁹ In Israel, similar to the United States, extremely large damage claims may support individual litigation.

(B) “[T]he extent and nature of any litigation concerning the controversy already commenced by or against members of the class.”⁸⁰ The existence of other suits by class members may suggest an interest in individual litigation. As mentioned above, according to Section 28 of the ICAL, a Class Action Registry will be established, and when it is established it will enable the court to know about other class actions filed in respect of similar issues or parties.⁸¹ As far as simple cases go, de-

⁷⁴ Rule 23(b)(3) also requires that common questions predominate over individual questions. *See infra* text, Section II.B.1.a.

⁷⁵ The advisory Committee confirms that the list is not intended to be exhaustive and that the court should consider other factors relevant to the litigation. *See* Rules Advisory Committee Notes to 1966 Amendments to Rule 23, 39 F.R.D. 69, 104 (1966).

⁷⁶ FED. R. CIV. P. 23(b)(3)(A).

⁷⁷ *Id.*

⁷⁸ *See* Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 63 TEX. L. REV. 571, 572 (1997) (acknowledging that “core precept of the American constitutional tradition: Individuals have a right ‘to be heard and participate in [any] litigation’ which purports to extinguish their rights”) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)); Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 589-94 (2004) (dealing with Individual Autonomy and Representational Legitimacy); Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747 (2002) (dealing with mass tort class actions as a threat to individual autonomy); David L. Shapiro, *Class Actions: the Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998) (dealing with individual autonomy and collective justice).

⁷⁹ *See, e.g.*, GIL LOTHAN & EYAL RAZ, CLASS ACTIONS 27 (1996).

⁸⁰ FED. R. CIV. P. 23(b)(3)(B).

⁸¹ According to § 28 of the ICAL, the registry will include, *inter alia*, a listing of all requests for certification, withdrawals or disqualifications of representative plaintiffs and class counsel, requests for approval of settlement agreements, and all court decisions in respect of each class proceeding listed in the registry.

defendants will most likely reveal all relevant litigation in their efforts to prevent certification of the class proceeding.

(C) “[T]he desirability or undesirability of concentrating the litigation of the claim in the particular forum.”⁸² This factor does not seem appropriate for a small country such as Israel, in which undue importance should not be attached to the question of whether a certain claim is submitted in the jurisdiction of one court or another.⁸³

(D) “[T]he difficulties likely to encountered in the management of a class action.”⁸⁴ The “manageability” factor has been the most hotly contested, and has been the most frequent ground for holding that the class action is not superior. One of the reasons that American courts deny certification on the basis of the “manageability” factor is the lack of adequate class definition, the ambiguity of which could allow class members to avoid the binding nature of an adverse judgment. Another reason for denying certification in a 23(b)(3) case may be the impossibility to provide notice as required or to manage the case as a class action.⁸⁵

This factor will surely be used by Israeli court while interpreting the “efficient means” prerequisite: when management difficulties make a class action less fair and efficient than some other methods of individual lawsuits, then the class action is improper.⁸⁶

2. Plaintiff and Class Counsel Related Prerequisites⁸⁷

Under ICAL, two plaintiff and class counsel-related conditions must be met. First, the interest of all members of the class will be represented and managed properly. Second, the interest of all members of the class will be represented and managed in good faith.

Similar versions of these conditions were included in prior class action legislation; however the new law introduces three primary modifications. The new law makes no reference to the named plaintiff—meaning that courts should examine whether these two conditions are carried out by class counsel, not only with regard to the named plaintiff.⁸⁸ Secondly, Section 8(a)(3) prohibits defendants from ap-

⁸² FED. R. CIV. P. 23(b)(3)(C).

⁸³ See e.g. Leave to CA 6920/94 Levi v. Poleg et al., IsrSC 49(2) 731 (1995).

⁸⁴ FED. R. CIV. P. 23(b)(3)(D).

⁸⁵ See, e.g., Simer v. Rios, 661 F.2d 655, 659 (7th Cir. 1981); Oshana v. Coca-Cola Co., 225 F.R.D. 575, 580 (D. Ill. 2005); Burns v. First Am. Bank, 2006 U.S. Dist. Lexis 92159 (D. Ill 2006).

⁸⁶ It has not been my intention to comprehensively analyze American rulings dealing with the above-mentioned factors. For a more comprehensive discussion see NEWBERG, *supra* note 47, §§ 4.29- 4.45.

⁸⁷ ICAL, §§ 8(a)(3), 8(a)(4).

⁸⁸ This seems justified since class counsel is generally given the responsibility to initiate and

pealing a decision that affirms that the interest of all members of the class will be represented and managed properly.⁸⁹ Finally, the good faith requirement in prior legislation was relevant only to the initial filing of the claim, while the good faith requirement in ICAL deals explicitly with the actual representation of the class and the management of the proceeding. The following analysis delves into the propriety and good faith representation of class members' interests.

a. The Interest of All Members of the Class Will Be Represented and Managed Properly

Under this prerequisite, the plaintiff must prove that class counsel meets the minimum qualifications necessary to properly manage a class action proceeding. It makes no difference whether better, more qualified, or more experienced lawyers than the class counsel are available.⁹⁰ All that matters to the decision maker is that the class counsel possesses the qualifications according to the above-mentioned criterion. The Israeli Supreme Court has ruled, before the legislation of ICAL, that class counsel's past experience in managing class action proceedings should be taken into consideration but is not mandatory.⁹¹ This gives lawyers an important incentive to seek out and bring class actions. This worthwhile goal is just as important as proper representation of the class because without lawyer motivation, significant class causes of action may be overlooked or lost. In the relatively small

manage the claim, while the plaintiff's role may be minimal. *See, e.g.*, Jean W. Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165, 181 (1990); Geoffrey P. Miller, *Full Faith and Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. REV. 1167 (1998); Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 439 (1999); Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 927-28 (1998); Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 NEB. L. REV. 646, 658-60 (1994); Jill E. Fisch, *Class Action Reform Qui Tam, and The Role of The Plaintiff*, 60 LAW & CONTEMP. PROBS. 167 (1997); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty In Representative Litigation*, 100 COLUM. L. REV. 370, 436-37 (2000); Brandi, *supra* note 57, at 368-69. In Israel: Goldstein & Ephron, *supra* note 35, at 46.

⁸⁹ However, any other decision to certify the claim as a class action is appealable with the permission of either the adjudicating court or the court of appeal (Sec. 8(d)). As we shall see *infra*, in Section II.B.5, a decision to deny certification is appealable without the permission of the court.

⁹⁰ Although ICAL § 7(b)(1) may imply otherwise: according to this section (dealing with a situation where multiple class action proceedings arise from the same issues), the court has discretion to replace the class counsel or the named plaintiff or join another counsel or plaintiff to ensure that the class will be represented in the best way and that the class action will be managed in the most efficient manner.

⁹¹ It should be noted that this aspect of the proper representation prerequisite was also addressed with regard to the class representative and not only to class counsel. *See* Tezet, IsrSC 49(5) at 789-90.

Israeli market, most of the well-known, experienced law firms work for large corporations or would like to work for them in the future, and hence can not (or will not) file class actions against such established corporations. In such a context, dismissing lawyers for lack of experience may well frustrate the intrinsic societal value of prosecuting class action proceedings. Moreover, if courts require proof of previous experience, it might channel most of the class actions to a small number of law firms.⁹² This is also undesirable, as it will force these few law firms to balance long-term considerations regarding other class proceedings they manage against their continuing relationship with opposing counsel, who are, much as the former, repeat players in the class action arena.⁹³

ICAL Section 8(a)(3) incorporates the prerequisites found in Rule 23(a)(3) and 23(a)(4) of the Federal Rules of Civil Procedure. With regard to the latter, U.S. courts have ruled that it is to determine (when dealing with the adequacy of the named plaintiff): (i) whether the plaintiff is a member of the class; and (ii) whether the plaintiff has conflicts of interest with other class members.⁹⁴ Only material conflicts pertaining to issues common to the class will bar a class action from being certified.⁹⁵ The courts have diverged over other considerations.⁹⁶ Within the analysis of the class counsel prerequisite, U.S. Courts have also examined, *inter alia*, counsel's competence, qualifications, overall experience, level of

⁹² Similar situations have arisen in U.S.-securities class action proceedings, which are filed by a relatively small number of law firms. According to data presented in Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 LAW & CONTEMP. PROBS. 97, 134 tbl. A4 (1997), 34 out of 127 class actions which were published in the New York Times between 1993-1996, were filed by a single law firm (Milberg Weiss Bershad Hynes & Lerach LLP).

⁹³ Large law firms clearly have the advantage when filing class actions due to the economies of scale—only a small number of all class action claims that are commenced are viable, not to mention ultimately successful, and firms incur significant costs in advancing such claims. It is not typically possible to determine in advance which claims are viable and which are not. Therefore, the more claims filed means the more the average gain for each claim. See Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1018-26 (1993); Deborah Hensler, *Reviewing the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 189 (2001).

⁹⁴ See, e.g., *East Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395 (U.S. 1977); cf. *Richmond v. Dart Indus.*, 29 Cal. 3d 462 (Cal. 1981).

⁹⁵ NEWBERG, *supra* note 47, § 3:23.

⁹⁶ E.g., the financial resources of the named plaintiff or his physical condition.

expertise with the relevant substantive issues, potential conflicts of interest,⁹⁷ and similar factors.⁹⁸

The 2003 revisions to the Federal Rules of Civil Procedure⁹⁹ contain a new rule, Rule 23(g), which explicitly addresses the appointment of class counsel.¹⁰⁰ The new Rule 23(g) provides specific criteria that courts need to consider in the appointment of class counsel. Section 23(g)(1)(C) requires that the court consider the work counsel has performed in the action, counsel's experience in complex litigation and knowledge of the applicable law, and the resources counsel will commit to the representation. The rule differentiates between cases where single versus multiple applicants seek appointment as class counsel, requiring that "the court must appoint the applicant best able to represent the interests of the class."¹⁰¹ The court also "may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs."¹⁰² While Rule 23(g) expands upon the adequacy requirement of Rule 23(a), the new provision also requires the court to follow a formal appointment procedure and to consider the above-mentioned enumerated factors. It seems that the legislation of the Private Securities Litigation Reform Act of 1995 ("PSLRA")¹⁰³ and the 2003 amendments to Rule 23 signal a greater role for the courts in the appointment of class counsel,¹⁰⁴ which brings them closer to the ICAL model.

Rule 23(a)(3) provides that a class action may be maintained only if "the claims or defenses of the representative parties are typical of the claims or defenses of the class."¹⁰⁵ This condition, which is known as the "typicality" prerequisite,

⁹⁷ Beyond the potential conflicts within the class, there are also inevitable conflicts of interest between the attorney representing the class and the class members. *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 386-94 (2000); Miller & Singer, *supra* note 92; Note, *In-Kind Class Action Settlement*, 109 HARV. L. REV. 810 (1996).

⁹⁸ *See, e.g.*, McGowen v. Faulkner Concrete Pipe Co., 659 F.2d 554 (5th Cir. Oct. 1981); Fendler v. Westgate-California Corp., 527 F.2d 1168 (9th Cir. 1975); CV Reit, Inc. v. Levy, 144 F.R.D. 690, 698 (S.D. Fla. 1992); Kuper v. Quantum Chem. Corp., 145 F.R.D. 80, 82 (S.D. Ohio 1992).

⁹⁹ FED. R. CIV. P. 23(g), effective December 1, 2003.

¹⁰⁰ Similarly, the Legislation of the Private Securities Litigation Reform Act of 1995 (15 U.S.C. 78u-4(a)(3)) created a formal mechanism for appointment of a lead plaintiff in securities class actions. For further discussion, *see e.g.*, Jill E. Fisch, *Class Action Reform Qui Tam, and The Role of The Plaintiff*, 60 LAW & CONTEMP. PROB. 167 (1997).

¹⁰¹ FED. R. CIV. P. 23(g)(2)(B).

¹⁰² *See* FED. R. CIV. P. 23(g)(1)(C)(iii).

¹⁰³ Pub. L. No. 104-67, 109 Stat. 737 (Dec. 22 1995).

¹⁰⁴ *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 37, § 21.11, 245-47.

¹⁰⁵ FED. R. CIV. P. 23(a)(3).

also deals with proper representation. Both the U.S. typicality and adequate representation prerequisites address the desirable characteristics of class representatives and are interdependent. While the typicality of claims requirement seeks to ensure that the interests of the representative are aligned with the common questions affecting the class, the adequate representation criterion examines this alignment of interests—evaluating whether the representative has any material conflicts of interest with the class with respect to the common questions involved, and whether class counsel will vigorously prosecute the action on behalf of the class.¹⁰⁶ Both of these prerequisites are included in the Israeli proper representation prerequisite stipulated in ICAL Section 8(a)(3). If there are substantial differences between the representative and the class, *e.g.* there is a unique general defense against the class representative,¹⁰⁷ an Israeli Court may rule that the interests of all members of the class will not be properly represented and managed.

As mentioned above, ICAL Section 8(a)(3) prohibits a defendant from appealing a court finding that the interests of all class members will be represented and managed properly. In addition to the functional fact that the defendant cannot file an appeal, Section 8(a)(3) may also reflect the reasoning that the proper representation and management of the class proceedings is not the concern of the defendant but, rather, the concern of class members.

b. The Interest of All Members of the Class Will Be Represented and Managed in Good Faith

In Israeli Jurisprudence, good faith (*bona fides*) is a central foundation of contract law.¹⁰⁸ The Israeli doctrine of good faith in contract law is based on several principles. First, the obligation of good faith is applicable to pre-contractual negotiations.¹⁰⁹ Second, it applies to the obligations stemming from the contract

¹⁰⁶ See, *e.g.*, *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, n. 13, 102 S. Ct. 2364, 72 L. Ed. 2d 740, 34 Fed. R. Serv. 2d 371 (1982); *Long v. District of Columbia*, 469 F.2d 927 (D.C. Cir. 1972).

¹⁰⁷ According to U.S. Courts, the mere existence of defenses unique to the named plaintiff does not automatically preclude a finding of typically and should not necessarily make his claims atypical. See *e.g.*, *Rodger v. Electronic Data Sys. Corp.*, 160 F.R.D. 532, 538 (E.D.N.C., 1995); *Nichols v. Poughkeepsie Sav. Bank*, Fed. Sec. L. Rep. (CCH) ¶ 95, 736 (S.D.N.Y. Dec. 19, 1990).

¹⁰⁸ Dealing with the general good faith principle in Israeli law goes beyond the scope of this paper. For a comprehensive discussion see, *e.g.*, Alfredo M. Rabello, *Culpa in Contrahendo and Good Faith in the Formation of Contract: Pre-contractual Liability in Israeli Law*, in *ESSAYS ON EUROPEAN LAW AND ISRAEL* 245-348 (Alfredo M. Rabello ed., 1996); GABRIELA SHALEV, *THE LAW OF CONTRACT* 41 (1995) (in Hebrew); DANIEL FRIEDMANN & NILI COHEN, *CONTRACTS*, Vol. 1 15 (1991) (in Hebrew); Miguel Deutch, *Good Faith in Implementation of Rights – Boundaries of the Principle*, 18 *YIUNEY MISHPAT* 261, 261-78 (1994); ISRAEL WEINBOIM, *IN AN ACCEPTABLE MANNER AND IN GOOD FAITH* (2000) (in Hebrew).

¹⁰⁹ *Contracts (General Part) Law*, 1973, S.H. 118, § 12(a).

and may be enforced with respect to the enjoyment of rights arising from the contract.¹¹⁰ Third, it may impose additional duties that may not be set forth in the contract, yet arise out of the need to perform the contract in good faith.¹¹¹ While in the European continental legal systems, the principle of good faith developed specifically as a regulator for the principle of freedom of contracts,¹¹² in Israel, good faith is an all-encompassing principle that enhances judicial discretion, allowing the judge latitude to decide according to the circumstances and his understanding of what is just.¹¹³ The good faith principle functions as a gateway through which moral values enter the law.¹¹⁴

Under Israeli Contracts Law, it is currently beyond dispute that the good faith requirement may be applied even when it is not explicitly stipulated in the relevant legislation. This is well established in Sections 12 and 39 of the Contracts Law, 1973,¹¹⁵ through Section 61(B) of the same law, which applies, *mutatis mutandis*, the provisions of the Contracts Law to legal actions which are not contractual. The Supreme Court of Israel also held, many years ago, that when exercising one's right to litigate, one must act in good faith,¹¹⁶ and that a court is authorized to dismiss a claim with prejudice if said claim is deemed an abuse of the legal process.¹¹⁷ Similarly under English Law, courts should determine whether a plaintiff acts in good faith, believes in the merits of his claims, and that his motives are not illegitimate.¹¹⁸

¹¹⁰ *Id.* § 39.

¹¹¹ HCJ 59/80 Beer-Sheva Public Transportation Services Ltd. v. The National Labor Court et al [1980] IsrSC 35(1) 828; The judgment of Justice Menachem Alon in CA 391/80 Laserson v. Shikun Ovdim [1984] IsrSC 38(2) 237, 263.

¹¹² A. DI MAJO, *I 'Principles' dei Contratti Commerciali Internazionali tra Civil Law e Common Law*, 41 RIVISTA DI DIRITTO CIVILE 609, 616 (1995).

¹¹³ "The principle of good faith inserted an element of flexibility in [Israeli] civil law, enabling the system to adjust to the varying requirements of life. This principle enables a bridging of the gap between the individuality of 'freedom of contract' (and the rigidity occasionally accompanying it), and the philosophy of a welfare state and public requirement. It is the funnel through which the law absorbs novel ideas and refreshes existing ones and is the instrument which preserves the decency in the interrelations between 'opponents.'" Aharon Barak, *The Civil Code Interpretation in Israel*, in ISRAEL AMONG THE NATIONS 1, 20-21 (A.E. Kellermann et al. eds., 1998).

¹¹⁴ Martijn W. Hesselink, *The Concept of Good Faith*, in TOWARDS A EUROPEAN CIVIL CODE, 471, 472 (A.C. Hartkamp et al. eds., 2004).

¹¹⁵ Contracts (General Part) Law, 1973, S.H. 118.

¹¹⁶ See, e.g., Leave to CA 305/80 Shilo v. Ratskovski et al. [1981] IsrSC 35(3) 449; CA 391/80 Laserson v. Shikun Ovdim [1984] IsrSC 38(2) 237, 267; Drora Pilpel, *Section 39 of the Contracts Law (General Part) 5733-1973 and the Connection with the German Law*, 36 HAPRAKLIT 53 (1984); Goaltiro Procaccia, *Outlines of the Good Faith Theory*, 13 IYUNEI MISHPAT 61 (1988); Goaltiro Procaccia, *The Application of the Good Faith Doctrine in Israeli Law*, 39 HAPRAKLIT 291, 294 (1990).

¹¹⁷ See, with respect of this doctrine in Israeli law, Zeev Zeltner, *Abuse of Right*, 2 MISHPATIM 465 (1969).

¹¹⁸ See e.g., Prudential Assurance Co. Ltd. v. Newman Industries, Ltd., 3 All E. R. 507 (1979).

Before ICAL was enacted, Israeli courts strictly scrutinized the motives of any plaintiff who filed a class action.¹¹⁹ The main reason was to prevent frivolous claims, which can impose severe hardship on defendants.¹²⁰ Sometimes it may be due to collusion between the class action plaintiff and the defendants. Likewise, courts must be wary of class actions which have been instituted due to *turpis causa*, such as extortion,¹²¹ competition, hostile takeover or nuisance. The class action—even if it lacks any real substance—can coerce defendants into compromising with plaintiffs rather than undertaking an expensive and potentially drawn-out defense.¹²² Another goal was to prevent the suit from damaging uninvolved class members. A class action may, for example, harm (such as in the case of *res judicata*)¹²³ an individual who did not know about the case at all.¹²⁴ A named plaintiff and/or class counsel seeking out the limelight with dubious motives by filing a class action; collusion between the class representative or counsel and the defendant;¹²⁵ hostile takeover, conflicts of interest are some additional harmful scenarios. The good faith prerequisite was integrated into class action proceedings in order to prevent such abuses. Unlike other threshold requirements found in prior laws, the burden of proving good faith was imposed upon the defendant, *i.e.*, the

¹¹⁹ ERAN B. TAUSSIG, THE PLACE FOR REQUIREMENT OF GOOD FAITH IN THE CLASS ACTION PROCESS IN ISRAELI LAW (LL.M. Dissertation, Tel-Aviv University, 2004). See also Stephen Goldstein & Yael Ephron, *The Mechanisms of Class Action and Derivative Action in the New Corporation Law*, 32(2) MISHPATIM 462, 476 (2002); Tezet, IsrSC 49(5) at 784; CC 937/95 Goldstein v. The Electricity Corporation [1995] Dinim-DC, 26(5) 356, 435-36; CC (TA) 19/92 Zat-A Company for Economic Counselling Ltd. v. Teva Medicine Factories Ltd [1996] IsrDC 1996(2) 183, 195.

¹²⁰ LOTHAN & RAZ, *supra* note 79, at 129; Leave to another Appeal 5712/01 Barazani v. Bezeq—The Israeli Comm. Corp. et al. [2003] Dinim SC 64, 943 ; CC (TA) 1252/92 Analyst A.M.C. Management of Trust Funds (1986) Ltd. v. The State of Israel [1993] Takdin-DC 94(2) 210.

¹²¹ See, e.g., Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 8-9 (1971); Henry J. Friendly, FEDERAL JURISDICTION 120 (1973).

¹²² See Goldstein, *supra* note 42, at 428.

¹²³ With regard to the conditions to which the U.S doctrine of *res judicata* applies, see *Matsushita Electric Indus. Co. v. Epstein*, 516 U.S. 367 (U.S. 1996); RESTATEMENT (SECOND) OF JUDGMENTS §§ 41(1)(e), 42(1)(e) (1982).

¹²⁴ See, e.g., Zohar Goshen, *A Critical Review of the New Companies Law: The Aims of a Company, Purchase Offers and the Class Action*, 32(2) MISHPATIM 381, 410 (2002); *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1402-04 (1976). This is the reason why a defendant may have an incentive to agree to the certification of a class action, which would then be settled. See John Leubsdorf, *Co-Opting the Class Action*, 80 CORNELL L. REV. 1222, 1225 (1995).

¹²⁵ U.S. scholars named this phenomenon “Sweetheart Class Action.” See John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883 (1987); G. Donald Puckett, *Peering into a Black Box: Discovery and Adequate Attorney Representation for Class Action Settlements*, 77 TEX. L. REV. 1271, 1272 (1999).

defendant had to show that the named plaintiff acted in bad faith when the class action was filed.¹²⁶

Before ICAL was enacted, there were differing views in Israel regarding the content and scope of the good faith requirement. The prerequisite's proponents favored vigorous application of the good faith requirement,¹²⁷ while its detractors maintained that the requirement was superfluous and exaggerated.¹²⁸ Notably, the latter argued that the good faith requirement may cause obfuscation and difficulties in interpretation because of the overlap between some of the threshold requirements.¹²⁹ Those who favored finding a special level of good faith, which is higher than that accepted in the general Israeli Law, argued that the potential for injury to the defendant and class members requires the adoption of an especially high standard of good faith.¹³⁰ Also, certain aspects of economic efficacy will be found between the considerations for raising the threshold of good faith in class actions, because of the exaggerated exposure of large economic bodies to class actions which can bring about over wariness, to the extent of paralysis.

It is still unclear just how the good faith prerequisite may be affected by the enactment of ICAL. On its face, it seems that the Israeli Legislature has broadened the good faith requirement in the new law, as this prerequisite no longer relates only to the filing stage of the proceedings but also to case management and class representation. Some may assert that this change is merely semantic, due to the fact that according to the ruling of the Israeli Supreme Court, as mentioned above in this section, good faith is applicable also with regard to other, non-contractual acts. Thus, it may be argued that the good faith prerequisite was applicable even when it was not expressly written into the relevant law. In one of the most famous civil procedure cases of the Israeli Supreme Court, *Shilo v. Ratskovski*, former President Aharon Barak ruled that filing a claim according to the Civil Procedure Rules is a juridical action to which the good faith doctrine applies. President Barak held that the litigant's obligation to exercise his legal-procedural power in an ac-

¹²⁶ See, e.g., § 210 of the Corporation Law (1999). Most of the Israeli case law, as well as the scholars who have dealt with the issue, did not refer to the distinction between the burden of persuasion and the burden of production of evidence, concerning good faith prerequisite. However, it seems like the intention of the courts was to shift only the burden of production of evidence, while the burden of persuasion remained as always on the shoulders of the plaintiff. In other words, the plaintiff is not required to bring evidence in order to prove his good faith unless the defendant indicates facts which place this good faith in doubt.

¹²⁷ See Goshen, *supra* note 124, at 414.

¹²⁸ See, e.g., LOTHAN & RAZ, *supra* note 79, at 134-35; JOSEPH GROSS, THE NEW COMPANIES LAW 264-65 (3d ed., 2003).

¹²⁹ For example, they argued that if a frivolous class action is lodged, it will not be the most efficient and appropriate means of resolving the dispute.

¹³⁰ See, e.g., the position of the legal advisor to the government filed in the Tezet litigation, IsrSC 49(5) 774.

ceptable way and in good faith require him to act as a reasonable dissenting litigant would have acted in his position.¹³¹ This broad principle protects the interests of the defendant and class members. Clearly, using class proceedings for purposes other than those intended by the legislator, such as in order to squeeze the defendant into a quick settlement for a meritless claim, will not be tolerated.¹³²

The new Israeli Class Actions Law poses another significant permutation. The new law applies the good faith and proper representation doctrines to class counsel as well as to the named plaintiff.¹³³ This application may entitle courts to determine whether class counsel has ulterior motives or conflicts with the interests of the represented class.

Even though Rule 23(a) does not include a good faith prerequisite, some of the good faith tests are included in existing prerequisites. In *Eisen v. Carlisle and Jacquelin*,¹³⁴ the court ruled, “[I]t is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class.”¹³⁵

U.S. Courts have diverged over the question of the motives of the named plaintiff. Some decisions denied class certification because of the named plaintiff’s motives,¹³⁶ while others ruled that it should not determine the faith of the claim.¹³⁷ Moreover, certain other issues, which are addressed by Israeli courts within the scope of the good faith prerequisite, are addressed in the United States within the scope of the adequate representation prerequisite.¹³⁸

Regardless of the absence of any express good faith prerequisite, U.S. Courts are ultimately entitled to examine the good faith of the named plaintiff and class

¹³¹ Shilo, IsrSC 35(3) at 461.

¹³² This may frustrate another important goal of class proceedings—to conserve judicial resources and increase judicial access. *See, e.g.,* Califano v. Yamasaki, 442 U.S. 682, 700-01, 799 (U.S. 1979); Safran v. United Steelworkers of Am., *AFL-CIO*, 132 F.R.D. 397, 401 (W.D. Pa. 1989).

¹³³ ICAL, § 17 expressly requires loyalty and dedication duties from class counsel. As may have been deduced from the analysis above, class counsel’s good faith could and should have been examined even before the legislation of the new Israeli Class Actions Law.

¹³⁴ *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968).

¹³⁵ *Id.* at 562.

¹³⁶ *See, e.g.,* Maynard, Merel & Co. v. Carcioppolo, 51 F.R.D. 273 (S.D. N.Y. 1970); Kameran v. Ockap Corp., 112 F.R.D. 195 (S.D. N.Y. 1986); Steiner v. Tetronix, Inc., Fed. Sec. L. Rep. (CCH) ¶ 95,823, 98,965 (D. Or. Feb. 7, 1991). In *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449 (9th Cir. 1995), the district court dismissed five named plaintiffs as inadequate representatives as they were determined to have been vindictive toward the defendants. While the appellate court reversed the decision in part and held that the district court erred, it did not rule that vindictiveness was not a reason to deny certification.

¹³⁷ *See, e.g.,* Dorfman v. First Boston Bank Corp., 62 F.R.D. 466 (E.D. Pa. 1973).

¹³⁸ *E.g.,* sophisticated investors as named plaintiffs; competition between the named plaintiff and some of the class; and previous class actions filed by the named plaintiff.

counsel via Rule 11 of the Federal Rules of Civil Procedure,¹³⁹ which requires class counsel to certify that the pleading is “well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as harass or to cause unnecessary delay or increase in the cost of litigation.”¹⁴⁰ If a pleading does not meet this standard, then the court may sanction the filing attorney or the party. Usually the sanction imposed on the offender is to pay the opposing party’s expenses,¹⁴¹ although non-monetary sanctions are also available.¹⁴² In addition, courts in some jurisdictions may impose sanctions for bringing litigation in bad faith.¹⁴³ Yet, in most cases attempts to use Rule 11 as a basis for requesting denial of certification do not succeed.¹⁴⁴ This is especially true since the 1993 amendment of Rule 11, which, at least according to the understanding of the lower federal courts, liberalized the rule.¹⁴⁵

¹³⁹ According to the 1993 amendments to Rule 11, courts are empowered to sanction any party, lawyer, or any entity responsible for Rule 11 violation. *See* FED. R. CIV. P. 11(c) and FED. R. CIV. P. 11 Advisory Committee’s Note (1993).

¹⁴⁰ Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 167 (1983); ELIZABETH C. WIGGINS & THOMAS E. WILLGING, RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1991).

¹⁴¹ STEPHEN B. BURBANK (rptr.), STUDIES OF THE JUSTICE SYSTEM: RULE 11 IN TRANSITION, THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, 36-37 (1989).

¹⁴² *Id.*

¹⁴³ *See e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32 (U.S. 1991); Cal. Civ. Proc. Code § 128.5.

¹⁴⁴ *See, e.g.*, Bartleson v. Dean Witter & Co., 86 F.R.D. 657 (E.D. Pa. 1980); Brown v. Cameron-Brown Co., 652 F.2d 375 (4th Cir. 1981); Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548 (9th Cir. 1986); Montgomery v. Atlanta Family Rests. Inc., 752 F. Supp. 1575, 1578 (N.D. G.A. 1990); NEWBERG, *supra* note 47, § 3.42.

¹⁴⁵ *E.g.*, in Hagas v. Yonkers Racing Corp., 845 F. Supp. 1037 (S.D. N.Y. 1994), although the court suggested that the plaintiff and his counsel tried to mislead the court, and although it found that the action “lack[ed] any substantial basis,” it stated that: “We do not believe, however, that it was so frivolous as to warrant Rule 11 sanctions under the recently liberalized standards.” *Id.* at 1041. In other cases courts have made it clear that under the 1993 version of Rule 11, courts are to impose sanctions only where the conduct in question reaches a point of clear abuse. *See, e.g.*, Krauth c. Executive Telecard, 870 F. Supp. 543, 548 (S.D. N.Y. 1994) (sanctions should be imposed with caution); Fontaine v. Ryan, 849 F. Supp. 242, 245 (S.D. N.Y. 1994) (clear abuse should result in monetary sanctions); Thomas v. Treasury Mgmt. Ass’n, 158 F.R.D. 364, 368-70 (D. Md. 1994) (court must interpret Rule 11 according to 1993 Advisory committee intent to curb abusive use of Rule 11). In another case the court did not find “clear abuse,” but, more importantly, noted that the purpose of the 1993 amendments was to “reduce the number of motions presented to the court.” *See* Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 925 F. Supp. 193 (S.D. N.Y. 1996), *vacated on other grounds*, 103 F.3d 9 (2d Cir. 1997). Allegedly one exception exists: in the PSLRA Congress enacted a provision that essentially restored Rule 11 to its 1983 form in private securities class action. *See, e.g.*, Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc., 186 F.3d 157, 167 (2d Cir. 1997); Corroon v. Reeve, 258 F.3d 86, 92-93 (2d Cir. 2001). Nevertheless, despite

c. Interpretation of Plaintiff and Class Counsel Related Conditions

Before we address the subject of interpretation, it should be noted that the role of the American judge in class action litigation has changed. Rather than assuming the role of passive participants, judges have necessarily taken a more activist role in class action litigation.¹⁴⁶ A similar phenomenon has been noticed in the Israeli legal system.¹⁴⁷

Class action procedure is considered an important instrument to private enforcement of the law.¹⁴⁸ Therefore, the court should not overuse its discretion and deter potential plaintiffs and lawyers who have a worthy claim that fulfill the requirements of Sections 8(a)(1) and 8(a)(2). On the other hand, it is also essential that class members be properly represented. The court should not be too harsh, but if it finds that either the plaintiff or the counsel is not adequate, it should replace them without dismissing the class action.¹⁴⁹ This way, the court will ensure not only that the claim is duly litigated as a class action, but also that the quality of the representation will be optimal. Hopefully, the strict approach taken by Israeli courts regarding the certification of class actions will change after the enactment of the new law.

Before the court reviews the conditions related to the plaintiff and class counsel, it is important to note that according to the words of Sections 8(a)(3) and 8(a)(4) it is clear that the burden of proof for these conditions is lower than those for the first two conditions. In order to satisfy the Section 8 requirements, it is sufficient to prove that “There exists a reasonable basis to assume that”¹⁵⁰ the interest of all members of the class will be represented and managed properly and that the

the recurring use of adjectives like “mandatory” in the sanction provision and the hundreds of class actions brought since the PSLRA was enacted, the sanction provision has been little used as a weapon against possibly abusive class actions. See Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1507-08 (2006).

¹⁴⁶ See e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1313 (1976); Natalie C. Scott, *Don't Forget Me! The Client in a Class Action Lawsuit*, 15 GEO. J. LEGAL ETHICS 561, 571 (2002). According to the Manual for Complex Litigation, the court's responsibilities are heightened in class action litigation, where the judge must approve counsel for the class. See MANUAL FOR COMPLEX LITIGATION, *supra* note 37, § 10.23, 28 and § 21.27, 278-82.

¹⁴⁷ See, e.g., AHARON BARAK, INTERPRETATION IN THE LAW 467 (1993); MENACHEM MAUNTNER, THE DECLINE OF FORMALISM AND THE RISE OF VALUES IN ISRAELI LAW 51 (1993).

¹⁴⁸ See *supra* text accompanying footnotes 63-64.

¹⁴⁹ ICAL, § 25 enables the court to advertise its decision to replace the named plaintiff and/or the class counsel and to invite the public to nominate a suitable replacement for plaintiff or counsel.

¹⁵⁰ ICAL, §§ 8(a)(3), 8(a)(4).

interest of all members of the class will be represented and managed in good faith. Once this burden has been discharged to the satisfaction of the court, the burden will shift to the defendant to prove otherwise. Such is not the case in the claim related conditions.

3. Overlap among Section 8(a) Prerequisites

Clearly, there is a noticeable overlap among Section 8(a) prerequisites, though each serves segregated purposes and has distinct tests. This contention has been noted in Israel many years before the ICAL was enacted.¹⁵¹ One of the areas of alleged overlap was between the good faith prerequisite and the proper representation prerequisite.¹⁵² The scholars who claimed there was an overlap between those prerequisites also argued that, therefore, one should be deleted. The reason, such scholars argued, was because the overlapping prerequisites complicated the life of the potential plaintiff, thereby inhibiting class action proceedings and the societal goals they were meant to fulfill. I beg to differ. As mentioned above, I believe both of the prerequisites should remain and that the Israeli Parliament was right to maintain both of them in the new Class Actions Law. Even before the legislation of the new law some of the Israeli Courts addressed this question and ruled that the good faith prerequisite can be used for purposes other than the proper representation prerequisite.¹⁵³ Moreover, even if such an overlap exists, I believe that good faith is appropriate as a “stop-valve concept”¹⁵⁴. It enables the court to deny certification in cases that the other prerequisites do not. It also serves as a signpost deterring potential class plaintiff and counsel not to file frivolous claims or sweet-heart class settlements.

Similar arguments have been made in the United States, *inter alia*, with regard to the typicality and adequate representation prerequisites.¹⁵⁵ When typicality of claims is absent, the class representative inherently has a conflict with the rest of the class because he or she may have no incentive to prosecute vigorously.¹⁵⁶ If a

¹⁵¹ See, e.g., Noam Sher, *Securities Law: Central Trends*, YIUNEY MISHPAT 22(1) 265, 287 (1999); LOTHAN & RAZ, *supra* note 79, at 135.

¹⁵² Now found in ICAL, §§ 8(a)(3), 8(a)(4).

¹⁵³ See, e.g., Leave to CA (BS) 928/99 The Environment Services Corp. (Ramat-Hovav) et al. v. the Association of Southern Scientists et al. [2000] Takdin-DC 2000(2) 9153, 9158; CC (Jer) 1165/97 Shimonov v. Hevra Kaddisha et al. [1998] Takdin-DC 98(2) 3319, 3323.

¹⁵⁴ Procaccia, *supra* note 116; AHARON BARAK, 2 INTERPRETATION IN THE LAW 136 (1993). See also, *supra*, text accompanying footnotes 107-113.

¹⁵⁵ See, e.g., *Stewart v. Abraham*, 275 F.3d 220 (3d Cir. 2001); *Harper v. Trans Union, LLC*, et al., 2006 U.S. Dist. Lexis 91813 (2006); *In Re Vicuron Pharmaceuticals, Inc. Sec. Litig.*, 233 F.R.D. 421, 426 (D. Pa. 2006); *In Re Loewen Group Sec. Litig.*, 233 F.R.D. 154, 162 (D. Pa. 2005).

¹⁵⁶ *Bartelson v. Dean Witter & Co.*, 86 F.R.D. 657 (E.D. Pa. 1980).

plaintiff's claims are not typical, then the fundamental reason for allowing class suits to be binding on absent class members cannot be satisfied, and such a plaintiff cannot adequately represent the class.¹⁵⁷ Nevertheless, it does not mean the prerequisites are identical and that one of them should be eliminated.¹⁵⁸

4. Class Certification Safeguards

Under ICAL Section 8(b), even if all of the 8(a) prerequisites are satisfied, a court will not certify a claim as a class action if a request to certify was filed against the State, (including one of its authorities, a municipal council, a statutory corporation or a body which provides an essential service to the public)¹⁵⁹ and if the court is convinced that the mere administration of the claim as a class action might cause severe harm to individuals in need of that defendant's services or to the public at large. The court should take into account the expected benefit of such a class action to the class members and to the public, and considering whether the damage cannot be prevented by revising the request to certify the claim as a class action. Even if the court decides to certify such a claim, it may still limit the damages for which the defendant will be liable if the class wins the case, if this limitation would benefit the people in need of the service rendered by the defendant or to the public at large.¹⁶⁰ Another restriction, which only applies to State authorities, is entrenched in Section 9. According to this Section, the court will not certify a class action in a restoration suit against a State 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.¹⁶¹ Also, according to Section 21, in case the court has certified a class action in a restitution suit against an authority, it will not obligate the authority to perform restitution regarding a period that exceeds the 24 months previous to the date in which the request for approval was submitted.

It seems that Israeli courts should give narrow interpretation to Section 8(b) and use it only when the damages caused by adjudicating the case as a class action transcends the utility thereof. Courts should keep in mind that the usage of the Section 8(b) safeguard prevents the adjudication of a legitimate dispute suited to

¹⁵⁷ NEWBERG, *supra* note 47, § 3:22, and the decisions the author cites in footnote 9.

¹⁵⁸ *Id.*

¹⁵⁹ *E.g.*, bank corporation, stock market, insurance company, water/electricity utility.

¹⁶⁰ ICAL, § 20(d)(2). While the court decides on the sum of compensation to successful plaintiffs, it may take into consideration, *inter alia*, "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." *Id.*

¹⁶¹ ICAL, § 9(b). It is noteworthy that § 9 does not preclude the ability of individual litigants to seek restoration of unlawfully collected funds via individual claims.

class action proceedings. These considerations constitute the proper interpretation according to the purposes underlying the enactment of the new Israeli Class Actions Law.

5. Appeal of Certification

On December 1, 1998, Rule 23 of the Federal Rules of Civil Procedure was amended to allow discretionary interlocutory appeals of class certification decisions. According to Rule 23(f) “A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule. . . .”¹⁶² This rather new rule is different from the American “final judgment rule” according to which appeals can normally be taken only from final decisions of the district courts, and appeals on intermediate decision are not possible.

The Israeli rule is quite similar to Rule 23(f). According to section 8(d) of ICAL, a decision to certify a class action according to Section 8 may be appealed if either a permission to appeal was given within the decision¹⁶³ or leave to appeal is subsequently granted by the court of appeals. Section 8(d) deals only with interlocutory appeal on a decision to *certify*, as opposed to a decision to *deny* certification. This stems from the Israeli Supreme court ruling, according to which a decision to deny certification is a final decision and can be appealed without the permission of the court.¹⁶⁴

Clearly, appellate review of the certification decision is often of major importance to the litigants. If the class is certified, defendants frequently pursue settlement rather than incur extensive discovery and trial expenses and risk the prospect of an overwhelming judgment in favor of the class. When certification is denied, the representative plaintiffs often discontinue the action, concluding that proceeding with the litigation on an individual basis is not economically worthwhile.¹⁶⁵

¹⁶² FED. R. CIV. P. 23(f). See also MANUAL FOR COMPLEX LITIGATION, *supra* note 37, § 21.28, 282-84. Rule 23(f) differs from other interlocutory review provisions in that it does not call for the district judge to recommend whether the appellate court accept the interlocutory appeal.

¹⁶³ This refers to an Israeli rule of civil procedure that gives the court the power to grant leave to appeal the decision within the decision itself. It is a power that is rarely exercised.

¹⁶⁴ See, e.g., Barazani, IsrSC 55(4) at 607; CA 8613/03 Ielinek v. Bank Leumi [2003] (not published); CA 7346/01 Shtandel v. Bezeq International Ltd. [2002] (not published).

¹⁶⁵ See, e.g., Kenneth S. Gould, *Federal Rule of Civil Procedure 23(f): Interlocutory Appeals of Class Action Certification Decisions*, 1 J. APP. PRAC. & PROCESS 309, 311-13 (1999); Jordon L. Kruse, *Appealability of Class Certification Orders: The “Mandamus Appeal” and a Proposal to Amend Rule 23*, 91 NW. U. L. REV. 704, 704-05 (1997).

III. CONCLUSION

There is no dispute about the need for and the significance of class action proceedings.¹⁶⁶ Nevertheless, there can be no dispute that at present there is a contradiction between the rhetoric used by the Israeli courts and what the courts exercise in practice. The rhetoric welcomes the class action emphasizing that it is an important instrument to advance social aims, while in reality the courts have certified a very small number of all class actions commenced in Israel.¹⁶⁷ The practical difficulty in advancing class proceedings is harmful to the economy and the society at large.¹⁶⁸ The recent enactment of the new Israeli Class Action Law was intended to address this issue, as the underlying subtext behind the words of the new law was to facilitate the process of class certification—at least to some extent. Hopefully this will help to eliminate the contradiction between the rhetoric and the practice of the Israeli courts.

This Paper does not purport to present all of the legal arrangements entrenched in the new Israeli Class Actions Law. Instead, it attempts to analyze the prerequisites to class action certification found in Section 8 of the new Law using previous Israeli Court rulings on the new law's predecessors. It has also used the abundant U.S. case law interpreting Rule 23 of the Federal Rules of Civil Procedure. As the ICAL is still new, the Israeli Public awaits interpretation of the law's provisions. In making such interpretations, the Israeli Supreme Court will certainly look to, among others, U.S. decisions and interpretations of Rule 23.

¹⁶⁶ See e.g., JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 41 (1995); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1988 U. ILL. L. REV. 69 (1989).

¹⁶⁷ As this paper was going to print, the first Israeli Supreme Court case in which judgment was granted in favor of the plaintiffs was decided. See CA 345, 359/03 Dan Reichart v. The Estate of Moshe Shemesh (June 7, 2007), available at <http://elyon1.court.gov.il/files/03/450/003/i18/03003450.i18.htm>

¹⁶⁸ See, e.g., Faulk, *supra* 58, at 235.