THE UNEXPECTED EFFECTS OF ISRAELI COURTS' APPROACH TO DUAL-LISTED COMPANIES

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This Article studies the Israeli courts' approach to choice of law in securities class actions against dual-listed companies, and its unexpected adverse effects on Israeli shareholders. Israeli courts apply American law to dual-listed companies, as an inducement for companies to list their shares for trade on the Tel Aviv stock exchange. However, one of the outcomes of this choice was to enable American attorneys to include Israeli-traded shares in American securities class actions. The Article claims that this outcome might undermine Israeli shareholders' rights and reduce their expected compensation.

Introduction

The idea of a 'law market' is essential for understanding private international law (PIL) from an economic perspective. The conceptualization of choice of law and jurisdiction by legal systems, on the supply side of the global law market, and by private individuals and firms, on the demand side, carries important insights into both descriptive and normative questions in PIL. This Article demonstrates one troubling feature of the law market, which has not been fully appreciated so far. It shows how Israel's efforts to attract companies to list their shares on its stock exchange have translated into the capture of its local investors' claims by American class action lawyers. The Article explains the dynamics that have led to this outcome, its normative implications for Israeli investors' rights, and the possible measures that could be taken to prevent these consequences.

The law market literature distinguishes between post-dispute and pre-dispute markets. In a *post-dispute* (*ex-post*) law market, plaintiffs shop for their preferred forum and law. Plaintiffs thus constitute the demand side of the ex-post law market. The supply side consists of countries that offer their choice of law as well as substantive and procedural internal laws to potential plaintiff shoppers. The dynamics of the ex-post market and its normative implications have been analyzed with respect to choice of law,[1] jurisdiction,[2]

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1 Bruce L. Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 Geo. L.J. 617 (1992); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. Legal Stud. 235 (1979); Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, 37(1) Proc. Acad. Pol. Sci. 90 (1988).

2 Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. Calif. L. Rev. 1551 (2012); Daniel Klerman, *Rethinking Personal Jurisdiction*, 6(2) J. Legal Analysis 245 (2014) [hereinafter Klerman, *Rethinking Personal Jurisdiction*]; Geoffrey P. Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*, 2 Stan. J. Complex Litig. 1 (2014).

and recognition and enforcement of foreign judgments.[3]

In addition to the ex-post market, there is also an *ex-ante*, *pre-dispute* law market. On the demand side of this market, parties may incorporate specific national laws into their contractual relations through choice-of-law provisions, and they may select their preferred forum by choice-of-court clauses; corporations may opt for their preferred law by incorporating in a specific country; and more generally, natural persons and corporations may create sufficient connections with a country so as to guarantee that its laws will apply to their future disputes, when pre-dispute contracting is impossible or too costly. The supply side of this market is facilitated by nations that compete over people, corporations, and assets by offering laws that advance their interests.[4]

This Article examines one example of a combined law market—a pre-dispute market for listing public firms on stock exchanges, and a post-dispute market for class actions. In the stock exchange market, a few exchanges in the U.S., England, China and Japan take the lead and are attractive to global firms, as their volume and liquidity are high. Other, smaller, exchanges, like Israel's, must compete over companies and make registration for trade on them sufficiently attractive.[5] To render registration simpler, the local jurisdiction may ease its reporting and disclosure requirements. Alternatively, it may unify these requirements with the ones to which the foreign firm is already subject. As long as the benefits from attracting foreign firms to register their shares on the local exchange are sufficiently large to offset potential dilution of their ex-ante deterrence and the reduction in ex-post compensation for local investors, this approach may be justified from a local welfare perspective. This, indeed, was the approach taken by the Israeli legislature regarding dual-listed companies.[6]

However, the post-dispute market for class actions, in which lawyers compete over potential securities litigation against issuing firms, might operate in ways that undo the local jurisdiction's intended balance between social costs and benefits and undermine the rights of local investors for ex-ante full disclosure, and ex-post compensation. As this Article demonstrates, such dynamics have indeed resulted with respect to companies that were listed on both American and Israeli exchanges, as American class actions lawyers, representing Israeli institutional investors, took control over class actions that included both American and Israeli investors against these companies. It discusses the unique features of the Israeli securities' regime, and how it led to a situation where Israeli-traded shares were represented in American class actions, even after the American Supreme Court's holding in *Morrison v. National Australia Bank*[7] that the Securities Exchange Act has no extraterritorial application

3 Michael J. Whincop, *Conflicts in the Cathedral: Towards a Theory Property Rights in Private International Law*, 50 U. Toronto L.J. 41 (2000).

4 Erin A. O'Hara & Larry E. Ribstein, The Law Market (2009).

5 Amir N. Licht, *David's Dilemma: A Case Study of Securities Regulation in a Small Open Market*, 2 Theoretical Inquiries L. 673, 684-86 (2001).

6 Amir N. Licht, *Dual Listing of Securities*, 32 Mishpatim 561, 579-84 (2002) (Isr.).

7 Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010).

to foreign traded shares. The Article explains how this may have undermined the interests of Israeli class members to have their case litigated in Israel.

In particular, representation of Israeli class members in both Israeli and American class actions drives their expected settlement value below the lowest expected value in either the American or Israeli jurisdictions, due to reverse auction dynamics created by such competition. Lawyers in both jurisdictions who try to be appointed to represent the Israeli class, are willing to accept lowers settlement offers in order to induce the defendant to settle with them in their jurisdiction. In addition, American class actions implicate inherent conflicts of interest between American class members, on the one hand, and Israeli class members on the other hand, due to differences in the realization settlement rates in both jurisdictions. As a consequence, potential advantages of the Israeli class action regime might go unutilized, in ways that reduce Israeli investors' expected compensation.

These implications have gone unnoticed by the Israeli courts. Recognizing them should inform the courts' approach to choice of law, jurisdiction and most significantly, recognition of American class action settlements, if they want to implement an optimal tradeoff between attracting foreign firms and protecting local investors.

The Article proceeds as follows: Part I describes the tradeoff between attracting foreign firms to register for trade on a local exchange by applying their chosen foreign law, and the potential adverse impact on local investors. It then makes the claim that the two effects can be balanced by applying local jurisdiction to lawsuits against foreign firms. Part II explains the Israeli unique dual-listing regime, and its application of American liability law in securities class actions against these firms. Part III describes the American courts' approach to Israeli-American listed companies and the current trend toward assuming supplemental jurisdiction over Israeli-traded shares, notwithstanding *Morrison*. Part IV presents the dynamics of the market for representation in class actions against Israeli-American traded companies, which is driven by the competition between class action lawyers in both jurisdictions, and facilitated as well by unique portfolio monitoring agreements between American class action lawyers and Israeli institutional investors. This Part explains how these dynamics reduce the expected settlement payoff to Israeli investors; Part V explains why Israeli law concerning anti-suit injunctions and the recognition of foreign class action settlements makes it unlikely that Israeli courts will assume control over parallel litigation conducted in the U.S. The consequences are, therefore, unlikely to change unless the courts' approach to applying American liability law to Israeli class actions against dual-listed companies changes. The last Part concludes.

I. Attracting Foreign Firms to Register on Local Exchanges—The Optimal Combination of Choice of Law and Jurisdiction

This Part provides an analytic perspective on the law market dynamics regarding dual-listed companies, if litigation were held only individually. Section I.A explains the choice-of-law perspective of attracting foreign firms to register on a local exchange. Section I.B examines the jurisdiction perspective on the same issue. The conclusion is that an optimal balance from a local welfare perspective may allow foreign firms a restricted choice of the law that would apply to them, yet require them to litigate potential claims against them in the local jurisdiction.

Throughout this Part I refer to local investors, implicitly assuming that they are trading their shares on local exchanges, whereas foreign investors trade their shares only on their home-foreign exchange. This is not necessarily the case, as I explain in the next Parts. However, for the sake of clarity it is convenient to maintain this assumption here.

A. Choice of Law

The operation of a stock market depends, among other factors, on its disclosure requirements and on the liability imposed when these requirements are not satisfied. In order for the market to operate efficiently, the legal framework that applies to all companies listed on it must either be the same, or be easily distinguishable by and understandable to investors. Information about a firm, including the law that applies to it, must be available to investors if they are to price its shares correctly. A multitude of legal standards in one market might adversely affect both investors and issuers.[8] Hence, foreign companies that list their shares for trade on a local market should be subject to the same legal standards that apply to local companies, and if they are not, then investors should be able to identify and comprehend the different legal standards that apply to these companies.

However, once a company is registered for trade in more than one national market, it may be subject to more than one set of legal standards. This alone may render issuing stock for trade in the local market too costly for the foreign firm. Furthermore, if the firm chooses to register its shares on both exchanges, spillover effects from one market to another may ensue, since irrespective of whether the

8 *See* Zachary Shulman, *Fraud-on-the-Market Theory After Basic Inc. v. Levinson*, 74 Cornell L. Rev. 964, 975-79 (1989) and Mark Klock, *The Enduring Legacy of Modern Efficient Market Theory after Halliburton V. John*, 50 Ga. L. Rev. 769, 776-79 (2016) for a discussion of the relationship between disclosure and market price. *See* Estelle M. Sohne, *The Impact of Post-Enron Information Disclosure Requirements Imposed under U.S. Law on Foreign Investors*, 42 Colum. J. Transnat'l L. 217, 243, 253-55, 259 (2003); Carsten Gerner-Beuerle, *United in Diversity: Maximum versus Minimum Harmonization in EU Securities Regulation*, 7(3) Capital Markets L.J. 317, 336-37 (2012) and Uri Greiger, *The Case for the Harmonization of Securities Disclosure Rules in the Global Market*, 1997 Colum. Bus. L. Rev. 241, 260, 307-10 (1997) for examples of the effect of multitude or complex legal standards versus identical or similar standards on securities markets.

company's choice is to satisfy the strictest standard, the lowest standard or some combination of the two, the multiplicity of legal standards will impact investors in all the relevant jurisdictions. Whether the level of care taken by the firm is higher or lower than the one mandated in a specific jurisdiction, it must fall short of being optimal, from the perspective of that jurisdiction. Otherwise, it would have chosen that level of care to begin with. These costs, both to the issuing firm and to investors in both markets, impact the welfare analysis.

To give a simple example, suppose that the standard of care required from the firm's directors when making an investment decision differs between the two jurisdictions. In jurisdiction A the standard of care requires the directors to invest 100 in care, whereas in jurisdiction B they are only required to invest 80. The directors must then choose whether to invest 80 or 100. Either of these choices would imply non-optimal investment in care, from the non-chosen jurisdiction's perspective. It would be either too high or too low. Furthermore, if the directors were to take the lower level of care, then they would be subject to liability in jurisdiction A. However, whereas only the shareholders in this jurisdiction are compensated, all shareholders, including those in jurisdiction B, would bear the costs of care and liability. If, on the other hand, the directors decide to take the higher level of care, the costs would be borne by investors in both jurisdictions, even though jurisdiction B considers this to be an unnecessarily high investment in care.

The question whether a uniform standard should apply to all firms traded on a certain market, or, alternatively, uniformity should be applied to each firm, irrespective of where it is traded, has no straightforward answer. Optimality can be examined from a global perspective, namely, which approach would maximize global wealth, however it is distributed among local companies and investors. This is the approach often taken by economic scholars of private international law.[9] However, a local jurisdiction is likely to take a narrower perspective, that would account only for the costs and benefits to the local market—firms and investors. Firms clearly want to maximize their profits, while investors want to maximize the returns on their investments given the risk they are willing to assume.[10] In addition, they prefer to be fully compensated when the firm does not satisfy its legal duties toward them. Notably, the local perspective would not account for the local regime's spillover effects in other markets. It would only consider the local aggregate welfare effects.

A distinction should be made between stock markets that are sufficiently attractive for foreign firms to register on them, even if the firms have to bear legal adjustment costs, and other markets which have to take active measures to attract foreign firms to list on them. In the first type of markets, since the local law is optimal from the local jurisdiction's perspective, it may insist on applying it to foreign companies as well. In some cases, these markets may actually be attractive for their strong investor protection, which provides the cross-listing firm a bonding mechanism

9 *See, e.g.*, Andrew T. Guzman, *Choice of Law: New Foundations*, 90 Geo. L.J. 883 (2002).

10 Zvi Bodie, Alex Kane & Alan J. Marcus, Investments 117-68 (10th ed. 2014).

that may increase its value.[11] But even if no bonding value can be realized, foreign firms willing to list their shares on these markets may choose to bear the consequent costs, if registration on that market is sufficiently valuable to them.

This, however, is certainly not true for all markets. Small exchanges might offer no reputational value. Other advantages of cross listing on them, such as liquidity, increase in shareholder base, and visibility, may also be smaller.[12] Hence these markets are forced to adapt their requirements to the ones applicable in the stronger and larger exchanges.

Thus, markets that wish to attract foreign firms may opt for applying to the foreign firm the reporting, disclosure and liability rules that apply to it in the other, foreign market on which it is originally traded.[13] This may impose some costs on local investors, since the law that applies to the foreign firm may not be optimal from the local jurisdiction's perspective. Hence, the local jurisdiction's choice depends on the costs and benefits of applying foreign standards to the foreign firm. On the benefit side is the listing of foreign companies on the local exchange, and on the cost side are the consequent sub-optimalities in the foreign firms' behavior, ex ante, and in the liability regime that applies to them, ex post.

To differentiate between local and foreign companies, a choice-of-law rule must be used. The choice-of-law rule must refer to a connecting factor such that local law should apply to local firms whereas foreign firms will be subject to a foreign law. In the case of a dual-listed company, the applicable choice-of-law rule may refer to the law that applies to it in the foreign exchange. Alternatively, it may allow the company to choose between this law and the local law.

At the same time, since the foreign law may not provide sufficient protection to local investors, the application of the foreign law should be restricted. In particular, if the foreign liability rule undermines the rights of local investors, or if it compromises its efficient pricing, then its application in the local exchange may require specific limitations or adjustments. Indeed, an important question is whether investors can identify and fully understand the implications of the different liability regime the foreign firm is subject to. If they do, the choice of law applying to the foreign firm has no costs, as it would be priced by investors in the market.[14] However, if the implications of a different liability rule are more difficult to identify and comprehend, application of the foreign law may need to be restricted.

The firm's choice of law—based on its prior listing decision—may be restricted ex post, by imposing some fairness or optimality constraints on it in litigation. This

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11 For a review of the theory and empirical evidence regarding legal bonding of cross-listed firms, see Amir N. Licht, *Liability for Transnational Securities Fraud, Quo Vadis*?, *in* Reconceptualizing Global Finance and Its Regulation 250 (Ross P. Buckley, Douglas Arner et al. eds., 2016).

12 For a discussion of the potential advantages from cross-listing, see *id*.; Olga Dodd, *Why do Firms Cross-list Their Shares on Foreign Exchanges? A Review of Cross-listing Theories and Empirical Evidence*, 5(1) Rev. Behav. Fin. 77 (2013).

13 Amir N. Licht, *Stock Exchange Mobility, Unilateral Recognition and the Privatization of Securities Regulation*, 41 Va. J. Int'l L. 583, 597-603 (2001).

14 Guzman, *supra* note 9, at 913-15. *See also* Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 Yale L.J. 2359, 2366-67 (1998).

can be done through the use of the public policy (*ordre public*) doctrine. However, application of this doctrine is usually limited.[15] Therefore, jurisdictions may have to resort to ex ante restrictions on the application of foreign law, by listing the jurisdictions, or alternatively, the exchanges, whose law may be applied by the local courts instead of the local law. This is the approach taken by Israel, as I explain below in Part II.

B. Jurisdiction

The same considerations that apply to choice of law regarding foreign firms, namely—attracting those firms to list their shares on the local exchange, yet maintaining the protection of local investors' interests—are relevant to the questions of jurisdiction and choice of forum. Making foreign firms litigate in local courts subjects them to additional costs, as compared to litigating the same claims in their home-foreign court. These costs are produced by the geographic distance and the unfamiliarity with the local law, especially as it pertains to procedure and evidence. Conversely, if litigation is conducted in the firm's home-foreign court, it imposes similar costs on the local exchange's investors. Furthermore, since those investors are dispersed, they do not enjoy the same scale efficiencies as the foreign firm, and hence their per-lawsuit litigation costs may be higher, as compared to the respective costs of the foreign firm if it is forced to litigate in the local court. Thus, just as the choice between foreign and local law should balance the costs to foreign firms and local investors, respectively, so should the choice of forum.

There are, however, significant differences between the analysis of choice of law and jurisdiction, when considering the optimal balancing of costs and benefits to local jurisdictions.[16] For the sake of the current analysis, I assume that both local and foreign courts would apply the same substantive law, so that its effect is neutralized.

First, whereas the applicable law has various implications for the costs and benefits of the firm's primary activity and its consequences, the choice of forum only affects the litigation costs, as long as the same law applies in local and foreign courts. At most, these costs might also include the costs of errors, which might be different between the two jurisdictions, as the local court is less familiar with the foreign law, compared to the foreign court. Thus, the choice of forum has a much smaller effect on primary activity decisions by the firm.

Second, the choice of a foreign forum might make litigation less valuable to plaintiffs, rendering its pursuit a negative expected value endeavor.[17] Whereas foreign law may not discriminate between its locals and foreigners, the mere choice of a

15 Kent Murphy, *The Traditional View of Public Policy and Ordre Public in Private International Law*, 11 Ga. J. Int'l & Comp. L. 591, 595 (1981); Cheshire, North & Fawcett, Private International Law 133 (15th ed. 2017).

16 Michael J. Whincop, Mary Keyes & Richard Posner, Policy and Pragmatism in the Conflict of Laws 127-66) 1st ed. 2001).

17 For a discussion of Negative Expected Value lawsuits, see Lucian A. Bebchuk & Alon Klement, *Negative-Expected-Value Suits*, *in* 8 Encyclopedia of Law and Economics: Procedural Law and Economics 341 (Chris W. Sanchirico ed., 2011).

distant forum might generate sufficient costs to deter litigation. This would both undermine the foreign firm's incentives to satisfy its legal obligations, ex ante, and eliminate potential compensation for affected local investors, ex post.

Third, a local forum loses control over the resolution of disputes if they are litigated abroad. The only way of supervising the foreign forum is through ex post recognition and enforcement rules, yet they may prove too late and to a large extent ineffective.

These differences imply that attracting foreign firms by allowing them to choose their preferred forum might result in insufficient protection of local investors and local firms' rights and interests. At the same time, if the same substantive law is applied in both jurisdictions, the benefit to foreign businesses from allowing them to choose the forum may prove less significant.[18] Consequently, the overall local welfare effects of allowing the firm to choose its preferred forum might be negative—the gain to the foreign firms is low, whereas the loss to local investors might prove high.

The local exchange may be able to attract foreign firms by allowing them a restricted choice of the law that would apply to them, yet requiring them to litigate in the local forum. Assuming that local jurisdiction rules are sufficiently broad to apply to the litigation, and that the foreign firm cannot avoid them if it operates in the local market, the choice of forum would be made by the plaintiff. If the local judgment can be enforced locally, then there is not even a problem of foreign enforcement.[19] Thus, combining foreign law with local jurisdiction is somewhat similar to a 'you cut I choose' solution for an allocation problem.[20] The firm chooses the law, and the plaintiff chooses the forum. This combination may be necessary to sufficiently protect local interests, and at the same time provide sufficient inducement for the foreign firm to list its shares on the local exchange.

To summarize: a jurisdiction may attract foreign firms to list on its local exchange by applying a foreign liability law, using a choice-of-law rule. It must take the relevant measures to secure what it deems a minimum level of liability so that its local welfare is maximized. An important way of doing so is to allow plaintiffs to choose their preferred forum, and decline to enforce an ex-ante choice of forum imposed by the foreign firm.

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18 If the law applied by each forum is different, this implies a de facto choice of law for the business, which increases its benefits but also aggravates the local consumers' and competitors' problems. This, then, should be analyzed like a type of choice of law. For a general discussion of economic analysis of jurisdiction rules, see Michael Whincop, *Three Positive Theories of International Jurisdiction*, 24 Melb. U. L. Rev. 379, 381-88 (2000).

19 Of course, to render the local market attractive to the foreign business, the local regime must guard against local bias in its courts.

20 *See* Steven J. Brams & Alan D. Taylor, Fair Division: From Cake-Cutting to Dispute Resolution 8-12 (1996).

II. Israeli Courts' Application of American Law to Dual-Listed Companies

The previous Part explained how an optimal balance between attracting foreign firms to register on a local market, and providing adequate protection of local investors can be realized. To do so, local courts should use a choice of law rule which applies foreign liability law, and at the same time apply jurisdiction rules that allow local investors to sue in local courts.

As this Part explains, this was indeed the approach taken by Israeli courts, as they have held that the law that applies to the civil liability of Israeli-American dual-listed companies is American and not Israeli law. Yet, as the next Part demonstrates, the optimal balance between attracting foreign firms to register, and protecting local investors, was frustrated by the parallel use of class actions in both jurisdictions. Based on Israeli courts' choice of American liability law, American courts were willing to assume jurisdiction over Israeli-traded shares in American class actions. This has enabled American class action lawyers to include Israeli investors in American class actions, despite facing competition by Israeli lawyers, who filed class actions in Israel. Thus, the decision to apply American law to Israeli class actions has resulted in the capture of Israeli investors' claims by American lawyers, and the total relinquishment of control over them by Israeli courts.

Israel has adopted a unique disclosure regime for dual-listed companies. Under this regime, companies listed for trade on foreign stock exchanges, which are specified in the second and third Schedules of the Israeli Securities Act,[21] report according to the foreign law that applies to them and are exempt from local Israeli disclosure regulations. This arrangement was meant to encourage Israeli firms that want to be traded in one of the major world stock exchanges not to delist from the Tel Aviv Stock Exchange (TASE). Applying the same disclosure regime to foreign companies that list on the TASE was supposed to attract them to register their stock for trade in Israel. The goals of this arrangement therefore were to advance securities' trade, increase liquidity, and facilitate a viable financial market in Israel.[22] Although American exchanges are not the only ones to which this regime applies, all the litigation concerning it, so far, has been with respect to American-Israeli dual-listed firms. Hence, I will restrict most of the discussion to this case only.

While it was clear that the Securities Act has replaced Israeli disclosure requirements with the American ones, the implications as regards liability for violations of these requirements was less obvious. The question arose whether dual-listed companies were subject to Israeli law's liability standards, or whether their liability should be governed by the foreign law that applies to their disclosure requirements. This question was addressed in two decisions delivered by the economic department of

21 § 2-3, Securities Law, 5728-1968, SH 1749 252 (2000) (Isr.), https://www.nevo.co.il/law_html/law01/308_001.htm.

22 Licht, *supra* note 13; Licht, *supra* note 6, at 579-84.

the Tel Aviv District Court.[23] In both cases, the court also considered the Israeli Securities Authority's (ISA) approach, which suggested a broad interpretation of the dual-listing arrangement, and advocated that application of Israeli liability rules would undermine the basic goal of this arrangement, namely, to attract companies to list their shares on the TASE.[24] Accepting this interpretation, both decisions determined that the goals of the special disclosure arrangement enacted for dual-listed companies requires that their liability be subject to American law instead of Israeli law.[25] On appeal, the Supreme Court noted that it agreed with the District Court's interpretation, yet provided no explicit reasoning for this conclusion.[26]

The District Court decisions were not based on common-law choice of law analysis, but on the interpretation of the statutory language of the Securities Act and its legislative history. The judges on the District Court differed on the question whether the Securities Act leaves open the question of the applicable liability law, or whether its language mandates application of the foreign law. Yet both agreed that a purposive interpretation of the Act mandates such application.[27] Since the Act's reporting requirements were meant to attract firms to list on the TASE, the judges reasoned that applying Israeli liability law to alleged violations of these requirements, nondisclosure or fraud, would undermine that same goal. Hence, applying American law was held to be necessary to realize the purpose of the dual-listed disclosure regime. Thus, the outcome of both District Court decisions was that the Israeli securities law incorporates the relevant foreign law, which in both cases was American, and directly applies it to dual-listed companies.[28]

The District Court judges restricted their analysis to the choice-of-law question—namely, which law should apply to the companies' liability. Questions with respect

23 *See* CA (DC for Economic Affairs TA) 44775-02-16 Cohen v. Tower Semiconductor Ltd., Nevo Legal Database (Nov. 7, 2017) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-16-02-44775-500.htm (*Tower I*); CA (DC for Economic Affairs TA) 28811-02-16 Damty v. Mankind Corporation, Nevo Legal Database (Oct. 12, 2017) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-16-02-28811-164.htm. (*Damty I*). Two additional significant decisions are CivA 2889/18 Damty v. Mankind Corporations, Nevo Legal Database (Oct. 4, 2018) (Isr.), https://www.nevo.co.il/psika_html/elyon/17087370-O07.htm (*Damty II*); CA (DC for Economic Affairs TA) 44775-02-16 Cohen v. Tower Semiconductor, Nevo Legal Database (Feb. 20, 2018) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-16-02-44775-310.htm (*Tower II*), which applied the foreign liability rules to accountants working with dual-listed companies; CA (DC for Economic Affairs TA) 51914-12-18 Ra'becca Technologies Ltd. v. ICL, Nevo Legal Database (Aug. 1, 2019) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-18-12-51914-141.htm, which broadened the rules' scope of application to all types of companies under the regime, regardless of their place of incorporation, the identity of the stock exchange in which their securities were first traded, the primary location of trade and the location of the majority of investors.

24 Position statement by the Israel Securities Authority in resp. to Pl's class action compl. in CA (DC CT) 22300-05-15 Hayat v. Verifone Holdings, Inc. (Isr.) at 7-32 ¶¶19-26, 31, 75, 79, 86 (2016), https://www.isa.gov.il/%D7%97%D7%A7%D7%99%D7%A7%D7%94%20%D7%95%D7%90%D7%9B%D7%99%D7%A4%D7%94/Enforcement/Private_Inforcment/4508/2018/Documents/taur.pdf. Note that the ISA's more significant position was filed in the *Hayat* case but referenced in the *Tower* and *Damty* decisions.

25 *See Tower I*, *supra* note 23, at ¶¶ 66-69; *Damty I*, *supra* note 22, at ¶¶ 23, 64-65, 72-73.

26 *See Damty II*, *supra* note 23.

27 *Tower I*, *supra* note 23 at ¶¶ 61-62; *Damty I*, *supra* note 23, at ¶¶ 39, 77.

28 Using Michael Dorf's terminology, this incorporation is *dynamic* since any change in the foreign law automatically applies to the Israeli law. *See* Michael Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. Pa. L. Rev. 103, 104-5 (2008).

to jurisdiction over the case and the application of the Israeli class action procedure to it were not raised. The judges' analysis was premised on the assumption that the case would be litigated as a class action, in Israel.[29] As explained above, class action litigation imposes unique costs on foreign firms, distinct from the costs of local substantive law. Yet these costs have not been addressed by the District Court judges.

A recent decision by a different judge on the economic division of the Tel Aviv District Court, in a class action brought against *Ceragon Networks*, has parted ways with the previous decisions, as it held that the applicable law to dual-listed companies' liability is the Israeli law.[30] The impact of this decision on both Israeli and American class action litigation regarding dual-listed companies remains to be seen. The analysis below therefore focuses on the previous decisions and their consequences, and then returns to the possible implications if the *Ceragon* approach is chosen.[31]

III. American Courts Apply Supplemental Jurisdiction over Israeli Investors

This Part explains how the Israeli courts' decision to apply American liability law to Israeli-American dual-listed companies led to the inclusion of Israeli-traded shares in American class actions, despite the Supreme Court's decision in *Morrison v. National Australia Bank LTD* decided in 2010.[32] Section IIIA explains how American lawyers partnered with Israeli institutional investors to file class actions against dual-listed firms. Section IIIB explains how American courts were led to assume supplemental jurisdiction over Israeli-traded shares in class actions against these companies, irrespective of *Morrison*.

A. Israeli institutional investors file class actions in the U.S.

An examination of securities class actions filed in the U.S. against Israeli-U.S. dual-listed companies reveals that there are at least thirty (30) cases in which Israeli institutional investors have sought the role of lead plaintiffs. In some of these cases the represented class included Israeli class members who traded their shares on the TASE.[33] Within this subset of cases, there are some in which a class action was

29 *See Tower I*, *supra* note 23, at ¶¶ 41, 114-115; *Damty I*, *supra* note 22, at ¶¶ 17, 83.

30 CA (DC for Economic Affairs TA) 7363-01-15 Hazan v. Ceragon Networks Inc., ¶ 12, Nevo Legal Database (May 27, 2021) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-15-01-7363-918.htm).

31 It should be noted that following this decision, the ISA has published a draft for revising the Securities Law and mandating the application of foreign law to questions of liability of dual-listed companies;. Draft Bill for the Securities Law, 5728-1968 (Legislative Amendments 2021) (ISA Bill), https://www.isa.gov.il/%D7%97%D7%A7%D7%99%D7%A7%D7%94%20%D7%95%D7%90%D7%9B%D7%99%D7%A4%D7%94/Legislation/Proposed%20Legislation/Suggestions/Documents/Isa020221.pdf.

32 Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010).

33 In re VeriFone Holdings, Inc. Sec. Litig., No. C-07-6140 EMC, 2014 WL 12646027 (N.D. Cal. Feb. 18, 2014) (Israeli investors were included in the settlement agreement); Holdings, Inc. Sec. Litig., No. C-07-6140 EMC, 2014 WL 12646027 (N.D. Cal. Feb. 18, 2014); Clal Finance Batucha v. Perrigo, 2011 WL 5331648 (S.D.N.Y. Sept. 28, 2011) (*Perrigo 1*) (Israeli investors were included in the complaint

filed in Israel, by plaintiffs who were not related to the institutional investor that filed the American class action.[34]

The aforementioned cases are detailed in the Appendix. They were extracted from the "Securities Class Action Clearinghouse," run by Stanford Law School.[35] An additional search was conducted using the Westlaw database. Details for each case include the identity of the Israeli institutional investor who served as Lead Plaintiff or Class Representative; the date the motion to serve as Lead Plaintiff was filed—based on the most recent U.S. District Court Civil Docket—and the date said motion was approved; the filing dates of revised versions of the class action complaint, and the class certification date, if such certification was granted; the identity of the attorney for the Israeli institutional investor—based on the most up to date relevant court document or the most recent U.S. District Court Civil Docket; and the current status of the case.

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and later excluded by the court); Roofer's Pension Fund v. Papa, 333 F.R.D. 66, (D.N.J. 2019) (*Perrigo 2*) (Israeli investors were included as class members when class certification was granted); *Ormat Tech. Inc.*, No. 18-CV-00271-RCJ-WGC, Securities Class Action Clearinghouse (D. Nev. Jan. 21, 2021) (Israeli investors were included in the settlement agreement); Halman Aldubi Provident & Pension Funds Ltd. v. Teva Pharm. Indus. Ltd., No. CV-20-4660-KSM, -2021 WL 1217395, at *10 (E.D. Pa. Mar. 26, 2021) (Israeli investors are included in the class action complaint); In re Mylan N.V. Sec. Litig., No. 16-CV-7926 (JPO), 2018 WL 159585 (S.D.N.Y Mar. 28, 2018) (Israeli investors were included in the complaint and later excluded by the court); In re Mellanox Tech., Ltd. Securities Litigation, No. 13-CV-04909-JD, Securities Class Action Clearinghouse (N.D. Cal. Dec. 17, 2014) (Israeli investors were included in the complaint and the class action was dismissed altogether).

34 Class action comp., CA (DC CT) 8386-09-20 Hillel v. Teva Pharmaceuticals Inc., Nevo Legal Database (Sep. 6, 2020) (Isr.), https://www.nevo.co.il/psika_html/kitvey/TY-20-09-8386-A.pdf; CA (DC for Economic Affairs TA) 5407-09-17 Lightcom (Israel) Inc. v. Teva Pharmaceuticals Inc., Nevo Legal Database (Jul. 8, 2018) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-17-09-5407-711.htm (*Lightcom*); CA (DC for Economic Affairs TA) 39214-02-13 Weinberger v. Mellanox Inc., Nevo Legal Database (Jan. 8, 2015) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-13-02-39214-168.htm; CivA 3973/10 Stern v. Verifone Holdings, Inc., ¶ 30, Nevo Legal Database (Apr. 2, 2015) (Isr.), https://www.nevo.co.il/psika_html/elyon/10039730-s27.htm (*Stern*); CA (DC for Economic Affairs TA) 44366-05-18 Hayat v. Ormat Technologies Inc., ¶ 7, Nevo Legal Database (Jan. 4, 2021) (Isr.) https://www.nevo.co.il/psika_html/mechozi/ME-18-05-44366-127.htm (*Hayat*); CA (DC for Economic Affairs TA) 43065-03-13 Hatzlacha the Movement for the Promotion of a Fair Society v. Perrigo Company, Nevo Legal Database (Oct. 2, 2014) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-13-03-43065-525.htm (This class action is the Israeli equivalent to *Perrigo II*). Multiple similar class action complaints to the American *Perrigo II* were submitted in Israel—see Pl.'s answer to Def.'s disclosure mot. at ¶ 1(Nov. 6, 2017) in CA (DC for Economic Affairs TA) 64911-06-17 The Managing Company of the Electric Company's Workers' Pension Funds v. Perrigo Company, https://www.nevo.co.il/psika_html/kitvey/TY-17-06-64911-B.pdf. (note that the plaintiffs' counsel reported an agreement between them and the American class action's plaintiffs reached after the class action complaint was submitted to the court); CA (DC for Economic Affairs TA) 43897-05-16 Gavrieli v. Perrigo Company PLC, Nevo Legal Database (May 22, 2016) (Isr.), https://www.nevo.co.il/psika_html/kitvey/TY-16-05-43897.pdf. Multiple similar class actions complaints to the American *Mylan* were also submitted in Israel—see the Petitions for Certification of the Class Action in CA (DC for Economic Affairs TA) 18217-10-16 Friedman v. Mylan N.V., Nevo Legal Database (Oct. 13, 2016) (Isr.), https://www.nevo.co.il/psika_html/kitvey/TY-16-10-18217-A.pdf; CA (DC for Economic Affairs TA) 50981-04-17 The Managing Company of the Electric Company's Workers' Pension Funds v. Mylan N.V., Nevo Legal Database (Apr. 30, 2017) (Isr.), https://www.nevo.co.il/psika_html/kitvey/TY-17-04-50981.pdf.

35 Securities Class Action Clearinghouse, Stan. Stanford L. Sch., http://securities.stanford.edu/advanced-search.html (last visited Oct. 7, 2021).

Interestingly, institutional investors' involvement as class representatives in Israeli class actions is very rare. The same institutional investors who seem eager to file American class actions are by and large indifferent to Israeli class actions and are reluctant to take an active role in them.[36] Given these investors' geographic location and their familiarity with Israeli law, their choice to pursue American class actions and refrain from being involved in Israeli ones is puzzling.

There are a few potential explanations for this puzzle. One explanation is based on a comparison between the costs and benefits of serving as a class representative in Israel and in the U.S. A representative plaintiff in Israel not only bears his side's litigation expenses but is also subject to the risk of having to reimburse the defendant for a share of its litigation costs, if the class action is not certified, or alternatively, if it is certified but the defendant eventually prevails.[37] By comparison, in U.S. class actions the attorney is usually responsible for all litigation costs and expenses.[38] Furthermore, under the American cost allocation rule the loser does not reimburse the winner for her litigation costs, and therefore the plaintiff is not subject to the risk of fee shifting. This difference may imply higher costs of litigating in Israel as compared to the U.S. However, the costs shifted under Israeli law and practice consist only of a small portion of the actual litigation costs borne by the winning party.[39] Moreover, on the benefit side, whereas class representatives' incentive fees in American class actions are nominal, in Israel the representative is awarded 20-25% of the representing attorney fee.[40] Thus, a simple comparison of the costs and benefits of being appointed to represent the class in Israel and in the U.S. does not indicate that doing so in the U.S. is significantly more profitable.

It may be surmised that in cases where the institutional investor's holdings in the American market are higher its expected compensation is also more significant. Yet this too cannot explain the institutional investor's inclination to serve as class representative. Representation in the U.S. might still be costly, especially for an

36 An exception to this general observation are the following class actions in which Israeli institutional investors took an active role: CA (DC Hi) 1318/99 Psagot Securities Ltd. v. Elscint Ltd., Nevo Legal Database (Mar., 15, 2018) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-99-1318-499.htm ; CA (DC TA) 22874-05-14 Psagot Securities Ltd. v. D.B.S. Investments Ltd., Class Action Registry (Apr. 5, 2017) (Isr.), https://www.court.gov.il/NGCS.Web.Site/HomePage.aspx; CA (DC CT) 14144-05-09 Harel Pia Mutual Funds v. Landmark Group Ltd., Nevo Legal Database (Sep. 5, 2017) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-09-05-14144-166.htm.

37 Alon Klement & Robert Klonoff, *Class Actions in the United States and Israel: A Comparative Approach*, 19 Theoretical Inquiries L. 151, 188-89 (2018); *see* Israeli Civil Procedure Regulations, 5744-1984, § 511-512 SH No. 4685, p. 2210, 2220 (Isr.); Theodore Eisenberg, Talia Fisher, Issi Rosen-Zvi et al., *Attorneys' Fees in a Loser-Pays System*, 162 U. Pa. L. Rev. 1619, 1631-35 (2014).

38 Klement & Klonoff, *supra* note 37, at 168-70; 7 William B. Rubenstein et al., Newberg on Class Actions §§ 22:60, 22:61 (5th ed. 2011); Fed. R. Civ. P. 23(h).

39 Klement & Klonoff, *supra* note 37, at 188-89, 194-95; Alon Klement, Keren Weinshall-Margel et al., *Cost-Benefit Analysis of Class Actions: An Israeli Perspective*, 172 Inst. & Theoretical Econ. 75, 100 (2016).

40 *Id.* at 98-100; Klement & Klonoff, *supra* note 37, at 194-95. Additionally, *compare* § 22, Class Action Law, 5776-2016, § 22 SH No. 2054 p. 264, 275 (Isr.), *with* Rubenstein et al., *supra* note 38, at § 22:61, *and* Fed. R. Civ. P. 23(h).

Israeli investor, and the expected compensation is not supposed to be higher than if the investor were merely represented as a class member.[41]

An alternative explanation is that due to the small size of the Israeli market, institutional investors are reluctant to sue Israeli defendants, with whom they wish to maintain good business relationships. Institutional investors are often insurance companies and pension funds, and filing a class action in Israel might adversely affect not only their relationships with the defendant but also with the entire local financial market. Nonetheless, it is far from obvious why suing the same defendant in the U.S. would not carry similar implications. It may be the case that the defendants sued in the U.S. class actions in which the institutional investor represents the class were not ones that could impact its business reputation in Israel. But then, again, if that is the case then suing the same defendant in Israel should inflict no reputational damage on the institutional investor, just the same.

Thus, institutional investors' different approach to representing class members in Israel and in the U.S. may result from the different costs and benefits of doing so in each of the jurisdictions. However, there is no clear indication that such a difference exists, nor that it is sufficiently significant to justify representation in the U.S. but not in Israel.

An alternative explanation for the Israeli institutional investors' willingness to serve as representative plaintiffs relates to portfolio monitoring agreements they have with American class action attorneys. Under these agreements, the class action attorney firm monitors the institutional investor's investments and identifies class action settlements in which it may have claims. The firm advises the investor of any settlement in which it may be eligible to participate, and provides assistance for timely filing of its claims. In addition, the attorney looks for irregularities that may suggest possible grounds for litigation. If the investor decides to commence litigation, then the firm that did the monitoring is retained to represent it. These services are often provided free of charge, or for a small fee. [42]

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41 It should be noted, though, that controlling the class action may provide the investor with an opportunity to structure the settlement for its own benefit. For example, if the settlement class is comprised of subclasses, the investor can influence the settlement in favor of the subclass he is part of. These tradeoffs are not always rejected by the court reviewing the settlement agreement, *see* Morris A. Ratner, *Class Conflicts*, 92 Wash. L. Rev. 785, 838-39 (2017). Further, the investor can influence the characteristics of the settlement according to his own preferences (e.g., the timeframe for the allocation of settlement funds; the nature of compensation etc.), *see* Dewey v. Volkswagen Aktiengesellschaft, 681 F. 3d 170, 186-7 (3d. Cir. 2012). In addition, see Bruce A. Green & Andrew Kent, *May Class Counsel Also Represent Lead Plaintiffs?*, 72 Fla. L. Rev. 1083, 1101-6, 1111-13 (2020), for a discussion regarding the investor's ability to influence the settlement and its structure via holdouts.

42 *See* William B. Rubenstein, *What We Now Know About How Lead Plaintiffs Select Lead Counsel (And Hence Who Gets Attorneys Fees!) in Securities Cases*, 3 Class Action Att'y Fee Dig. 219 (2009). Further, for example, on the website of Pomerantz LLP, a leading class action law firm, the following description of PomTrack, its proprietary portfolio monitoring service, appears: "PomTrack®, the Firm's proprietary, state-of-the-art portfolio monitoring service, monitors a fund's investments and cross-references trading data to identify securities class action claims and settlements. PomTrack® alerts fiduciaries when assets they oversee suffer significant loss due to financial misconduct, allowing them to make informed, timely decisions on how best to maximize a recovery. Pomerantz monitors the portfolios of some of the most influential institutional investors worldwide, monitoring assets in excess

Class action lawyers are interested in being appointed to represent the class in U.S. courts, since the Private Securities Litigation Reform Act (PSLRA) mandates that the class member holding the largest financial interest is presumptively the most adequate to be appointed lead plaintiff. Israeli institutional investors are, therefore, potential candidates, where dual-listed companies are concerned.[43] Hence, lawyers provide free portfolio monitoring services to Israeli institutional investors, and in return expect to be hired to represent them in motions to serve as lead plaintiffs in class actions identified and filed by the lawyers, in which the institutional investors hold sufficient stakes.

Thus, the understanding between the Israeli institutional investor and the class action attorney firm is that the firm provides monitoring services and in return the investor agrees to serve as a lead plaintiff in class actions filed by the firm. This arrangement induces institutional investors to apply for the lead plaintiff role in U.S. securities class actions. The absence of this inducement in Israel (possibly in addition to other considerations elucidated above) explains Israeli institutional investors' refrainment from filing class actions in Israel.

B. American courts assume supplemental jurisdiction over Israeli-traded shares

Morrison v. National Australia Bank LTD, decided in 2010,[44] has limited the extraterritorial application of American Securities Exchange Act. In *Morrison*, class action complaints were filed against National Australia Bank and others for making fraudulent and manipulative statements regarding the value of its U.S. subsidiary HomeSide on its public documents from the time of its purchase onwards. These

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of $5.6 trillion, and growing. Spearheaded by Partner and Head of Client Services, Jennifer Pafiti, the PomTrack® team comprises attorneys, forensic economists, damages analysts and paralegals, as well as a dedicated team of a senior and junior support staff. Pomerantz offers an optional claims filing service to ensure the timely filing of eligible claims. For a small fee, this additional service is available as an add-on to the complimentary portfolio monitoring service." Previously, the text read: "Investment plan fiduciaries have a duty to preserve and protect the beneficiaries pension plan investments. In this regard, it is imperative that they understand and make informed decisions concerning potential legal claims that the institution may have and participate in settlements from which the institution may be eligible to receive monies. In order to assist our clients in fulfilling these responsibilities, Pomerantz has developed a proprietary portfolio monitoring system called PomTrack®. This system enables us to quickly identify fund losses that may have been caused by financial misconduct and is the first step in our in-depth case evaluation process. PomTrack® tracks and evaluates securities class action settlements in which our clients may have claims. Through monthly, personalized reports, we advise clients of every settlement in which they might be eligible to participate, and the important deadlines for filing proofs of claims." In another page on the Pomerantz website, the following statement was made: "Note: Pomerantz provides a no-cost portfolio monitoring service whereby clients receive monthly, personalized reports quantifying losses in new actions relating to the U.S. and worldwide, providing legal advice in respect of those losses and highlighting upcoming claims filing deadlines for settled securities class actions in which the fund is eligible to participate. For more information, please contact the author of this article at: jpafiti@pomlaw.com."

43 The Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 (2016), empowers the Lead Plaintiff (subject to the court's approval) to choose the class action's representative attorney. For literature describing the portfolio monitoring tactic, see Drew T. Johnson-Skinner, *Paying-to-Play in Securities Class Actions: A Look at Lawyers' Campaign Contributions*, 84 N.Y.U. L. Rev. 1725, 1754-55 (2009).

44 Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010).

statements allegedly caused the bank's ordinary shares and American Depositary Receipts (ADR) prices to plummet when the bank announced two subsequent writedowns of HomeSide's value over two years after its purchase.[45] The consolidated class action complaint was filed in the name of a class comprised of both foreign purchasers of the bank's ordinary shares—which were not available for direct purchase on the NYSE—and domestic purchasers of the bank's ADRs during the relevant time period.

Before reaching the Supreme Court, the class action was litigated before the Southern District of New York (SDNY) and the Court of Appeals for the Second Circuit. The SDNY court dismissed the Australian plaintiffs' claims due to lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), and the Court of Appeals for the Second Circuit has affirmed on similar grounds.[46]

On appeal, the U.S. Supreme Court held that Section 10(b) of the Securities Exchange Act of 1934 (and consequently also Rule 10b-5) has no extraterritorial application. It held that the Exchange Act applies only if the purchase or sale of the security was made in the U.S., or if the lawsuit involves a security listed on an American exchange.[47]

Although the Supreme Court held that this was not a question of subject matter jurisdiction,[48] its holding had significant implications for federal courts' jurisdiction over foreign traded securities. The federal district court's original subject matter jurisdiction in securities law claims may be based on one of three grounds: federal question jurisdiction, diversity jurisdiction, or supplemental jurisdiction.[49] Following *Morrison*, the cause of action with respect to foreign securities transactions is based on foreign securities law rather than the Exchange Act. Therefore, district courts have no federal question jurisdiction. Furthermore, under the requirement of complete diversity, jurisdiction cannot be established if both the representative plaintiff and the defendant are foreign.[50]

Thus, the remaining basis for establishing subject matter jurisdiction over foreign traded securities is supplemental jurisdiction. Supplemental jurisdiction is established under 28 USC § 1367. According to § 1367(a):

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

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45 *Id.* at 253 (the claims were made pursuant to §§ 10(b) and 20(a) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C §§ 78j(b), and SEC Rule 10b–5, 17 CFT §240.10b-5 (2009), promulgated pursuant to § 10(b)).

46 Due to this analysis and the aforementioned characteristics of the bank's shares, the class action was dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Id.* at 251-54.

47 *Id.* at 267-70.

48 *Id.* at 254.

49 For a discussion of federal question jurisdiction, see Charles A. Wright et al., Federal Practice and Procedure—Jurisdiction and Related Matters 13D § 3561 (3d ed. 2008, Apr. 2021 Update).

50 Hannah L. Buxbaum, *Remedies for Foreign Investors Under U.S. Federal Securities Law*, 75 Law & Contemp. Probs. 161, 176-77 (2012).

According to § 1367(a) the court may decline, however, to exercise supplemental jurisdiction if it finds that either:[51]

> (1) the claim raises a novel or complex issue of State law
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Even if the court finds that it has supplemental jurisdiction, it may dismiss the claim for reasons of *forum non conveniens*.[52] Following *Morrison*, U.S. courts have refrained from exercising supplemental jurisdiction with respect to foreign-listed stock that have not been traded in the U.S.[53]

This approach, however, has not been consistently applied where the securities were registered on the Israeli TASE. The following paragraphs describe what seems to be a shift in U.S. district courts' approach to including Israeli-traded securities in American class actions. A review of the courts' reasoning, initially for declining to apply supplemental jurisdiction, and later for holding it possible, indicates that this shift has been motivated by the application of American securities law in Israeli class actions, by the Israeli courts.

In the matter of *Verifone Holdings*,[54] decided in 2014, the court held that it is unclear whether *Morrison* applies where a foreign investor purchases on a foreign exchange a security that is listed both on the foreign and an American exchange. However, the court considered the question regarding application of U.S. law to be moot, since none of the parties before it sought to exclude Israeli investors from the settlement class.[55] In *Clal Finance Batucha v. Perrigo* (*Perrigo 1*),[56] decided in 2011, the court dismissed the claims of the named plaintiffs who purchased their shares on the TASE, based on *Morrison*. In the case of *Mylan*,[57] decided in 2018, the court decided not to apply supplemental jurisdiction over Israeli investors, finding that the claim raised novel or complex issues of foreign Israeli law, since by that time it was not yet clear how Israeli courts would interpret the dual-listing arrangement in

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51 For analysis of these factors, see Wright et al., *supra* note 49, at § 3567.3; Supplemental Jurisdiction, 28 U.S.C. § 1367(c) (1994).

52 *Id*. at 180-81.

53 In re BP p.l.c. Sec. Litig., 843 F. Supp. 2d 712 (S.D. Tex. 2012); in re Toyota Motor Corp. Sec. Litig., No. CV 10-922 DSF (AJWX), 2011 WL 2675395 (C.D. Cal. July 7, 2011); in re Alstom SA Sec. Litig., 741 F. Supp. 2d 469 (S.D.N.Y. 2010); Stoyas v. Toshiba Corp., 191 F. Supp. 3d 1080 (C.D. Cal. 2016), *rev'd on other grounds*, 896 F. 3d 933 (9. Cir. 2018); Sodhi v. Gentium S.p.A., No. 14-CV-287 JPO, 2015 WL 273724 (S.D.N.Y. Jan. 22, 2015).

54 In re VeriFone Holdings, Inc. Sec. Litig., No. C-07-6140 EMC, 2014 WL 12646027 (N.D. Cal. Feb. 18, 2014) (*in re VeriFone*).

55 In re VeriFone at 3.

56 Clal Finance Batucha v. Perrigo, 2011 WL 5331648 (S.D.N.Y. Sept. 28, 2011), *sub nom*. Harel Insurance, LTD. v. Perrigo Company, No. 09-CV-02255-LGS Securities Class Action Clearinghouse (S.D.N.Y Jan. 28, 2013).

57 In re Mylan N.V. Sec. Litig., 2018 WL 1595985, at *19-20 (S.D.N.Y. Mar. 28, 2018).

the Securities Law.[58] The court went further to hold that it would decline to apply supplemental jurisdiction also because

> Israeli courts are better equipped than this Court to offer Israeli plaintiffs an appropriate forum to litigate their claims under Israeli law . . . In the interests of international comity, this Court hesitates to impinge on Israeli courts' ability to adjudicate the claims of their own citizens under their own securities laws—even if Israel has chosen, as a matter of Israeli law, to apply U.S. securities law . . . . On the other side of the ledger, the United States has only a minimal interest, if any, in providing a forum to litigate the claims of foreign stockholders under foreign securities laws . . . . And, finally, declining jurisdiction over the Israeli Plaintiffs avoids the risk of exposing Defendants to inconsistent or double liability.[59]

Nevertheless, the court later certified the class action and appointed Israeli institutional investors as representative plaintiffs.[60]

However, more recent decisions issued in securities class actions filed against Israeli U.S. dual-listed companies have taken an expansive approach to supplemental jurisdiction. In *Roofer's Pension Fund v. Papa* the court stated in a footnote that it would not refuse to exercise such jurisdiction over the Israeli law claim.[61] In a subsequent decision the court has certified a class action in the name of both American and Israeli investors.[62] In *Mas Costas v. Ormat Technologies* the court stated that the parties agreed that Israeli law applies U.S. securities law to determine liability and therefore claims under Israeli law may proceed as their resolution depends on the resolution of the American securities law claims.[63] The court later certified a settlement including shares traded on both the NYSE and the TASE.[64]

Most significantly, in *In re Teva Securities Litigation*[65] the court conducted a thorough investigation of the various factors enumerated in 28 USC § 1367(a), with respect to claims relating to shares traded on the TASE. The court held that these claims did not raise a novel or complex issue of State law, as required by § 1367(a)(1). It held that "it is settled as a matter of Israeli law that U.S. securities law establishes civil liability" under the Israel Securities Law, and that "the only potential complexities do not arise from existing evidence but instead regard speculations about what Israeli courts or the *Knesset* might say or do in the future."[66] The court

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58 Thus, applying Judiciary and Judicial Procedure; Supplemental Jurisdiction, 28 U.S.C. § 1367(c)(1) (1994). *Id*.

59 Applying *id*. at § 1367(c)(4).

60 In re Mylan N.V. Sec. Litig. No. 16-CV-7926 (JPO), 2020 WL 1673811 (S.D.N.Y. Apr. 6, 2020).

61 Roofer's Pension Fund v. Papa, No. CV 16-2805, 2018 WL 3601229, at *24 n.24 (D.N.J. July 27, 2018).

62 Roofer's Pension Fund v. Papa 333 F.R.D. 66 (D.N.J. 2019) (*Perrigo 2*).

63 Costas v. Ormat Tech. Inc., No. 18-CV-00271-RCJ-WGC Securities Class Action Clearinghouse at 2, 17 (D. Nev. Dec. 6, 2019).

64 For the order granting preliminary settlement approval, see Costas v. Ormat Tech. Inc., No. 18-CV-00271-RCJ-WGC Securities Class Action Clearinghouse (D. Nev. March 9, 2020); for the order granting final settlement approval, see Costas v. Ormat Tech. Inc., No. 18-CV-00271-RCJ-WGC Securities Class Action Clearinghouse (D. Nev. Jan. 21, 2021).

65 In re Teva Sec. Litig., 512 F. Supp. 3d 321 (D. Conn. 2021), reconsideration denied, No. 3:17-CV-558 (SRU), 2021 WL 1197805 (D. Conn. Mar. 30, 2021) (*in re Teva*).

66 *Id*. at 24.

further found no "exceptional circumstances" or "compelling reasons" that favor declining supplemental jurisdiction over these claims, according to § 1367(a)(4). The court based this finding on its view that the record before it did not identify any potential idiosyncrasies of Israeli law that might result in differences between how an Israeli court and an American court would decide the same case. This includes differences in questions relating to what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, and what attorney's fees are recoverable.[67] The court also decided not to dismiss these claims based on *forum non conveniens*, since they mirror the federal securities law claims, and hence are better litigated in one place, all at once. In considering the issue of comity, whether as part of the public-interest factors under *forum non conveniens* analysis or under the examination of "exceptional circumstances" in § 1367(a)(4), the court found that following the approach of the ISA and the Israeli courts' treatment of parallel litigation "there are reasons to believe that exercising jurisdiction will *improve* comity between the United States and Israel."[68]

Review of the above decisions indicates that the recent expansive approach to supplemental jurisdiction and the court's reluctance to dismiss the Israeli investors' claims was based on the understanding that Israeli courts would apply American securities law in Israeli class actions. The decisions by the Tel Aviv district court eased the concern that novel or complex issues of substantive law would arise, or that comity considerations would be implicated if U.S. district courts seize jurisdiction over Israeli claims. Once it became clear that Israeli courts would apply American law in class actions against dual-listed companies, these concerns carried much less weight, and American courts could apply supplemental jurisdiction to the Israeli-traded stock.

The recent decision by the Tel Aviv district court in *Ceragon* may reverse the current trend toward recognizing supplemental jurisdiction over Israeli-American dual-listed companies. In the face of the contradictory decisions on the applicable law, U.S. courts may return to the *Mylan* approach and decline to apply their jurisdiction to these cases. Whether that is indeed the outcome of *Ceragon* is yet to be seen.

IV. How Representation of Israeli Investors in American Class Actions Undermines their Interests

The analysis in Part I suggested that a jurisdiction wishing to attract foreign firms to list on its local exchange yet protect its local investors' interests should incorporate the foreign liability law, yet maintain jurisdiction in local courts. Parts II and III demonstrated how this strategy was frustrated in the case of Israeli-American dual-listed firms, by the capture of Israeli investors' claims in American class actions.

67 *Id.* at 24-25.
68 *Id.* at 25-26.

In this Part, I demonstrate how this outcome might undermine Israeli investors' interests. I first show why competition between class action lawyers in the two jurisdictions would result in reducing Israeli investors' expected settlement payoff. I then explain why the expected payoff to Israeli investors is lower in the U.S. as compared to Israel, even absent competition between class action lawyers. It follows that Israeli investors would prefer to be represented only in one jurisdiction, and between American and Israeli class actions, they would prefer the latter, even if the same liability law applies in both.

A. The structural implications of representation in both jurisdictions

I first show that the potential for representing Israeli investors both in Israeli and in American class actions creates competition between class action lawyers in both forums. Such competition is detrimental to the Israeli class members since the defendant may utilize it for its own interests—through some type of what has been termed in the literature a reverse auction.[69]

In a reverse auction, the competition drives lawyers in both forums to 'sell' the class for a minimum settlement value. A lawyer in the U.S. must conclude a settlement representing Israeli plaintiffs, before the lawyers in Israel settle in their name. Similar considerations impact lawyers in Israel. Clearly, the defendant would settle with the lawyer who will 'sell' the Israeli class for the lowest amount. Importantly, none of the lawyers can decline to settle and pose a threat of litigation, because the defendant can always approach the other lawyer, settle with her, and preempt any litigation in the other jurisdiction. Hence, such competition may drive the settlement in each jurisdiction below the litigation value.

Notably, even if the threat of litigation and the expected liability in one jurisdiction is higher, class action lawyers in that jurisdiction would be motivated to settle the case for a lower value. In fact, lawyers in both jurisdictions would be driven into settling the case for values below the lower of the class's expected litigation payoff in both jurisdictions, because if they do not settle it, they might be left with no payoff.

To give a simple example, suppose that the expected payoff to the class in the U.S. is 100, and in Israel it is 80. Suppose also that lawyers in both jurisdictions earn 10% over the expected class litigation payoff, and that their investment in litigation and settlement is the same.[70] If lawyers in Israel did not face competition from American class actions, they would not settle for less than 80, since this is the amount they expect in litigation, of which they can earn 8. However, facing competition, they would nevertheless agree to settle for a lower amount, because the defendant can always settle with the American lawyers, leaving the Israeli lawyers with no payoff.

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69 For a discussion of reverse auctions in general, see John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 95, 1343-465 (1995). In the context of jurisdiction rules in private international law, see Klerman, *Rethinking Personal Jurisdiction*, *supra* note 2, at 289-94.

70 This assumption is only made to demonstrate the effects of the reverse auction. In fact, lawyers' investment and risk are much higher in litigation than in settlement. Hence, their incentives to settle below the expected litigation value are even more intensive.

American lawyers would also have an incentive to settle the case for less than 80, because the defendant can threaten to settle in Israel, leaving the American lawyers with no remuneration. Thus, competition between class actions in both jurisdictions pushes the settlement value in both, below the minimum litigation value, 80.

The reverse auction thus undermines the ability of the Israeli courts to maintain the preferred level of protection for local investors. As explained in Part I, absent class actions, such protection can be provided by a combination of constraints on choice of law and insistence on local jurisdiction. Class actions, however, produce competition that creates an ex-post race to the bottom, serving the interests of the defendant dual-listed firm but not those of the represented claimants.

Since American class members are represented only in the American class action, the American attorneys are not subject to competitive pressures regarding them, and they would decline to settle their claims below their litigation value. The question, then, is how the combination of exclusive representation of the American class with competition over the Israeli class affects the settlement dynamics in both forums. The answer depends on the relative share of each class in the overall value of the class action. The higher the share of the American class, the less the American lawyers would be inclined to compete over the Israeli class, if such competition might undermine their claims regarding American class members. If the settlement proceeds to each class member must be the same, irrespective of whether she is American or Israeli, American class action lawyers may not want to dilute their payoff over the American class, due to competition over the Israeli class.

Suppose, for example, that there are 100 class members, of which 90 are American, and the expected litigation payoff to each class member in the U.S. is 10. American lawyers would prefer to settle only the American claims, for 10 per class member, totaling 900, over settling all claims for any amount lower than 9 per class member. The higher the share of the American class, the higher the minimum settlement amount American lawyers would agree to accept.

Even in such a case, however, the defendant would still be able to choose whether to settle the Israeli class members' claims in Israel or in the U.S. It would choose the jurisdiction in which its settlement payment would be lower. Thus, the Israeli class would not gain from the higher expected litigation value and the minimum value constraint on settlement in the U.S.

The response might seem to litigate Israeli investors' claims only in one forum. Since the American claims are litigated in the U.S., it would seem that there are efficiency gains from litigating the claims of Israeli class members there as well. However, as I next show, Israeli class members expect lower compensation in the U.S., as compared to Israel, if their claims are combined with those of American investors. The next section demonstrates that this is a direct consequence of the different realization rates of settlement proceeds in Israel and in the U.S.

B. Divergent interests between Israeli and American class members

As I explain below, there are reasons to suspect that the interests of Israeli class members diverge from those of American class members. A unique feature of Israeli law results in different realization rates of class members in securities class action judgments or settlements, as compared to the U.S. In Israel, the Tel Aviv District Court, the economics division, has held that where a settlement is approved, it is automatically distributed to all class members through members of the TASE who have made the transactions for these class members.[71] The court issues an order to all TASE members instructing them to report to a special settlement trustee all the transactions and holdings of class members who are their clients, in the time period relevant to the litigation and settlement. The trustee then calculates the exact entitlements of each of these class members, and transfers the sum to the TASE member, who then pays them to its clients, the class members. This distribution mechanism establishes a realization rate of more than 99% for class members in Israeli securities class action settlements.[72]

By comparison, in the U.S. there is no similar mechanism. Settlement amounts are distributed through claims administrators, who are unable to directly notify all class members about their rights. Hence, the class action administrators send notice of the settlement to banks and brokers, who are then supposed to pass them along to their investor clients. Every client who gets the notice must then complete a claim form and send it to the claims administrator. Only if these conditions are all satisfied will the investor be awarded his share of the settlement proceeds. As it turns out, the rate of claim filing for retail investors is probably not higher than one third.[73]

The realization rate by Israeli class members in U.S. class actions is probably even lower than the respective rates for American investors. Israeli investors are less likely to be informed of the American settlement, and even if they are aware of it,

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71 CA (DC for Economic Affairs TA) 4700-02-10 Yitzchak Shabtai v. Pama Investment & Properties, Nevo Legal Database (Aug. 1, 2013) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-10-01-4425-373.htm.

72 This statistic was obtained through conversations with the representative attorneys in the settlements reached in CA (DC CT) 7554-11-13 Dror Cohen v. Eyal Zion Zabida, Nevo Legal Database (Dec. 24, 2017) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-13-11-7554-741.htm; CA (DC CT) 14144-05-09 Harel Pia Mutual Funds Ltd. v. Landmark Group Ltd, Nevo Legal Database (Sep. 5, 2017) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-09-05-14144-421.htm; CA (DC for Economic Affairs TA) 47490-09-13 Public Benefit v. Clal Industries Ltd., Nevo Legal Database (Aug. 6, 2015) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-13-09-47490-388.htm; CA (DC for Economic Affairs TA) 5837-09-17 Moshe Hiatt v. Shikun & Binui, Nevo Legal Database (May 29, 2019) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-17-09-5837-544.htm; CA (DC for Economic Affairs TA) Eliyahu Shichur v. Negev Ceramics Ltd., Nevo Legal Database (May 29, 2019) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-17-09-5837-544.htm; CA (DC for Economic Affairs TA) 2484-09-12 Hatzlaha v. Cohen, Nevo Legal Database (Jun. 30, 2019) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-12-09-2484-858.htm. In all the aforementioned cases, the undistributed remainder of the settlement funds was donated or transferred to the Israeli Class Action Public Fund.

73 James D. Cox & Randall S. Thomas, *Letting Billions Slip through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 Stan. L. Rev. 411, 419-21 (2005); Jessica Erickson, *Automating Securities Class Action Settlements*, 72 Van. L. Rev. 1817, 1826-27 (2019).

submitting claims in the U.S., in English, often proves difficult. Indeed, anecdotal evidence from the American *Verifone Holding* case suggests that about 12% of Israeli class members have filed claims and participated in the settlement award, as compared to a much higher participation rate among American investors.[74]

The difference in settlement realization rates between Israeli and American class actions produces a significant divergence of interests between the two respective subclasses. Where the entire class settlement is distributed among all class members who have filed claims with the administrator, one subclass benefits if the percentage of filing among members of the other subclass is lower. Since realization rates in Israeli class actions are about 100%, if the total amount is distributed among all class members who file claims, irrespective of whether they filed their claims in Israel or in the U.S., then the Israeli distribution mechanism would result in a larger overall share of distribution to the Israeli subclass, as compared to the American subclass. Although each class member, whether Israeli or American, gets equal compensation, the expected total payoff to each subclass is different.

To give a simple example, suppose that a $60 settlement is supposed to be distributed between 100 American and 100 Israeli class members. Suppose also that the rate of realization for Israeli and American class members in American class actions is 30%. In each of the two subclasses—American and Israeli—there would then be 30 class members who realize their right to compensation. Each of them would be awarded $1, totaling $30 for each subclass. The share of both subclasses in the total award would therefore be equal to 50%.

Now suppose, instead, that the realization rates among Israelis is only 10%. There would then be 10 Israel class members and 30 American class members who realize their rights. Dividing $60 among these 40 class members (awarding each class member $1.5) leads to the distribution of $15 to the Israelis, and $45 to the Americans. Thus, the share of the American class members increases to 75% of the total award.

On the other hand, if the Israeli distribution mechanism is applied for Israeli class members, then even if this results in realization rates of 90%, it implies that there are 90 Israeli class members and 30 American class members who would realize their rights. This would imply (if each class member is awarded $0.5) that Israeli class members would be awarded $45, whereas Americans would be awarded only $15. Hence, in this case, the share of the American class members is only 25% of the total award.

Notably, the lower the share of the Israeli class members' holdings, and consequently their entitlements in the total settlement, the greater is their interest, as a class, in being subject to the Israeli distribution mechanism. If, in the previous example, there were only 10 Israeli class members and 90 Americans, then under equal realization

74 The statistic for Israeli participation in In re VeriFone Holdings, Inc. Sec. Litig., No. C-07-6140 EMC, 2014 WL 12646027 (N.D. Cal. Feb. 18, 2014) was provided by the plaintiff' attorney in one of the parallel Israeli class actions. *See* Pl.'s answer to Def.'s am. answer to Pl's. class action compl. in CA (DC CT) 22300-05-15 Hayat v. Verifone Holdings, Inc. ¶ 6 (Nov. 1, 2016) (Isr.) (unpublished, on file with author) (*Hayat v. Verifone*).

rates of 30%, the Israeli investors would be awarded $6 of the total settlement. If Israeli class members' realization rate drops to 10%, then they would be awarded only $2.16—only 36% of their share under equal realization rates.[75] On the other hand, if their realization rate is 90%, then they would be awarded $15, 2.5 times their share under equal realization rates.[76]

Thus, whereas Israeli class members, as a class, prefer that their case be litigated in Israel, or at least that its proceeds be distributed according to the Israeli mechanism, American class members have an interest that Israelis be subject to the American filing and distribution mechanism. This creates a divergence of interests between the two subclasses.[77]

One possible way to address the realization rate differential between Israel and the U.S. is to allocate the total settlement amount between the two subclasses, according to their relative total share of the potential compensation. This allocation plan seems to have been implemented in the *Ormat* settlement.[78] Yet the implementation of this allocation plan in a single settlement in the U.S. is questionable, from a U.S. law perspective. The outcome of such a settlement, given the different realization rates in Israel and in the U.S., is that class members in the same class action are awarded different compensation for the same loss. The total loss of Israeli class members is allocated among all of them, following a realization rate of almost 100%, whereas the total loss of American class members is divided among a lower percentage of class members who have successfully filed claim forms with the settlement administrators. Hence, the per share compensation for Israeli class members would be lower than the respective compensation for American class members.

Furthermore, although this outcome seems to replicate the expected settlements if the class actions were separately litigated in Israel and in the U.S., there are reasons to suspect that the outcome in separate litigation would actually be different, even if the same law is applied in both courts. A settlement in a class action, as in any other litigation, is bargained against the shadow of the expected litigation outcome. A final judgment, however, is inherently different than a settlement, in that it

75 Of the $60 total, Israeli class members would be entitled to (0.1*0.1)/((0.1*0.1)+(0.9*0.3))=0.01/0.28 =0.036.

76 Of the $60 total, Israeli class members would be entitled to (0.1*0.9)/((0.1*0.9)+(0.9*0.3))=0.09/0.36 =0.25.

77 For an analysis of the possible sources of divergence of interests among class members in class actions, and the impact of the Supreme Court's decisions in Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997); and Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), see Ratner, *supra* note 41.

78 This allocation plan seems to have been implemented in Costas v. Ormat Tech. Inc., No. 18-CV-00271-RCJ-WGC Securities Class Action (D. Nev. Jan. 21, 2021). Following an order issued by the U.S. court, preliminarily approving a stipulated settlement including both American- and Israeli-traded shares, the Israeli class attorney filed a motion for an anti-suit injunction against the institutional (Israeli) lead plaintiff, Phoenix insurance company, claiming that its representation of Israeli class members in the U.S. significantly undermines their interests. Based on my correspondence with the Israeli plaintiff lawyer and the Israeli mediator, following mediation in Israel, the American and Israeli lawyers agreed that the settlement amount would be divided into two sums—for the Israeli class members and for the American class members. However, the formal record does not include any indication that this scheme was indeed implemented. I should note that an expert opinion I wrote was filed by the class action attorney, in support of his motion for an anti-suit injunction.

would determine the per-share entitlement, and leave the total compensation to be determined according to the realization rate at the execution stage. Unlike in settlement, pro-rata distribution among class members who have submitted proofs of claims would be unacceptable.[79] Therefore, the higher the realization rate, the higher the expected total payment by the defendant.

To give a simple example, if there are 100 shares, and each of them entitles its holder to a $1 compensation, then the total liability expected by the defendant would equal $100 multiplied by the realization rate. If the realization rate in the U.S. is 30%, then the defendant's expected liability would be $30, whereas if in Israel the realization rate is 100%, then the defendant's expected liability would be $100. Hence, the realization rate determines the expected total liability if the case is litigated to judgment. It follows that defendants facing a higher realization rate would agree to settle for a higher total amount, even if the number of eligible shares and the per-share compensation in judgment is the same.

Hence, dividing a settlement between American and Israeli subclasses according to the number of eligible shares in each subclass does not replicate the separate litigation scenario. It not only awards Israeli class members a lower per-share compensation than American class members, but it also awards the Israeli class a lower total compensation as compared to the amount it could expect if the litigation were conducted in Israel.

Finally, the total settlement could be allocated among all class members, by applying the American distribution mechanism to U.S.-traded shares, and the Israeli automatic distribution mechanism to Israeli-traded shares. This, however, would result in a higher total compensation to the Israel subclass as a whole, due to its higher realization rate. If this were acceptable to American shareholders, and approved by American courts, then indeed the problem of Israeli class members would be resolved. The divergence of interests between the two subclasses would still be manifested, yet it would adversely impact the American subclass, instead of the Israeli subclass.

Thus, no matter how the settlement proceeds are allocated among Israeli and American class members, the interests of the two subclasses diverge, given the difference in realization rates in the two jurisdictions. Higher compensation to one subclass might come at the cost of lower compensation to the other.

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79 Class members' compensation in litigation may not be larger than their actual loss. *See* Van Gemert v. Boeing Co., 553 F.2d 812 (2d Cir. 1977). The Van Gemert decision was embraced by subsequent cases, *see* Hayes v. Arthur Young & Co., 1994 U.S. App. LEXIS 23608; Weinberger v. UOP, Inc; 1989 Del. Ch. LEXIS 21. While some citing of the judgement over the years has implied otherwise, see Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990); Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992 (E.D.N.Y. 2006), rev'd sub nom. McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008)), the mechanism was not implemented. However, in settlement it is common to redistribute unclaimed funds, as the per-share settlement amount is much lower than the total loss anyhow. *See* Beecher v. Able, 575 F.2d 1010 (2d Cir. 1978); Weber v. Goodman, No. CV-97-1376(CPS), 1998 WL 1807355 (E.D.N.Y. June 1, 1998); American Law Institute, Principles Of The Law Of Aggregate Litigation § 3.07 (2010).

Since neither Israeli nor American class members are parties to the class action (although they are represented in it), their divergent interests become problematic if their representatives in the class action—American lawyers and Israeli institutional investors—do not adequately represent them. Portfolio monitoring agreements, coupled with American law firms' inability to file and represent in Israel, indeed raise such concerns.[80]

Portfolio monitoring agreements guarantee the institutional investor high realization rates in any class action settlement that entitles it to compensation. Therefore, the institutional investor does not share other Israeli class members' preference for distribution in Israel.[81] Like any other class member who realizes his right to compensation, their interest is in reducing the overall number of eligible class members, thus increasing their share of the settlement. Hence, if Israeli class members' realization rate is low, this may only increase the institutional investor's share.

As for the lawyer, he is using the Israeli institutional investor to win the race to represent an *American* class in an *American* class action. By entering monitoring agreements with Israeli institutional investors, American lawyers are mainly interested in inducing these investors to be appointed lead plaintiffs, in cases where their holdings are sufficiently large to allow the lawyers to seize control over the class action. These investors are the lawyers' ticket to representation of *American* class members, and the interests of Israeli class members are of no particular significance to them. They may seek representation of Israeli class members if the Israeli institutional investor holds Israeli shares—possibly in addition to American shares—but their main goal is to represent American class members, who often hold the majority of the stock represented in the class action. Since Israeli class actions promise no potential gain for American law firms, which operate in the American class action market only, those firms would always prefer to represent all class members, Israeli and American, in the U.S., even if this would reduce Israeli class members' expected payoff.

Thus, whether Israeli class members' share of the total recovery is low or high, representation by American class attorneys might prove problematic. The attorney's focus is on an American class action, and the alternative of suing in Israel is by and large unavailable to him. His representation of the Israeli class, by inducing Israeli

80 American courts have expressed some concern over the practice of portfolio monitoring agreements. *See, e.g.*, in Iron Workers Local No. 25 Pension Fund v. Credit-Based Asset Servicing and Securitization, LLC, F. Supp. 2d 461, 462 (S.D.N.Y. 2009), the court held that this practice "fosters the very tendencies toward lawyer-driven litigation that the PSLRA was designed to curtail." The concern, therefore, has been that lawyers would file frivolous lawsuits and control their litigation and settlement decisions, without being effectively supervised by the class representatives. *See* Rubenstein, *supra* note 42.

81 In addition, the institutional investor holds the option of litigating its claims individually. *See, e.g.*, *in re Teva*, *supra* note 65; Sec. Litig., 512 F. Supp. 3d 321 at 27 n.4 (D. Conn. 2021), reconsideration denied, No. 3:17-CV-558 (SRU), 2021 WL 1197805 (D. Conn. Mar. 30, 2021). Realistically, this option is not available for ordinary class members, and this, too, distinguishes their interests from their representatives in the U.S. For a discussion regarding this phenomenon and its implications (for non-institutional plaintiffs), see John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why Exit Works Better Than Voice*, 30 Cardozo L. Rev. 407 (2008).

institutional investors to opt to be appointed lead plaintiffs, might thus be contrary to these class members' interests.

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To conclude, Israel's choice to apply American securities laws, the goal of which was to prevent Israeli companies from delisting their shares from the TASE and encourage foreign companies to list their shares there, has resulted in potential unexpected harmful effects to Israeli investors' rights. Israeli courts' application of American law has allowed American courts to apply supplemental jurisdiction over Israeli-traded shares, irrespective of *Morrison*. This has been used by American class action lawyers, who contracted with Israeli institutional investors in portfolio monitoring agreements, to seize control over Israeli-traded securities in American class actions.

As a consequence, Israeli investors' interests may be undermined. Their compensation rights may be subject to reverse auction dynamics, which create a race to the bottom between American and Israeli lawyers. This implies that Israeli investors may be better off if they can be represented in only one of these forums. Yet, since the settlement distribution mechanism in Israel is more effective than in the U.S., the maximization of Israeli class members' expected payoff requires their representation in Israel only. Israeli investors would be interested in being represented in the U.S. only if their total settlement amount is higher in the U.S., and if their part in this settlement is not significantly lower. However, since Israeli courts would always hold jurisdiction over Israeli class actions including Israeli investors, dual-listed defendants would always be able to opt for a low settlement in Israel, if their expected liability in the U.S. is higher. Thus, representation of Israeli investors in the U.S. only, is not a viable option.

As the next Part demonstrates, Israeli courts' inclination to stay the proceedings before them where a parallel class action is filed in the U.S., as well as their lenient requirements for recognizing American class action settlements, results in Israeli investors' representation in American class actions, irrespective of the dynamics that undermine their interests.

V. Can Israeli Courts Protect Israeli investors' interests?

Class action competition undermines Israel's ability to maintain its preferred balance between attracting American firms to list their shares for trade on the stock exchange, and protecting the interests of Israeli investors. Although this balance could be maintained by applying American law yet maintaining jurisdiction in Israeli courts, the inclusion of Israeli investors in American class actions undercuts this scheme. The divergence of interests between Israeli and American class members, combined with the reverse auction dynamics, raises concerns that Israeli class members' rights

may be compromised, especially as they are represented by American lawyers, whose interest is to maintain the class action in the U.S.

To overcome the reverse-auction dynamics, Israeli class members should be represented in a single jurisdiction only. That jurisdiction cannot be the U.S. because the defendant can always approach Israeli class action lawyers and settle the Israeli class action with them. Such a settlement would be approved by Israeli courts. Thus, the only way to guarantee representation of Israeli investors in one jurisdiction is to limit their representation in American courts. As this Part explains, such limitation is unlikely to be applied, given current law and practice by Israeli courts.

Israeli courts could forestall the representation of Israeli investors in American courts, by issuing anti-suit injunctions against such representation by Israeli institutional investors. As section A explains, this is unlikely given current jurisprudence in Israel on anti-suit injunctions. Alternatively, Israeli courts could protect Israeli class members' interests by maintaining close supervision of American class action settlements that include them. This, however, is also unlikely, given the Israeli Supreme Court's precedent regarding the recognition of American class action settlements.

A. Forestalling foreign litigation

Where the same claim is litigated in Israel and in the U.S., Israeli courts are likely to award precedence to the American proceeding and stay the proceedings before them. According to Section 35KF of the Securities Law, if a lawsuit is filed in Israel for a cause of action relating to a dual-listed company, and a lawsuit for a similar cause of action is filed in a foreign court, the Israeli court may stay its proceedings until a final judgment is rendered by the foreign court. This provision is meant to prevent duplicate proceedings in Israel and abroad, and it allows the Israeli court to give preference to the foreign proceeding, where the court finds it appropriate to do so.[82] Israeli courts have consistently applied this section in class actions where parallel proceedings have been litigated in the U.S.[83]

Staying the Israeli proceedings allows Israeli class action lawyers to free-ride on the investment made by their counterparts in American class actions. This, indeed, would benefit Israeli class members, if their representation were limited to Israeli class actions only. Since information produced in American proceedings is relevant to the Israeli class actions whether or not Israeli class members are represented in the U.S., staying Israeli proceedings yet maintaining unique jurisdiction over Israeli

82 Lightcom, *supra* note 34, at ¶ 27; *Damty I*, *supra* note 23, at ¶ 33.

83 CA (DC CT) 3912-01-09 Stern v. Verifone Holdings, Inc. p. 9-10, Nevo Legal Database (Sep. 11, 2008) (Isr.), https://www.nevo.co.il/psika_html/mechozi/me-08-01-3912.htm; CA (DC CT) 3912-01-09 Stern v. Verifone Holdings, Inc. ¶ 4; Nevo Legal Database (Aug. 25, 2011) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-08-01-3912-593.htm; CA 3973/10 Stern v. Verifone Holdings, Inc, Nevo Legal Database (Apr. 2, 2015) (Isr.), https://www.nevo.co.il/psika_html/elyon/10039730-s27.htm; CA (MC TA) 47825/08 Dany Galmidi v. Comverse Technology, Inc., 8, Nevo Legal Database (Feb. 20, 2012) (Isr.), https://www.nevo.co.il/psika_html/shalom/SH-08-47825-457.htm; CivA (DC TA) 37986-03-12 Dany Galmidi v. Comverse Technology, Inc., 2, Nevo Legal Database (Nov. 13, 2012) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-12-03-37986-368.htm.

class members could prove optimal for them. Doing so, however, would require preventing American lawyers from representing Israeli class members.

In a few cases Israeli class representatives have tried to forestall foreign litigation by moving the court to issue an anti-suit injunction. However, Israeli courts have rejected these motions,[84] basing their decisions on the generally cautious approach to issuing such injunctions, since these are viewed as limiting the plaintiff's right of access to court and implicitly interfering with the jurisdiction of foreign courts.[85] The main considerations in issuing such an injunction are whether filing the foreign proceeding was intended to undermine the movant's rights: to apply undue pressure on him to refrain from litigation in the local court; and more generally, whether it contravenes basic principles of substantive and procedural justice. Hence, Israeli courts are unlikely to award precedence to the proceedings before them, in order to overcome the problems ensuing from the representation of Israeli class members in American class actions, unless they suspect that the foreign class action undermines local plaintiffs' rights.

Although the competition between Israeli and American class actions produces just these undesirable consequences for Israeli investors, Israeli courts are unlikely to recognize these structural effects as sufficient for issuing anti-suit injunctions. Hence, their only way to protect Israeli class members' interests is through ex-post close examination of American class action settlements. As I next explain, the Israeli courts' approach has not been very promising in this regard.

B. Recognition of foreign class action settlements

Recognition of a foreign class action settlement as *res judicata*, barring further litigation of parallel Israeli class actions (as well as individual litigation by class members), is subject to Section 11(b) of the Israeli Foreign Judgments Enforcement Law (FJEL). According to this provision, a court may recognize a foreign judgment for the purpose of establishing *res judicata* if it finds that law and justice so require.[86] This is termed 'incidental' recognition of the foreign judgment, and it may be applied by a court dealing with a matter before it, for which it deems it necessary to make such recognition. The 'law and justice' conditions are vague standards, but Israeli courts have interpreted them to include various factors, derived either from

84 CA (DC TA) 50307-11-20 B.M & B.L. Trade Inc. v. Yang Ming Marin Transport, at ¶ 14, Nevo Legal Database (March 5, 2021) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-20-11-50307-33.htm; An anti-suit injunction motion was also brought before the district court in the *Ormat* proceedings. No decision was given before the parties moved the court for voluntary dismissal. *See* CA (DC for Economic Affairs TA) 44366-05-18 Hayat v. Ormat Technologies Inc., at ¶ 7, Nevo Legal Database (Jan. 4, 2021) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-18-05-44366-127.htm.

85 CivA 714/96 Priscal v. Orenstein 49(5) PD 759 (1996) (Isr.), https://www.nevo.co.il/psika_html/elyon/PADI-NH-5-759-L.htm; CivA Inter-Lab Inc. v. Israel Bio Engineering Project 57(5) PD 769 (2003) (Isr.), https://www.nevo.co.il/psika_html/elyon/0300778.htm; CivA 2459/20 Hebrew University v. Pickard, Nevo Legal Database (June 6, 2020) (Isr.), https://www.nevo.co.il/psika_html/elyon/20024590-R03.htm.

86 Foreign Judgments Enforcement Law, 5718-1958, S.H. 879 (1977) 44 (Isr.).

common law or from other provisions of the FJEL, which apply to enforcement or to 'direct' recognition of foreign judgments.[87]

In the context of foreign class action settlements, the Israeli Supreme Court held in *Stern v. Verifone* that the recognition of a class action settlement is conditioned on a finding by the Israeli court that the foreign court had actual connection to the dispute (this condition is stricter than the requirement that the foreign court had jurisdiction), that class members received adequate notice and an opportunity to opt out of the class, and that they were adequately represented.[88] The Supreme Court's holding was based on its reading of the U.S. Supreme Court's holding in *Phillips Petroleum Co. v. Shutts*,[89] which specified the necessary conditions for providing an absent class member minimal due process protections.[90] In discussing adequate representation, the Israeli Supreme Court addressed the case where Israeli law would be more favorable to Israeli class members than foreign law, or where there are other significant differences between the Israeli and the foreign subclasses. The Court noted that in such cases a uniform compensation to Israeli and foreign class members might raise a concern that Israeli class members were not adequately represented by the foreign class representative and lawyer.[91] The Supreme Court was aware of the 'reverse auction' problem, and discussed its ramifications, yet did not address it in its discussion of the pertinent conditions for recognition of the class action settlement.[92]

Importantly, a court considering whether a foreign settlement bars further litigation in Israel would not examine the merits of the settlement. This general rule was qualified in the context of class action settlements by the Supreme Court's holding that in exceptional cases, if the class action settlement outcome clearly deviates from the reasonable outcome according to Israeli law, or where it evidently contradicts public policy (*ordre public*), the foreign settlement may not be recognized.[93]

Thus, whenever a substantial portion of a dual-listed company's shares were traded in the U.S., an Israeli court is likely to find that the American court which approved a settlement including both Israeli- and U.S.-traded shares has had an actual connection to the dispute. Also, according to Rule 23 of the Federal Rules of Civil Procedure,[94] all the above conditions for an Israeli court to recognize a foreign class action settlement (notice, opt out, and adequate representation) are also necessary

87 CivA 3294/08 Goldhar Corporate Finance Ltd. v. S.A. Klepierre, Nevo Legal Database (Sep. 6, 2010) (Isr.), https://www.nevo.co.il/psika_html/elyon/08032940-s06.htm.

88 *Stern*, *supra* note 34, at ¶ 30. The Supreme Court left open the question whether section 35KF implies that Israeli courts should relax the requirements for recognition of a foreign class action settlement, given the legislator's intention to award priority to foreign proceedings and avoid their obstruction.

89 Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985).

90 *Id.* at 811 It should be noted that the *Shutts* holding was given not in the context of international class actions, but rather for the question whether a plaintiff who does not possess the minimum contacts with the forum that would support personal jurisdiction over a defendant, would nevertheless be subject to the state's jurisdiction.

91 Stern, *supra* note 34, at ¶ 26.

92 *Id.* at ¶ 19-21.

93 *Id.* at ¶ 33.

94 Fed. R. Civ. P. 23(e)(1), (2)(A), (4) (1966).

for approval of a class action settlement by an American federal court. Hence, it is most likely that an American class action settlement approved by a U.S. federal court would be recognized by the Israeli court and bar further litigation in Israel.

In *Verifone* the Israeli Supreme Court decided that only the representative plaintiff in Israel, Mr. Stern, who filed an objection to the pending settlement in the U.S. court, was barred from further pursuing his claims in Israel. The Court did not examine the above conditions for recognizing the settlement before it, and left it open for another plaintiff to file a new class action for the same claims, where the question of *res judicata* would have to be examined regarding the class as a whole. The lawyers representing the plaintiff in *Verifone* indeed filed another class action in the name of another plaintiff. The district court found that the American settlement bars further proceedings in Israel and recognized it as establishing claim preclusion in Israel.[95] However, the court noted that the automatic distribution mechanism of class action settlement in Israeli securities class actions was not available in the case before it, since it preceded the Tel Aviv District Court's decision which established this mechanism for the first time.[96] The court further noted that a future U.S. class action settlements might be considered unfair to the Israeli class for the mere reason that it does not use this distribution mechanism.

Hence, under current law, an Israeli court is likely to recognize a U.S. settlement, especially if it allocates the compensation to Israeli class members according to the unique Israeli automatic distribution mechanism. As explained above, dividing the total settlement between the two subclasses and using the automatic distribution mechanism with respect to the Israeli subclass might still provide insufficient compensation to Israeli-traded shares. Furthermore, it does not address the conflict of interests between American lawyers, class representatives and class members, and Israeli class members.

Furthermore, the Supreme Court's holding that a plaintiff filing an objection to a settlement in an American court is barred from further litigating the case is Israel or raising any claim regarding the U.S. settlement creates a disincentive to file such an objection, thus rendering the approval of a settlement, including both American and Israeli class members, even more likely. Hence, ex post protection of Israeli class members' rights and interests within the Israeli recognition procedure is unlikely.

Conclusion

This Article has demonstrated the problematic effects of the law market in the case of dual-listed Israeli-American shares. It showed how Israeli courts' choice of law

95 Hayat v. Verifone, *supra* note 74.

96 *Id.* at ¶ 46-48. The Israeli distribution mechanism was first introduced in CA (DC CT) 4425-01-10 Hefez v. Maxel Inc., Nevo Legal Database (Aug. 1, 2013) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-10-01-4425-373.htm. Shortly afterward, on 8.9.2013, the American Verifone settlement was submitted to the Federal court, and the settlement was approved on 2.25.2014—before the distribution mechanism was cemented as the status quo mechanism in securities class actions.

decision, aimed to attract foreign firms to list on the Israeli stock exchange, has resulted in the application of jurisdiction by American courts over Israeli traded shares, and consequently, in competition dynamics which threatens to reduce Israeli investors compensation.

The dynamics created by Israeli courts' decision to apply American law to securities class actions involving dual-listed companies has allowed American courts to apply supplemental jurisdiction over Israeli-traded shares in parallel class actions filed in the U.S.. American lawyers have used this dynamics to seize control over both American- and Israeli-traded shares, but the divergence of interests between these lawyers, the Israeli institutional investors and American shareholders, on the one hand, and Israeli shareholders on the other hand, in addition to reverse auction dynamics, risks undermining Israeli shareholders' interests.

Notably, since other countries have not incorporated American law into their local securities law, following *Morrison* American courts do not apply their jurisdiction to shares traded in these countries. Hence, in the case of other jurisdictions that apply their own class action procedures (e.g., Canada and Australia), the adverse effects of class action competition are avoided. Although the same claim may be litigated separately in two class actions, in two jurisdictions, each would include only shares traded on the local exchange. Thus, the unfortunate consequences of inter-jurisdictional competition between class action lawyers, is avoided.

Evidently, litigating class actions in two jurisdictions for the same claim poses problems of its own, as it may waste both the defendant's and the courts' resources. An optimal solution would therefore be to stay the proceedings in one of the jurisdictions, yet maintain separate representation of local class members in each court. Currently, this solution is not applied, neither in Israel, nor in other jurisdictions which maintain class action procedures.

Notably, the most recent decision by the Tel Aviv District Court in *Ceragon*, which takes an opposite approach to the one taken in previous decisions and declines to apply U.S. liability law, may prove most significant in changing the dynamics described in this Article. This is expected, not least due to this decision's potential implications for the willingness of U.S. courts to apply supplemental jurisdiction over Israeli-traded shares.[97] Whether that would be the case, and whether it would positively impact the Israeli stock market and Israeli investors, remains an open question.

97 *See* the discussion *supra* note 37-54, Part III.

Appendix

Table 1: Israeli Institutional Investors' Involvement in U.S. Securities Class Actions

#	**Case**	**Lead Plaintiff Class Representative**	**Significant Dates**	**Counsel for the Israeli Institutional Investor** "NA"—not available	**Current Status** "IRLVT"—irrelevant due to denial of motion for appointment
1	Jansen v. International Flavors & Fragrances Inc. No.: 19-CV-07536-NRB. Court: S.D. N.Y.	Appointed Lead Plaintiff: * Menora; * Clal; * Atudut Pension Fund.	Appointments * Lead Plaintiff motion filed 10/11/2019. * appointed Lead Plaintiff 12/26/2019. Other * amended class action complaint filed 03/16/2020.	Pomerantz, LLP.	**Dismissed with prejudice** 03/31/2021. Notice of appeal was filed 04/28/2021.
3	Sayce v. Forescout Technologies, Inc. No.: 20-CV-00076-SI. Court: N.D. Cal.	Appointed Lead Plaintiff: Meitav Tachlit.	Appointments * Appointed Lead Plaintiff on two separate occasions, before and after a consolidation of cases: 03/23/2020; 19/11/2020. Other * amended class action complaint filed on: 05/22/2020; 12/18/2020; 05/10/2021.	Pomerantz, LLP.	**Dismissed with leave to amend** 03/25/2021.
4	Costas v. Ormat Technologies Inc. No.: 18-CV-00271-RCJ-WGC. Court: D. Nev.	Appointed Lead Plaintiff: Phoenix	Appointments * Lead Plaintiff motion filed 08/10/2018. * appointed Lead Plaintiff 03/12/2019. Other * amended class action complaint filed 05/13/2019.	Pomerantz, LLP.	**Settled**, the settlement agreement was approved 01/21/2021.

#	**Case**	**Lead Plaintiff Class Representative**	**Significant Dates**	**Counsel for the Israeli Institutional Investor** "NA"—not available	**Current Status** "IRLVT"—irrelevant due to denial of motion for appointment
5	Halman Aldubi Provident and Pension Funds Ltd. v. Teva Pharmaceutical Industries Limited No.: 20-4660-KSM. Court: E.D. Pa. 2021.	Not appointed as Lead Plaintiff: * Clal; *Menora.	Appointment * motion to be appointed Lead Plaintiff denied 03/21/2021.	* Pomerantz LLP and * Kaskela Law LLC.	**IRLVT**.
6	Arora v. HDFC Bank Limited No.: 20-CV-04140 Court: E.D. N.Y.	Appointed Lead Plaintiff: Meitav Dash.	Appointment * Lead Plaintiff motion filed 11/02/2020. * appointed Lead Plaintiff 12/09/2020. Other: *amended class action complaint failed 02/08/2021.	Pomerantz LLP.	**Ongoing**.
7	Meitav Dash Provident Funds and Pension Ltd. v. Spirit AeroSystems Holdings, Inc. No.: 20-CV-0054-CVE-JFJ Court: N.D. Okla.	Appointed Lead Plaintiff: Mitav Dash.	Appointment *Lead Plaintiff motion filed 04/10/2020. * appointed Lead Plaintiff 04/23/2020. Other: * amended class action complaint filed 07/20/2020.	Labaton Sucharow, LLP.	**Ongoing**.
8	In re Mylan N.V. Securities Litigation No.: 16-CV-07926-JPO Court: S.D. N.Y.	Appointed Lead Plaintiff and later as Class Representative: * Menora; * Phoenix; * Meitav Dash.	Appointment *motion filed 12/12/2016. * appointed Lead Plaintiff 01/09/2020. * Class Representative 04/06/2020. Other amended class action complaint filed: 03/20/2017; 07/06/2018; 06/17/2019.	* Pomerantz LLP; * Cohen Milstein Sellers & Toll PLLC.	**Ongoing**, class certification granted 04/06/2020.

#	**Case**	**Lead Plaintiff Class Representative**	**Significant Dates**	**Counsel for the Israeli Institutional Investor** "NA"—not available	**Current Status** "IRLVT"—irrelevant due to denial of motion for appointment
9	Roofer's Pension Fund, v. Perrigo Company Plc No.: 16-CV-02805- MCA-LDW. Court: D. N.J.	Appointed Lead Plaintiff and later Class Representative: * Migdal; * Clal; * Atudut; * Meitav Dash; Not appointed Lead Plaintiff: Harel.	Appointment * appointed Lead Plaintiff 02/10/2017. Other * amended class action complaint filed 06/21/2017.	Migdal, Clal, Meitav Dash * Pomerantz LLP; * Bernstein Litowitz Berger & Grossman. Harel * Cohen, Lifland, Pearlman, Herrmann & Knope, LLP.	**Ongoing**, class certification granted 11/14/2019.
10	Plaut v. The Goldman Sachs Group No.: 18-CV-12084-VSB Court: S.D.N.Y.	Not appointed Lead Plaintiff: Meitav Dash.	Appointment * Lead Plaintiff motion filed 02/19/2019. * motion to be appointed Lead Plaintiff denied 09/19/2019.	Pomerantz LLP.	**IRLVT**.
11	In re NVIDIA Corporation Securities Litigation No.: 18-CV-07669-HSG. Court: N.D. Cal.	Not appointed Lead Plaintiff: Meitav Dash.	Appointment * Lead Plaintiff motion filed 02/19/2019. * motion to be appointed Lead Plaintiff denied 05/02/2019.	Pomerantz LLP.	**IRLVT**.
12	In re DXC Technology Company Securities Litigation No.: 18-CV-01599-AJT-MSN. Court: E.D. Va.	Not appointed Lead Plaintiff: Meitav Dash.	Appointment * Lead Plaintiff motion filed 02/25/2019. * motion to be appointed Lead Plaintiff withdrawn 03/04/2019.	The Kaplan Law Firm.	**IRLVT**.
13	In re Celgene Corp. Inc. Securities Litigation No.: 18-CV-04772-JMV-JBC. Court: D. N.J.	Not appointed Lead Plaintiff: Menora Mivtachim.	Appointment * Lead Plaintiff motion filed 05/29/2018. * unclear if motion to be appointed Lead Plaintiff was denied 09/26/2018 or withdrawn beforehand.	Cohen, Lifland, Pearlman, Herrmann & Knope, LLP.	**IRLVT**.

#	Case	Lead Plaintiff Class Representative	Significant Dates	Counsel for the Israeli Institutional Investor "NA"—not available	Current Status "IRLVT"—irrelevant due to denial of motion for appointment
14	In re Facebook, Inc. Securities Litigation No.: 18-CV-01725-EJD Court: N.D. Cal.	Not appointed Lead Plaintiff: Phoenix.	Appointment * Lead Plaintiff motion filed 05/21/2018. * motion to be appointed Lead Plaintiff denied 08/03/2018.	Pomerantz LLP.	**IRLVT**.
15	In re Sanofi Securities Litigation No.: 14-CV-09624-PKC. Court: S.D.N.Y.	Appointed Lead Plaintiff: Meitav Dash.	Appointment * Lead Plaintiff motion filed 02/02/2015. * appointed Lead Plaintiff 03/20/2015. Other * amended Class Action complaint filed 05/19/2015.	Pomerantz, LLP.	Dismissed by S.D.N.Y 06/01/2016; **dismissed with prejudice** by the 2nd. Cir. 11/07/2016.
16	In re ITT Educational Services No.: 14-CV-1599-TWP-DML Court: S.D. Ind.	Appointed Lead Plaintiff: Meitav Dash.	Appointment * Lead Plaintiff motion filed 12/01/2014. * appointed Lead Plaintiff 03/16/2015. Other * amended class action complaint filed 05/26/2015.	Glancy Prongay & Murray, LLP.	**Settled**, the settlement agreement was approved 03/24/2016.
17	Pasha S. Anwar, et al. v. Fairfield Greenwich Group No.: 09-CV-00118-VM-FM Court: S.D. N.Y.	Appointed Lead Plaintiff and later Class Representative: Harel.	Appointment * Lead Plaintiff motion filed 05/11/2009. * appointed Lead Plaintiff 07/07/2009. Other * amended class action complaint filed: 04/24/2009; 09/29/2009.	Boies, Schiller & Flexner, LLP (NYC).	**Ongoing**, class certification achieved 03/03/2015.
18	In re Mellanox Tech., LTD. Securities Litigation No.: 13-CV-04909-JD Court: N.D Cal.	Appointed Lead Plaintiff: * Harel; * Clal; * Menora.	Appointment * appointed Lead Plaintiff 05/14/2013. Other * amended class action complaint filed: 07/12/2013; 05/19/2014.	Pomerantz Grossman Hufford Dahlstrom & Gross LLP.	**Dismissed with prejudice** 12/17/2014.

#	**Case**	**Lead Plaintiff Class Representative**	**Significant Dates**	**Counsel for the Israeli Institutional Investor** "NA"—not available	**Current Status** "IRLVT"—irrelevant due to denial of motion for appointment
19	New York State Teachers' Retirement System v. General Motors Company, No.: 14-CV-1191-LVP-MKM. Court: E.D. Mich.	Not appointed Lead Plaintiff: Menora Mivtachim.	Appointment * motion to be appointed Lead Plaintiff denied 10/24/2014.	* Pomerantz LLP; * Cafferty Clobes Meriwether & Sprengel.	**IRLVT**.
20	City of Providence, Rohde Island et al. v. Bats Global Markets, Inc., No.: 14-CV-2811-JMF Court: S.D. N.Y.	Consolidated Plaintiff: Harel.	Appointment * appointed Consolidated Plaintiff 07/02/2014. Other * amended class action complaint filed 09/02/2014.	* Labaton & Sucharow LLP; * Pomerantz LLP.	**Ongoing**.
21	Harel Insurance, LTD. v. Perrigo Company No.: 09-CV-02255-LGS. Court: S.D.N.Y 2009.	Appointed Lead Plaintiff: * Phoenix; * Clal . * Harel, following the dismissal of Phoenix and Clal's complaint.	Phoenix, Clal Appointment * Lead Plaintiff motion filed 05/14/2009. *Appointed Lead Plaintiff 06/15/2009. Harel: * Lead Plaintiff motion filed 12/23/2010. * appointed Lead Plaintiff 10/27/2011. Other: * amended class action complaint filed: 07/31/2009; 10/07/2011.	Phoenix, Clal Pomerantz, Haudek Grossman & Gross, LLP. Harel * Glancy Binkow & Goldberg LLP; * Robbins Geller Rudman & Dowd, LLP; * Pomerantz, LLP.	Phoenix, Clal **dismissed**, 09/28/2011. Harel **Settled**, the settlement agreement was approved 05/17/2013.
22	Dvora Weinstein v. Aubrey K. Mcclendon No.: 12-CV-00465-M Court: W.D. Okla.	Not appointed Lead Plaintiff: Clal.	Appointment * Lead Plaintiff motion filed 06/25/2012, * motion to be appointed Lead Plaintiff denied 07/20/2012.	John E Barbush PC.	**IRLVT**.

#	Case	Lead Plaintiff Class Representative	Significant Dates	Counsel for the Israeli Institutional Investor "NA"—not available	Current Status "IRLVT"—irrelevant due to denial of motion for appointment
23	In re Toyota Motor Corp. Securities Litigation No.: 10-CV-00922-DSF-AJW Court: C.D. Cal.	Not appointed Lead Plaintiff: Harel.	Appointment * Lead Plaintiff motion filed 04/09/2010 * motion to be appointed Lead Plaintiff was withdrawn 07/20/2010.	* The Wagner Firm; * Pomerantz, Haudek, Grossman and Gross LLP.	**IRLVT**.
24	In re Comverse Technology, Inc. Sec. Litig. No.: 06-CV-01825-NGG-RER. Court: E.D. N.Y.No.: 06-CV-01825-NGG-RER. Court: E.D. N.Y.	Appointed Lead Plaintiff: Menora Mivtachim. Not appointed Lead Plaintiff: Leumi Pia.	Appointment * appointed Lead Plaintiff 03/02/2007. Other: * amended Class Action complaint filed 03/23/2007; 03/05/2008; 04/09/2008; 02/27/2009; 03/10/2009.	Pomerantz Haude et al., Grossman & Gross LLP.	**Settled**, the settlement agreement was approved 06/23/2010.
25	In re ProShares Trust Securities Litigation No.: 09-CV-6935-JGK Court: S.D. N.Y.	Not appointed Lead Plaintiff: Clal.	Appointment * unclear if motion to be appointed Lead Plaintiff was denied 10/05/2009 or withdrawn beforehand.	Pomerantz LLP.	**IRLVT**.
26	Dan Israeli v. Team Telecom International Ltd. No.: 04-CV-04305 Court: D. N.J.	Appointed Lead Plaintiff: Leumi Gemel.	Appointment * Lead Plaintiff motion filed 12/1/2004. * appointed Lead Plaintiff 12/27/2004.	* Glancy Binkow & Goldberg LLP; * Law Offices of Jacob Sabo.	**Settled**, the settlement agreement was approved 09/11/2008.
27	In re Verifone Holdings, Inc. Securities Litigation No.: 07-CV-06140-EMC Court: N.D. Cal.	Not appointed Lead Plaintiff: Harel (Harel Pia) & Clal.	Appointment * motion to be appointed Lead Plaintiff denied 08/22/2008.	Clal * Joseph Saveri Law Firm; * Pomerantz LLP; * Cotchett, Pitre & McCarthy LLP. Phoenix, Harel * Schubert Jonckheer & Kolbe LLP; * Chitwood Harley Harnes; * Faruqi & Faruqi, LLP.	**IRLVT**.

#	**Case**	**Lead Plaintiff Class Representative**	**Significant Dates**	**Counsel for the Israeli Institutional Investor** "NA"—not available	**Current Status** "IRLVT"—irrelevant due to denial of motion for appointment
28	In re Alvarion Ltd. Securities Litigation No.: 07-cv-00374-JSW Court: N.D. Cal.	Not appointed Lead Plaintiff: Harel.	Appointment * Lead Plaintiff motion filed 04/09/2007. * motion to be appointed Lead Plaintiff withdrawn 09/20/2007.	Glancy, Binkow & Goldberg LLP.	**IRLVT**.
	In re Gilat Satellite Networks, Ltd., No.: 02-CV-01510-CPS-SMG. Court: E.D. N.Y.	Appointed Lead Plaintiff: Leumi Pia/Harel.	Appointment * Lead Plaintiff motion filed 05/28/2002. * appointed Lead Plaintiff 01/15/2003.	* Glancy & Binkow LLP; * Cohen, Milstein Hausfeld & Toll PLLC.; * Law Offices of Jacob Sabo.	**Settled**, the settlement agreement was approved 09/18/2007.
29	Murray Zucker v. Zoran Corporation. No.: C-06-05503-WHA Court: N.D. Cal.	Not appointed Lead Plaintiff: Menora Mivtachim.	Appointment * motion to be appointed Lead Plaintiff denied 12/11/2006.	NA.	**IRLVT**.
30	Leumi Gemel LTD. v. ECTEL Ltd. No.: 04-cv-03380-RWT. Court: S.D. Maryland.	Appointed Lead Plaintiff: Leumi Gemel.	Appointment * Lead Plaintiff motion filed 01/07/2005. * appointed Lead Plaintiff 09/12/2005.	* Glancy Binkow & Goldberg LLP; * Law Offices of Jacob Sabo; * Cohen Milstein Hausfeld and Toll PLLC.	**Dismissed with prejudice** 07/18/2006.
31	Eisenberg O. Management & Consulting LTD. v. Lipman Electronic Engineering LTD. No.: 05-CV-04788-BMC-KAM. Court: E.D. N.Y.	Not appointed Lead Plaintiff: Altshuler Shacham; Providence Fund of the Clerks of Bank Leumi Leisrael ltd.	Appointment: * Altshuler Shacham's motion to be appointed Lead Plaintiff withdrawn 24/02/2006. * Providence's motion to be appointed Lead Plaintiff withdrawn 9/6/2006.	-	**IRLVT**.