



Legal Update

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FBC Legal Update - Intellectual Property

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Validity of online agreements

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Validity of choice of law and choice of venue provisions in online agreements

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Dear Clients,

On May 31, 2015, the Central District Court in Lod (Judge Ofer Grosskopf) approved a Motion to Certify a Class Action against PayPal (Class Action Claim: 39292-04-13, Kalengaofer v PayPal Pte. Ltd.). In this decision, Judge Grosskopf addressed the questions -- previously not examined in depth by an Israeli court -- of the validity of the choice of law and jurisdictional provisions in online contracts.

General Background

The Motion to Certify a Class Action against PayPal was filed in connection with the claim that PayPal does not permit customers maintaining PayPal accounts with non-Israeli currency to transfer their funds to an Israeli bank account in that currency, and instead requires them to convert the foreign currency to Israeli Shekels, while also charging its customers a fee in respect of the conversion.

A user opening a PayPal account is required to agree to Terms of Use providing that any claim or dispute between the user and PayPal will be heard in a Singapore court pursuant to Singapore law.

Validity of Online Agreements

Israeli judgments have previously recognized online agreements (for example, terms of use for internet sites, or agreements concerning the receipt of online services) as an important technological development. As such, Israeli court rulings have confirmed the legal validity of these contracts and even attempted to apply the rule, which generally pertains to written contracts, that a person signing an agreement is bound by its terms and is regarded as having read and agreed to the conditions, subject to necessary changes required by virtue of the nature of online agreements.

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Such changes arise because, in contrast to standard written agreements, which enter into effect upon signature, online agreements become legally valid in other ways (usually by checking a box indicating the user has read and agreed to the terms of use) or by other actions of the user on the website evidencing consent.

Israeli precedent requires that in order for a "signature" on an online agreement to have the same force as a signature on a written document, the agreement must be disclosed to the user, and the user must read it, be aware of its terms and agree to accept them. Israeli courts are more likely to recognize the validity of the online agreement that requires active agreement (i.e., "Clickwrap"), rather than passive consent (i.e., "Browsewrap").

In a case involving an online agreement whose terms were not entirely visible to the user, who was required to open another link in order to read them in full, the Court held that even these terms may bind a user, if the link is clear and accessible.

The Online Agreement as a Uniform Contract

The Israeli Uniform Contracts Law, 1982 ("the Law") defines a uniform contract as a *"form of contract whose terms, all or in part, are pre-determined by one party in order to apply the terms to numerous contracts between it and people who cannot be specified by number or identity."* Typically, these contracts are not negotiable so that, in deciding whether to enter into the contract, the counterparty must choose between accepting or rejecting the contract in its entirety. In Israel, online agreements are usually treated as uniform contracts.

The Law provides the courts and designated tribunals the authority to strike out discriminatory provisions in uniform contracts. A discriminatory term *"discriminates against clients or provides an unfair advantage to the supplier and is likely to result in discrimination against clients."* The Law also lists terms that are likely to be considered discriminatory: For example, a term in an agreement stipulating the choice of venue or providing the drafting party with the exclusive right to choose the place of hearing or jurisdiction for arbitration of the dispute, will be considered to be discriminatory. Accordingly, the court is permitted to void such a term.

The Decision in the PayPal case

In order to grant the Motion to Certify a Class Action against PayPal, the Court was required initially to consider whether it had jurisdiction to hear the claim in light of the provisions of the online contract relating to the applicable law and venue. As the parties did not refer in their Court submissions to the application of Singapore law, the Court presumed that the relevant provisions of Singapore and Israeli law are identical.

At the second step, looking at the issue from the perspective of Israeli uniform contracts law, **the Court held that the provision setting venue in Singapore was void as discriminatory, and that the provision did not preclude the hearing from taking place in Israel pursuant to Israeli law.** The Court further found that the only purpose of the jurisdictional provision of the agreement was to block Israeli customers of PayPal from exercising their rights against PayPal

and that its validity should not be recognized.

Judge Grosskopf emphasized that this was a case of a multinational corporation marketing its services in a targeted fashion to the Israeli market, including via an internet site in Hebrew and the provision of support services to tens or even hundreds of thousands of customers in Israel. In this circumstance, the Judge wrote, prior rulings of the Supreme Court, to the effect that a multinational company marketing its products or services to Israeli customers can expect to be sued in Israel, should be applied. According to Judge Grosskopf, **the fact that the activities of a large multinational corporation occur principally or exclusively via the internet does not afford immunity from litigation in Israeli courts under Israeli law.**

Summary

Previous Israeli court rulings regarding online contracts have pointed to a number of practical conclusions for the design, drafting and structure of such agreements. For example, users should be required to provide active acceptance of the Terms of Use by checking a text box ("I accept"); these Terms of Use should be visible, accessible and clear to users, and fair; and discriminatory terms may not be enforced if challenged.

The PayPal decision further highlighted that Israeli courts may not honor provisions concerning the applicability of foreign law and the conduct of proceedings in a foreign country, on the grounds that such terms are "discriminatory." Under the "target audience" test, already recognized in other jurisdictions, the choice of law and jurisdiction will be determined in accordance with the identity of the target audience to which the website is directed.

Although the decision in the PayPal matter is not binding, it provides a clear indication that Israeli courts are likely to void foreign choice of law terms in uniform online contracts. While the decision in the PayPal case related to a 'simple case' of a large multinational corporation that should have expected to be sued in Israel, the decision raises questions in relation to the validity of similar terms in the online agreements of smaller companies, Israeli and foreign, which do not necessarily target their services to an Israeli audience. This question seems to have been left open for consideration at this stage, but is likely to be the subject of future litigation.

We would be happy to answer any questions that you might have.

Sincerely,

Fischer Behar Chen Well Orion & Co.

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