

Stages of a Class Action and available motions/tactics (Israel)

1. Service of Class action and Motion to Certify

a) Letter rejecting service

During this stage of the CA proceedings, specifically when concerning VW and CM, the Supreme Court (by the Honorable Judge E. Hayut) in Petition for Leave to Appeal No. 77/16 **Champion Motors Ltd. v. Tawfik Nassar** has ruled that CM qualifies as an agent of VW for the purpose of service. The Court also ruled that there is no justification to deviate from the well established rule, by which the court examines the intensity of the relationship between the "agent" and the foreign defendant as well as the likelihood of such "Agent" to advise the foreign defendant of the proceedings instigated against him in order to qualify such person or entity as an agent.

In light of this decision it is not recommended for VW to claim that CM shouldn't be deemed an "agent" for the purpose of submitting courts' documents to VW.

b) Notice of representation / Appearance letter

Except for rare circumstances which may arise on a case by case basis, there are no motions or tactics to pursue by the respondent at this stage of the proceedings, since the notice of representation is submitted in the framework of the reply to the Motion to Certify.

2. Reply to Motion to Certify

a) (early) Motion to dismiss

As mentioned in our previous reference, an early motion for dismissal at the stage of the Motion to Certify will rarely be granted (for example, if it is clear on the outset that the matter does not qualify to be resolved in proceedings of a class action, or if there is a general statute of limitation applicable to the group (as opposed to the specific representative) etc).

There are certain arguments for dismissal, which must be contested when submitting the first pleadings to the court of law, for example a statute of limitations argument, *res judicata* argument etc.. With respect to such arguments, any failure to raise them on the outset will constitute a waiver of such defense. Although there is no general restriction under the Procedure Regulations to submit a motion for dismissal on other grounds (which do not fall to the exceptions mentioned above) the courts have ruled that such motion should be submitted before the first preliminary hearing and if the litigant fails to do so he will not be able to raise the relevant argument for dismissal at a later stage (Civil Appeal 504/86 **M.L.R.N. Electronics Ltd. v. The State of Israel**, P.D. 43(30 579).

b) Application for extension of deadline to File the Response to the Motion to Certify

The respondent may ask for an extension to submit his response to the Motion to Certify. The period of the extension must be reasonable, considering the fact that the respondent has substantial time to submit his response (90 days). The number of extensions should also be reasonable and will be decided on a case by case basis.

The grounds for an extension need to be reasonable, particularly if it is submitted without the opposing party's consent. The longer the extension or the greater the number of

extension requested - the stronger the reason needs to be (for example, extended time to translate the pleadings, appendices etc.). When the proceedings entail a matter of expertise, foreign litigants or complex issues, the court will usually tend to grant a motion to extend deadlines in order to allow the proper verification of facts, translation of experts' opinions, affidavits etc.

c) Response to the Motion to Certify including Expert Opinions and Affidavits

At the stage of the response to the Motion to Certify, one of the tactics to be considered is an attempt to disqualify the applicants (or any of them) on the grounds that they are not qualified to serve as class claimants or otherwise continue the current proceedings with weaker petitioners instead of risking the appointment of a stronger one.

Another factor to be taken into account during this stage of the proceedings, relates to matters of expertise involving a foreign litigant or foreign element. In such circumstances the respondent may summon a foreign expert in order to extend deadlines to submit the response (due to the need of translation) as well as to achieve an advantage during the cross examination stage (the cross examination of a foreign expert will burden the other party since it will require an interpreter, making it hard for the attorney to cross examine the witness, giving the expert more time to rethink his answers on the stand).

d) (early) Settlement offer/Withdrawal from a Motion to Certify

As mentioned in our previous reference, an early settlement offer is subject to the court's approval as well as the approval of the Attorney General and other relevant entities as the case may be (such as the court's expert etc.). The more common stage to reach an early settlement as a matter of tactic is after the pleadings of all parties have been submitted to the court.

Also, in addition to an early settlement, each petitioner or claimant is entitled to approach the court with a motion to withdraw from the Motion to Certify/Class Action Claim (as applicable) under Section 16 to the Class Action Law. The withdrawal is subject to the court's approval, and the party who wishes to withdraw from the proceedings may not accept any benefit or compensation from the respondent/defendant, unless it has obtained the court's approval. If a motion to withdraw was submitted by all petitioners/claimants or if the court has concluded that none of the petitioners/claimants is qualified to serve as class applicants/claimants, the court will set out a deadline to submit a motion for the appointment of an alternative petitioners/claimants ("**Motion for an Appointment**"). If at the end of the time period determined by the court no Motion for an Appointment was submitted, then the court will order to publish a relevant notice calling any person who wishes to be appointed as such to submit his pleadings. If no Motion for an Appointment was submitted within 45 of the day such notice was published or if a Motion for an Appointment was submitted within 45 days but thereafter denied by the court, then the court will move to strike the Motion to Certify/Class Action.

3. Replica by Claimant

a) Additional response

During this stage of the proceedings, the respondent will usually verify that the Replica by the Claimant does not over extend the scope of the controversies as depicted in the first pleadings (*ibid* the Motion to Certify and the Response to the Motion to Certify). If there is an attempt to over extend the controversy by raising new legal or evidential arguments, the respondent may approach the court and ask to strike such arguments.

b) Application for extension of deadline to file response

See Section 2(b) above.

c) Settlement offer

See Section 2(d) above.

4. Certification Hearing

a) Objection against Judge on grounds of bias

As mentioned in our early papers, the law sets out specific circumstances in which a judge must disqualify himself from presiding over the case, for example if he is family related to one of the litigants, has business relations with one of the parties, has financial or personal interest in the proceedings or its outcome etc.). In addition to the aforesaid circumstances, if a party to the proceedings has an imminent objective reason to believe that the judge hearing the case is biased or might be in conflict of interest, he may petition for judicial disqualification. The test in this context is objective rather than a subjective one. A mere subjective feeling of a litigant that a judge is being resentful or hostile or a statement of the Judge referring to his early assessment of the case will not be sufficient for disqualification.

The motion for judicial disqualification should be submitted without delay and immediately after the litigant became aware of the reason for disqualification, to the judge whose disqualification is requested. The judge must rule in the motion without delay before giving any other decision or ruling in the case. An appeal on the judge's decision not to disqualify himself should be submitted to the Supreme Court within 10 days from the day the petitioner was informed of the court's ruling in the motion.

It should be noted that an appeal on a ruling not to disqualify does not stay the proceedings unless the Chief of the Supreme Court or the judge ruling in the appeal instruct to stay the proceedings until a final decision in the appeal is given.

b) Leave to Appeal against Certification

In addition to that which was stated in our previous papers with respect to the timetable to submit a motion to grant leave to appeal against the certification of a class action, it should be noted that according to the landmark ruling of the Supreme Court in the matter of **Civil Leave to Appeal No. 8761/09 Cellcom Israel Ltd. Vs. Tal Fattal (published on May 6, 2010)** the court has narrowed the cases in which leave to appeal will be granted against certification ruling. The court will consider *inter alia* the following considerations (as well as the particular circumstances of each case): 1) The financial consequences and affect of the class action on the defendant; 2) The scope and weight of the legal and factual controversies arising from the motion to grant leave to appeal as compared to those left to be resolved during main

proceedings. When the scope of the legal and factual controversies left to resolve in the main hearing is extensive and complex and the issues arising from the certification ruling are relatively simple, it may serve as grounds to grant leave to appeal; 3) The likelihood that the leave to appeal will be granted. If it is clear on the outset that there was a mistake in the certification ruling it may serve as grounds to grant leave to appeal.

Usually opting (out) by eligible class members

If an eligible class member exercises his right to be excluded from the Motion to Certify or from the Class Action as the case may be, it has to comply with the requirements prescribed under Section 16 to the Class Action Law. According to Section 16 such class member will be required to obtain the court's approval for the withdrawal as well as any benefit it is to obtain from such withdrawal. The member who wishes to be excluded will be required to submit an affidavit stating all relevant facts to his motion. In ruling whether to grant a motion to exclude a class member, the court will consider, *inter alia*, whether the Motion to Certify shows *prima facie* evidence (if the withdrawal was requested during the certification stage) as well as the advantages to the class action proceedings or to the other class members.

5. Main Hearing

a) Objection against Judge on grounds of bias

See Section 4(a) above.

b) Suggestion of experts, laboratories, etc.

At this stage, the involvement of a foreign expert/laboratory may assist in obtaining time extensions for the submission of documents due to the need of translation or verification of facts, as well as advantages in the cross examination stage (See Section 2(c) above).

6. Court Decision and Enforcement/Appellate Proceedings

a) Motion to Appeal

During this stage of the proceedings, if the appeal is submitted by the claimant (*ibid.* VW is the respondent) VW may submit a motion under Regulation 433 to the Procedure Regulation to increase the amount of security which the claimant has to deposit within the appeal proceedings. In considering such a motion the court will take into account, *inter alia*, the following: The scope of the claim; its complexity; the number of respondents and representing attorneys; the expense amounts which were imposed by the lower court on the respondent; the estimated amount of expenses which might be imposed if the appeal will be denied etc.

If VW is the appellant it may submit a motion to stay the execution of judgment until the appeal proceedings are exhausted. We have referred in our previous papers to the obstacles the appellant faces under such circumstance, particularly in monetary claims. However, if the appellant shows that the chances of the appeal are high and that it will face substantial difficulties in trying to recover the amounts which will be paid according to the judgment to all class members (if the stay of execution is denied) and that the damage which might be incurred to the class members is relatively small (if the stay of execution is granted) then the court might be persuaded to grant a motion to stay the execution. If the motion to stay the execution of judgment is granted it will serve as preliminary indication of the likelihood that the appeal will succeed, as well as impose further difficulties on the other party.