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The Supreme Court expands the possibility of suing an international corporation in Israel (PCA 5860/16 Facebook Inc v. Ohad Ben Hamo)

Recently, the ruling of the Israeli Supreme Court in the case of PCA 5860/16 Facebook Inc. v. Ohad Ben Hamo was published. The court ruled that although the agreement to use Facebook's services provides that the agreement is governed by the laws of the State of California and that any dispute between the user and "Facebook" will be adjudicated in a California court, claims by Israelis against Facebook will be litigated in Israeli courts.

We would like to bring to your attention some of the main points of the ruling, which may be relevant, in certain circumstances, to your activities in Israel.

Introduction

Facebook USA and Facebook Ireland are companies that run the social network "Facebook".

A user who wishes to sign up for Facebook is required to agree to certain terms listed in a document entitled "Statement of Rights and Responsibilities" ("Terms of Service"). Section 15(1) of the Terms of Service provides that any dispute between users and Facebook shall be resolved: (1) in a California court (the "Jurisdiction Clause"); and (2) according to the laws of the State of California (the "Choice of Law Clause").

In September 2014, a motion for the approval of a class action lawsuit against Facebook was submitted to the Court in Israel. The plaintiffs claimed that Facebook (i) read, without permission, private messages sent by Facebook users and made commercial use of such messages; (ii) violated the Israeli Protection of Privacy Law, 5741-1981; and (iii) infringed the rights of minors using Facebook. Facebook filed a motion to dismiss the claim, arguing that in light of the Terms of Service, Israeli courts should refrain from adjudicating the claim. The user argued that the Jurisdiction Clause and the Choice of Law Clause were "unduly disadvantageous clauses in a standard contract" and petitioned for their rescission.

The Supreme Court determined that the Terms of Service constitutes a "standard contract", and that in order to decide the question of whether the Jurisdiction Clause and the Choice of Law Clause were unduly disadvantageous, an examination must be conducted as to whether these clauses deter clients that signed the contract from taking legal action.

The main determinations of the Supreme Court

1. The Jurisdiction Clause, which sets forth that disputes between Facebook and its users will be decided in the State of California, is an unduly disadvantageous clause that must be rescinded, and instead Israeli users should be allowed to sue Facebook in Israel. In this context, it was determined, inter alia, as follows:

- 1.1 The fact that Facebook provides free services does not provide it with immunity from a claim in Israel since it was not proven that Facebook's ability to provide its users with free services depends upon its not being required to litigate outside California.
- 1.2 Facebook's argument that since it provides services to billions of people worldwide, it does not have the ability to litigate each claim by a user in his/her state was rejected. It was determined that this argument is not compatible with the fact that Facebook exempts some of the Facebook users from a foreign jurisdiction clause (Facebook allows residents of Germany to sue it in their own state and according to German law).
- 1.3 Significance should be afforded to the fact that Facebook has many clients in Israel (4.5 million users).
- 1.4 The fact that the US Courts enforce the Jurisdiction Clause does not indicate, in this case, that it is not an unduly disadvantageous clause due to the fact that Canadian and French courts have ruled that it should not be enforced since it is disadvantageous; in Austria, the courts have also allowed for the local adjudication of legal proceedings against Facebook.
- 1.5 It is impossible to disregard the enormous power gaps between Facebook and Israeli Facebook users, which justify the existence of tight control over its activity and the imposition of a stringent standard of inspection. This is reinforced by the dramatic increase in the volume of trade with foreign corporations over the internet in recent years.

2. The Choice Law Clause, stipulating that disputes between Facebook and its users shall be resolved according to the laws of the State of California, is not an unduly disadvantageous clause and should be enforced. In this regard, it was determined, inter alia, as follows:

- 2.1 The legal system in California possesses similar characteristics to those of the legal system in Israel and is considered one of the most advanced in the world in the field of class action lawsuits.
- 2.2 The precedents and laws in California are in English, which is understood by many of the residents of Israel, and are accessible on the Internet.
- 2.3 The Choice of Law Clause is intended to protect a legitimate business interest. Facebook's ability to plan its actions in an intelligent manner depends on its being subject to a single set of laws, especially given the sheer volume of Facebook users spread across the globe.
- 2.4 It is fair to assume that a person who wishes to conduct a class action in the amount of USD 400 million will not be deterred by a standard contract clause which determines that his/her claim will be decided according to the laws of the State of California (as opposed, for instance, to a standard contract which stipulates that the claim must be decided according to Singapore law).

Naturally, the ruling may affect the operation of global companies in Israel. Therefore, we recommend examining the agreements, articles of association, terms of use, etc. of the companies, and, in particular, the terms of the choice of law and jurisdiction clauses. In light of the above ruling, it may be advisable to make changes and adjustments to these documents. We are happy to assist with any clarifications or questions arising from the above.