

## Israel Supreme Court Grants Israeli Jurisdiction In Legal Actions Against Facebook



On May 15, 2018, the Israeli Supreme Court held that users of Facebook in Israel may sue Facebook in Israeli courts, in spite of the Facebook User Terms of Use provision requiring that any legal action against Facebook be undertaken solely in the State of California. This decision was made after a Class Action Suit was filed in Israel against Facebook, to which Facebook responded that the Facebook User Terms of Use require for California to be the exclusive jurisdiction for litigating such legal action.

The Class Action Suit in the amount of \$400 Million, filed in September 2014 by Ohad Ben Hamo and others, alleges that both Facebook Inc. (the Facebook USA entity) and Facebook Ireland Ltd (the outside of the US entity) view and make commercial use, without consent, of Israeli Facebook users' private messages. Furthermore, the suit alleges that Facebook violated the Israeli Privacy Law in that it did not register a database as required under Israeli privacy regulations, and that it violated juvenile users' rights. Facebook responded to the suit by arguing that according to the Facebook User Terms of Use such a suit is to be brought exclusively in California and therefore the Israel courts are not the correct and legitimate forum to litigate the suit.

The Israeli Supreme Court, led by Chief Justice Esther Hayut, made its decision based on two material questions: (1) Is California the exclusive venue for legal matters against Facebook?; and (2) Are the laws of California the exclusive laws which should be applied to govern legal action taken against Facebook?

The Supreme Court held that the Facebook User Terms of Use is a standard form contract (also known as a contract of adhesion, a leonine contract, a take-it-or-leave-it contract, or a boilerplate contract)

and therefore its provisions cannot contain depriving conditions which are prejudicial against the consumer.

### **Attorney-General's Opinion**

The Attorney-General's opinion, requested by the Supreme Court, held that the jurisdiction and choice of law provisions of the Facebook User Terms of Use do not bind Israelis that use Facebook. Several reasons were provided by the Attorney General for this conclusion, including the following:

1. These provisions are intended to deter Israelis from exercising their rights, due to various factors such as the cost of hiring a foreign lawyer and travel abroad;
2. Israeli Facebook users are at a clear and substantial disadvantage vis-à-vis Facebook when agreeing to the User Terms of Use;
3. Any foreign company that decides to allow Israelis to use its products and services and invests in marketing in an effort to increase its revenues should be prepared to allow its customers to exercise their right to litigate in Israel; this should not be construed as an excessive burden, as the foreign company can assess the relevant legal risks and price its products and services accordingly;
4. Facebook has greater access to Israeli courts compared to the access of its Israeli members to Californian courts.

The Attorney General also noted the facts that Facebook has 4 million Israeli members, operates a Hebrew interface and support services in Hebrew and that it translated its terms and conditions to Hebrew – all suggesting that Facebook is doing business in Israel.

### **California As The Exclusive Venue**

Regarding the provision that the U.S. District Court for the Northern District of California or a state court located in San Mateo County, California is the exclusive venue for any legal action against Facebook, the Israel Supreme Court ruled this provision to be depriving and therefore non-enforceable. Chief Justice Hayut reasoned that "Most of Facebook's users (in Israel) do not have means and information to carry out litigation in California...which creates an unbalanced situation." She added that Facebook's user base of 4.5 million people in Israel represents a significant business presence in the country and having to defend against litigation in Israeli courts does not pose an unbearable burden for the multi-national tech giant.

**California Law To Exclusively Govern**

As opposed to the depriving nature of the exclusive venue provision of the User Terms of Use, the Israel Supreme court ruled the California choice of law provision to be reasonable and enforceable. However, the court held that a distinction is to be made between Facebook Inc. and Facebook Ireland. In order to use Facebook, Israeli users agree to the User Terms of Use with Facebook Ireland; however no legal agreement is made between Israeli users and Facebook Inc. Therefore, the User Terms of Use do not apply to the relationship between Israeli Users and the Facebook U.S. entity (Facebook Inc.). Therefore legal actions against Facebook Inc. will be according to Israeli law, whereas California law will apply solely to actions against Facebook Ireland.

**Summary**

The Israel Supreme Court's decision was in line with Attorney-General Avichai Mandelblit's legal opinion that multinational contracts in such situations, where there was a major power imbalance between simple customers and a multinational corporation, cannot enforce unreasonable provisions forcing the average customer to litigate their issue overseas. As a result of this important decision, a wide array of Israeli class action lawsuits against Facebook will be litigated in Israeli courts, despite the fact that the User Terms of Use unequivocally state that any dispute with Facebook will be litigated in California. International Internet companies operating in Israel such as Google and Amazon will no longer be able to prevent Israeli users from submitting claims against them in Israel and under Israeli law.

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