



Legal Update

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Litigation Department

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An Important Israeli Court Decision for Dual-Listed Companies: The Liability for Breaches of Reporting Obligations by Dual-Listed Companies Is Governed by the Securities Laws of the Foreign Trading Jurisdiction

On November 7, 2017 the Tel Aviv District Court (Economic Division, Judge Kabub) issued a decision in *Cohen v. Tower Semiconductor Ltd. et al.*, C.A. 44775-02-16 (in which our firm represented Tower Semiconductor ("Tower")), that addresses comprehensively the following fundamental question: What law governs a dual-listed company with respect to liability for breaches of the company's ongoing reporting obligations? The Court provided a resoundingly clear answer that the securities laws of the foreign jurisdiction in which the company's shares are traded govern this issue.

The decision related to Tower's motion to dismiss a class action certification motion claiming that certain items in Tower's financial statements were misleading. The motion to dismiss was based on Tower's contention that the governing law had to be determined before the substance of the plaintiff's claims could be considered. Tower argued that, as a matter of Israeli law, both the law establishing the relevant reporting requirements as well as the law determining the liability for breaches of those requirements are the United States securities laws (as Tower's shares are traded on NASDAQ as well as on the TASE); the certification motion mandated dismissal, in Tower's view, because the plaintiff failed to address the US law and to bring an expert opinion establishing for the Court the applicable provisions of the US law.

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Judge Kabub's detailed opinion set out a careful analysis of the reasoning underlying the decision. The opinion began by determining that as a procedural matter, the question of applicable law is a preliminary issue that is appropriate to be considered in the context of a motion to dismiss. Based on the undisputed premise that under the Israeli Securities Law, the reporting requirements applicable to a dual-listed company are the foreign law requirements, the Court concluded that the appropriate interpretation of the Securities Law requires applying the same foreign law to govern the liability for breaches of those reporting requirements. In Judge Kabub's words, "This conclusion fulfills the purpose of the dual-listing arrangement" – reducing the Israeli regulatory burden in order to encourage companies to dual-list in Israel as well as abroad, while ensuring adequate protections for Israeli investors. Distinguishing between the law establishing the reporting requirements and governing their breach would be artificial and counter-productive. In this context, the Court also held that claims seeking to assign liability under the Israeli Companies Law or Torts Ordinance to a dual-listed company for breaches of reporting requirements would undermine the broader principle, established by the Securities Law, that breaches of reporting requirements should be governed by the foreign law that establishes those requirements; hence the Court dismissed those claims as well.

The decision went on to address the situation – relevant in Tower's case – in which certain of the dual-listed company's securities were traded only in Israel, while others were traded on both the Israeli and foreign exchanges. The Court ruled that even with respect to the securities traded only in Israel, the foreign law governing reporting requirements with respect to the dual-listed securities should apply. This conclusion reflected the Court's view that distinguishing between the applicable law for dual-listed securities and for non-dual-listed securities would be artificial and would be inconsistent with principles of efficient jurisprudence. In this regard, the Court held that the existence of multiple classes of securities in a dual-listed company should not influence the choice of law applicable to liability for breaches of the company's ongoing reporting requirements.

In view of amendments to the Israeli Securities Law that came into effect after the years relevant to the case against Tower, however, the Court left open the possibility that in certain circumstances specific Israeli reporting provisions could apply in order to ensure that Israeli investors have the same level of protections that would be available to them under Israeli law.

The class action certification motion also included claims against Tower's auditors. The Court did not decide at this stage which law is applicable to the company's auditors, and ordered further briefings on this issue from the parties and the Israeli Securities Authority in the coming weeks. We anticipate that the Court will address the auditor liability issue in a supplemental decision in this case.

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The decision in the *Tower* case follows the direction set by the Economic Division of the Central District Court in its recent decision in *Damti v. Mankind Corporation et al.*, C.A. 28811-02-16. In that case, the Court held that the US securities law should apply to liability for breaches of reporting obligations of a dual-listed company that is organized in the United States (while Tower, by contrast, is organized in Israel). The *Mankind* decision also concluded that a situation in which reporting rules are determined by foreign law while liability for breaches of those rules is determined by Israeli law would be undesirable and inconsistent with both the Israeli and foreign legal systems. Together, the *Mankind* and *Tower* decisions enhance the certainty for dual-listed companies in regard to the legal standards governing their reporting, and substantially reduce the risk to those companies of dealing with reporting requirements of two separate legal frameworks.

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FBC represents foreign and Israeli issuers in connection with dual-listing in Israel and regularly advises dual-listed companies in connection ongoing reporting obligations and securities offerings in Israel. For further information in this regard generally, or more specifically in regard to the *Tower* and *Mankind* decisions, please feel free to be in touch with your regular FBC contact or any of the following attorneys below.

Sincerely,

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