



Legal Update: Aviation Law

November 2020

Dear Clients and Colleagues,

We are pleased to provide you with important aviation law updates.

Class Action 18226-04-20 The Israel Consumer Council v. United Airlines et al.

The District Court in Tel Aviv recently heard a motion to certify a claim as a class action which was brought by the Israel Consumer Council against four airlines including against Vueling Airlines which was represented by our firm (hereinafter: the "**Council**" and "**Vueling**" respectively). The claim alleged that the airlines did not provide refunds to their customers whose flights were cancelled due to the outbreak of the COVID-19 pandemic and this was a breach of their obligations under the Aviation Services Law (Compensation and Assistance for Flight Cancellation or Change of Conditions) 5772-2012 (hereinafter: the "**Aviation Services Law**"). The claim also alleged that the companies breached their disclosure duties under the Aviation Services Law when they failed to notify their customers on their refund rights.

The Applicant's claim against Vueling was principally based on the allegation that Vueling's website did not disclose the option to receive a refund for flights which Vueling cancelled due to the COVID-19 crisis.

Immediately after Vueling received the motion to certify, our firm on Vueling's behalf approached to the Council and argued that the motion to certify was filed prematurely and without the Council having all the relevant information. Accordingly, Vueling emphasized to the Council the policy it implemented during the COVID-19 crisis and explained that contrary to what was alleged in the motion to certify, Vueling offered and permitted its Israeli passengers to receive refunds (passengers flying to and from Israel) whose flights Vueling cancelled if the passengers were not interested to change their flight dates or to receive travel vouchers for future use, and all in accordance with the refund amounts established in the Aviation Services Law.

Vueling also explained to the Council that it clarified to its passengers that due to the pandemic crisis it could take up to 8 weeks at most to receive the refunds. This time period did not exceed from the mandatory refund period established in the Aviation Services Order (Compensation and Assistance for Flight Cancellation or Change of Conditions) (The Novel Coronavirus – Temporary Order – Amendment) (Extension of the Effective Period) 5780-2020 (hereinafter: the "**Amendment to the Law**") which at the time was pending Knesset approval

and since then, with some changes, entered into force retroactively.

After lengthy legal discussions the Council recognized that Vueling indeed at the relevant times permitted its customers to receive refunds for the flight cancellations and that Vueling also informed its passengers and the travel agents on its policy. Thus, the Council submitted a consent motion to the court in which it requested the dismissal of the motion to certify against Vueling, with no order for costs.

The District Court (the Hon. Judge E. Stemmer) granted the motion to dismiss and gave her decision the force of a judgement. The legal proceeding continued against the three other respondents in the case.

Class Action 20020-09-19 Noy v. Hotels.com

The District Court in Tel Aviv recently heard a motion brought by Hotels.com to dismiss a motion to certify a claim as a class action in the case Class Action (TA) 20020-09-19 **Noy v. Hotels.com** (the "**Motion to Certify**").

The Motion to Certify alleged that Hotels.com's benefits program which offers members one free hotel night after accumulating 10 nights in total cannot be exercised by Israeli customers for travel services in Israel, and thus the program unlawfully discriminates against such customers.

The main argument in the motion to dismiss the Motion to Certify (the "**Motion to Dismiss**") was that in view of the choice of law clause which established the laws of the State Texas as the governing law of the contract between the parties, the Respondent failed to demonstrate a cause of action pursuant to such law, and in addition failed to support its motion with an opinion proving the applicable law – as required.

The District Court held even though it was an extreme remedy, when in a motion to dismiss a motion to certify a class action an argument was made on the question of the governing law and such argument undermines the foundation of the motion to certify, then the court could render a decision on the preliminary question of the motion to dismiss before its adjudication on the merits of the motion to certify.

In response to the Motion to Dismiss, the Respondent argued that the Israeli law was the governing law because the choice of law clause in the contract was a prejudicial condition which should be cancelled. The Respondent based this argument on the court's judgment in the case Class Action 23241-09-16 Hotels.com v. Silis (hereinafter: "**Silis**"). The Respondent argued that in Silis the court held that the same term which was the subject of the Motion to Dismiss was a prejudicial condition which should be cancelled. In addition, the Respondent argued that in the case Leave for Civil Appeal Facebook v. Ben Hamu (hereinafter: "**Ben Hamu**") the court's decision in that case according to which the mere existence of a choice of law clause is not in itself a prejudicial condition, and that the applicant is required to prove that the governing law according to such choice of law clause is depriving, was not relevant to the

matter at hand because in Ben Hamu the presumption of a prejudicial condition pursuant to the Standard Contracts Law, was not proven. The Respondent also argued that the Silis case, as described above, provided sufficient support to prove the deprivation in the case at hand and the governing law clause was voided when its purpose was to evade non-dispositive Israeli laws such as the Consumer Protection Law, 5741-1981 (the "**Consumer Protection Law**") and the Prohibition of Discrimination in Products, Services, and Entry into Places of Entertainment and Public Places Law, 5761-2000 (the "**Discrimination Prohibition Law**"), as stated by the Hon. Judge Meltzer in the Ben Hamu case (Judge Meltzer's remark was made in *obiter* and therefore was not binding).

The Applicant responded in its reply to the Respondent's response that the court's decision in Silis was in relation to a jurisdiction clause in contrast to a governing law clause and the decision was rendered in the context of the court's adjudication on the *forum non conveniens* issue and not on the governing law issue. Further, the Applicant argued that in the later Ben Hamu case a new precedent was established according to which a governing law clause would not in and of itself be deemed to be depriving. The Applicant further argued that in accordance with the test applied in Class Action 54491-01-15 **Bashan v. Easyjet**, which required proof that the applicable law under the governing law clause was depriving, the Respondent failed to prove that the laws of Texas were depriving, separate from the question of whether the Texas legal provisions were the same as the Israeli legal provisions.

The District Court (the Hon. Judge Doron Hasdai) granted the motion to dismiss and held that the Respondent did not satisfy its burden to prove that the governing law clause was depriving which the Respondent was required to do with an expert opinion on the foreign law. In addition, the court affirmed the distinction which the Applicant drew between the Silis matter which dealt with a jurisdiction clause and in which the court made no binding determination on the matter of the governing law and whether it was depriving, and between the matter at hand which principally centered on the governing law clause. The court also held that the Ben Hamu case was binding precedent and thus the Respondent was required to prove through an expert opinion on the foreign law that the laws of Texas were deficient, unreasonable and depriving.

Sincerely,

Fischer Behar Chen Well Orion & Co

For further information, please contact:

Adv. Shirly Kazir

skazir@fbclawyers.com

+972-3-6941348