In the Supreme Court

LCA 3973/10

Before:	President (ret.) A. Grunis Justice U. Vogelman Justice N. Sohlberg
The Petitioner:	David Stern
	v.
The Respondent:	Verifone Holdings, Inc.
	A motion for leave to appeal the decisions of the District Court (Cent. Lod) of April 26, 2010 and August 25, 2011 in Class Action 3912-01-08 by President **H. Gerstl**
On behalf of the Petitioner:	Adv. Gil Ron; Adv. Aharon Rabinovitz; Adv. Jacob Aviad; Adv. Nadav Miara
On behalf of the Respondent:	Adv. Josef Ashkenazi; Adv. Moshe Yacov; Adv. Hanan Haviv

Abstract

Facts: A U.S. court approved a settlement in a class action that was filed against the Respondent, a U.S. company, and which concerned trade in securities. According to the terms of the settlement, it applies to the members of the represented class who are located both in and outside of the U.S. The Petitioner filed a motion for class certification against the Respondent in a District Court in Israel. The proceedings revolved around the question of whether approval of the settlement in the U.S. establishes a res judicata vis-à-vis the Petitioner and vis-à-vis the class that he purports to represent in Israel, so as to bar the proceeding that he initiated.

Held: The Supreme Court (per President (ret.) A. Grunis, Justices U. Vogelman and N. Sohlberg concurring) granted leave to appeal. The appeal was denied.

In order for the Respondent to establish a claim of res judicata due to a judgment that was issued in a foreign country, the judgment must undergo a process of "acceptance" in Israel, pursuant to Israeli law. The acceptance of foreign judgments in Israel is mainly regulated in the Foreign Judgment Enforcement Law (the "Law"), which includes several "tracks". When a party in a proceeding in Israel claims the existence of a res judicata due to a foreign judgment, the appropriate track is that of indirect recognition of the judgment, pursuant to Section 11(b) of the Law.

A foreign judgment in a class action may be recognized incidentally pursuant to Section 11(b) of the Law. A first consideration that must be taken into account is whether the judgment in the foreign country was issued by a court holding jurisdiction to hear the proceeding. In this context, it is also necessary to examine whether the foreign court has a substantial link to the subject of the class action.

The participation of the lead plaintiff or the party seeking class certification in the proceeding conducted in the foreign court may be deemed as consent to the jurisdiction of the foreign court.

A further consideration is whether the right of the members of the represented class to a fair proceeding was prejudiced. In the context of this consideration, three main elements must be contemplated: giving proper notice to the class members of the fact of the conduct of the class proceeding in the foreign court, and giving the class members an opportunity to participate therein; giving the class members an opportunity to withdraw from the proceeding; and adequate representation of the class members by the lead plaintiff (and his counsel) in the foreign court throughout the conduct of the proceeding.

Examination of the outcome of the class action in the foreign court on the merits (or examination of a settlement that was approved in a foreign country on the merits) will only be performed in cases in which the outcome is clearly and patently unreasonable. Non-recognition of a foreign judgment for repugnance to public policy will occur only in exceptional cases.

Weight should also be afforded to the fact that the claims being raised against recognition of the foreign judgment were already heard and decided by the foreign court. In addition, decisive weight should be afforded to the fact that the party raising the claims against recognition of the foreign judgment in Israel raised these claims himself in the foreign court, and his claims there were rejected.

If the court finds that the foreign judgment should be recognized, how is it applicable to the proceeding being held in Israel? The applicability of the foreign judgment pursuant to the foreign law is a fact that must be proven, and insofar as necessary, recourse may be made to the parity of laws presumption. According to Israeli law, if the proceeding in Israel is a class proceeding which is at the stage of class certification, denial of the class certification motion does not establish a res judicata vis-à-vis the class. In such a case, recognition of the foreign judgment is applicable only to the party filing the motion for class certification. In a case in which the foreign judgment is recognized without hearing the claims in connection with the right of the class to a fair proceeding on the merits, because the party seeking class certification (or the lead plaintiff) are barred from raising the same, recognition of the foreign judgment is applicable only to the party seeking class certification (or the lead plaintiff).

In the case at bar, the foreign judgment that was issued in the class proceeding in the U.S. should be recognized. The Petitioner did not deny the jurisdiction of the U.S court and should be deemed as having agreed thereto. In addition, the class proceeding has a material link to the U.S. in view of the fact that we are concerned with trade in securities of a U.S. company which was mainly performed in the U.S. The Petitioner's claims of a violation of the right of the class members in Israel to a fair proceeding were already heard by the U.S. court and rejected, and the Petitioner should not be permitted to raise his claims for a second time in the Israeli court. The Petitioner has no serious, arguable claim with regards to the body of the terms and conditions of the agreement, which claim will only be heard in exceptional cases.

In view of the aforesaid, there is no impediment to recognizing the foreign judgment approving the settlement in the class proceeding in the U.S. pursuant to Section 11(b) of the Law. Moreover, in view of the provisions of the settlement and the definition of the represented class according to the settlement, the foreign judgment establishes a res judicata pursuant to U.S. law with respect to the class proceeding in Israel, and therefore the motion for class certification should be denied.

Judgment

President (ret.) A. Grunis:

1. A court in the United States approves a settlement in a class action being heard before it. According to the terms and conditions of the settlement, it applies to the members of the represented class who are located both in and outside of the United States. What effect does approval of the settlement have on a class proceeding on the same issue in Israel? This is the question before us.

The chain of events

2. The motion at bar for leave to appeal has undergone many twists and turns since being filed. I will, therefore, briefly describe the chain of events, focusing on the issue that is now to be decided. The Respondent, Verifone Holdings, Inc. (the Respondent) is a foreign company that was incorporated in the State of Delaware in the United States. The Respondent engages in the development of secure electronic payment systems and solutions. The Respondent's shares are traded on the New York Stock Exchange (NYSE), and in the period between July 2006 and July 2010 they were also traded on the Tel Aviv Stock Exchange (TASE). In December 2007, the Respondent published immediate reports on the stock exchanges in the U.S. and in Israel, in which it was stated that errors had been discovered in its periodic financial statements in relation to the first three quarters of the financial year ended October 31, 2007. After this publication, there was a sharp drop in the value of the Respondent's stock. These circumstances led to the filing of 16 actions in the United States against the Respondent by its shareholders, ten of which were motions for class certification, and six of which were motions for approval of derivative suits. The hearing of nine of the class proceedings was consolidated before the Federal Court in California (*In re Verifone Holdings, Inc. Securities Litigation,* Civil Action C 07-6140 MHP, decision of January 18, 2008; this consolidated proceeding shall hereinafter be referred to as the "Class Proceeding in the U.S."). Various entities contended in the California court for appointment to the position of the lead plaintiff in the consolidated proceeding ("Lead Plaintiff"), including several Israeli institutional bodies ("Phoenix", "Harel", "Clal Finance", "Prism", "Batucha Investment Management" and "Yashir Investment House"). Ultimately, the California court chose to appoint a body named "National Elevator Fund" as lead plaintiff.

3. On January 27, 2008, the Petitioner, David Stern (hereinafter: the Petitioner) filed a motion for class certification against the Respondent (hereinafter: the Motion for Class Certification in Israel) in the District Court (Cent. Lod). In this proceeding, the District Court was asked to certify a class action against the Respondent on behalf of any person who purchased shares of the Respondent on TASE between March 7, 2007 (the date of publication of the first erroneous financial statement) and December 2, 2007, and who held the stock on December 3, 2007 (the date of publication of the immediate report in Israel in which the error was exposed). The Petitioner asserted that following the discovery of the errors that occurred in the Respondent's financial statements, the value of its shares fell by approximately 46%. It was asserted that the Respondent bears responsibility to its shareholders for inclusion of the misleading details in the financial statements (pursuant to Section 38C of the Securities Law, 5728-1968 (hereinafter: the Securities Law)). The Petitioner

stated that he estimates that the damage to the class members (in Israel) is in the sum of NIS 2.48 billion.

4. As aforesaid, I will review the rest of the chain of events only in brief. The Respondent filed a motion for dismissal in limine of the Motion for Class Certification in Israel, and alternatively to stay the proceedings (it is noted that the Respondent did not file an answer in response to the Motion for Class Certification in Israel, and in fact, such an answer has not been filed to date). The main grounds of the motion were the proceedings which were pending in the U.S. and which concern the same issue, and *forum non conveniens* considerations. The Respondent asserted, *inter alia*, that the law applicable to the Motion for Class Certification in Israel is U.S. law. At the hearing held before the District Court on May 25, 2008, the parties reached a stipulation whereby the court would first address the issue of the law applicable to the Motion for Class Certification in Israel. On September 11, 2008, the District Court ruled that the law applicable to the Motion for Class Certification in Israel is U.S. law (H. Gerstl, P.). A motion for leave to appeal (LCA 8517/08) was filed from this decision. In a decision of January 27, 2010, this Court ordered the dismissal of the motion for leave to appeal, ruling that the District Court must also address the issue of staying the hearing of the Motion for Class Certification in Israel until the class proceeding in the United States is decided (A. Grunis, E. Arbel and N. Hendel, JJ.). It was further ruled that once the matter was decided, this Court could hear both the stay of proceedings issue and the issue of the applicability of foreign law. On April 25, 2010, the parties filed joint notice with the trial court whereby they agreed that the hearing of the Motion for Class Certification in Israel be postponed "based on the Honorable Court's ruling regarding the applicability of the foreign law", and without derogating from the Petitioner's ability to seek to appeal the ruling regarding the applicability of the foreign law. The District Court (H. Gerstl, P.) ordered the postponement of the continued hearing of the proceeding, as agreed (decision of April 26, 2010).

5. On May 24, 2010, the motion for leave to appeal at bar was filed, from the trial court's decision of April 26, 2010, in which the District Court ordered a stay of the proceedings (although the grounds of the motion for leave to appeal relate to the issue of the applicability of the foreign law, which was decided in the District Court's decision of September 11, 2008). On September 1, 2010, the Petitioner filed with this Court (after being granted leave) new evidence -- a judgment that had been issued by the Supreme Court of the United States, after the granting of certiorari, in which the extraterritorial applicability of U.S. securities law was addressed (*Morrison v. Nat'l Austl. Bank Ltd*., 561 U.S. 247 (2010), judgment of June 24, 2010 (hereinafter: the *Morrison* case)). The Petitioner asserted that in *Morrison*, it was ruled that U.S. securities law is not applicable outside of the U.S., and therefore, so he claims, the law applicable to the Motion for Class Certification in Israel is the law in Israel, and there is no room to order the continued postponement of the hearing of the proceeding. In my decision of October 13, 2010, I ordered that the handling of the motion for leave to appeal be suspended and that the District Court decide the consequences of the ruling in the *Morrison* case on the Petitioner's case. On August 25, 2011, the District Court decided that the judgment in *Morrison*

does not change its position with respect to the applicability of the foreign law, and therefore the stay of the hearing of the proceeding would remain in place. In accordance with my decision, on November 13, 2011, the Petitioner filed an amended motion for leave, in which the District Court's decision of August 25, 2011 was also challenged. On February 4, 2013, the Petitioner gave notice (after hearing this Court's comments at the hearing that was held on January 9, 2013) that he agrees that in view of the existence of the Class Proceeding in the U.S., the hearing of the proceeding that he instituted in Israel be postponed, while he retains the possibility of "resuming the proceedings upon circumstances so justifying". Accordingly, we ordered, in our decision of February 10, 2013, that the hearing of the proceedings being conducted in Israel between the parties be postponed, and that if the Petitioner would petition for resumption of the hearing of the motion for leave to appeal at bar, the hearing would be resumed from the point at which it was left off.

6. In the meantime, there were developments in the proceedings in the United States. On August 9, 2013, the parties in the Class Proceeding in the United States filed a motion for approval of a settlement that was reached between them (hereinafter: the Settlement, or the Agreement). It is this Settlement which now stands at the center of the hearing before us (the Settlement was filed for our inspection in a notice on behalf of the parties of May 1, 2014). According to the Settlement, the Respondent's shareholders in the relevant period will be entitled to financial compensation. According to the provisions of the Agreement, the class to which the Settlement applies includes any person who purchased shares of the Respondent between August 31, 2006 and April 1, 2008 (with the exception of officers of the Respondent and members of their families), "on any domestic or foreign exchange or otherwise"; sec. 1.3 of the Agreement). It is already possible to see that this definition of the class includes the class, as defined in the Motion for Class Certification in Israel, in terms of both geography and time (since the definition of the class in the Motion for Class Certification in Israel relates to whoever purchased shares of the Respondent on TASE between March 7, 2007 and December 2, 2007). The sum total of the settlement is U.S. $95 million (sec. 1.22 of the Agreement; this amount includes the representing counsel's fees, secs. 1.16 and 5.2(c) of the Agreement). The representing counsel requested the award of fees in his favor at a rate of 20% of the settlement (i.e., 20% of U.S. $95 million; Annex A1 to the Agreement). The Agreement stated that the average compensation amount that would be due to the class members, before deduction of the fees of the Lead Plaintiff's counsel, was U.S. $0.71 per share (*ibid.*).

In accordance with the provisions of the Settlement, the notice regarding the Agreement would be sent by mail to the class members who may be located with reasonable effort (sec. 6(a) of Appendix A to the Agreement). It was further agreed that an announcement would be published regarding the Agreement in three newspapers, "Investor's Business Daily", "Globes" and "The Business Wire" (sec. 6(b) of Appendix A to the Agreement). According to the Agreement, every member of the class is required to prove his entitlement to receive compensation by sending an appropriate form within 90 days after delivery of the notice regarding the Agreement (sec. 5.4 of the

Agreement) (hereinafter: the "Entitlement Forms"). The representing counsel has discretion to permit submission of the Entitlement Forms also after this period if an undistributed balance remains in the settlement account (sec. 5.5 of the Agreement). It was further agreed that any balance that would remain in the settlement account after a period of six months would be distributed, insofar as possible, to the class members who applied for receipt of compensation and who proved their entitlement. If a balance remains after this additional distribution, it was agreed that it would be donated to a public cause (an organization which gives legal aid to the needy; sec. 5.6 of the Agreement). The Settlement further determined that each member of the class may be heard at the court hearing the proceeding, and object to approval of the Agreement (secs. 10 and 12 of Appendix A to the Agreement). Each member of the class may also give notice that he wishes to leave the class, in which case he will not be entitled to compensation by virtue of the Agreement and will not be subject to the decision in the proceeding (sec. 11 of Appendix A to the Agreement). The settlement further determined that approval of the Settlement will constitute *res judicata* vis-à-vis all of the class members (sec. 8 of Appendix A to the Agreement).

7. On October 15, 2013, the Federal Court in California issued "preliminary approval" for the Settlement (Edward M. Chen, J.). On December 30, 2013, the Petitioner filed with the Californian court (according to the date scheduled therefor) objection to approval of the Settlement. The objection was filed on his behalf and on behalf of the class that he seeks to represent in the Motion for Class Certification in Israel. On February 14, 2014, a hearing was held at the Federal Court in California on the objection filed by the Petitioner. The Petitioner, two of his Israeli counsel (Adv. Gil Ron and Adv. Nadav Miara) and a U.S. attorney whom they retained, were present at the hearing. On February 18, 2014, the Federal Court in California rejected the Petitioner's objection to the Settlement. In its decision, the court addressed in detail the claims raised by the Petitioner against approval of the Agreement. We will address the court's rulings in this context in greater detail below. The Federal Court in California further found that the settlement was fair and fitting, and that the fees at the rate requested by the representing counsel should be approved. However, the California court ordered that further publications be made in Israel regarding the fact of the Agreement. With respect to the applicability of the approval of the Settlement to the members of the class in Israel, the court added as follows: "However, as the Court noted on the record and reiterates here, this order granting final approval is not intended to dictate to the Israeli courts (nor does this Court opine on) the enforceability of the releases contained in the settlement agreement or the applicability of *Morrison* should the Israeli investors' claims be permitted to proceed in Israel". On February 20, 2014, the lead plaintiff in the Class Proceeding in the U.S. announced that notice in Hebrew would be sent by mail to many class members in Israel, that an announcement would be published in Hebrew in the "Globes" newspaper, and that the last date for the class members in Israel to submit the Entitlement Forms would be extended. The final approval of the Settlement was granted on February 25, 2014.

The parties' claims in the supplementary pleading

8. In accordance with my decision of June 26, 2014, the parties filed a supplementary pleading in which they addressed the applicability of the Settlement that had been approved in the U.S. to the Motion for Class Certification in Israel. The Petitioner claims that the Settlement gravely discriminates against the class members in Israel, and therefore should not be recognized as preventing the continued hearing of the Motion for Class Certification in Israel. The Petitioner claims that defects occurred in the manner in which the class members in Israel were informed of the Agreement, and that, in fact, they were denied the right to withdraw from the class and object to approval of the Settlement. According to the Petitioner, the notice in Hebrew regarding the Agreement was delivered to the class members in Israel after the date for filing objections to the Agreement, and the date for withdrawing therefrom had lapsed, and the information that was provided therein was only partial and was inarticulately presented. The Petitioner adds that there are differences between the securities law in Israel and such law in the United States He claims that in the United States, the security holder is required to prove the *mens rea* of fraud or gross negligence in order to establish a cause of action due to an error that occurred in a financial statement, while in Israel, there is no need to prove such grounds. Therefore, so the Petitioner asserts, there was room to set apart the class members in Israel from the rest of the represented class in the United States, and to award the Israelis higher compensation. Despite these differences between the various class members, the Petitioner asserts that the Settlement makes no explicit reference to the existence of the class members in Israel, and that, in fact, the attention of the United States court was drawn thereto only at a later stage, following the objection that he filed. Thus, for example, the Settlement states that the settlement will be published in the "Globes" newspaper, without stating that it is an Israeli newspaper. On the Entitlement Forms, the class members were even required to declare that they were not aware of a legal proceeding that had been filed on their behalf on the same issue, which is not true in respect of the class members in Israel. The Petitioner adds that the United States court expressed grievance that its attention had not been drawn to the existence and uniqueness of the class in Israel. The Petitioner further states that, on the merits, the compensation that was granted to the class members in the Settlement is too low.

The Petitioner further refers, in the supplementary pleading, to the conditions for recognition of a foreign judgment pursuant to the Foreign Judgment Enforcement Law, 5718-1958 (hereinafter: the Foreign Judgment Enforcement Law). The Petitioner asserts that a class settlement issued in a foreign country should only be recognized if the right of the class members in Israel to a fair proceeding is not prejudiced. According to him, the right to a fair proceeding of the class members includes the right to receive notice of the settlement, to withdraw from the settlement, to object thereto, and the settlement being fair. According to the Petitioner, the Settlement in the case at bar does not meet these conditions. The Petitioner emphasizes in his arguments the fact that the California court explicitly ruled that it was not deciding the issue of the applicability of the settlement to the class members in Israel. Finally, the Petitioner believes that the issue of the applicability of the Settlement should be decided by the District Court. The Petitioner further seeks that we decide

the issue of the applicability of the foreign law, since this decision bears consequences for the fairness of the settlement vis-à-vis the class members in Israel.

9. The Respondent, conversely, claims in the supplementary pleading on its behalf that the settlement that was approved in the United States is fitting and fair, and that it establishes *res judicata* in respect of the Motion for Class Certification in Israel. The Respondent rejects the Petitioner's claims whereby the rights of the class members in Israel were denied. The Respondent specifies in its arguments the considerable efforts made to locate the class members in Israel and inform them of the Settlement and the terms and conditions thereof. The Respondent states that many class members from Israel submitted the Entitlement Forms, and a considerable portion of the "entries" to the designated website that was set up for purposes of implementation of the Settlement was from Israel. Thus, although the scope of the trade on TASE in shares of the Respondent in the relevant period was approx. 7-8% of the entire scope of the trade in its shares, it was found that 28% of all of the entries to the website mentioned were from Israel and approx. 25% of the Entitlement Forms that were submitted by way of delivery of documents arrived from Israel (as distinguished from forms that were submitted online, in respect of which the Respondent did not have full data to classify the identity of the persons submitting the forms by place of residence). In the Respondent's opinion, the intense participation of the class members in Israel in the settlement that was reached reveals that they were well aware of the fact of the Agreement, and that many of them believed that it was a fair and fitting agreement. The Respondent adds that the Petitioner does not present even a single case of a member of the class in Israel who sought to object to the Settlement or to withdraw therefrom and was prevented from doing so. The Respondent emphasizes in its claims that the Petitioner played an active part in the hearing on approval of the Settlement in the United States, and that his claims were addressed there and rejected. The Respondent adds that the Petitioner even admitted to the California court that in his opinion, the settlement is fair. Therefore, the Respondent asserts that the judgment approving the Settlement in the United States should be recognized pursuant to the Foreign Judgment Enforcement Law, and the Motion for Class Certification in Israel denied due to the existence of *res judicata*. The Respondent attached to the supplementary pleading on its behalf an expert opinion regarding the foreign law, whereby approval of the Settlement in the United States establishes *res judicata* vis-à-vis the class members. It is noted that the Petitioner filed, after leave was granted, a response to the Respondent's supplementary pleading, in which it added a response to its claims.

Discussion and decision

10. We decided to hear the motion as if leave had been granted and an appeal filed according to the leave granted. As aforesaid, the motion for leave to appeal before us has undergone various twists and turns since it was filed. The issue now before us is the applicability of the Settlement that was approved in the United States to the class proceeding that the Petitioner filed in Israel. The

question is whether approval of the Settlement in the United States establishes *res judicata* vis-à-vis the Petitioner and vis-à-vis the class that he purports to represent in Israel, so as to bring an end to the proceeding that he initiated.

Res judicata arising from a judgment issued in a foreign country

11. In order for the Respondent to establish a claim of *res judicata* due to a judgment that was issued in a foreign country, the judgment must undergo a process of "acceptance" in Israel, pursuant to Israeli law. "So long as the foreign judgment has not undergone a process of acceptance, it has no status in Israel at all, either for the purpose of enforcement thereof in Israel or for the purpose of recognition thereof as a *res judicata*; it is treated as never having existed" (Celia Wasserstein Fassberg "On the Finality of Foreign Judgments", 18 *Mishpatim* 35, 53 (1988); also see CApp 499/79 *Ben Dayan v. ADS International Ltd.*, IsrSC 38(2) 99, 103 (*per* M. Ben-Porath, D.P.) (1984) (hereinafter: the *Ben Dayan* case)). The acceptance of a foreign judgment in Israel is mainly regulated in the Foreign Judgment Enforcement Law. The Foreign Judgment Enforcement Law comprises several "tracks" for acceptance of a foreign judgment: declaration of the foreign judgment as an enforceable judgment (secs. 3-10 of the Law), direct recognition of the foreign judgment (sec. 11(a) of the Law) and indirect or "incidental" recognition of the foreign judgment (sec. 11(b) of the Law) (see the survey in CApp 4525/08 *Oil Refineries Ltd. v. New Hampshire Insurance Co.*, paras. 16-19 of the opinion of E. Arbel, J. (December 15, 2010); CApp 1297/11 *Levin v. Zohar*, paras. 5-6 of the opinion of N. Hendel, J. (December 29, 2013) (petition for further hearing dismissed in CFH 304/14) (hereinafter: the *Levin* case); Nina Zaltzman Res Judicata in Civil Proceedings, 565-566 (1991) (Hebrew)). It was ruled that when a party in a proceeding in Israel claims the existence of *res judicata* due to a foreign judgment, the appropriate track is that of indirect recognition of the judgment, pursuant to Section 11(b) of the Law (see *Ben Dayan* at p. 112 (*per* A. Barak, J.); CApp 490/88 *Basilius v. Adila*, IsrSC 44(4) 397, 404 (1990) (the *Basilius* case); C.A. 970/93 *Attorney General v. Agam*, IsrSC 49(1) 561, 568 (1995) (*per* E. Goldberg, J.); CApp 3294/08 *Goldhar Corporate Finance Ltd. v. S.A. Klepierre*, para. 6 (September 6, 2010) (hereinafter: the *Goldhar* case)). Section 11(b) of the Law prescribes that "incidentally to a hearing on a matter that is within the jurisdiction thereof and for the purpose of such matter, a court or tribunal in Israel may recognize a foreign judgment, even if subsection (a) does not apply thereto, if it deems it is lawful and just to do so".

12. Among the considerations that the court must examine as to whether "it is lawful and just" to recognize the foreign judgment, it has been held that it may look to sec. 6 of the law, which lists events, upon the occurrence of which a foreign judgment will not be enforced in Israel. Another source to which it is customary to refer in this context is English law (see *Goldhar*, para. 6, and the authorities cited there). One of the considerations usually examined is whether the court issuing the foreign judgment held jurisdiction. However, in this regard it was ruled that if a person cooperated with the conduct of the proceedings at the foreign court and did not challenge the court's jurisdiction there, he may not argue that they were conducted *ultra vires* (the *Goldhar*

case, para. 7; *Ben Dayan*, at p. 106 alongside the letter D (*per* M. Ben-Porath, D.P.); Amos Shapira "Recognition and Enforcement of Foreign Judgments" (Part Two), 5 *Iyunei Mishpat* 38, 51-52 (1976)).

13. Another central criterion to be considered is whether the right of the counter-litigant to due process was prejudiced at the foreign court, or whether the proceedings conducted therein were inconsistent with the rules of natural justice. The main argument that is usually raised in this context is that the litigant with respect for whom the recognition of the foreign judgment is requested was denied a fair opportunity to raise his arguments before the foreign court (see the *Levine* case para. 6 of the opinion of N. Hendel, J; *Basilius*, p. 406; CApp 221/78 *Ovadia v. Cohen*, IsrSC 33(1) 293, (1979)hereinafter: the *Ovadia* case)). The burden of proof with respect to the violation of the right to due process is imposed on that litigant who argues the violation (see, *ibid*., p. 296 (*per* M. Ben Porath, J.); CApp 1268/07 *Greenberg v. Bamira*, para. 13 (March 9, 2009) hereinafter: the *Greenberg* case)).

14. Various additional considerations that case law notes in this respect are whether the recognition of the foreign judgment is repugnant to public policy (see the *Ben Dayan* case, p. 107 (*per* M. Ben Porath, D.P.); for regarding broader discussion, see also Amos Shapira "The Recognition and Enforcement of Foreign Judgments", 4 *Iyunei Mishpat* 509, 530-534 (1974)), and whether the seeker of recognition acts in good faith (see:. *Goldhar*, para. 8). It should be noted that an indirect recognition of a foreign judgment pursuant to sec. 11(b) of the Law, does not require mutual treaty between Israel and the country wherein the judgment was issued (as distinguished from direct recognition pursuant to sec. 11(a) of the Law; see: *Levine*, para. 6 of the opinion of N. Hendel, J.). It should be further be emphasized that within the recognition of the foreign judgment, the correctness of the judgment on its merits is not to be examined (see: *Basilius*, p. 406; *Greenberg*, para. 10).

15. A finding by the Israeli court that the foreign judgment should be (incidentally) recognized does not conclude the matter, and the court must still determine whether the recognized judgment establishes *res judicata* in Israel. Different opinions have been expressed in the case law in this regard as to whether such a review should be carried out according to Israeli law or also according to the laws of the foreign country (see: *Basilius*, p. 411; *Goldhar*, para. 6). In any case, the foreign law applicable to the matter is a fact that requires proof (*ibid.*, para. 9). However, one can also make recourse to the parity of laws presumption, whereby there is a presumption that the foreign law is identical to the Israeli law (see: *Basilius*, p. 411).

Indirect recognition of a judgment in a class action issued in a foreign country

16. In this age of globalization, more and more class actions cross international borders and comprise class members from different countries and even continents (see: *Guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress*, International Bar Association 6 (2008) (hereinafter: the IBA Guidelines)). This is also relevant to class actions under securities law, since in this area the trading of securities is also becoming increasingly cross-border (see: *ibid.*, p. 17). That being the case, how should we examine whether

it would be "lawful and just" (as per the language of sec. 11(b) of the Enforcement of Foreign Judgments Law) to recognize a judgment in a class action that was issued in a foreign country? How is the recognition of a foreign judgment in a class action different from the recognition of a foreign judgment pertaining to a non-class action?

17. In a proceeding (*in personam*) that is not a class action, only the rights and obligations of the litigants who are present in court are heard and decided. Conversely, a class action is a proceeding which contemplates, *inter alia*, the rights and obligations of additional players, who are absent from the court room, namely the class members. In a class action, the lead plaintiff seeks to conduct a proceeding on behalf of the class members, and the outcome of the class action might bind them, for better or for worse (see *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011): "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only' (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979); *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940)). Hence, prior to a recognition of a foreign judgment in a class action, the rights of the class members should be considered, as well as the concern regarding the violation thereof (see: John P. Brown, "Seeking Recognition of Canadian Class Action Judgments in Foreign Jurisdictions: Perils and Pitfalls," 4(2) *Canadian Class Action Rev.* 220, 222 (2008)) (hereinafter: Brown).

18. The aforesaid is particularly relevant in relation to a class settlement certified by a court in a foreign jurisdiction. A class settlement has a great potential of discrimination against the rights of the class members, since the lead plaintiff and the defendant may collaborate in negotiation and reach agreements that harm the class members and at their expense. There is a concern that the two may agree to high legal fees and compensation to the lead plaintiff and his counsel, in return for an agreement that is not optimal for the represented class. The agreement can be harmful to the class members in two main ways: compensation which is lower than what would be reasonable for each one of the class members, or an expansion of the scope of causes of action in respect of which *res judicata* shall be established following the certification of the agreement (see: Amir Weizenbluth "Adequate Representation in Class Settlements") 43(1) *Mishpatim* 351, 366-367 (2012) (hereinafter: Weizenbluth); *Greenberg v. Procter & Gamble Co.* (*In re Dry Max Pampers Litig.*), 724, F. 3d (6th Cir. 2013) 713, 715).

19. In the case of a number of class proceedings pertaining to the same issue and conducted in different tribunals, and when a settlement is achieved in one of these proceedings, the said concern for harming the class members is further intensified. First of all, *from the perspective of the lead plaintiffs and their counsel* in the various proceedings, the situation generates competition over the compensation and counsel fees which will be awarded upon the conclusion of the proceeding, since even if the proceedings are not consolidated, it is unlikely that compensation and legal fees will be awarded against the same defendant in more than one proceeding (however, see para. 21 below). Therefore, the lead plaintiffs and their counsel have an incentive to rush the negotiations and reach a settlement with the defendant as quickly as possible.

The faster they reach the settlement, and the more expansive the settlement is, the better they can "ploy" their competitors, the lead plaintiffs and their counsel in the other proceedings. On the other hand, a lead plaintiff who chooses to pursue the proceeding to its conclusion, or to start negotiating at a later stage thereof, may leave empty handed. There is no doubt that at times such conduct might be at the expense of the class members and involve their inadequate representation (see John C. Coffee, Jr., "Class Wars: the Dilemma of the Mass Tort Class Action**,"** 95 *Colum. L. Rev*. 1343, 1370 (1995) (hereinafter: Coffee, "Class Wars"): "The first team to settle with the defendants in effect precludes the others (who may have originated the action and litigated it with sufficient skill and zeal that the defendants were eager to settle with someone else"; Samuel Issacharoff & Richard A. Nagareda, "Class Settlements Under Attack," 156 *U. Pa. L. Rev*. 1649, 1666 (2008) (hereinafter: Issacharoff & Nagareda). We explained elsewhere the lead plaintiff's incentive to be the first to file the motion for class certification (see LCA 4778/12 *Tnuva Central Cooperative for the Marketing of Agricultural Produce in Israel Ltd. v. Naor*, para. 7 (July 19, 2012); LCA 4253/14 *Halfon v. Shemen Oil and Gas Resources Ltd.*, para. 10 (December 29, 2014)). When several class proceedings treat the same causes of action and are conducted concurrently in several courts (whether in the same country or in different ones), the lead plaintiffs and their counsel have another incentive, which is to be the first to conclude the proceeding. These two incentives (to be the first to initiate the proceeding and the first to conclude it), might prejudice the quality of representation of the class members.

20. The concern for harm to the class members also exists from the *perspective of the defendant*. In view of the "competition" between the various lead plaintiffs, the fear arises that the defendant may choose to focus on the proceeding in which he deems the lead plaintiff and the forum to be most convenient, in an attempt to promote negotiation for settlement in that proceeding. By such conduct, which American law refers to as "reverse auction", the defendant attempts to identify a class proceeding, among those filed against him, in which he can reach a favorable settlement, and which encompasses the causes of action that are contemplated in the remaining proceedings (see: *Reynolds v. Benefit Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002); Coffee, "Class Wars," p. 1372; Myriam Gilles & Gary B. Friedman, "Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers," *155 U. Pa. L. Rev.* 103, 161-162 (2006)). We would note that also in cases in which no settlement is achieved, the defendant can act to expedite the hearing of a class action that he deems convenient, and procrastinate in others, thus influencing the forum before which the arguments against him shall be heard (see Arthur R. Miller & David Crump, "Jurisdiction and Choice of Law in Multistate Class Actions After *Phillips Petroleum Co. v. Shutts*," 96 *Yale L.J*. 1, 24 (1986); also see Henry P. Monaghan, "Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members," 98 *Colum. L. Rev*. 1148, 1160-1161 (1998) (hereinafter: Monaghan)).

21. Indeed, a defendant who follows this path assumes the risk that an unfair settlement that he entered into shall eventually not be recognized by other tribunals, and he may be charged with additional payment to the class

members or any part thereof (see Brown, p. 220; *IBA Guidelines*, p. 9-10; Tanya J. Monestier, "Is Canada the New Shangri-La of Global Securities Class Actions?" 32 *NW J. Int'l L. & Bus*. 305, 334 (2012)). That risk might be an incentive to the defendant to avoid executing an unfair settlement that prejudices the rights of class members. However, sometimes this is a calculated risk taken by the defendant.

22. As we can see, there is a difference between the recognition of a foreign judgment in a class action and the recognition of a foreign judgment in a non-class action, in terms of the identity of the litigant whose rights are feared to be harmed. In a non-class proceeding, the recognition would normally not raise any particular difficulty for the plaintiff in the foreign tribunal, since he is the one who initiated the proceeding there. Usually, the question under consideration would be whether the rights of the defendant in the foreign tribunal were prejudiced. On the other hand, in class proceedings, the recognition of the foreign judgment is usually requested by the defendant, attempting to establish *res judicata* in regard to the represented class (after the defendant has completed, successfully according to him, a class proceeding in a foreign tribunal). In that case, the question is whether the rights of the class members were prejudiced by the local tribunal. The Canadian court explained this issue, as follows (*Currie v. McDonald's Restaurants of Canada Ltd.* 74 O.R. (3d) 321, 330 (Ont. C.A. 2005) (hereinafter: the *Currie* case)):

> "In a traditional non-class action suit, there is no question as to the jurisdiction of the foreign court to bind the plaintiff. As the party initiating proceedings, the plaintiff will have invoked the jurisdiction of the foreign court and thereby will have attorned to the foreign court's jurisdiction. The issue relating to recognition and enforcement that typically arises in whether the foreign judgment can be enforced against the defendant.
>
> Here, the tables are turned. It is the defendant who is seeking to enforce the judgment against the unnamed, non-resident plaintiffs. The settling defendants, plainly bound by the judgment, seek to enforce it as widely and as broadly as possible in order to preclude further litigation against them".

The considerations to be taken into account for incidental recognition of a foreign judgment in a class action

23. We shall now return to the Enforcement of Foreign Judgments Law. It would seem that nothing prevents the application of sec. 11(b) of the Law even to the incidental recognition of a foreign judgment issued in a class action. However, there is a question regarding the manner of implementation of the various criteria that the court must consider in this context, in view of the aforementioned special characteristics of the recognition of a foreign judgment in a class proceeding (on the need to adapt the regular rules for the enforcement and recognition of a foreign judgment in a class action, see Brown, p. 222; for a review of the guidelines established in this respect by the International Bar Association, see the abovementioned *IBA Guidelines*). We would note that the discussion below suits both a foreign judgment that

approves a class settlement and a foreign judgment deciding a class action on its merits.

24. As stated above, one of the relevant considerations for the purpose of incidental recognition of a foreign judgment is that the judgment was issued with authority. Presumably, this consideration should also be taken into account also with respect to a foreign judgment that was issued in a class action. However, in my opinion, in the case of a class action conducted abroad, and in view of the various interests that we addressed above, it would be appropriate to require that the foreign court also have a *substantial connection* to the dispute in the class action. This will reduce the concern for "ploy" by a foreign lead plaintiff and by the defendant in a court which they find convenient and which is unrelated to the dispute, while prejudicing the rights of the represented class. This appears to be the approach in Canada (see the *Currie* case, p. 328-329, where this test is referred to as a "real and substantial connection" to the forum wherein the judgment was issued; and also see, in English law: Mark Stiggelbout, **"**The Recognition in England and Wales of United States Judgments in Class Actions," 52 *Harv. Int'l L. J.* 433, 464 (2011) (hereinafter: Stiggelbout)). Indeed, in various contexts it was ruled that in order to recognize a foreign judgment incidentally, a sufficient connection is required between the foreign court and the subject of the proceeding, according to the rules of private international law jurisdiction, in force in Israel (see, for example, regarding the recognition of a bankruptcy order that was issued in a foreign country, MApp 10359/01 *Sussman v. the Official Receiver*, IsrSC 56(3), 160 (2002); Shlomo Levin & Asher Grunis, Bankruptcy 415 (3rd ed., 2010) (Hebrew)). In this regard, questions arise such as whether a significant part of the represented class is present in the foreign country. Another relevant question is whether the class members could have reasonably anticipated, at the time of engagement with the defendant, that future disputes between them would be decided by the foreign court (see: *Currie*, p. 332; and *cf*. LCA 10250/08 *Katziv v. Zao Raiffeisenbank*, para. 7 (March 18, 2010)). Obviously, also with respect to class proceedings, a litigant who cooperated in a proceeding conducted in the foreign court, and did not challenge the court's jurisdiction, may be deemed as having accepted the jurisdiction of the foreign court (see para 12 above).

25. As noted, an additional consideration that we addressed in regard to the recognition of a foreign judgment is whether the right to due process of the litigant against whom the recognition is requested has been violated. As we saw, in addressing the recognition of a judgment in a class action, the question that would normally arise pertains to the protection of the class members' rights. How must we examine whether the class members right to due process has been violated? United States case law customarily includes three elements in the right of the class members to due process, as follows (*Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985) (hereinafter: the *Phillips Petroleum* case)): first, receipt of proper notice regarding the proceeding, and being afforded an opportunity to participate therein; second, being afforded the opportunity to withdraw from the proceeding; and third, appropriate representation by the lead plaintiff (and his counsel) throughout the proceeding (some refer to these elements as "voice"; "exit" and "loyalty",

by analogy to the discussion of shareholders rights in corporate law; see Issacharoff & Nagareda, p. 1701; John C. Coffee, Jr., "Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation," 100 *Colum. L. Rev*. 370, 376-377 (2000)). These three elements, according to diverse United States case law, are the ones required to secure "due process" for the class members. These elements were recognized as the considerations to be weighed for the recognition of a class action decided by one court as binding the class members in a class action that is heard by another court (see, e.g.: *In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141, 145 (3d Cir. 2005) (hereinafter: the *Diet Drugs* case)); *Gotthelf v. Toyota Motor Sales, U.S.A.*, In., 525 Fed. Appx. 94 (3d Cir. 2013) (hereinafter: the *Gotthelf* case)); Debra Lyn Bassett, "U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction," 72 *Fordham L. Rev.* 41 (2003)); this is also the common approach in Canada, see the survey in Brown, p. 231-234; also see *IBA Guidelines* p. 14 and 26-27; Stiggelbout p. 470 and 499-500).

26. I shall briefly review each of the three aforesaid elements. Regarding a proper notice of the proceeding, it seems there is no need, in the matter at bar, to set hard and fast rules regarding the question what would be considered sufficient notice. In Canada, it was held that personal delivery of notice to each one of the class members is not required (see *Canada Post Corp. v Lépine* 1S.C.R. 549, para. 43 (hereinafter: the *Lépine* case)). On the other hand, there is a view that personal delivery of notice to each class member is preferred, whenever possible (see: *IBA Guidelines* p. 27). Obviously, the costs of such publication or delivery of notice should be considered, according to the circumstances of the matter. Regarding the content of the notice, it must include a description of the legal proceedings and the settlement (if any), and an update of the class members of their rights and the expected implications of the proceeding for them. Furthermore, they should be updated regarding their right to appear before the foreign court and to object to a settlement reached there (see: the *Lépine* case para. 45;the *Phillips Petroleum* case p. 812).

The right of a class member to withdraw from the class has also been recognized as a central aspect of the right to due process. (see: Currie, p. 333-334). The notice delivered to the class members should also inform them of that option (see: *IBA Guidelines*, p. 27).

As for the condition that the class members must be adequately represented, in the legal literature we find the opinion that claims of inadequate representation should focus upon conflicts of interests between the lead plaintiff (and his counsel) and the class members, in whole or in part, or conflicts of interests among the class members, as distinct from arguments that representation was inadequate because the compensation awarded by the foreign court is insufficient on its merits, whether by a judgment or by a settlement (see the article of Issacharoff & Nagareda; and also see *IBA Guidelines*, p. 26; Stiggelbout, p. 474-475; the *Gotthelf* case, p. 102-103; and also *cf*: *Restatement of the Law, Second, Judgements*, para. 42(d)-(e)). A possible conflict of interests may derive from a difference in the applicable law in each one of the countries. If Israeli law favors the class member as compared to the

applicable law in the foreign country, a settlement abroad awarding uniform compensation to all class members may raise a concern of improper representation of the class members in Israel. This is the case, inasmuch as uniform compensation will result in the transfer of wealth from the class members in Israel to the class members abroad. In such case, it may not be proper to negotiate on behalf of all of the class members (both in Israel and abroad) in their entirety (see: Issacharoff & Nagareda, p. 1681-1683; *Lépine*, para. 56; *Wolfert v. Transamerica HomeFirst Inc.*, 439 F.3d 165, 173 (2d Cir. 2006) (hereinafter: the *Wolfert* case)). Obviously, additional differences among class members in each of the various countries may also lead to conflicts of interests. Similarly, a settlement whereby some of the class members are treated differently, while the whole class was represented as one by a single lead plaintiff, raises concern of misrepresentation of that part of the class (see: Weizenbluth, p. 386-387).

27. Nevertheless, it would seem that an examination of the compensation level and other terms and conditions of a class settlement that was certified overseas, on their merits, should not be ruled out when such compensation, terms, and conditions clearly and manifestly deviate from what is reasonable (see *IBA Guidelines*, p. 14, where it was recommended that such an examination be conducted when compensation is "patently inadequate"; and also *cf*: Celia Wasserstein Fassberg *Foreign Judgments in Israeli Law – Deconstruction and Reconstruction,* p. 76-77 (1996) (Hebrew)). In extreme instances, it would seem that recognition of a foreign judgment in a class proceeding may be denied for repugnance to public policy (see: Stiggelbout, p. 471-472).

28. Another issue that arose in United States case law concerns the circumstances in which a party will be permitted to raise a claim that the right of the class members to due process was not properly protected in a class proceeding heard in another court. Various opinions have been expressed on this issue. According to one approach, such an "indirect challenge" of the proceeding at the other court may be permitted only if no fair opportunity was given to raise the said claims in the challenged proceeding. In other words, according to this approach, it is enough that an opportunity was available – even if not exploited -- in the challenged proceeding, in order to bar an "indirect challenge" of the outcome of the proceeding (see the majority opinion in *Epstein v. MCA, Inc.*, 179 F.3d 641, 648-649 (9th Cir. 1999)). Conversely, a different position was also expressed in United States case law whereby an indirect challenge of class proceedings should be permitted in a broader spectrum of cases. According to this position, the possibility of claiming that a defect occurred in a class action decision will be barred only vis-à-vis a party who appeared at the challenged proceeding, and only in regard to claims that he raised and that were explicitly decided (see the dissenting opinion of Thomas, J. in *Epstein*, *ibid.*, at p. 655). According to a third opinion (which may be referred to as the middle approach), if various claims in connection with the right of the class members to a due process were heard and decided by the court hearing the challenge, each party, including a party who did not appear himself at the other court, will be barred from raising the same for a second time in the framework of an indirect challenge. Thus, if a member of the class objects to a

class settlement at a foreign court and the foreign court explicitly addresses his claims and rejects them, any other member of the class will also be barred from raising the same claims in an Israeli court (see the dissent of Wiggins J., *In re Epstein*, *ibid.*, at p. 651;. *Diet Drugs*, at p. 146; and also see: *Wolfert*, at p. 172, in which the position was expressed that the class member will be barred from raising in an indirect challenge a claim that was heard and decided in the challenged proceeding, even if the claim was raised therein by the defendant; for a survey of the various positions, see: Issacharoff & Nagareda, at pp. 1652-1653 and pp. 1714-1718, and *see***:** Patrick Wooley, "Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages," 58 *U. Kan.. L.*, 917 (2010); also see: *IBA Guidelines*, at p. 25).

In the matter before us, there is no need to decide among the different approaches. Suffice it to say that weight should certainly be afforded to the foreign court's decision concerning claims of a denial of due process by the class, if these claims are raised for a second time in an Israeli court. In any event, it appears that according to all of the approaches described above, when the party who raises claims of a denial of due process to the class members is the *same party* who raised those claims in the foreign court (as occurred in the case at bar), decisive weight should be afforded to the fact that his claims were rejected by the foreign court. In such a case, the rulings of the foreign court may be deemed as establishing a quasi "collateral estoppel" vis-à-vis the party whose claims were rejected, which prevents him from trying his luck for a second time by raising the same claims. In such a case, the party seeking class certification in Israel, who is barred from claiming against defects in the foreign judgment, may also be deemed as lacking a personal cause of action to represent the class members in Israel. See Issacharoff & Nagareda (at p. 1715-1716):

> "At the very least, adaptation of preclusion principles for collateral attacks should guard against the situation of a literal 'do-over'. It would be intolerable to allow a collateral-attack plaintiff to escape the binding effect of a class settlement by raising the same structural defects in the class representation that she previously had raised on direct review in the original court and where she had lost on that precise point… Clearly, there must be finality where the very same class member made the same structural claims in the form of an original objection in the rendering court. No plausible conception of adequate representation can countenance a literal re-presentation of the same structural claim collaterally".

29. A further matter that should be emphasized pertains to the court's involvement when deciding whether to recognize a foreign judgment in a class action. In regards to recognition of a foreign judgment that is not in a class action, it was held that "the process of recognition of the foreign judgment, checking *all* of the recognition conditions, need not be performed in each and every case, and such an examination of the fulfillment of a condition or the existence of a defense against recognition will be performed in accordance with the claims of the party opposing recognition" (the *Basilius* case, at p. 404, emphasis original

– A.G.), as an expression of the adversarial approach prevailing in Israel. However, it is highly doubtful that such an approach is appropriate when we are concerned with class proceedings. It should be borne in mind that, usually, the class members will not have an interest in appearing before the court and raising claims in connection with the consequences of the foreign judgment, due to the low value of the personal cause of action to each of them. Moreover, there is also no assurance that the claims of possible harm to the class members will be presented properly by the party seeking class certification, since the issue of recognition of the foreign judgment will often arise before class certification and before a ruling that the petitioner represents the class members in an appropriate manner and is eligible to act as lead plaintiff. Therefore, and in view of the fact that we are concerned with the rights of persons absent from the courtroom, considerable supervision and involvement are required by the court (see: the *Raynolds* case, at p. 279-280).

30. A further comment is that when dealing with a proceeding concerning securities, it is necessary to consider sec. 35Z of the Securities Law, whereby, "If action was brought before a Court in Israel under any enactment, on grounds that derive from an interest in the securities of a foreign corporation, the Court may – on application by a party – stay the proceedings in the action, if it learns that action was brought before a Court abroad on the same grounds or on similar grounds, and that until a judgment that is no longer subject to appeal is handed down in that action". This provision reflects the legislature's inclination to respect and not frustrate proceedings that are being conducted at a foreign court in connection with companies whose securities are "dual-listed" (see: Amir Licht "Dual Listing of Securities," 32(3) *Mishpatim* 561, 617 (2002) (Hebrew)). However, if the proceeding in the foreign country ends in a judgment, the recognition and enforcement thereof must be performed pursuant to the provisions of the Foreign Judgment Enforcement Law. In the proceeding at bar, there is no need to decide whether, in view of Section 35Z above, there is room to relax the conditions for recognition or enforcement of a foreign judgment in regard to a company whose securities are "dual-listed".

31. To complete the picture, I will note that the issue of recognition of a judgment in a class action may also arise in the court in which the cross-border class action is heard. In the United States, it has been held that when a class certification, in which some of the class members are located overseas, is concerned, it is necessary to consider, at the class certification stage, whether foreign courts will recognize the outcome of the proceeding. If the chances that the judgment in the class action will be recognized in the foreign country are not high, this constitutes grounds for not certifying the class action with respect to class members located in such country, in the context of the requirement that for purposes of class certification, it is necessary to examine whether it is the most efficient method of deciding the dispute (see: *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 95 (2007); *In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 281-282 (2008)). Thus, in one case that arose in the United States, the court denied certification of a class action against members of the class located in various countries, including Israel (*Anwar v. Fairfield Greenwich*, 289 F.R.D. 105, 121 (2013)).

32. If a foreign judgment in a class action is recognized (indirectly), it is necessary to further enquire as to its significance for the proceeding being heard in Israel. Aside from the question of the foreign judgment's consequences under the applicable law of the court that issued it (which must be proved as a fact, or if necessary, by recourse to the parity of laws presumption), the significance of the foreign judgment will also be decided according to Israeli law (see para.15, above). It should be borne in mind that if the proceeding is at the stage of the hearing of the motion for class certification, denial of the motion does not establish *res judicata vis-à-vis the class members* (and see: *Smith v. Bayer Corp*., 131 S. Ct. 2368, 2379-2382 (2011) (the *Smith* case)). The consequences of recognition of the foreign judgment affect only the party filing the class certification motion. It may of course be wondered what is the practical reason for the filing of an additional, identical class proceeding by another class member, but this is the outcome whenever a class certification motion is denied (although it has been ruled that the denial of a class certification motion may also have certain repercussions for a later class certification motion concerning the same issue and filed by another lead plaintiff; see CC (Tel Aviv District Court) 1043/00 *Rosenfeld v. The Social Security Covenant Implementation Organization* (October 24, 2002) (Justice E. Hayut), appeal denied in CApp 10688/02 (March 27, 2003); CApp 2505/06 *Becker v. Cellcom Israel Ltd.*, paras. 16-17 (December 9, 2008)).

In addition, if the party seeking class certification (or the lead plaintiff, if the class action has been certified) has asserted his claims at the foreign court and his claims there were rejected, as we have seen above, he himself will be barred from raising these claims for a second time in the Israeli court (see the discussion in para. 28). In such a case, too, the consequences of the recognition of the foreign judgment apply only to him, and it is possible that if another member of the class files a new proceeding on the same issue, the court will be required to address the claims regarding the due process claims of the class members on the merits.

33. To summarize our discussion thus far: a foreign judgment in a class action may be recognized incidentally. This recognition is conducted pursuant to sec. 11(b) of the Foreign Judgment Enforcement Law, according to which the foreign judgment may be recognized if "it is lawful and just to do so". A first consideration that must be taken into account is whether the foreign judgment was issued by a court with jurisdiction to hear the proceeding. In this context, it is also necessary to examine whether the foreign court has a substantial link to the issue being heard in the class action. The participation of the lead plaintiff or the party seeking class certification in the proceeding in the foreign court may be deemed as consent to the foreign court's jurisdiction. A further consideration is whether the right to due process of the members of the represented class was violated. In this regard, three main elements must be addressed: serving proper notice to the class members of the class proceeding in the foreign court and affording the class members an opportunity to participate therein; giving the class members an opportunity to withdraw from the proceeding; and adequate representation of the class members by the lead plaintiff (and his counsel) at the foreign court throughout the conduct of the proceeding. Examination of the outcome of the class action in the foreign

court on the merits (or examination of a settlement that was approved in a foreign country on the merits) will only be performed in cases in which the outcome is clearly and manifestly unreasonable. Similarly, the foreign judgment will be denied recognition for repugnance to public policy only in exceptional cases. Weight should further be afforded to the fact that the claims being raised against recognition of the foreign judgment were already heard and decided by the foreign court. In addition, decisive weight should be afforded to the fact that the party raising the claims against recognition of the foreign judgment in Israel raised these claims himself in the foreign court, and his claims there were rejected.

If the court finds that the foreign judgment should be recognized, what is its significance for the proceeding being held in Israel? The consequence of the foreign judgment pursuant to the foreign law is a fact that needs to be proven, and insofar as necessary, the parity of laws presumption may be drawn on. According to Israeli law, if the proceeding in Israel is a class proceeding which is at the stage of class certification, denial of the class certification motion does not establish *res judicata* vis-à-vis the class. In such a case, recognition of the foreign judgment applies only to the party filing the class certification motion. In a case in which the foreign judgment is recognized without hearing the claims in connection with the right of the class to due process on the merits, because the party seeking class certification (or the lead plaintiff) are barred from raising the same, recognition of the foreign judgment is applicable only to the party seeking class certification (or the lead plaintiff).

From the general to the particular

34. There is no doubt that the manner in which the motion for leave to appeal at bar was heard is irregular. The proceeding underwent many twists and turns while it was pending before this court. In this framework, the parties submitted evidence regarding the developments that occurred over time in a manner which is inconsistent with the regular conduct of a proceeding in a court of appeals (although it is emphasized that the parties did not object to the filing of this evidence). There is a dispute between the parties on the adequacy of the notice that was given in Israel regarding the class proceeding in the United States, on the opportunity that was given to the class members in Israel to withdraw from the Settlement, and on the adequate representation of the class members in Israel before the foreign court. Hence, the question arises as to whether it was correct to remand the case to the trial court in order that it hear such new evidence and decide these disputes between the parties.

35. However, ultimately I reached the conclusion that there is no point in remanding the case to the trial court. Based on the material before us, it appears that it may clearly be ruled that the foreign judgment that was issued in the class proceeding in the United States should be recognized, and that such recognition leads to denial of the Motion for Class Certification in Israel. First, and with regards to the issue of jurisdiction, the Petitioner appeared at the court in the United States and raised his claims on the merits in his objection to approval of the Settlement. The Petitioner did not refer us to where he denied the jurisdiction of the court in his pleadings that were filed in the United States (I would add that inspection of the Petitioner's claims in the

supplementary pleading reveals that he, indeed, did not deny the jurisdiction of the court in the United States to hear the proceeding; paras. 50-52 of the supplementary pleading on behalf of the Petitioner, and para. 12 of the Petitioner's response to the supplementary pleading on behalf of the Respondent). The Respondent referred us to a pleading that was filed by the Petitioner with the California Federal Court in which he explicitly asserted that his claims against the Settlement ought to be heard in the United States and not in Israel (para. 32 of the supplementary pleading on behalf of the Respondent, which refers to Chapter III of Exhibit 27 to the supplementary pleading on behalf of the Petitioner). By his said conduct, and in the absence of an argument from the Petitioner on the issue of the convenient forum for a factual hearing at the trial court, he should be deemed as having agreed to the jurisdiction of the court in the United States It also appears that there can be no real dispute that the class proceeding has a substantive link to the United States in view of the fact that it concerns trade in securities of a United States company which was mainly performed in the United States.

36. With regard to the Petitioner's claims of a violation of the right of the class members in Israel to due process, as specified above, decisive weight should be afforded to the fact that the Petitioner himself already raised these claims before the California court, and that they were heard there and rejected. I will briefly review the California court's rulings on the matter (decision of February 18, 2014, Exhibit 29 to the supplementary pleading on behalf of the Petitioner). After having heard the Petitioner's claims at the hearing held before it, the California court found that the Settlement was reasonable and fair vis-à-vis investors from Israel. The court added that the Petitioner's claims regarding inadequate representation of the class members were not proven. In this context, it was held that the Petitioner did not prove that the class members from Israel ought to receive higher compensation due to a difference between securities law in Israel and such law in the United States The California court referred to the ruling of the District Court in Israel, whereby the law that applies to the Motion for Class Certification in Israel is United States law. The California court further added that the class proceeding in Israel is still in its infancy. Under these circumstances, the California Federal Court ruled that the Petitioner had "a long road ahead" in order to succeed in the proceeding that he had initiated in Israel. The California court's said conclusion appears quite logical under the circumstances. The California court also referred in its decision to the relatively high rate of participation of investors from Israel in the Settlement. It transpires from the data presented in such decision that the rate of participation of Israeli investors in the settlement was considerably higher than their percentage in the entire class represented in the class proceeding in the United States It was held that these data reveal that the class members in Israel were aware of the Settlement, and also that they undermine the Petitioner's claims in connection with the manner of representation of these class members. The court also rejected the Petitioner's claim in connection with the implications of the judgment in the *Morrison* case. Finally, the United States court ordered the publication of an additional notice regarding the fact of the Settlement among the class members in Israel, and extension of the date for the filing of the Entitlement Forms by them.

37. As we can see, the Petitioner's claims were heard in detail by the California court and rejected. Under these circumstances, there is no room to permit the Petitioner to raise his claims yet again in the Israeli court, even according to the broadest approach to an "indirect challenge" of a class proceeding (see the discussion in para. 28 above). Indeed, there is no claim before us on the part of any member of the class in Israel, apart from the Petitioner, asserting that he did not receive adequate notice of the class proceeding in the United States, or that his rights were violated in any way. All we have before us is the Petitioner whose claims were already raised and rejected by the foreign court. Hence, there is no reason to accept the Petitioner's claims regarding a violation of the class's right to due process, and there is also no reason to remand the case to the trial court to hear his claims. I will add that the Petitioner has no serious, arguable claim with regards to the body of the terms and conditions of the Agreement, which claim, as aforesaid, will only be heard in exceptional cases. The conclusion is that there is no impediment to recognizing the foreign judgment pursuant to sec. 11(b) of the Foreign Judgment Enforcement Law.

38. Notwithstanding my said conclusion, I will not deny that I am dissatisfied with the manner in which the Respondent conducted itself. In the Settlement itself, no explicit reference is made to the fact that a considerable portion of the class members are persons who are located in Israel and purchased shares of the Respondent on TASE. This matter was subsumed in the manner in which the represented class was defined (sec. 1.3 of the Settlement, whereby the class members are any person who purchased shares of the Respondent in the relevant period "on any domestic or foreign exchange or otherwise"). The manner in which it was stated that the notices of the fact of the Agreement would be announced in the newspapers is particularly puzzling: "once in *Investor's Business Daily*, once in *Globes*, and once over the *Business Wire*" (sec. 6(b) of Appendix A to the Agreement), without stating that the second of the three newspapers is an Israeli newspaper. In addition, on the Entitlement Form the class members were required to declare that they had not initiated a proceeding in connection with the subject matter of the Settlement, and that they are not aware of such a proceeding having been filed on their behalf (sec. IV of Appendix A2 to the Settlement). Clearly, this declaration is not true with respect to the class members in Israel in view of the filing of the Motion for Class Certification in Israel. Moreover, in one of the pleadings that was filed in the framework of the hearing on approval of the Settlement (on behalf of the lead plaintiff in the United States), an attempt was made to convince the court that the class is homogeneous, and then too, without saying a word about the difficulty presented by the fact that a considerable portion of the class members is located in another country, and in whose regard there is an additional class proceeding (Exhibit 7 to the supplementary pleading on behalf of the Petitioner).

Moreover, it transpires from the documents that the Respondent attached to the supplementary pleading on its behalf, that it filed several affidavits with the California court regarding the manner in which the Settlement was announced and regarding the pace of implementation thereof (Exhibit 2 to the supplementary pleading on its behalf). In the first of the affidavits that were attached, of December 16, 2013, no explicit mention was made of the

existence of the class members in Israel. Then, too, the notice in the "Globes" newspaper was described alongside the other notices that were published in the United States, without stating that this notice was made in Israel. On December 30, 2013, the Petitioner filed his objection to the Settlement (Exhibit 20 to the supplementary pleading on behalf of the Petitioner). Subsequently, on January 16, 2014, an additional affidavit was filed by the Respondent, and this time providing substantial details regarding the existence of the class members in Israel, the notices that were sent to them, and the rate of response on their part according to the Settlement. This affidavit finally stated that the "Globes" newspaper is a newspaper distributed in Israel, and that this notice of the settlement was made in Israel. This conduct raises a suspicion that, prior to the filing of the objection by the Petitioner, the Respondent, together with the lead plaintiff in the United States, tried to underplay the fact of the existence of the class members in Israel.

Indeed, at the time of the hearing in the California court on the Petitioner's objection to approval of the Settlement, the court expressed irritation that it was not aware of this problematic aspect of the Agreement (pp. 56, 62 and 68-69 of the transcript of the hearing of February 14, 2014, Exhibit 28 to the supplementary pleading on behalf of the Petitioner). The court was also troubled by the adequacy of the notice that was given to the class members in Israel, and even informed the Respondent of the concern of a future indirect challenge of the approval of the Settlement (*ibid.*, at p. 24, line 22*ff*., and at p. 63). In view of the court's comments at the hearing, the Respondent published an additional notice of the Settlement in Israel, this time in Hebrew, and the date for the filing of the Entitlement Forms by the class members in Israel was also extended.

39. In my opinion, there is no doubt that the Respondent ought to have clearly informed the California court of the problem presented by the existence of the class members in Israel, at its initiative and at the stage of the filing of the Settlement for the court's approval. A separate and in-depth hearing on the Settlement and the motion to approve it ought to have been dedicated to the issues concerning the existence of no few class members from outside of the United States However, although this was not done, ultimately the California court was informed of the foregoing difficulty, it explicitly addressed it, and decided the issue. This was done following the objection that the Petitioner filed to the Settlement, and to his credit, it is noted that the objection led to the publication of an additional notice of the settlement in Israel and to the extension of the date for the filing of the Entitlement Forms. In any event, once the California court addressed the matter, and decided as it did, there is no room to permit the Petitioner to try his luck by raising the same claims once again in Israel.

40. Having reached the conclusion that the judgment approving the Settlement in the class proceeding in the United States should be recognized, the question arises as to the implications thereof for the Motion for Class Certification in Israel. The Respondent filed an expert opinion in respect of the significance of the judgment in the United States, but it appears that in this regard too, there is no point in remanding the case to the trial court for a factual hearing of the

issue. The fact that the foreign judgment establishes *res judicata* pursuant to United States law is quite clear in view of the provisions of the Settlement, and in view of the definition of the represented class according to the Settlement. The Petitioner has no good claim in connection therewith. It is noted that the judgment that was issued in the United States is final (it is noted that another class member filed an appeal from the judgment with the Federal Court of Appeals and the appeal was denied by consent: Exhibit 1 to the supplementary pleading on behalf of the Respondent). Although the California court ruled that it was not deciding upon the consequences of approval of the Settlement in respect of the proceeding being held in Israel, this is inconsequential. Leaving the significance of a judgment to a proceeding in another country as an open issue to be decided by the court in the other country is a technique used by courts from time to time (see the survey in Brown's article, at pp. 224-226; and see the *Smith* case, at p. 2375). The question of the significance of the foreign judgment in Israel is determined by the court in Israel, as we shall now do.

With respect to the implications of the foreign judgment in Israel pursuant to Israeli law, the proceeding is at the class certification stage. Therefore, the implications of recognition of the foreign judgment are vis-à-vis the Petitioner only, and not vis-à-vis the class in Israel. This is particularly true when the claims regarding violation of the right of the class members to a process were not heard by us on the merits, since the Petitioner himself is barred from raising the same.

41. We find, under the circumstances created, there is no point in remanding the case to the trial court for a factual hearing on the parties' claims. The parties were given a full opportunity to present their claims on the matter before us. It should be recalled that a court of appeals has broad jurisdiction to decide disputes between the parties, and in this context the court of appeals is granted jurisdiction to issue any decision that may be issued by the trial court, and to issue a decision in favor of the respondent even without the filing of an appeal or a counter-appeal on its part (see sec. 462 of the Civil Procedure Regulations, 5744-1984).

42. However, I would reemphasize that as aforesaid, in my judgment no examination was performed on the merits of the claims in connection with the right of the class members in Israel to due process, since the Petitioner himself is barred from raising such claims after he raised them in the United States and they were rejected there. Therefore, if, in the future, these claims are raised by another member of the class in Israel, the competent court may be required to address the same on the merits. In such an examination, weight will probably also be afforded to the rulings made at the California court (and see para. 32 above). I, of course, express no position with regard to the fate of such a proceeding.

Final comment

43. In CApp 3441/01 *Anonymous v. Anonymous*, IsrSC 58(3) 1, 23 (2004), Chief Justice A. Barak stated (not in connection with class actions):

> "In today's reality, many Israeli citizens litigate outside of Israel. We are indeed living in a world that is becoming 'one large village' (LCA 2705/97 *Hageves A. Sinai (1989) Ltd. v. The Lockformer Co.*, at p. 114). In this reality, motions to recognize foreign judgments of all types and varieties are becoming commonplace. The various dilemmas arising from the issue must be regulated in legislation. The dilemmas revolving around this proceeding will prove the extent to which the issues are complex, and ought to be given a detailed and structured legislative solution".

With this I concur. The manner in which foreign judgments in class actions are recognized ought to be regulated in legislation. Thus, the certainty with regards to the conditions required for recognition of a foreign judgment in a class action will increase, and the parties will be able to plan their steps accordingly.

44. In conclusion, I propose to my colleagues that we hold that the Settlement that was approved in the class proceeding in the United States be recognized in Israel for purposes of the class proceeding in Israel. Hence, the motion for class certification that was filed in Israel should be denied, and we so order. In view of the Respondent's conduct, which I specified above, I propose that we make no order for costs.

President (ret.)

Justice U. Vogelman:

I concur.

Justice N. Sohlberg:

I concur.

Decided as stated in the judgment of President (ret.) A. Grunis.

Given this day, Nissan 13, 5775 (April 2, 2015)

President (ret.) Justice Justice