The Supreme Court sitting as High Court of Justice

HCJ 1893/11
HCJ 1965/11
HCJ 9325/12
HCJ 7644/13

Before The Honorable Justice H. Melcer, The Honorable Justice Z. Zylbertal, The Honorable Justice D. Barak-Erez

The Petitioner in HCJ 1893/11 Respondent 3 in HCJ 1965/11 Respondent 9 in HCJ 9325/12 and Respondent 5 in HCJ 7644/13:	The Israel Security Association
The Petitioner in HCJ 1965/11 and Respondent 3 in HCJ 1893/11:	Tevel Security, Cleaning and Services Ltd.
The Petitioner in HCJ 9325/12:	Amishav Services Ltd.
The Petitioner in HCJ 7644/13:	Yashiev German

v.

Respondent 1 in HCJ 1893/11 Respondent 2 in HCJ 1965/11 Respondent 1 in HCJ 9325/12 Respondent 3 in HCJ 7644/13:	The National Labor Court
Respondent 2 in HCJ 1893/11 and Respondent 1 in HCJ 1965/11:	Yigal Viron
Respondent 4 in HCJ 1893/11 and HCJ 1965/11 Respondent 5 in HCJ 9325/12 and Respondent 2 in HCJ 7644/13:	The New Histadrut General Labor Organization
Respondent 5 in HCJ 1893/11 and in HCJ 1965/11 and	

Respondent 4 in HCJ 7644/13:	Kav La'oved Association
Respondent 6 in HCJ 1965/11:	Employees of Tevel Security, Cleaning and Services Ltd.
Respondent 3 in HCJ 9325/12:	Sergei Zandel
Respondent 4 in HCJ 9325/12:	Vlad Konstantinovsky
Respondent 6 in HCJ 9325/12:	Sa'ar Securuty
Respondent 7 in HCJ 9325/12:	Gashash Ltd.
Respondent 1 in HCJ 7644/13:	H.A.S. Systems and Services Ltd.

Petitions for Order Nisi

Dates of hearings: 7 Tammuz 5772 (27 June 2012)
2 Nisan 5774 (2 April 2014)
6 Adar 5777 (25 February 2015)

For the Petitioner in HCJ 1893/11 Respondent 3 in HCJ 1965/11 Respondent 8 in HCJ 9325/12 and Respondent 5 in HCJ 7644/13:	Shoshana Gavish, Adv., Odeliah Danoch-Shalom, Adv.
For the Petitioner in HCJ 1965/11 and Respondent 3 in HCJ 1893/11:	Shlomo Bechor, Adv.
For the Petitioner in HCJ 9325/12:	Oded Gil, Adv., Adi Menachem, Adv.
For the Petitioner in HCJ 7644/13:	Gai Avni. Adv.
For Respondent 2 in HCJ 1893/11 Respondents 1,6 in HCJ 1965/11 Respondents 2-4 in HCJ 9325/12:	Gal Gorodisky, Adv., Avi Mor Yosef, Adv., Igor Glidar, Adv., Ortal Dai, Adv., Naama Vanunu, Adv.
For Respondent 7 in HCJ 9325/12:	Dalit Kislev-Spektor, Adv., Sharona Margi, Adv.
For Respondent 5 in HCJ 1893/11 And HCJ 1965/11 Respondent 4 in HCJ 7644/13 and	

Respondent 7 in HCJ 9325/12: Eran Golan, Adv., Hagar Sussman, Adv.

For Respondent 4 in HCJ 1893/11, 1695/11 and Respondent 2 in HCJ 9325/12: Boaz Ben Tzur, Adv., Elad Peled, Adv., Oren Shrem, Adv.

For Petitioner 6 in HCJ 9325/12: Ovadiah Cohen, Adv.

For Respondent 1 in HCJ 7644/13: Saar Reshef, Adv., David Naftoliev, Adv.

For The Leumit Workers Organization: Betty Metzer Levi, Adv., Ran Konfino, Adv., Maya Retig-Saba, Adv.

For the Attorney General In HCJ 9325/12: Michal Leiser, Adv.

Facts: The petitions concerned the interpretation of section 10 (3) of Schedule Two of the Class Actions Law, which restricts the possibility of instituting a class action in labor law in the case of a "suit by an worker who is subject to a collective agreement that regulates the terms of his employment, and the employer of that worker, or trade association of which it is a member, is a party to that collective agreement." The petitions arose in light of decisions of the National Labor Court rendered in a number of cases litigated before it. The issue was whether this exception applied to every case in which a worker is subject to a collective agreement to which the employer, or the trade association, is a party, or whether it could be understood as not applying to such situations if neither collective nor legal action had been initiated to redress the breach of workers' rights addressed by the class action.

Held: The High Court of Justice (*per* Justice D. Barak-Erez, Justices H. Melcer and Z. Zylbertal concurring) denied the petitions, holding that the National Labor Court had struck a proper balance among the relevant considerations in LabA 629/07 *in re Viron*, in LabA 132/10 *in re Buskilla*, and in LabA 53348-01-12 *in re Yashiev*. However, the Court decided to clarify the applicability of the exception under section 10 (3) of Schedule Two in regard to enforcement agreements, *inter alia*, in light of certain differences in their treatment in *Buskilla* and *Yashiev*.

Based upon the objectives of the specific law and considerations peculiar to the Israeli labor market, the Court held that the law does not categorically prevent every request to certify a class action by workers in a workplace subject to a collective agreement. In cases in which the collective agreement does not comprise a mechanism for the monitoring or enforcement of workers' rights, and where the labor union is non-functional, i.e., is not an organization that takes practical steps for the enforcement of workers' rights, then section 10 (3) will not bar a request to certify a class action. This conclusion approves the basic approach adopted in the *Viron* case, which has since served as the basis for the Labor Court's decisions in other cases. In such cases, the Labor Court's discretion does not extend to the question whether the exception under section 10 (3) is met, but only to the existence of the other conditions established under section 8 of the Class Actions Law for the purpose of certifying such a suit.

In light of the above, the Court held that when a request for the certification of a class action suit is submitted, the questions that the Labor Court will have to address will be whether the labor union is acting to advance the workers' rights, and whether that action provides an effective means for the enforcement of the claimed rights. Such action need not be optimal, but it must be actual and not a mere "show".

The Court then addressed, in greater detail, the cases in which the activity of a labor union would be deemed to constitute actual involvement in labor relations. Among other things, it was held that the Labor Court should consider the general circumstances of the case, *inter alia*, the defining characteristics of the relevant field; the existence or absence of systematic breaches of rights; the type of rights infringed; the conduct of the labor union (both in regard to the infringed rights and in general); the availability of the labor union for addressing individual complaints of workers; the general functioning of the labor union in protecting workers' rights; the labor union's ability to bring about the actual enforcement of workers' rights, such that they receive what the employers owe them; as well as the labor union's ability to redress past infringements of rights, and not act merely prospectively.

In a unionized workplace, a worker seeking to initiate a class action must show that he first sought the assistance of the labor union before seeking certification of the suit. In the opinion of

Justice Barak-Erez, such a request for assistance must be for the enforcement of the personal rights of the worker. It must be a focused request for the enforcement of concrete rights, as opposed to some general request. Serving formal notice upon the labor union or informing it of the intent to initiate of a class action is not a precondition for filing a class action. The appropriate response time of the labor union can be considered by the labor court in accordance with the specific circumstances of each case.

Judgment

Justice D. Barak-Erez

1. The Class Actions Law, 5766-2006 (hereinafter: *the Class Actions Law* or *the Law*) restricts the possibility of initiating a class action in the case of a "suit by a worker who is subject to a collective agreement that regulates the terms of his employment, and the employer of that employee, or a trade association of which it is a member, is a party to that collective agreement" (as set out in section 10 (3) of Schedule Two of the Law, hereinafter: *sec. 10 (3)* or *sec. 10 (3) of Schedule Two*). The proper construction of this exception to the application of the Law is before this Court. More specifically, the question before us is whether this exception applies in every instance in which a worker is subject to a collective agreement to which the employer or the trade association is a party, or whether it should be understood such that it would not apply to such situations when neither collective nor legal action have been initiated for the enforcement of the violated rights addressed by the suit.

The Legal Question

2. Section 3 of the Class Action Law defines the cases in which a class action may be filed, and restricts the right to initiate such a suit to "a suit as set forth in Schedule Two or in regard to a matter in which explicit statutory provisions establish the right to initiate a class action" (sec. 3 (A) of the Law). Reading Schedule Two of the Law reveals that it recognizes many cases in which a class action can be initiated for the infringement of workers' rights. Section 8 of Schedule Two states that a class action can be initiated on a cause of discrimination under the Equality of Opportunities in Labor Law, 5748-1988, and upon a cause arising from the Male and

Female Workers (Equal Pay) Law, 5756-1996. Section 10 (1) of Schedule Two establishes a wide range of additional causes of action rooted in labor law that may give rise to a class action.

3. These broad provisions were restricted by sec. 10 (3) of Schedule Two, as follows:

> "In this section –
>
> 'Suit'—with the exception of a suit by a worker who is subject to a collective agreement that regulates the terms of his employment, and the employer of that worker, or a trade association of which it is a member, is a party to that collective agreement;
>
> 'Collective Agreement – a collective agreement under the Collective Agreements Law, 5717-1957, or a written collective arrangement[1]"

That is to say: an employee cannot initiate a class action if he is subject to a collective agreement that regulates the terms of his employment, and to which his employer or its trade association is party. The question that arises in the petitions before the Court concerns the construction of this condition. In other words, the question arising in the appeal before us addresses the ambit of the restriction set forth in sec. 10 (3) of Schedule Two in a situation subject to a collective agreement.

Summary of the factual basis and the prior legal proceedings

4. Despite the provisions of sec. 10 (3) of Schedule Two, requests to certify class actions have been submitted in the past even in regard to workplaces subject to collective agreements. The petitions before the Court revolve around several proceedings in which such class actions were initiated. In principle, the National Labor Court adopted the position that sec. 10 (3) of Schedule Two does not constitute an impregnable barrier to class actions, even in regard to workplaces subject to a collective agreement, but added the clarification that in such cases, it is necessary to examine whether or not the representative labor union was derelict in regard to the

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[1] Translator's note: A "collective arrangement" is a labor agreement that does not meet the statutory requirements of the Collective Agreements Law.

employees' rights, and only is such circumstances could a class action be certified. The proceedings before the Court concern three petitions addressing decisions by the National Labor Court in regard to requests to certify class actions related to the rights of workers in the security field. As will be more fully explained below, the petitions before the Court represent three "generations" in the case law of the National Labor Court in the matter of class actions in labor law, in general, and specifically in regard to the infringement of workers' rights in the security industry. These "generations" represent the periods in which the requests for certification of the class actions were submitted in reference to developments in regard to the activities of labor unions in relation to the protection of workers' rights in the security industry. The "first generation" represents the period in which the class actions were filed the labor unions took action to enforce the rights of workers employed as security guards. The "second generation" represents the period in which labor unions began to act to enforce the workers' rights. That activity was expressed in the signing of a general collective agreement intended to enforce the rights of workers in the security industry by virtue of labor law, extension orders,[2] and various collective agreements (hereinafter: the *General Enforcement Agreement*). The General Enforcement Agreement applied to all of the employers who were members of the trade association in the security industry, and every employer who would join the association after the signing of the agreement, in regard to the workers of such firms working as guards or in security positions. In the "second generation", the requests to certify class actions were submitted prior to the General Enforcement Agreement, but the decisions were handed down after it had entered into force. The "third generation" represents the period in which the requests were submitted after the General Enforcement Agreement had entered into force, but questions still remained as to its contribution to the enforcement of workers' rights in practice.

5. *The collective agreements in the security field* – As noted, the three proceedings before this Court concern the rights of workers employed in the security-guard industry. There is a trade association in this field – The Israel Security Association (hereinafter: *the Trade Association*). On July 12, 1972, the Trade Association signed a collective agreement with the Histadrut

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[2] Translator's note: An "extension order" is a ministerial order extending some or all the provisions of a collective agreement to other classes of workers or employers not party to the original agreement.

General Labor Organization (hereinafter: *the General Collective Agreement of 1972* and *the Histadrut*, respectively). The General Collective Agreement of 1972 was extended to all workers in the security field on December 25, 1973 (hereinafter: *the 1973 Extension Order*). On November 2, 2008, a new collective agreement was signed in the security industry (hereinafter: *the General Collective Agreement of 2008*). That agreement applied to all employers who were members in the Trade Association, and to all workers employed as guards or in security. The provisions of that agreement were extended by an extension order on June 21, 2009 such that they applied to all employers in the guarding and security industry in Israel, as well as to their workers employed in guarding and security positions (hereinafter: *the 2009 Extension Order*). The result is that all workers in the security and guarding industry enjoy rights that are anchored in the said extension orders of 1973 and 2009 respectively. Nevertheless – and it would seem that this point is no longer contested – the workers in this industry did not always enjoy all of the rights to which they were entitled, and yet no collective enforcement actions were undertaken to defend them. It was against this background that requests to certify class actions were submitted in regard to those breaches, even in regard to workplaces that were subject to the General Collective Agreement by virtue of the employer's membership in the Trade Association.

6. *The "first generation" of decisions of the National Labor Court* – The possibility of certifying class actions of workers within the ambit of sec. 10 (3) of Schedule Two was first recognized in LabA 629/07 *Viron v. Tevel Security, Cleaning and Services Ltd.* (March 1, 2011) (hereinafter: *the Viron case*), after previous requests to certify class actions of workers were denied for various reasons (see: LabA 339/07 *Oren v. Bank Hapoalim Ltd.*) (January 18, 2009), regarding which the petition to the High Court of Justice was denied *in limine* in HCJ 9720/10 *Oren v. National Labor Court* (January 25, 2011); LabA 58039-11-11 *Turgeman v. Shahak Security, Guarding and Office Services Ltd.* (December 31, 2012), regarding which the petition to the High Court of Justice was denied *in limine* in HCJ 62/13 *Turgeman v. National Labor Court* (January 28, 2013)). The *Viron* case concerned a request (submitted in 2006) to certify a class action for the failure to make pension-fund contributions for workers in accordance with the provident fund and severance provisions of the 1973 Extension Order. The respondent in that case, Tevel Security, Cleaning and Services Ltd. (hereinafter: *Tevel*) argued that it was a member of the Trade Association, and that the workers were therefore covered by the General Collective

Agreement of 1972 and the class action could not, therefore, be certified. The National Labor Court held that the class action met the various criteria of the Law, and that sec. 10 (3) of Schedule Two should be construed in a manner that does not preclude its submission. The reasoning grounding the decision (*per* Judge V. Viret-Livneh, Judge A. Rabinovich and Public Representative I. Segev concurring) was that the Labor Court is granted discretion to certify a class action even in regard to the infringement of rights in a unionized workplace, in view of the overall circumstances of the case and the purpose of the Class Action Law, for example, when the labor union does not act for the full enforcement of the workers' rights. It was further held that the matter was one in which justification for certifying the class action could be found in the powerlessness of workers in the security-guarding industry and the ongoing infringement of their rights, such that their rights had effectively received no protection. In addition, the court found that Tevel had joined the Trade Association only after the suit had been filed, and inasmuch as its membership could not have retroactive effect, the restriction under sec. 10 (3) of Schedule Two was not applicable to the suit in any case. As opposed to that, President S. Adler dissented from the majority's understanding of sec. 10 (3), arguing that the rule should bar class actions in unionized workplaces in all but exceptional, extreme and distinguished cases in which the labor union is a "puppet" or is not an authentic union or is entirely inactive. Nevertheless, President Adler concurred with the result under the circumstances of the case, inasmuch as Tevel was not a member of the Trade Association at the relevant time, but only joined after the submission of the request to certify the class action. Public Representative S. Habshush concurred in the opinion of President Adler.

7. Petitions challenging the decision in the *Viron* case were submitted to this Court in 2011 by the Trade Association (HCJ 1893/11) and by the employer, Tevel, itself (HCJ 1965/11). The respondents in those proceedings were the plaintiff in the class action, the Histadrut and the Kav La'oved Association (hereinafter: *Kav La'oved*) which had presented itself in the proceedings before the National Labor Court (in addition to the National Labor Court itself, which is, by nature of the proceedings, a formal respondent in all of the petitions before us). The Attorney General, who was asked to submit his position in regard to the petitions, stated that he saw no reason to intervene in the decision of the National Labor Court, inasmuch as everything stated in regard to sec. 10 (3) of Schedule Two was *obiter dicta* in light of the finding that Tevel was not a

member of the Trade Association at the time relevant to the suit. To complete the picture, it should be noted that in the course of the years following certification of the class action, the parties to the class action conducted negotiations towards a settlement, and the proceedings were therefore held in abeyance and left undecided. On January 5, 2015, the Tel Aviv District Labor Court ratified the settlement agreement between Viron, the plaintiff in the class action, and his employer, Tevel (LabC (T.A.) 6476/06 Deputy President S. Tenenbaum and Public Representatives M. Cohen and A. Kirshner). However, an appeal was entered against that decision, along with a request for a stay, by the Kav La'oved Association, which was of the opinion that the settlement did not adequately serve the interests of the workers due to the mechanism established for serving notices to the members of the group. The National Labor Court issued the requested stay on March 12, 2015 (LabA 14653-02-15, Judge A. Itach). The appeal was heard on June 22, 2015, and it remains in abeyance.

8. *Enforcement agreements made after the "first generation" of decisions* – The certification of the class action in the *Viron* case, and the submission of additional requests for certification of class actions that followed, served as a catalyst for the signing of additional collective agreements that were defined from the outset as intended to advance the enforcement of workers' rights in the security industry.

9. In 2011, the Trade Association and the Histadrut signed the General Enforcement Agreement. As noted, the Agreement applies to every employer that was a member of the Trade Association at the time, or that became a member thereafter, as well as to every worker employed by a member in that association in the fields of guarding or security. According to that agreement, every employer that is a member of the Trade Association is required to submit an annual statement, certified by an accountant, to that association and to the Histadrut, in regard to the fulfillment of its obligations and payments required under labor law, extension orders and collective agreements. Additionally, the General Enforcement Agreement required the establishment of an enforcement committee composed of a representative of the Trade Association, a representative of the Histadrut, and an external accountant. Under the General Enforcement Agreement, the enforcement committee is required to perform annual sample audits of the members of the Trade Association in regard to the fulfillment of their obligations and

payments as detailed above, including in regard to periods in the past. The General Enforcement Agreement further requires that the employers fully rectify any flaws that may be discovered, and the Histadrut is authorized to expand the audit of an employer and order him to redress flaws even if they are from periods that have expired due to limitation of actions. In addition, a worker who wishes to complain in regard to a breach of his rights may present his complaint through the representative of The Israel Security Association to the conflict resolution mechanism established by the General Collective Agreement of 2008. Under sec. 33 of that agreement, a joint review board composed of a representative of the employer and a representative of the Histadrut will first convene to examine and mediate the dispute between the parties to the agreement. If the review board is unable to resolve the matter by mutual agreement, the matter will be transferred to a superior joint review board composed of two representatives, one form each side (the Histadrut and the Trade Association). Under subsection (a) of sec. 33, if the superior joint review board is unable to reach an agreed resolution, the dispute will be transferred to an arbitrator chosen by the joint review board. Under subsection (b) of sec. 33, disputes between an employee and his employer, can be taken directly to an arbitrator, by mutual agreement, as stated in subsection (a).

10. In 2014, a special collective agreement (hereinafter: *the Special Enforcement Agreement*) was signed between Amishav Services Ltd., the Petitioner in HCJ 9325/12 (hereinafter: *Amishav*) and the Leumit Labor Federation (hereinafter: *the Leumit Federation*). The Leumit Federation has been operating as a labor union in Amishav since 2013, although its status as the representative organization[3] in the company has not yet been decided, as shall be explained below. Practically speaking, the Special Enforcement Agreement is similar to the General Enforcement signed with the Histadrut, except that it applies exclusively to Amishav and its employees. The agreement provides for the establishment of an enforcement committee composed of a company representative, a representative of the Leumit Federation, and a certified

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[3] Translator's note: A "representative organization" is defined under the Collective Agreements Law, 5717-1957. For the purpose of a general collective agreement, a representative organization is the employees' organization that comprises the greatest number of organized employees covered by the collective agreement. For the purpose of a special collective agreement, a representative organization is the employees' organization comprising or representing the greatest number of organized employees covered by the agreement, provided that it comprises or represents at least one third of the total number of workers to be covered by the agreement.

wage examiner under the Law for the Increased Enforcement of Labor Laws, 5772-2011. The Special Collective Agreement requires that, once every quarter, Amishav will provide sample pay slips of employees in its various projects as requested by the Leumit Federation, which will examine them and verify their accuracy, as may be required. It further provides for a quarterly sample audit of all the obligations and payments of Amishav to its employees, including for prior periods, and that the enforcement committee will have the authority to order the rectifying of flaws that may be discovered, as well to expand the scope of the audit as it may deem necessary.

11. *The "second generation of National Labor Court decisions* – the next stage of decisions in this area – its "intermediate generation" – comprises the cases in which requests for certification of class actions were submitted prior to the signing of the General Enforcement Agreement, but for which the decisions were rendered after it was signed. In two instances, the National Labor Court held that the General Enforcement Agreement was not relevant to requests submitted before it was signed, inasmuch as it was a prospective agreement that was not intended to redress past violations of employees' rights. In LabA 67/10 *Yivtach Ltd. V. Havusha* (March 14, 2012) (hereinafter: *the Havusha case*), the National Labor Court pointed out that, under the agreement, the obligation to present proof of payments applied to the employers only as of 2010, whereas the request to certify the class action was submitted in 2006. Moreover, the National Labor Court noted that the request concerned rights from 1999 forward, and thus from years that preceded the signing of the Enforcement Agreement. That was also the holding in LabA 132/10 *Buskilla v. Sa'ar Security Ltd*. (Sept. 3, 2012) (hereinafter: *the Buskilla case*), which addressed three requests to certify class actions that were joined, and that had been submitted in 2006 and 2007. In the *Havusha* case, the National Labor Court reiterated its view that in addressing the question of whether the restriction established under sec. 10 (3) of Schedule Two, the court must consider whether the purpose of that restriction was achieved, and that the proper construction in each case must consider the characteristics of the industry in which the workers were employed, and whether there was a widespread phenomenon of systematic breach of the rights of workers in that field. The court further held that that the question of whether the collective agreement actually regulated work conditions must be examined, that is, did the employer apply it in practice. The proceedings in the *Havusha* case are not yet over, and are currently adjourned due to a winding-up order issued against the employer in that case (see the decision of Nov. 26, 2012

in NIA 4524/06, Judge H. Yahalom). Similarly, in the *Buskilla* case, the court held that the restriction established by sec. 10 (3) is not comprehensive, but rather creates a defense for which the burden of proof falls upon the party claiming it. It was further held that the restriction does not apply where the employer raises the claim of the existence of a collective agreement only in the course of the proceedings, in order to "evade" the class action, or where the employer does not deny the existence of a collective agreement, but refused to apply it over a period of years. It should be noted that the proceedings in regard to the request were remanded to the District Labor Court in Haifa for consideration of the other conditions for the certification of a class action, and it was indeed certified by that court on Sept. 17, 2013 (Labor Dispute Case 924/07, Judge A. Kogen and Public Representatives H. Dror and Y. Ron). Accordingly, the case remains before the District Labor Court.

12. A petition against the District Labor Court's decision in the *Buskilla* case was submitted to this Court by Amishav, the employer of one of the class action plaintiffs in that matter (HCJ 9325/12). Two of the respondents in this proceeding are the other security companies that were sued, Sa'ar Security Ltd. and Gashash (Z.A.) Ltd. (hereinafter: *Sa'ar Security* and *Gashash*, respectively), along with the class action plaintiffs in that matter, as well as the Histadrut and the Trade Association. The Attorney General informed the Court that he, too, would appear in this proceeding, and the Leumit Federation that, as noted, operates as a labor union in Amishav since 2013, asked to join the proceeding in regard to the Special Enforcement Agreement that it signed with Amishav (after Buskilla's request to certify the class action, and after the hearing in the National Labor Court). The Trade Association, the petitioner in HCJ 1893/11, also asked to join. The Trade Association was joined to the proceeding on March 21, 2013 (Justice A. Arbel), and submitted its arguments. It should be noted that on the dates relevant to the suit, the General Collective Agreement applied to Amishav as a member of the Trade Association (as did the General Enforcement Agreement, for the same reason). Those agreements also applied for the same reason to Sa'ar Security and Gashash, the two other employers sued in the *Buskilla* case, who did not petition against the Labor Court's decision but support petitioner Amishav's position. We will add at this juncture that we have decided to join Kav La'oved and the Leumit Federation to this proceeding due to their relevance to the subjects at hand and their contribution to the proceedings as a whole.

13. *The "third generation" of decisions in the National Labor Court* – Following the signing of the General Enforcement Agreement in the security industry and its application in practice, the question arose whether the interpretive rationale that grounded the possibility of class actions for infringements of workers' rights in the security industry was still applicable. This question was addressed by the National Labor Court in LabA 53348-01-12 *Yashiev v. H.A.S. Systems and Services Ltd*. (June 3, 2013) (hereinafter: the *Yashiev* case). The *Yashiev* case concerned an additional request to certify a class action in the security industry, submitted in 2011, about two months after the signing of the General Enforcement Agreement, and addressed the infringement of workers' rights (failure to set aside pension payments in the amount of 6% of wages) over the preceding seven years. The National Labor Court held that in view of the entry into force of the General Enforcement Agreement, the request to certify the class action should be denied (President N. Arad, Deputy President Y. Plitman, and Public Representative A. Weitz). Citing LabA 12842-07-10 *Eyal v. Hot Communications Systems Ltd*. (June 9, 2011) (hereinafter: the *Eyal* case), the court further held in the *Yashiev* case that the class-action plaintiff should have applied to his employer and to the labor union before submitting the class action, and that the plaintiff could only submit a request for certification if they failed to act. Judge Rabinovich noted that he agreed, under the circumstances, that implementing the General Enforcement Agreement would be the more just and efficient means for resolving the issue in the instant case (citing sec. 8 (a) (2) of the Class Actions Law that establishes such a condition for the certifying of a class action), but added that the implementation of the General Enforcement Agreement should be evaluated over time, in accordance with its results, and by a concrete evaluation of the agreement in each case. Public Representative D. Sharon concurred. To complete the picture, we would note that the approach by which Histadrut action in regard to workers' rights under the General Enforcement Agreement bars the submission of class actions was adopted in subsequent cases (see: LabA 16808-06-12 *Tauber v. Hashomrim Group Guarding and Security Ltd*. (March 4, 2015); LabA 7229-05-12 *Batya v. Mikud Israel Security, Services and Manpower Ltd*. (March 4, 2015)).

14. The class-action plaintiff in the *Yashiev* case also submitted a petition to this Court, arguing that his case should have been decided in the same manner as preceding cases in which

the General Enforcement Agreement did not constitute a bar to a class action. The respondents in that proceeding are the Histadrut, the Kav La'oved Association, the Trade Association, and the plaintiff's employer, H.A.S. Systems and Security Ltd. (hereinafter: *H.A.S.*) (HCJ 7644/13).

15. The petitions before the Court were originally heard separately. In a hearing on June 27, 2012, on the petitions in the matter of *Viron* (HCJ 1893/11 and HCJ 1965/11), the parties agreed to conduct the proceedings as if an order nisi had been issued (A. Arbel, H. Melcer, D. Barak-Erez, JJ.). A hearing was held on April 2, 2014 in the *Buskilla* case (HCJ 9325/12, A. Grunis, CJ, Y. Danziger, Z. Zylbertal, JJ.), in which the parties updated the Court in regard to the developments in the various proceedings, including the settlement reached in the *Viron* case and the petition submitted in the matter of *Yashiev*. In addition, the response of the Attorney General was requested in the *Buskilla* proceeding (who, as noted, informed the Court of his intention to appear in these proceedings on March 7, 2014). Finally, a joint hearing was held in regard to all of the petitions on Feb. 25, 2015, in which the parties agreed that the hearing would be conducted as if orders nisi had been issued in regard to all of the proceedings.

Additional proceedings in the Labor Court

16. To complete the picture, it should be noted that additional requests for certification of class actions have been submitted in parallel to these proceedings. Examples will be presented below in order to demonstrate that in proceedings such as this, fundamental questions with a common denominator arise, and they will be the focus of our deliberation.

17. Another class action was submitted against Amishav, the respondent in the *Buskilla* case, by a woman who was employed by the firm as a cleaner, and by Kav La'oved. The hearing in that case was held in the National Labor Court after the *Yashiev* case was decided, and after the signing of the Special Enforcement Agreement between Amishav and the Leumit Federation. The National Labor Court held that, in light of the decision in the *Yashiev* case preferring enforcement of rights by means of the labor union, the case should be remanded to the District Labor Court for an examination of whether the Leumit Federation was actually taking collective action to enforce the workers' rights. For the time being, it was decided that the case will not be

joined with the proceedings in the matter of *Buskilla* (LabA 5268-01-11 *Tagnia v. Amishav Services Ltd.* (March 5, 2015)). That matter awaits the decision of the National Labor Court on the question of which labor union is the representative organization in Amishav (see: the decision of the Jerusalem District Labor Court in Judicial Appointment Hearing 5771/08, President D. Pruzinan, regarding Inter-Organization Suit 6759-12-14).

18. Another request to certify a class action was submitted in 2009 against an additional security company, Hashomrim Association Ltd. The District Labor Court denied the request for various reasons, noting that sec. 10 (3) of Schedule Two bars class actions against union-organized workplaces. The National Labor Court denied the worker's appeal against the decision not to certify the class action (and granted the company's appeal to recoup costs assessed against it) (LabA 425/09 *Goldberger v. Hashomrim Association Ltd*. (Feb. 2, 2010)). A petition against that decision was submitted to this Court. In light of the decision that had been handed down in the interim in the *Viron* case, the parties agreed that the Court remand the case to the District Labor Court in regard to the cause of action concerning the failure to set aside pension contributions according to the pensions provision, without taking a stand on the merits (HCJ 2023/10 *Goldberger v. National Labor Court* (Feb. 14, 2011)). In the end, having been remanded to the District Labor Court (and joined with another class action submitted by another of the company's workers in 2010), it was decided, in accordance with the *Yashiev* decision, that due to the existence of the General Enforcement Agreement, the class action should not be certified at this stage. The District Labor Court further noted that the plaintiffs had not approached the Histadrut, the Trade Association or the employer to request enforcement of their rights before instituting the suits (see Employee/Organization Case (BS) 15305-06-10 *Goldberger v. Hashomrim Association Ltd*. Jan. 1, 2014)). The appeal is now pending before the National Labor Court (LabA 21520-02-14).

19. Another case worthy of mention in this context is a request to certify a class action submitted in 2006 by a worker in B.G. Moked Security Ltd. In that case, the District Labor Court certified the class action, holding that the employer had not shown that it was a member of the Trade Association and that its workers were therefore covered by a collective agreement. In the National Labor Court, the employer claimed that it had agreed to a "process for enforcing the

rights of the company's workers" with the Histadrut, and asked that the court approve the agreement that establishes the said process, under which the workers' rights would be redressed retroactively for the seven preceding years, on the condition that the judgment of the District Court be set aside. The National Labor Court noted that the employer had chosen to claim the existence of a collective agreement only *ex post facto*, as a "shield" to the class action, and that it had not proven that it was a member of the Trade Association and thus subject to the original collective agreement. In any case, the National Labor Court further held that the agreement reached by the employer and the Histadrut in regard to an enforcement process for workers' rights does not justify altering the result, and that the process is not preferable to certification of the class action. The National Labor Court added that the fact that the employer began to pay its workers for the claimed rights after the request for the class action is not a sufficient reason to deny certification in view of the clear importance of that class actions in encouraging enforcement and deterring breach of the law. The National Labor Court noted that the enforcement process was offered only at the appeal, such that it is not unreasonable to imagine that it was the class action that spurred the employer and the Histadrut to action, and that the process offered no recompense to the plaintiff in the class action. Moreover, the class action related to a period that predates the one addressed by the enforcement process, and the enforcement of a judgment has advantages over the "enforcement process" as proposed, which would require appealing to the Histadrut if it is not enforced in practice (see: LabA 454/09 *Moked Security v. Ben Shlomo* (March 23, 2011) (hereinafter: the *Ben Shlomo* case)). It should be noted that, in the end, the parties reached a court-approved settlement, and in the framework of the settlement, a special collective agreement was signed (with the Leumit Federation) that included compensation for the company's workers for the cause of action claimed in the class action, including past workers of the company. It should also be noted that the settlement included an award to the plaintiff in the class action, and payment of her legal fees, and noted her contribution to the change in the employer's policy (see: Employee/Organization Case (TA) 9528-07-07 *Ben Shlomo v. B.G. Moked Security Ltd.* (Feb. 15, 2015)).

20. On July 7, 2015, after a hearing before this Court, the attorney for the class-action respondents filed a request to submit additional supporting material and to present protocols

from ongoing proceedings. In light of the nature of the questions that we have been asked to decide, we did not see fit to grant the request.

Summary of the pleadings

21. In general, the primary disagreement between the parties – *the "first-order" question* – centers on the very possibility of submitting a request to certify a class action when the employment of workers by the employer is subject to a collective agreement. Two primary positions were presented to the Court: One saw sec. 10 (3) of Schedule Two as posing an absolute bar to class actions in union-organized work places, while the other saw sec. 10 (3) as a relative bar that depended upon the question of whether workers' rights were enforced in practice in the workplace. In addition, if the latter were the case, then as a *"second order" question*, the parties were divided on the question of the "threshold" for the certifying of such a class action as regards the conduct of the labor union. Lastly, a *"third order question"* arises that also concerns situations in which the labor union has begun to act, but only after the submission of the class action.

The ("first order") issue in regard to the very possibility of a class action where a collective agreement exists

22. The position opposed to the submission of class actions was – for various reasons – that of the security companies whose workers were affected by the class actions – Tevel, Amishav, Gashash, Sa'ar Security and H.A.S. (hereinafter: *the employers*), the Trade Association, and the Histadrut. All of the above argued that sec. 10 (3) was intended to protect collective labor relations. In their view, the possibility for submitting a class action against an employer undermines the collective regime to which the employers and the labor union are parties.

23. From the formal point of view, it was argued that the language of sec. 10 (3) of Schedule Two is clear and unambiguous.

24. From the substantive point of view, it was argued that a class action is not a necessity in cases of inadequate protection of workers' rights by a labor unions, in light of the availability of other avenues for seeking relief, such as individual lawsuits by the injured workers, lawsuits against the labor union for "inadequate representation", or even the taking of steps to establish a competing labor union or organized defection to a competing union. It was further argued before us that the decision of this Court in HCJ 7029/95 *Histadrut General Labor Organization v. National Labor Court*, 51 (2) IsrSC 63 (1997) (hereinafter: the *Amit* case) demonstrates the importance of maintaining the collective framework in labor relations. This can be see, *inter alia*, from the fact that a union that ensures the wellbeing of workers but that does not address their working conditions and compensation from the point of view of collective labor relations cannot be deemed a "labor union" with all the significance that attends that recognition (*ibid*., at p. 131). The employers, the Trade Association, and even the Histadrut sought to employ this in the interpretation of sec. 10 (3) in regard to the importance of ensuring the primacy of collective labor law and that of labor unions within that framework. In furtherance of this point, it was argued that the possibility of initiating a class action in the presence of a collective agreement will result in harm to the labor unions, and will ultimately undermine the motivation of employers to join trade associations that are party to a collective agreement. Additionally, in regard to the "second order" issue that we will address more fully below, it was argued that such a "flexible" interpretation of sec. 10 (3) will lead to the need for a "voir dire" on the question of whether the labor union actually acts for the enforcement of workers' rights in practice.

25. For their part, the class-action plaintiffs rejected those arguments. Primarily, they argued that sec. 10 (3) should not be interpreted in a formal manner, without regard for its purpose, which is to deny class actions when there is a real alternative for protecting workers' rights in a collective framework. They went on to argue that the alternatives suggested for the protection of workers' rights were not real alternatives. Instituting a personal lawsuit, they argued, does not address the collective issue, and in any case, is not an effective path for unempowered workers. Additionally, it was argued that a suit for inadequate representation is subject to strict standards, such as "conspiracy", and the alternative of organizing under a different union is neither practical nor achievable in many cases where we are concerned with a powerless and dispersed group of workers. Moreover, the class-action plaintiffs emphasized that sec. 10 (3) even applies in cases

in which the relevant collective agreement is not the result of negotiations conducted by the union in regard to the specific workplace, and it is possible that the workers will not even be members of that union because the employer joined a trade association that is party to a general collective agreement. This, they believe, testifies to the danger inherent in the strict interpretation of sec. 10 (3), such that, in practice, the collective agreements will not result in the actual protection of workers.

26. Kav La'oved supported the position of the class-action plaintiffs. Its attorney also pointed out that sec. 10 (3) was not even mentioned in the Class Actions Bill, 5765-2005, and was added to the proposed law only in the course of the debate, after it was explained that class actions should not be recognized where there is in fact a means for protecting workers (citing the protocol of meeting no. 667 of the Constitution, Law and Justice Committee of the 16th Knesset, 18-21 (March 1, 2006)). Kav La'oved further pointed out that, in practice, collective organization had not been employed as a means for protecting the rights of workers in the security and cleaning industries, in which workers are employed through contracts with private manpower agencies, and the Histadrut does not defend their rights in practice. It was further emphasized that the application of the General Collective Agreement in the security industry to the workplaces relevant to these petitions derived solely from the respondent employers' membership in the Trade Association, and not as the result of any real activity by labor unions on behalf of the workers.

27. The Attorney General presented his position to the Court in his appearance in the hearing on the petition in the *Buskilla* case. In principle, the Attorney General supported the approach of the National Labor Court, according to which sec. 10 (3) of Schedule Two does not constitute an absolute bar to class actions. According to the position expressed to the Court, some solution should be provided for situations in which there is a disconnection between the workers and the union that purports to represent them. The Attorney General added that the case law of the National Labor Court developed tools for contending with such exceptional cases, without detracting from the purpose of unionized labor.

The ("second order") issue regarding the "limits" of the scope of the exception set forth in sec. 10 (3)

28. As earlier noted, the National Labor Court's decisions in the *Buskilla* case and the *Yashiev* case added an additional aspect to the question of which class actions would be disallowed under sec. 10 (3).What arises from those decisions of the National Labor Court is that the enforcement of rights in practice, in the form of an enforcement agreement, may change the picture in regard to class actions. The decisions addressed the General Enforcement Agreement between the Histadrut and the Trade Association, which we described above. In the *Yashiev* case, the National Labor Court took the view that a class action that was initiated after the General Enforcement Agreement had come into force and after the Histadrut had begun to act upon it (including in regard to the rights of former workers) should not be certified. In that case, the petition against the decision of the National Labor Court was submitted by the class-action plaintiff, who was of the opinion that the General Enforcement Agreement should not constitute a bar to the certification of the suit as a class action.

29. In essence, what the class-action plaintiff argued in the *Yashiev* case was that the mere existence of an enforcement agreement was insufficient, and that the court must ascertain whether the agreement was actually applied in practice. It was therefore argued that a decision not to certify the class action should be conditioned upon the implementation of the General Enforcement Agreement, which should be reviewed and monitored by the Labor Court. It was further argued that, in any case, the existence of the General Enforcement Agreement should not be taken into account in regard to breaches that preceded its signing. As opposed to that, the class-action plaintiff's employer, H.A.S., and the Histadrut argued that even in such a case, and a fortiori, class actions should not be permitted.

30. As opposed to that, the Kav La'oved Association sided with the class-action plaintiffs on the matter of enforcement agreements – emphasizing the history of signing enforcement agreements, which allegedly demonstrates that preventing class actions was the primary motive for their adoption. Kav La'oved further argued that there is a fear that such agreements will not live up to their promise (this view and the reasons grounding it are set out in detail in Eran Golan

and Yael Plitman, "Class Actions and Collective Labor Law – the Good the Bad and the Ugly," 6 *Maasei Mishpat* 177 (2014). It should be noted that the author Eran Golan is the attorney for Kav La'oved in the proceedings before this Court).

The ("third order") issue regarding the date on which the labor union began to act relative to the date of the filing of the class action

31. In the *Buskilla* case, the National Labor Court was of the opinion that the General Enforcement Agreement did not bar certification of the class action, inasmuch as the agreement was signed after the initiation of the class action.

32. The parties to the *Buskilla* petition essentially reiterated the above arguments. Here, too, the employers, the Trade Association and the Histadrut argued that the class action should not have been certified because the workers of Amishav were subject to the General Collective Agreement of 2008, as well as to the General Enforcement Agreement signed in 2011. In their view, those collective agreements constitute an impenetrable barrier to class actions. In their opinion, the test is the applicability of a collective agreement and not whether it is actually enforced, and any other interpretation would harm the collective labor relations that sec. 10 (3) was intended to protect. The Histadrut argued that, at the very least, the respondent should have been required to turn to the labor union before submitting a class action, in order to give it the opportunity to act collectively.

33. On their part, the class-action plaintiffs reiterated their stance that the existence of a collective agreement does not absolutely rule out the initiation of a class action. As regards the General Enforcement Agreement, which the plaintiffs referred to as the "breach agreement", they noted that when a defendant pays the claim after the initiation of a class action, it encourages infringing the law and undermines compliance (citing, inter alia, CA 10262/05 *Aviv Legal Services Ltd. V. Bank Hapoalim* (Dec. 11, 2008)). The class-action plaintiffs agreed with the holding of the National Labor Court that the General Enforcement Agreement was not relevant to the rights at issue in the *Buskilla* case, and that in any event, the General Enforcement Agreement was merely a "purported" agreement that could not serve as a bar to a class action

even if it were in force at the time of filing (as they also argued in the *Yashiev* case). Kav La'oved was also of the opinion that, in view of the circumstances of its signing and its actual effectiveness, the Enforcement Agreement was not sufficient.

34. The arguments in regard to the conclusions to be drawn from the existence of an enforcement agreement, particularly one signed after the initiation of the class action, were brought into sharper light when the Leumit Federation joined the proceedings. As earlier noted, the Leumit Federation signed a special enforcement agreement with Amishav, the petitioner in HCJ 9325/12. According to the Leumit Federation, when a labor union is actively engaged in protecting the rights of workers, the collective framework should be preferred to a class action, even if that activity began after the filing of the class action. The Leumit Federation further argued that in such a situation, the class action should not be certified, subject to the condition that if filing it was the class action that led to the enforcement of the rights, then appropriate compensation should be awarded to the class-action plaintiff and its attorney, despite the denial of the suit, or some other agreed arrangement should be made with the class-action plaintiff.

35. The Leumit Federation further argued that the Special Enforcement Agreement that it signed with Amishav was firm and not restricted to the limitation-of-actions period or to current breaches. Therefore, it was argued, it is important to preserve the organized labor relations created by the special collective agreement, and to prevent the submission of class actions where enforcement actions have commenced even after the filing of the class action. This is also true in view of the fact that a labor union has better tools for achieving enforcement in comparison to a class action. The attorney for the Leumit Federation noted in the hearing before this Court that Leumit is open to a certain measure of supervision of the implementation of the Special Enforcement Agreement by the labor court.

Discussion and Decision

36. This decision requires that we reexamine the guiding principles of labor law. It requires that we address the special difficulties associated with the protection of workers' rights in general, and of unempowered workers in particular, as well as the special considerations related

to collective labor law and the faithful representation of unempowered workers in that framework. All of this must be examined against the special background of class-action law and the principles that govern this Court's intervention in the decisions of the labor courts.

37. We should first note that, in this case as well, our guiding policy is that the labor courts are the appropriate forum for delineating the principles of labor law, in view of their superior expertise in this area (see, e.g., HCJ 525/84 *Hatib v. National Labor Court, Jerusalem*, 40 (1) IsrSC 673, 684-694 (1986); HCJ 4193/04 *Gartner-Goldschmidt v. National Labor Court*, paras. 12-14 (June 20, 2010); HCJ 92/13 *Peri v. National Labor Court*, para. 7 (Jan. 1, 2013)). However, the petitions before the Court are of a type that justifies an in-depth examination of the arguments by this Court, given the substantive legal question at issue, and its impact upon the interpretation of the Class Actions Law and upon the fundamental rights of a unempowered workers (see: HCJ 3716/13 *Egged, Israel Transport Cooperative Ltd. V. National Labor Court*, paras. 25-26 (July 3, 2014)).

38. In any event, for reasons that will be explained below, we have concluded that the petitions should be denied, as the National Labor Court struck an appropriate balance among the competing considerations in the *Viron* case, the *Buskilla* case, and in the *Yashiev* case. Nevertheless, we are of the opinion that the scope of the restriction established under sec. 10 (3) of Schedule Two should be clarified, *inter alia*, in light of certain differences in this regard in the *Buskilla* and *Yashiev* cases.

The scope of the dispute up to this point: Class actions prior to and following the Class Actions Law

39. In order to take a "broad view" in addressing the petitions before us, we should present the development of the case law of the National Labor Court, and the opinions expressed in that regard.

40. *Before the enactment of the Class Actions Law* – In principle, when the question of class actions of workers came before the courts prior to the enactment of the Class Actions Law, the

starting point of the National Labor Court was that class actions could not proceed against a unionized workplace subject to a collective agreement. This followed from the principled view that collective action was the high road for resolving labor-law disputes. This approach was established in the decision of President S. Adler in LabA 1210/02 *Bibring v. El Al Israel Airlines Ltd.*, 38 *IsrLC* 115, 136-140 (2002) (hereinafter: the *Bibring* case). (Also see: LabA 300031/98 *Israel Aircraft Industries Ltd. V. Morag*, 35 *IsrLC* 289, 308 (2000)).

41. We would preface our remarks by stating that, in general, this is a very sensible approach. However, the question before us is whether the principle is inviolable, or whether exceptions should be established for situations in which the collective protection system fails. This question only became acute with the enactment of the Class Actions Law and the exception in sec. 10 (3) of Schedule Two.

42. *The traditional approach following the enactment of the Class Actions Law* – Initially, the National Labor Court held fast to its traditional approach in regard to the possibility of submitting class actions in labor law, even after the enactment of the Class Actions Law. When the question came before the court, the majority opinion of the National Labor Court in regard to sec. 10 (3) of Schedule Two followed the interpretation previously adopted in the *Bibring* case, and thus reflected a narrow approach that prevented the submission of class actions (and see: LabA 1154/04 *Gross v. State of Israel Ministry of Defense* (Jan. 9, 2007) (hereinafter: the *Gross* case); LabA 1537/04 *Katz v. Clallit Health Services, Clalit Health Fund* (Jan. 9, 2007) (hereinafter: the *Katz* case); the *Oren* case). Deputy President E. Barak-Ussoskin adopted a different approach, arguing (in a minority dissent in the *Gross* case, and as a lone dissent in the *Katz* case) that class actions should be permitted in unionized workplaces when the labor union refrains from taking up the issue on the workers' behalf.

43. *The new approach after the enactment of the Class Actions Law* – As opposed to the traditional approach of the National Labor Court, a broader approach developed that recognized the possibility of certifying a class action in cases in which workers' rights were infringed even when the work place was purportedly subject to a collective agreement. Under this approach,

sec. 10 (3) of Schedule Two should be interpreted in a manner that would exempt situations of systematic infringements of workers' rights that were not effectively addressed by the labor union, as an exception that could be permitted at the discretion of the labor court. This approach, first enunciated in the opinions of Deputy President E. Barak-Ussoskin (originally in a minority or lone dissents), was adopted by the majority in the *Viron* case, *per* Judge V. Viret-Livneh (*ibid.* paras. 48-54). Judge Viret-Livneh based her opinion in the matter on the doctrine of purposive interpretation, as follows:

> "*The purpose of the exception in part 10 (3) of the Appendix* was to enable the representative labor organization in unionized workplaces subject to a collective agreement that regulates labor conditions – *and here I would add that it actually regulates the labor conditions in practice and not just on paper* – to take the steps at its disposal by virtue of its function, to compel the employer to conform to the collective agreement, primarily by initiating a process of a collective labor dispute" (*ibid.*, para. 31, emphasis original).

Thus, under this approach, sec. 10 (3) should be read in a manner that limits its scope in regard to situations in which the collective agreement formally addresses workers' rights, but does not advance them in practice. As noted, this approach was again adopted in the *Havusha* and *Buskilla* cases, which emphasized the importance attached to the actual enforcement of workers' rights, and referred to the labor court's discretion in the matter, in light of the specific character of the relevant labor relations.

44. It should be noted that the new approach in the case law of the National Labor Court was adopted only in a majority opinion. In the *Viron* case, President Adler continued to adhere to his strict approach to class actions in unionized workplaces, as it was earlier developed in the *Bibring* case. President Adler expressed his position in stating: "Even where we discern a problem of under-enforcement and a breach of workers' rights that undoubtedly requires resolution, it is proper – in the case of a unionized concern – that the solution be found in the collective labor framework and not by infringing or undermining it" (the *Viron* case, para. 17 of the opinion of Adler, P.).

45. It would hardly be superfluous to note that even according to the approach of President Adler, there may be exceptions to sec. 10 (3) of Schedule Two, and in some cases a class action may be certified despite the existence of a collective agreement. However, President Adler defined the exceptions very narrowly, referring to a situation of a "puppet" organization, or one that is not authentic or that is entirely inactive, situations in which the collective agreement is invalid (for substantive rather than technical reasons), or where a collective agreement is declared void because it was signed by a party that was not the representative organization at the time. As opposed to this, he emphasized that dissatisfaction with the functioning of the representative organization is insufficient in this regard (see: the *Viron* case, at para 17 of the opinion of Adler, P.), as the proceeding for the certification of a class action is ainppropriate for the examination of the functioning of the representative organization. The workers, he added, have other mechanisms at their disposal for improving the functioning of the labor union.

46. *Additional approaches* – Another narrow approach to the interpretation of sec. 10 (3) was presented in an article by Professor Alon Klement and Professor Sharon Rabin-Margalioth (Alon Klement & Sharon Rabin-Margalioth, "Employment Class Actions: Did the Rules of the Game Change?" 31 *Iyuney Mishpat, Tel Aviv University Law Journal* 369 (2009) (Hebrew)) (hereinafter: *Klement & Rabin-Margalioth*). However, the emphasis of that article was somewhat different, and was based upon a distinction between lawsuits initiated for a breach of contractual rights deriving from collective labor relations and lawsuits concerning a breach of rights deriving from labor shield laws. This distinction was based upon the postulation that a class action is a means for advancing the full enforcement of rights, whereas union action may only result in a partial enforcement of rights. The authors go on to explain that when rights deriving from labor shield laws are concerned, full implementation should be ensured, and class actions should be permitted in regard to their breach, while the protection of contractual rights can be left to labor unions, which should enjoy control over the extent of enforcement.

47. In addition to the approaches presented above, we should note that (retired) Deputy President Barak-Ussoskin even suggested – in light of cumulative experience – that sec. 10 (3) of Schedule Two be amended such that the labor courts be granted discretion to certify class actions

even when a workplace is governed by a collective agreement (see: Elisheva Barak-Ussoskin, "From the Heights of Nebo – Class Action and Labor Law: Can they exist together? In light of the Class Actions Law, 5766-2006," *Gabriel Bach Volume* 577, 579 (David Hahn et al, eds., 2011)). According to her approach, preventing class actions in unionized workplaces is not in keeping with the character and tradition of Israeli labor law, and in any case, is not appropriate as a matter of legal and social policy. The article is ultimately aimed at the legislature, and calls for amending the exception as it appears in the Law, in view of the fundamental principles of labor law. However, inasmuch as the article was completed after the decision in the *Viron* case was handed down, it also expresses support for the principled approach enunciated there (*ibid*., p. 617).

48. It is now appropriate that we move from the examination of cumulative experience to a presentation of the considerations that should guide us in establishing the appropriate approach for the construction of sec. 10 (3).

Interpreting the law: Labor law versus class-action law

49. We should state at the outset that in interpreting sec. 10 (3) of Schedule Two, we will adopt the interpretive approach generally employed by the Supreme Court in its decisions – purposive interpretation – which is the approach that guided the National Labor Court, as well.

50. In order to establish the appropriate purposive interpretation of this legislative provision, we must examine the objectives of the two fields of law between which it resides – class-action law and labor law. From the perspective of class-action law, the reigning objective is that of the maximal enforcement of rights, and those of unempowered communities in particular. Labor law, as well, views the optimal enforcement of workers' rights as a central objective. However, that objective is aligned with another one, that of the protection of the power of labor unions, and the two are strongly bound. The power of labor unions is not an independent value, but is intended to serve the interests of workers in the framework of collective labor relations. Weak unions cannot effectively represent the working community and ensure its rights, as such unions would not be relevant negotiating partners from the perspective of the employers. But union

activity is multi-dimensional, and is not limited to the enforcement of workers' rights. Often, it is directed at improving working conditions that go beyond the issue of existing rights. Thus, the protection of the power of unions is a broad objective that goes well beyond the defense of existing rights. The Class Actions Law sought to negotiate a path between these objectives by means of an arrangement that opens the broad avenue of class actions to workers, but that is subject to a restriction intended to preserve the power of labor unions. An understanding of the balance grounding that compromise will guide is as we proceed.

51. As earlier noted, there is, indeed, good reason for the approach that argues that the effective enforcement of workers' rights requires collective action that organizes workers against the power of their employer. In the collective labor system, collective action is generally founded upon the activity of the labor union. The Class Actions Law presented an alternative path for organized action by workers when their rights were infringed – not action by the labor union but through uniting forces by means of a class action. Section 10 (3) sought to prevent workers from choosing class actions, in normal circumstances, in order not to undermine union activity. In such circumstances, sec. 10 (3) should be construed in a manner that will ensure workers' rights, but without opening a breach that would undermine labor unions and their standing in the important system of organized labor relations. From this perspective, the current trend in the decisions of the Labor Court is appropriate. Below, we will set out the main points of our position in order to clarify its proper implementation, in the spirit of the decisions of the Labor Court but with some additional explanations and points of emphasis. The interpretation of the section is grounded upon several footings: interpretation of the language of the law, its legislative history, and its purpose.

The Language of the Law

52. Section 10 (3) of Schedule Two removes suits covered by a collective agreement from the type of suits that can be certified as class actions. The key to interpreting this section is the interpretation of the term "*regulate*". What is a collective agreement that regulates labor relations? The word "regulate" in its legal context is a term of art that refers to the establishing of a comprehensive normative system that applies to a field, its enforcement and supervision.

Regulation is comprehensive organization, in the sense of creating rules, enforcing them, and monitoring implementation. Thus, regulation is expressed by action, and not merely by words on paper. Professor Itzhak Zamir wrote in this regard that the concept of regulation “consists of two parts: first, regulation of private activity in different fields by means of rules determined by statutes, regulations and administrative provision; second, enforcement of the rules by various mechanisms…” (Itzhak Zamir, “Public Supervision of Private Activity,” 2 *IDC Law and Business Journal* 67 (2005) (Hebrew)). That represents the accepted approach in the literature on regulation in general. Of course, there are different approaches to defining the concept, but generally speaking, they can all be said to describe a system of rules that are implemented through monitored enforcement (see, for example: Philip Selznick, “Focusing Organizational Research on Regulation,” in *Regulatory Policy and the Social Sciences* 363, 363-364 (R.G. Noll, ed., 1985) “Regulation refers to sustained and focused control exercised by a public agency over activities that are valued by a community”; Morgan Bronwen and Karen Yeung, *An Introduction to Law and Regulation* 3 (2007) “deliberate attempts by the state to influence socially valuable behaviour which may have adverse side-effects by establishing, monitoring and enforcing legal rules”; David Levi-Faur, “Regulation and Regulatory Governance,” in *Handbook on the Politics of Regulation* 6 (David Levi-Faur, ed., 2011) “the ex-ante bureaucratic legalization of prescriptive rules and the monitoring and enforcement of these rules by social, business, and political actors on other social, business, and political actors”; and see: Sharon Yadin, “What is Regulation? Proposing a Definition Following First Uses of the Term in Israeli Legislation,” *Hukim Journal on Legislation* (Sept. 2014) (Hebrew); Ayelet Hochman, Alon Hesper and Dan Largmen, “Speaking about Regulation – On the Concept of ‘Regulation’ and its Place in Israeli Law,” in *Regulation* (Roy Kreitner, Yishai Blank and David Levi-Faur, eds., to be published in 2015) (Hebrew)).

53. This Court, as well, has repeatedly held that monitoring is an inherent element of regulation. Thus, for example, the Court held in CrimA 725/97 *Kalkoda v. Agricultural Inspection Authority*, 52 (1) IsrSC 749 (1998) that the need to monitor or enforce compliance with agricultural production and marketing quotas, as established by law, is a “structural need that is essential to the survival of the regulatory regime” (*ibid*., at p. 765). Moreover, according to the decisions of this Court, where the legislature grants an administrative agency the authority

to issue a license, we must assume that the legislature also intended to authorize that agency to supervise the activity for which the license was given, in order to prevent the frustration of the objectives that the license was meant to serve (see: CrimA 107/58 *Attorney General v. Nordau Plaza Hotel Ltd*., 13 IsrSC 1345, 1358 (1959); HCJFH 6127/00 *Insurance Supervisor v. Zion Insurance Co. Ltd*., 58 (4) IsrSC 937, 956-947 (2004); AAA 9187/07 *Luzon v. Minister of Interior*, para. 32 (July 24, 2008)). Therefore, regulation that is expressed in the dry words of rules alone – merely on the books – without the breath of life in the form of actual enforcement and supervision – does not constitute regulation in the full sense of the term, and certainly not for legal purposes.

54. This is true in the matter before us, as well. A collective agreement that is not enforced by the labor union cannot be deemed an agreement "that regulates the terms of his employment" in regard to the worker. Only when the implementation of a collective agreement is enforced and monitored can it be deemed an agreement that "regulates" the worker's terms of employment. Of course, this construction addresses only the "first order" issue, i.e., the question whether the existence of a collective agreement categorically prevents the submission of request to certify a class action. That is not sufficient. The following will address the question of the cases in which a collective agreement will be deemed one "that regulates the terms of his employment" in regard to a worker.

The Legislative History

55. Evidence of the purpose of sec. 10 (3) of Schedule Two as a provision intended to protect the activity of the representative labor organization in the workplace in which it acts to monitor and enforce the rights of workers – as opposed to where it does not act – can also be found in the words of Knesset Member Reshef Chen, who presented the Class Actions Bill to the Knesset plenum on behalf of the Constitution, Law and Justice Committee, for the second and third readings:

> "I would like to briefly address the scope of the causes of action to which this law will apply, and to draw the attention of the Knesset to the expansion presented by this law…It

will be possible to bring suit for every matter related to labor relations that is within the jurisdiction of the labor court. The suit will be heard by the labor court. The only restriction in this regard concerns matters in which the worker is represented by a labor union, because the idea is that if a worker is represented by a labor union, then it is right and proper that the labor union represent him rather than a class action proceeding" (13 *Proceedings of the Knesset* 94 (5766)).

56. From the above, it is clear that sec. 10 (3) of Schedule Two includes the inherent assumption that unions should be protected against the creation of means that sidestep them when they actually act to ensure the rights granted to workers by a collective agreement or by law, and as stated "it is right and proper that the labor union represent" the worker (*ibid*.). In other words, the section does not treat of the situation in which the labor union does not function.

57. We should further note that the above was stated after the problem of a union that does not act on behalf of the workers, despite the infringement of their rights, was addressed in the meetings of the Constitution, Law and Justice Committee. MK Chen raised the following question himself:

> "The question is what do we do when the labor union objects to the submission of a class action? The answer must be that it must be joined as a defendant."

And thereafter:

> "It objects by omission, it doesn't submit the lawsuit."

See the protocol of Session 1 of the Constitution, Law and Justice Subcommittee, 16th Knesset 57 (April 20, 2005).

Purposive Interpretation in light of Labor Law

58. As stated, the exception established under sec. 10 (3) of Schedule Two of the Law was intended to further an important objective of labor law – protection of the various organs in collective labor law, and particularly the labor union. The preliminary assumption grounding that protection is that the labor union enjoys an inherent advantage in protecting workers' rights. It is a permanent organization that is not formed only at times of crisis and conflict, and therefore can garner achievements over time and not just in localized conflicts. As already noted, it facilitates improvements in working conditions that go beyond the enforcement of obligatory rights. It can serve as a counterweight to the power of the employer. In general, it demonstrates the concept that the whole is greater than the sum of its parts (see Moran Savorai, "The Purpose of Representation Mechanisms in Labor Law: The Class Action Mechanism versus the Traditional Tools of Collective Labor Law," *Elisheva Barak-Ussoskin Volume* 597 (Stephan Adler et al., eds., 2012) (Hebrew)). Indeed, there have been changes over the years in the background of labor law that have directly and indirectly led to the weakening of labor unions (see: Guy Mundlak, "Inter-union Relations: On the Decentralization of the Israeli Labor Relations System," 6 *Labor Law Annual* 219, 239-240 (1996) (Hebrew) (hereinafter: Mundlak); Nava Pinchuk-Alexander, "Directions for the Renewal of the Labor Union in the Twenty-First Century,"10 *Labour, Society and Law* 51 (20040 (Hebrew)). However, these alone cannot detract from the basic reasons that ground the importance of those organizations. We will, therefore, proceed to examine the exception under sec. 10 (3) of Schedule Two in light of the objective of protecting labor unions.

59. In principle, the source of the representative labor organization's strength is to be found in its acting as a single actor in a given negotiation unit, uniting a large number of workers (this understanding gave rise, for example, to the slogan "One Histadrut – a strong Histadrut". See Mundlak, at pp. 230-234, and see: Stephan Adler, "Collective Agreements: Framework, Application and Coordination," *Bar-Niv Volume* 17 (1987) (Hebrew); Guy Mundlak, *Fading Corporatism – Israel's Labor Law and Industrial Relations in Transition* 18-19 (2007). The power of the labor union permits it to conduct a dialogue with the employer – to acquiesce in one matter in order to gain in another. Thus, for example, the labor union may relinquish certain non-obligatory economic or legal rights in order to garner achievements in other areas (see: LabA 300205/98 *Avni v. The New Histadrut Labor Organization*, 34 IsrLC 361, 369 (1999)). The

possibility of waiving certain rights in a manner that allows the employer to rely upon that waiver exists only when the workers, or some of them, cannot act against the employer in regard to that decision by means, for example, of a class action. In other words, a labor union's power to protect the rights of its members and act for their benefit derives from its uniqueness – from its representativeness. The achievement of this objective requires that we "encourage activity by means of strong labor unions that concentrate substantial negotiating power. This requires restricting the freedom to organize and preventing insubstantial organizations from negotiating on behalf of the workers" (Ruth Ben-Yisrael, *Labor Law*, vol. 3, 1134 (2002); and see: the *Amit* case, at p. 104; LabC 7-4/33 *Tel Aviv University v. Tel Aviv University Academic Faculty Organization*, 5 IsrLC 85, 96 (1973)). Against this background, the legislature was guided by the concept that class actions should not be permitted to undermine the representative labor organization in a unionized workplace in which the normal tools of collective labor law are being applied, for fear that it would weaken the union.

60. What does this imply? Purposive interpretation of the Class Actions Law in light of labor law leads to the conclusion that protection of the labor union is required only in cases in which there actually is organizational or legal labor-union activity for the purpose of protecting workers' rights.

61. The proposed interpretation of sec. 10 (3) of Schedule Two is consistent with a guiding principle of labor law that definitions must be scrutinized from within the system itself, in accordance with the actual situation and the purpose of the definitions, and not simply by an external examination focused upon classifications and terms. Thus, for example, the decision who is an "employee" is not contingent solely on the formal term the parties choose to describe the labor relationship. The test adopted over the years for classifying the employment category is a "mixed test". The test comprises a large number of subtests, among them the "integration test" that examines whether the party performing the work is integrated into the business of the party supplying it, and whether the party performing the work maintains his own business. In the framework of the integration test, the issue of control is examined, as well as the manner of employment and the arrangements for paying taxes, etc. As was explained in this context: "The main advantage of the mixed test is expressed in its great flexibility. This flexibility allows the

court maneuvering room in which to consider the dynamic character of labor relations, and strike a balance among the factors that influence the nature of the relationship between the performer of the work and the receiver of the work product" (see: Stephen Adler, "The Scope of Incidence of Labor Law – From Control to Purpose," *Menachem Goldberg Volume* 17, 22 (Aharon Barak, Stephen Adler, Ruth Ben-Yisrael, Yitzhak Eliasaf & Nachum Feinberg, eds., 2001)).

62. That is also what was decided in regard to the issue of recognizing a labor union. In the *Amit* case, it was held that a condition for recognizing a labor union was that an organization seeking legal recognition must be capable of fulfilling the function expected of such an organization by the legislature. In this regard, it was held that mere appearance was not enough, and that an examination was required to ascertain whether the organization actually, rather than just formally, met the statutory criteria for recognition. In other words, "one must also carry out a reasonable examination of whether an organization that presents itself as a labor union is truly a labor union" (*ibid*., at p. 120). As explained later in the decision, there can be two reasons that an organization will not be deemed a "true" union – first, that the organization merely purports to be a union but has no true intention to act in accordance with its declared purposes, and merely pretends to that end; second, and relevant to the present case, it is a failed organization, in the sense that although its intentions and desires are real, it does not realize them (*ibid*., at p. 121; and see EA (National) *Hareidi Kindergarten Teachers' Association v. Agudath Yisrael Teachers' Organization* (Sept. 15, 2008), para 24 of the opinion of Adler, P.). In practice, these two exceptions are also significant in understanding the dispute over the appropriate interpretation of the Class Actions Law, in light of the two purposes noted above – protection of workers' rights and preserving the power of labor unions. The narrow interpretive approach that President Adler proposed for certifying a class action adopted the first of the above two situations. As opposed to this, the majority of the Labor Court in the *Viron* case, and the National Labor Court's decisions in the *Havusha* and *Buskilla* cases, opened the class-action gate in the second situation – in which the organization failed in performing its duty – as well. In the *Yashiev* case, the National Labor Court further examined the question of when an organization may be said to fulfil its function properly, and more specifically, whether the existence of enforcement mechanisms justifies an affirmative answer to this question.

Purposive Interpretation in regard to the Class Actions Law

63. As noted, purposive interpretation of sec. 10 (3) of Schedule Two requires that we also examine it in light of the purpose of the Class Actions Law itself. The purposes of the Class Actions Law are defined in sec. 1 of that law, as follows:

> "The purpose of this law is to set uniform rules for the submitting and managing of class actions, in order to improve the defense of rights, and thereby particularly to promote the following:
> (1) Realizing the right of access to the courts, including for populations that have difficulty approaching the court as individuals;
> (2) Enforcing the law and deterring its violation;
> (3) Providing appropriate relief for those harmed by the violation of the law;
> (4) Efficient, fair and exhaustive administration of suits."

64. We can learn from sec. 1 of the Class Action Law that a class action has two primary purposes: first, helping injured groups; second, enforcement of the law and deterrence of further violations. A class action serves the personal interests of the plaintiff, but also "harnesses" him for the general good, and thereby ensures compensation for those who aid in law enforcement and deterrence of violations in areas in which there is a "market failure" in regard to enforcement. In this regard, a class action is a type of regulatory tool, in the broad sense of the term (as for the influence of the position of the regulator upon the certification of class actions, compare and contrast, for example: CA 7928/12 *A.R.M. Technologies Ltd. v. Partner Communications Ltd.* (Jan. 22, 2015)). The regulatory purpose of the Class Actions Law requires that we interpret sec. 10 (3) of Schedule Two in a manner that would prevent a market failure in the enforcement of workers' rights. Therefore, narrow construction of the exception established by sec. 10 (3), such that it would apply only in cases in which there actually is organized "regulation" of labor relations in practice, with all that this implies, is the interpretation that realizes the purposes of the Class Actions Law as established by the legislature.

65. That being so, our interpretation of sec. 10 (3), permitting the initiation of a class action in regard to a workplace in which the labor union is dysfunctional and does not act to enforce the workers' rights, is consistent with and advances the objectives stated in the Class Actions Law. As opposed to this, the interpretation urged by the employers, the Trade Association and the Histadrut, largely frustrates those objectives. The approach that would prohibit the initiation of a class action where the labor union is dysfunctional, directing the workers to alternative means for enforcing their rights, such as submitting individual lawsuits against the employer, leads to a paradoxical result. The initial assumption of collective labor law is that the individual worker is a weak party that is generally not equipped to bring about enforcement of the law and protection of his rights, and thus requires the assistance of a labor union. Therefore, one cannot argue that recourse must be made to private lawsuits when the labor union is dysfunctional. In such a case, in which the labor union is not doing its job, recourse must be made to a comparable alternative to a collective labor dispute, i.e., a class action. As a rule, an individual worker lacks adequate financial means to press for his rights, and all the more so in circumstances characterized by relatively small infringements from the perspective of the worker. To this we might add that, practically speaking, under such circumstances, the worker does not have very promising alternatives. That is true in regard to a suit for inadequate representation, which the case law narrowly construes (see: LabC 4-7/36 *El Al Israel Airways Ltd. v. Herut*, 8 *IsrLC* 197, 223 (1977); LabA 7129-10-11 *Hajaj v. Tnuva Central Cooperative for the Marketing of Agricultural Produce in Israel Ltd.* (April 7, 2014)).

Purposive Interpretation in regard to the Principal-Agent Problem

66. In truth, interpreting the exception established in sec. 10 (3) of Schedule Two is another example of contending with the phenomenon of the "Principal-Agent Problem" in law, that is, situations in which the party meant to represent the interests of another fails to do so, and for whatever self-serving reasons, does not fulfil its duty. The Principal-Agent Problem refers to situations in which the interests of the agent and of the principal are not congruent. The agent is meant to act faithfully in pursuing the principal's interests, but occasionally, the interests of the two are not aligned, and the agent acts in his own interest. The agent may not act in the interests of the principal in a situation in which there is an asymmetry in the information available to each

of them. In addressing this problem, it is important to employ incentives that will bring the interests of the parties into closer alignment, while imposing a supervision and monitoring regime over the actions of agent (and see: Zohar Goshen, "'Agency Cost' as a Unifying Theory in Corporate Law," in *Essays on Law in Memory of Professor Gualtiero Procaccia* 239 (Aharon Barak ed., 1996) (Hebrew)). In the present context, the labor union is the agent responsible for the protection of the interests of the workers. When a labor union fails to fulfil its duty to act for the realization of the rights of unempowered workers, we have an example of the Principle-Agent Problem. A labor union would seem to have incentives to represent workers effectively in order to maintain its position as a representative organization and continue to collect dues. However, those incentives are not sufficient in a situation in which the workers are characteristically dispersed and unaware of their rights, such that they ae a "captive audience". In such a situation, particularly when it would be difficult to establish a competing organization, the Principle-Agent Problem becomes acute. The labor union may suffice with minimal or no activity, and nevertheless continue to collect dues from its members. Accordingly, it is appropriate to interpret sec. 10 (3) in a manner that ensures monitoring of the attendant concerns of the Principle-Agent Problem. This conclusion is of particular importance in light of the narrow construction given to lawsuits for inadequate representation, that otherwise might offer an alternative solution. Parenthetically, we would note that the narrow construction adopted in this regard would seem to be problematic. But inasmuch as the matter is not before the Court, we will not address it in depth.

67. Occasionally, the Principal-Agent Problem is anticipated by *ex ante* monitoring, for example, by requiring court approval for legal acts (by a guardian or a receiver). In other cases, the Principal-Agent Problem is addressed by *ex post* monitoring, by creating an alternative procedure for enforcing rights – in those case where the "high road" is blocked by an agent's defective action. Thus, for example, derivative suits in companies law constitute a residual alternative to the high road of a lawsuit brought by the company's authorized organs. A derivative suit allows a shareholder to wield the company's power to sue when the company does not use that power (see: Zipora Cohen, *Company Shareholders - Causes of Action and Remedies* Vol. 3 (2nd ed., 2010)). One of the reasons for this apparatus was explained as follows:

> "The danger of abuse in reserving the power to initiate legal action to the board of directors. The directors may decide not to initiate legal action on the company's behalf in order to shield themselves and prevent the discovery of their mistakes or the imposition of liability upon them. Since the deciding of primary rights and obligations is not involved, but rather their realization by means of a secondary right – the right to sue – there is greater willingness to permit a majority of shareholders to intervene" (*ibid*., at pp. 452-453).

We thus find that where the Principal-Agent Problem is one in which the organ with the authority to initiate legal action, i.e., the board of directors, does not act, and the shareholders may be harmed thereby, a special procedure exists for contending with the problem, as an alternative route appropriate for a situation of "system failure".

68. At times, a petition to the High Court of Justice or to the Administrative Court against an act or omission by a governmental agency may be an example of contending with the Principal-Agent Problem in situations in which a public functionary fails in its duty as a public trustee. As Justice H. Cohn noted:

> "The private sphere is not like the public sphere. In the former, one grants at will and denies at will. The latter exists for no reason other than to serve the public, and has nothing of its own. All it has is held in trust, and it has no other, different or separate rights or obligations than those that derive from that trust or that are granted or imposed by the authority of statutory provisions" (HCJ 142/70 *Shapira v. Bar Association District Committee, Jerusalem*, 25 (1) IsrLR 325, 331 (1971)).

69. Similarly, in the matter before us, the question is how to act in situations in which the potential danger inherent in agency is realized when the labor union refuses to defend workers' rights. In such a situation, we should not deny the possibility for alternative action that would allow the workers to enforce their rights collectively. Moreover, the very existence of a residual system may itself serve as an incentive for the labor union to act on behalf of its members, and

thus mitigate the Principal-Agent Problem (even when it is not employed). A labor union that knows that if it does not act to protects workers' rights, there is the possibility of a class action that will effectively make it superfluous, will make an effort to take timely action against the employer in appropriate cases. The very existence of an alternative system (that of class actions), even if not used, may change the incentives of the organs acting for the general good, and strengthen the mechanisms of collective labor law. All the more so when we take into account the changes that have occurred in the labor market, in which we find a stratification of worker populations, with low-paid workers at the lowest stratum that is barely represented by labor unions, and that suffer from under-enforcement of their rights and from low job security (and see: Guy Mundlak & Reuben Gronau, *Industrial Relations in Times of Transition*, The 12th Caesarea Economics Policy Planning Forum, 69-106 (Policy Paper No. 54, Israel Democracy Institute, 2004)).

Comparative Aspects

70. In principle, our decision in this matter is rooted in Israeli labor law and the conditions of the local labor market. In such circumstances, the value of a comparative law analysis is relatively limited. Accordingly, the parties focused their arguments on local law. However, in his supplementary pleadings, the attorney for the class-action plaintiffs pointed to the possibility of initiating class actions in American and Australian labor law even in unionized workplaces. Against this background, we will briefly comment on the subject.

71. In general, an examination of foreign legal systems in this area reveals a variety of approaches. These approaches are the result of the particular considerations of each system rather than of some statutory restriction in the law governing class actions.

72. In Canada, we see an approach restricting the possibility of submitting class actions in labor law in order to protect collective labor relations. An example can be found in the Canadian Supreme Court's decision in *Bisaillon v. Concordia University* [2006] 1 S.C.R. 666 (hereinafter: the *Bisaillon* case), in which a request to certify a class action was denied in a case in which there was a collective agreement. However, that conclusion derived from the fact that, in Canada, the collective agreement mechanism is entirely governed by the conception that disputes arising

therein be referred to arbitration (in accordance with the Canada Labour Code, 1985). The restriction is not upon class actions, *per se*, but is part of a general view as to the resolution of disputes in collective labor relations. Additionally, and no less important, in the *Bisaillon* case, the relevant labor unions supported the class action, such that it did not address the issue before us – the initiation of a class action in circumstances in which the labor unions refrained from supporting the workers whose rights were infringed.

73. In the United States, the birthplace of class actions, the question of certifying class actions in labor law focuses upon whether the traditional requirements of class actions in this regard are met (in terms of the commonality of the claims of the members of the class, etc.), rather than upon "threshold" questions (see, e.g., *Wal-Mart Stores, Inc. v. Dukes* 564 U.S. (2011)). To the extent that restrictions apply to the submission of class actions in workplaces with collective agreements, they arise from arbitration clauses in the agreements with the workers (although there is some debate as to the enforceability of such clauses, see, e.g., Stacey L. Pine, "Employment Arbitration Agreements and the Future of Class-Action Waivers," in 4 (1) *Am. U. Labor & Employment L. Forum* 66 (2014)).

74. To all the above we should add that a comparison to the situations in other jurisdictions is further complicated by the fact that the labor unions are, themselves, important "actors" in this area. In the United States, a class action can be filed against the union itself, and not just against an employer. In Australia, labor unions are deemed effective class-action plaintiffs in cases of infringement of workers' rights (see: Jane Caruna & Vince Morabito, "Australian Unions – the Unknown Class Action Protagonists," 30 *Civil Justice Quarterly* 382 (2011)).

75. In light of all the above, we have based our opinion primarily upon the objectives of local law, and the particular considerations of the Israeli labor market.

Answer to the "First Order" Question: Regulation as Regulation in Practice

76. Our conclusion is, therefore, as follows: The Law does not categorically prevent the submission of a request for the certification of a class action by workers in a workplace that is

subject to a collective agreement. In cases in which the collective agreement does not comprise an enforcement and monitoring mechanism for workers' rights, and the labor union is dysfunctional, i.e., it does not act to enforce the rights of the workers in practice, sec. 10 (3) will not constitute a bar to certification of the request for a class action. A collective agreement that is "on paper", but that is not enforced in practice, is not sufficient to constitute a bar to the initiation of a class action under sec. 10 (3). A collective agreement that is a dead letter, and a labor union that is no more than a fig leaf that hides an actual failure to protect workers' rights are insufficient. In such cases, one cannot claim that the collective agreement regulates labor relations, and therefore the request to certify the class action may be granted. Below, we shall discuss in greater detail the cases in which the conduct of a labor union will be deemed actual regulation of labor relations (in the framework of the discussion of the "second order" question).

77. This construction of sec. 10 (3) will prevent situations in which a worker will find himself in a "catch-22" in which his rights and those of his fellow workers are neither protected nor respected, but he is unable to act because he is subject to a labor union for good and for ill. In such circumstances, in which the collective agreement is not worth the paper it is written on, as neither the union nor the employer act to enforce it, we must say that there is no "collective agreement that regulates the terms of his employment", and the exception established under sec. 10 (3) of Schedule Two does not apply.

78. This conclusion thus approves the fundamental approach adopted in the *Viron* case, which has served as the basis for the decisions of the National Labor Court in subsequent cases, as well. What this means is that when a labor union does not act to enforce the infringed rights of workers, the bar established by sec. 10 (3) of Schedule Two is removed. In such cases, the labor court's discretion does not relate to the question of whether the exception established under sec. 10 (3) is met, but only to the fulfilment of the other conditions established by sec. 8 of the Class Actions Law for the purpose of certifying such a suit.

Answer to the "Second Order" Question: The Scope of Incidence of Section 10 (3) in relation to the Question of what Constitutes an Active Labor Union

79. *Examining the activity of a labor union* – in light of the above, when a request to certify a class action is submitted, the question that the labor court must examine is whether the union is working to advance the rights of the workers, and whether that activity constitutes an effective means for enforcing the rights claimed in the suit. Such activity need not be optimal, but it must exist as more than a "display" of activity. Section 10 (3) is not meant to protect a labor union that shirks its responsibilities and power, and refuses to protect the rights of its members. The purpose of sec. 10 (3), which focuses upon the protection of the representative organization, evaporates when the labor union does not function. There is no reason or justification for protecting a union that does not do its job.

80. The decision as to what constitutes such a situation is, of course, dependent upon the circumstances of each individual case. In general, in order to decide whether there is a collective agreement that "regulates" the labor relations, the labor court will have to examine whether the labor union acts to protect the workers' rights. The court will have to consider the overall circumstances of the case, including: the characteristics of the particular industry; the existence or absence of systematic violations of workers' rights; the type of rights infringed; the activity of the labor union (both in regard to the infringed rights and in general); the accessibility of the labor union for addressing particular complaints of workers, on the assumption that a functioning labor union must provide an active, efficient mechanism for addressing the complaints of the workers it represents, and for enforcing their rights; the general functioning of the labor union in regard to the protection of workers' rights; the ability of the labor union to enforce workers' rights in practice, such that they receive what they are entitled to from the employer; as well as the ability of the labor union to redress past violations, and not act solely prospectively.

81. We would further note that it would be easier for the class-action plaintiff to show that a labor union is ineffective by specifying cases of other workers who did not receive an adequate response from the union in regard to the violation of their rights. As opposed to this, it would be easier for the labor union to show that it was active if it could point to concrete steps that it adopted in regard to the violated rights, show that there was an efficient, effective mechanism that enabled workers to voice their complaints and enforce their rights, and if it would supply data in regard to the complaints it successfully resolved (without need for an exhaustive list).

82. In this regard, the distinction between obligatory rights and contract rights may be of importance – a distinction addressed by Klement & Rabin-Margalioth (para. 46 above) if not in the same manner. There is a presumption that a labor union is dysfunctional when it fails to act in protecting the obligatory, statutory rights of workers, inasmuch as the matter is not discretionary, and such rights cannot be waived. In such circumstances, there is no rationale for protecting the union, and there is no reason to prevent the certification of a class action brought by a worker. As opposed to this, when a union does not take action to protect a right that derives from an agreement, that failure to act does not necessarily imply that the union is not functioning properly. A union may justifiably refrain from acting from a broader perspective of labor relations with the employer and a desire to achieve some other goal in another aspect of those relations. Therefore, in such a case, the burden of proof is on the labor union in proceedings for the certification of a class action, and requires that it show that its inaction resulted from a discretionary decision. It is worth emphasizing that, at this stage, the labor court is not required to evaluate the wisdom of the union's decision, i.e., whether it would have acted in the same manner as the union. There is also no need for an exhaustive examination in order to decide whether the labor union acted or failed to act to protect the workers' rights, and whether such a failure to act was reasonable under the circumstances. As a rule, the labor court enjoys broad discretion in examining the matter and its circumstances in relating to the nature of the violated rights and the scope of their infringement. The labor court must gain an impression of whether the labor union considered the matter, the appropriate time to take action and the alternatives, and whether, in view of these considerations, it reached a decision that took the rights of the affected workers into account.

83. *Prior notice to the labor union for the purpose of examining its actions* – An additional question that arises in this context is whether the class-action plaintiff must show that he gave advance notice to the labor union before requesting the certification of the class action, in order to allow the labor union to take the initiative in seeking a resolution of the dispute. The National Labor Court gave a resoundingly affirmative answer to this question in the *Eyal* case, in the course of developing its case law on the subject following the *Viron* decision. President N. Arad wrote in this regard:

> "In light of these provisions, and in order to realize the objectives of the provisions of the Class Actions Law, when a class plaintiff intends to initiate class-action proceedings in an unionized workplace, it is proper that he first deliver written notice to the labor union of his intention to initiate a class action and its causes of action…Prior notice to the representative labor organization in the workplace is also required by the principles of fairness, efficiency and good faith in a unionized workplace, and it serves to further the provisions of the Class Actions Law in accordance with their purpose…If the class plaintiff acts in such a manner, it is conceivable that the class action will become superfluous, or that it is subject to the restrictions established by the Law. In doing so, the prior notice will help clarify the possibility of initiating a class action under the circumstances, and afford the labor union an appropriate opportunity to consider its position on the dispute or prepare for its resolution. Alternatively, the presence of the labor union in the proceeding may allow for a more efficient examination, to the benefit of the parties and the public in general" (the *Eyal* case, paras. 13-14).

This principle was also emphasized in later decisions, particularly the *Yashiev* case, which was addressed by this Court (see the *Yashiev* case, para. 54 of the opinion of then Deputy President Y. Plitman, and para. 14 of the opinion of President N. Arad).

84. The proceedings before the Court did not focus on the issue of prior notice to the labor union, but in practice it is inherent due to its influence upon the question of whether the labor union is functional. Applying to the labor union would appear to present a simple, efficient means for examining whether it is responsive to workers' complaints in regard to the violation of their rights. In this regard, we are of the opinion that there is merit to the fundamental approach of the National Labor Court in the *Eyal* case in regard to the importance attributed to notification of the labor union. However, and in addition to that, we must address how that demand should be understood in the context of the current examination, i.e., in a class action regarding labor law in a unionized workplace.

85. In examining this question, and before addressing the special considerations for submitting a class action in labor law, it is important that we view it in the broader context of the question debated in the legal literature as to whether a class-action plaintiff should be required to

give the defendant prior notice. This question raises conflicting considerations. On its face, it would appear that such notice could lead to the resolution of the problem motivating the class action at an early stage and reduce litigations costs. However, as opposed to that, there is the fear that such notice will reveal the "idea" of the class action to others, and thereby harm not only the class-action plaintiff but also the general incentives to expose wrongdoings in order to submit class actions in their regard (for a comprehensive discussion of these considerations, see Chemi Ben Nun & Tal Havkin, "Should a Plaintiff be required to give notice to the Defendant before requesting Certification of a Class Action?" 12 *Alei Mishpat* (not yet published) (hereinafter: *Ben Nun & Havkin*)). Needless to say, this question is not before the Court. Indeed, this Court has recently held that, as a rule, prior notice should be given to the potential defendant in a class action when that defendant is a public authority (AAA 2978/13 *Mei Hagalil – District Sewage Corporation Ltd. v. Younes* (July 23, 2015) (hereinafter: the *Mei Hagalil* case)). However, that decision did not unequivocally decide the question of notice to a private defendant (see: *ibid*., paras 14 and 38 of the opinion of Deputy President E. Rubenstein). In any case, the question before the Court is different. We are not concerned with a potential defendant but rather with the particular question of prior notice to the labor union as opposed to a defendant. This question must be framed by different considerations, at least in part, than those relevant to notice to a potential defendant. In the instant case, we will limit ourselves to this question, alone. The purpose of giving notice to the labor union is to enlist its aid. Moreover, from the start, the legislature was guided by a preference for the enforcement of rights through the labor union, where an active labor union is operating in the workplace. Thus, insistence upon prior notice to the labor union realizes the legislative intent.

86. In my opinion, in that light, and in view of the purpose of serving notice upon the labor union – notice that is intended to call it to action – that notice should be directed at enforcing the personal rights of the worker, as opposed to a specific warning of the intention to initiate a class action. The labor union is supposed to muster for action as a result of a worker's complaint regarding a serious infringement of his rights, whether or not it has been "warned" of the possibility of a class action. On the contrary, it may be said that the true test of a union's seriousness in enforcing workers' rights is its response to a complaint that is not accompanied by an express statement of the possibility of a class action. Moreover, this approach mitigates the

Principal-Agent Problem in regard to labor unions, inasmuch as the looming possibility of a class action in the event of a failure to act serves as an incentive to act for the enforcement of workers' rights. As opposed to this, imposing a duty of notice of a class action may act as an incentive for the union to bide its time and wait until it is explicitly "threatened". An additional advantage of such notice – that does not explicitly "wave the sword" of a class action – is that it mitigates the possibility of undermining the incentives to potential class-action plaintiffs (because it does not involve "publication" of the possibility of a class action, which might lead others to "steal the idea" (see: Ben Nun & Havkin, chap. 2 (1) (a)). However, although there is no need for a formal warning or notice of the intention to initiate a class action, a focused demand to enforce concrete rights, as opposed to some general request, is required. In other words, the class-action plaintiff must submit a specific complaint to the union, asking for the enforcement of rights that he claims were violated. However, in my view, serving the labor union formal warning or notice of an impending class action is not a precondition.

87. I would further clarify that while a prior application to the labor union is required, that should clearly not create a possibility for a lengthy period of deliberation by the union as to the course of action it should adopt. The appropriate response time for the union is a matter that can be examined by the labor court, in light of the circumstances of each case. In considering the period of time that should be granted to the labor union prior to submitting the class action, some weight should be given to the question of whether we are concerned with a union that was "presently absent" in addressing workers' rights in the workplace, and completely absent over a long period of years. In such a case, the union would have to prove that it "woke up", and relatively very quickly set about protecting the rights of those workers it had ignored, in order to justify refraining from initiating a class action as a means for redressing those rights. Here, too, the distinction between obligatory and contractual rights is of importance. Where the enforcement of obligatory rights is concerned, the labor union must act relatively quickly, for as already noted, it does not enjoy discretion in regard to the enforcement of rights granted by law and that cannot be waived. As opposed to this, where contractual rights are concerned, it would seem appropriate that the union be granted a reasonable period to consider the matter against the background of its overall activity, upon the assumption that the enforcing of contractual rights may form part of a broader strategy within the collective framework. The reasonable length of

time for such activity can be examined by the labor court in the context of the applicability of sec. 10 (3) of Schedule Two. We should emphasize that prior notice that leads to a purported display of activity to "shake off" the class action, should not shield it from examination in the framework of the interpretation of sec. 10 (3) of Schedule Two, a point we will more fully address below.

88. *The problem of the pretended awakening of the labor union, and the significance of enforcement agreements* – In examining the activity of the labor union, even after prior notice has been served, it is important that we consider the possibility that although awakened to action, that awakening was merely "pretended". In this regard, it is necessary to examine what constitutes the "awakening" of a labor union, in a similar way to that for examining what constitutes an active labor union, which we considered above, and is directly related. Acting "as if" that does not provide every worker with an avenue for enforcing his rights in an easy and cost-free manner cannot be deemed an "awakening" of the labor union. It is not enough that the matter "is being handled" (see and compare: CA 3807/12 *Ashdod City Center K.A. Ltd. v. Shimshon*, para. 7 of my opinion (Jan. 22, 2015)). Such purported activity can occur in a number of ways. A specific instance of the phenomenon, that we have largely focused upon in this case, is action by the labor union in the form of signing or beginning to implement an enforcement agreement when it is as yet unclear whether such action has borne fruit from the perspective of the workers. In such a case, the specific question that arises is whether such activity is a sufficient response to the period prior to signing the enforcement agreement or to the commencing of its implementation. That is the question that arose most forcefully in the *Yashiev* case. According to the class-action plaintiffs, there is no certainty that the Enforcement Agreement of 2011 will actually result in the enforcement of workers' rights, and all the more so in regard to events in the past. As opposed to this, the employers and the labor unions argue that when an enforcement agreement is in place, sec. 10 (3) of Schedule Two fully applies, as it can no longer be maintained that there is no "regulation" of the workers' rights.

89. It is our belief that there cannot be a comprehensive, fundamental answer to this question, but rather, the answer must be contextual, not only in regard to the concrete example of an enforcement agreement, but also in regard to other execution mechanisms that may be suggested for the enforcement of rights. In each case, we must ascertain whether the actions taken to

enforce the workers' rights actually constitute "regulation", or whether they are nothing but continued non-enforcement in new clothes. The criteria for examining these questions were set out in secs. 79-82, above. In the context of an enforcement agreement, we might add that the labor court should consider whether the mechanism for the enforcement of workers' rights makes it possible for every worker to enforce his rights easily and without cost (inasmuch as these are characteristics of enforcement in the class-action framework). In this regard, the examination should consider whether the complaints of workers of the specific company named in the class action were answered in all that regards the enforcement of their rights, whether the enforcement agreement also regulates the enforcement of rights that were infringed in the past, and is not limited to the prospective enforcement of rights, and whether the rights claimed in the class action are addressed in this framework. A step taken by a union for the enforcement of workers' rights in the industry (whether an enforcement agreement or some other step) cannot be deemed to render class actions superfluous in that industry. In this context, the responses given to prior complaints to the union and the timeframes that the union is willing to set for enforcement are important factors in ensuring that the protection of workers' rights will be achieved within a reasonable time. For that purpose, limitation-of–actions periods established in regard to labor rights can also be taken into consideration, and an inviolable upper limit can be established in each case (see, e.g., sec. 31 of the Annual Leave Law, 5711-1951, that establishes a three-year limitation of actions; sec. 17A of the Wage Protection Law, 5718-1958, that establishes various periods of limitation for delayed payment, dependent upon the circumstances, which run from sixty days to three years, as the case may be). Of course, this is merely an upper limit, and we should normally expect that the reasonable time for acting will be considerably less.

90. The labor courts can, as may be needed, further develop tools for addressing the question of when an enforcement step will be deemed effective to the extent that it would prevent the submission of a class action. In the *Yasheiv* case, concerning the General Enforcement Agreement, Judge Rabinovich emphasized that it should be evaluated over time, and in light of its results. That is true for any other enforcement step. Just as the heading "enforcement agreement" or even the establishment of an "enforcement committee" are insufficient to categorically prevent class actions, so other obligations to enforce rights do not "inoculate" a

union or an employer against class actions. Here as well, the purposive interpretation of sec. 10 (3) of the Class Actions Law requires a substantive examination of regulation in practice, together with the requirement of prior notice to the labor union that allows it to enforce those rights that the plaintiff seeks to redress by a class action.

The Answer to the "Third Order" Question: "Awakening of the Labor Union following the initiation of a Class Action

91. Up to this point, we have considered the situation of a labor union that began to act before the request to certify a class action was filed. That is the optimal situation (relatively speaking) in a situation in which the labor union did nothing to enforce rights in the past, but mustered shortly after receiving a complaint. That is the purpose of giving prior notice to the labor union, and when it achieves its purpose, a class action is no longer needed. Of course, the test of whether the labor union acted to enforce those rights will be conducted in accordance with the criteria we set out in paras. 79-82, above. As we explained, should it be found that its action was "pretended", that will not serve as a bar to the submission of a class action. That is, in effect, the situation that was examined in the *Yashiev* case. When the labor union "awakes" prior to the submission of the request to certify the class action, the question of the application of sec. 10 (3) will be examined in accordance with the enumerated criteria. However, we must further consider the question of what should occur when labor unions "awake" only after the request for certification of the class action is submitted. That question arose in the *Buskilla* case.

92. The submission of a request for the certification of a class action is a step that may spur labor unions to greater action. In this regard, it is important that we distinguish two situations of "awakening". One possibility is that the "threat" to its position may lead the existing representative labor organization to act where it had previously failed to do so. Another possibility is that a new labor union that had not previously operated in the workplace will identify a possibility to expand its activity, succeed in becoming the representative labor organization and sign a special collective agreement after the submission of the class action. In the *Buskilla* case, we see both of these possibilities occur at once. Only following the submission of the request to certify the class action in that case, did the Histadrut sign the General Enforcement agreement. And only following the submission of the request to certify the class

action (and, in fact, only after its approval), did the Leumit Federation sign the Special Enforcement Agreement with Amishav.

93. In the *Buskilla* case, the National Labor Court addressed only the General Enforcement Agreement (as the Special Enforcement Agreement had not yet come into being). The National Labor Court held that the General Enforcement Agreement did not have retroactive effect, and that the signing of enforcement agreements following the submission of a request to certify a class action could not be taken into account and did not apply to the rights claimed in it. Our approach is similar to that of the Labor Court, although not identical, as we shall explain.

94. As a rule, we are of the opinion that the basic approach to steps by labor unions taken for the protection of workers' rights after the submission of a request for the certification of a class action (when it has been submitted after a prior "exhaustion of remedies" with the labor union) must be that such steps should not prevent the certification of the class action under the provisions of sec. 10 (3) of Schedule Two. In other words, the restriction established by sec. 10 (3) should be examined in accordance with the situation in regard to the possibility of enforcing the claimed rights as it was on the day of the submission of the request. Viewing steps taken after the request to certify the class action as constituting a bar to certification might encourage deals between labor unions and employers that would not reflect a true intention to enforce workers' rights, and in effect, allow them to replace the statutory bar with another. Moreover, such a practice might strike a fatal blow to the incentives for submitting class actions on behalf of workers. If class-action plaintiffs knew that their class actions might be frustrated at any moment by a subsequent awakening of a labor union, this might result in creating disincentives for vital class actions.

95. Therefore, where enforcement steps commence after the filing of a request to certify a class action, the restriction established by sec. 10 (3) will not apply. However, this does not necessarily mean that class actions are the best and most efficient means for enforcing workers' right from the perspective of the general tests established by the Class Actions Law. In other words, if the situation changes to the extent that the class action is no longer justified at the time of its certification, whether because a new union or the existing union is providing a full, effective response, then there may no longer be any need for it to proceed. If the labor court find

that the union has presented an appropriate path for redressing the rights claimed in the class action, including past rights and the rights of former workers who no longer work for the employer, it can deny the request for certification when certifying the class action no longer constitutes the path that is "efficient and just for resolving the dispute", as stated in sec. 8 (a) (2) of the Law (and not on the basis of the "primary" restriction of sec. 10 (3) of Schedule Two). In this framework, the labor court may weigh the advantages and disadvantages of conducting the proceeding as a class action. Effective collective action that ensures the redress of the claimed rights is a practical alternative for achieving the objectives of the class action (see: Alon Klement, "Guidelines for the Interpretation of the New Class Action Statute – 2006" 49 *Hapraklit* 131 (2006)). As explained in regard to prior notice to the labor union, the legislature expressed its view that collective action and class actions are alternative tools for the enforcement of rights. The late awakening of a labor union can be taken into account, in light of all the considerations noted, in considering the request of a class-action plaintiff to withdraw, or in the framework of a compromise agreement by the parties (see the *Ben Shlomo* case, in which the National Labor Court examined a proposed rights process that was submitted, and emphasized the need to reward the class-action plaintiff as a condition for approval of the process).

96. We should reiterate that even in this context, the enforcement of rights – like the activity of the labor union – must be evaluated by its practical success, in accordance with the various considerations elaborated above. In addition, specific consideration is required in regard to the particular question of whether the labor union is providing redress for the rights of former workers who no longer work for the employer. It may be assumed that such workers are not aware of the filing of the class action and of their right to demand the enforcement of their rights. They also do not pay union dues or service fees, and therefore, there is a fear that the union may, regrettably, see itself as less obligated to them. There may also be some doubt as to the ability of such former workers to apply for help in ascertaining their rights, even if there is an effective mechanism for such enquiries by current workers Therefore, to the extent that an employer or labor union argues against the certification of a class action, the labor court will have to examine carefully whether such enforcement steps provide a comprehensive response to the rights

claimed by current and former employees as one. We are certain that the National Labor Court will develop guidelines for this examination.

97. It should be noted that, as a rule, a distinction should be drawn between the enforcement steps undertaken by an existing labor union and those of a new union that "enters" the workplace following the class action. In the latter case, when a new union presents a collective agreement that is meant to serve as grounds for denying the class action, the said collective agreement must be examined carefully in order to remove the suspicion that its purpose is solely to remove the threat of the class action, as well as to make sure that the agreement also covers former workers who may "fall between the cracks", and not benefit from the new agreement.

98. We should further add that when a union's awakening after the filing of a class action prevents the class action from proceeding – in all of the "paths" delineated above – the court must make sure that the class-action plaintiff and his attorney receive an award sufficient to protect the incentives for filing the class action that, in practice, brought about that "awakening" (see: sec. 22 (3) (1) of the Class Actions Law; CA 1834/07 *Keren v. Dan Region Tax Assessment Officer*, para. 25 (Aug. 12, 2012)).

From Theory to the Practice

99. It is now time to put the principles delineated above into practice in regard to the instant petitions.

100. The petition in the *Viron* case concerned a case in which the class action was directed at a persistent, systematic violation of workers' rights in an industry characterized by low-wage workers with limited ability to act collectively. It concerned an industry in which wages are not high, and it is, therefore, possible that there is little incentive for an individual worker to demand his rights. Moreover, it is in industry in which the workers are scattered among various security points and do not spend much time together, which impedes the possibility of organizing. In such circumstances in which the labor union was long aware that the collective agreement had become a dead letter, and that the basic rights of the workers had not been protected, yet nevertheless did not lift a finger to act for the workers' benefit for reasons known only to itself and motives that do not fall within the prerogative granted it in the conduct of negotiations and the waiving of

certain rights, such a union is not one that the Law sought to protect. Therefore, the National Labor Court correctly decided to certify the class action.

101. The same is true for the *Buskilla* case. After the filing of the request for certification of the class action in this case, two collective agreements were signed – the General Enforcement Agreement with the Histadrut, and the Special Enforcement Agreement with the Leumit Federation. However, these agreements were signed only after the request was filed. The General Enforcement Agreement, which at the times relevant to the National Labor Court's decision, applied to all the employers included in the proceedings, was signed only after the request was filed, and the Labor Court found that it did not apply retroactively, such that it did not provide for the rights of the workers during the periods relevant to the filing of the suit. The Special Enforcement Agreement – whose effect was argued by the Leumit Federation – was signed only after the National Labor Court had rendered judgment. In such a case, as we have already explained, the restriction established by sec. 10 (3) does not apply, inasmuch as we are concerned with arguments that are based upon events subsequent to the filing of the class action, which raise the fear of excessively deterring the filing of class actions that serve as a catalyst to hastening labor unions to act for the protection of unempowered workers. That, of course, is the case unless the said events make it possible to redress of the violations grounding the class action retroactively. The National Labor Court did not find that to be so in the specific case, and we see no reason to intervene in that finding.

102. In the end, and not without second thoughts, we did not find reason to intervene in the decision of the Labor Court in the *Yashiev* case. While in the *Buskilla* case, the National Labor Court found that the General Enforcement Agreement did not apply retroactively, in the *Yashiev* case, the National Labor Court (adopting the opinion of the District Labor Court) held that the agreement provided sufficient response to the rights claimed by the workers, even though their claims dated back to 2004, seven years prior to the signing of the General Enforcement Agreement and the filing of the class action. This change in the National Labor Court's approach to the effect of the General Enforcement Agreement of 2011 on past rights would appear to raise questions. However, the *Yashiev* decision focused upon the facts as they appeared at the time to the National Labor Court, and the Histadrut's actual enforcement of the rights that grounded the class action. Under the circumstances, we see no reason to intervene in those specific findings.

First, we are also of the opinion that weight should be given to the finding that the class-action plaintiff made no application to the labor union, a fact that weighs against him. In addition, the Histadrut demonstrated before the National Labor Court how enforcement had commenced on the basis of the General Enforcement Agreement, and the National Labor Court gained the impression that it was well underway and that it was efficient and effective both in terms of the sample audit carried out, and the in-depth audits of the various employers in the security industry. As noted, the Histadrut also demonstrated before the National Labor Court the manner in which the specific cause of action in the *Yashiev* matter was being addressed, namely, the employer's payments to the pension fund in that matter. We agree with the fundamental approach that requires not only the making of enforcement agreements but also there actual execution. Actually, in our view, the important test is whether the workers' rights are enforced by the labor union, and not the precise mechanism that serves that purpose. We also agree with the opinion of Judge Rabinovich in the *Yashiev* case that the test must be contextual, examining the results of enforcement over time. As we have already stated, we do not find it appropriate, at this stage, to intervene in the factual findings in the *Yashiev* case, which were based upon the actions of the Histadrut in regard to the subjects addressed by the class action (and not only in regard to the general provisions established by the Enforcement Agreement). However, we would note that every enforcement agreement, including the General Enforcement Agreement of 2011, which was addressed in the *Yashiev* case, must be evaluated on the basis of its actual results in each case. More generally, the question of whether the Enforcement Agreement constitutes a bar to the certification of a class action must be weighed in light of all the stated considerations, including the actual execution of the relevant enforcement agreement at the times relevant to the request – and also in regard to the specific employer – in regard to the claimed rights. In light of the delineated considerations, the labor union may be requested to submit its activity in regard to the General Enforcement Agreement to further scrutiny. If that activity prove unsatisfactory, the request for a class action may be reinstated.

103. It is important to reiterate that concluding an enforcement agreement (or taking any other step "on paper") is not enough. The root of the problem in all the proceedings before the Court is the creation of enforcement agreements that left the workers unprotected in practice. As we noted, in the future, in this regard, the labor court will have to take into consideration the

complaint mechanism that the enforcement agreement provides the workers, whether complaints in regard to violations of rights are addressed in practice, and the time period required for the union to respond to such complaints. It is also important that we reiterate that in order for an enforcement regime – including an enforcement agreement – to be deemed an appropriate substitute for class actions, it is not enough that it comprise a "sample" enforcement regime. Rather, it must present a means by which the class-action plaintiff, or any other worker, can seek redress even before his workplace comes up in the sample-audit lottery. It should be superfluous to note that the application of these principles in these cases is not within the usual purview of this Court, and should be left to the the judgment of the labor courts. We are confident that the National Labor Court will continue to develop its case law in this matter, in examining the relevant enforcement agreements and their success in meeting the tests of time and reality, and with due regard for the objectives of sec. 10 (3) of Schedule Two.

Comments and Answers

104. At this juncture, I have had the opportunity to read the opinion of my colleague Justice H. Melcer. My colleague concurs with the principles I have set out in regard to the interpretation of sec. 10 (3) of Schedule Two, according to which the submission of a class action in labor law should not be precluded when the labor union fails in its duty to represent workers whose rights have been violated. However, my colleague adopts a somewhat different approach in regard to two aspects related to the application of those principles, both in regard to the method for serving notice upon the labor union prior to filing a class action, and in regard to the applicability of sec. 10 (3) to the violation of obligatory labor rights, as opposed to rights granted under a collective agreement. The common denominator of our respective views is greater than the differences between them. Although the practical import of the difference is limited, and relates solely to the form of the notice, I would like to clarify my position in regard to these two matters.

105. *The form of the notice to the labor union* – My colleague is of the opinion that in order to prepare the groundwork for filing a class action, the notice served upon the labor union cannot be a "usual" request for help in securing the personal rights of the worker. In his opinion, there is need of a formal notice that clearly states the intention to file a class action, and that reserves the right to do so if the complaint is not appropriately addressed within a reasonable time. My

colleague explains that such notice is required by the good-faith doctrine, and accords with the opinion of this Court in the *Mei Hagalil* case, cited above in para. 85 (which treated of the need to give prior notice to an administrative agency expected to be a defendant in a class action). I hold a different opinion in this regard. The prior notice in the instant matter is directed at the labor union rather than the defendant employer, and is intended to serve as a true test of whether the union actually acts to defend the rights of the workers. In this regard, I believe that insisting that the notice include a warning that an unsatisfactory response will result in a class action misses the point of the notice – an authentic test of the daily operation of the union, even when not "warned". Moreover, my colleague's approach might result in the union having no incentive to protect the rights of unempowered workers when it knows that as long as it has not been "warned" of an intention to initiate a class action, there is no danger of the undermining of its status as the defender of workers' rights, even when it does not actually do so. Moreover, it should be our objective that the relationship between a worker and a labor union not be "lawyered up" to the point that a workers' request that the union come to his defense require a formal notice of the type described by my colleague in order for it to have practical effect for the purpose of filing a class action. I do not think that my colleague's approach is required by the good-faith doctrine. On the contrary, it may be said that the union's duty to act faithfully and diligently on behalf of the workers it represents supports the view that there be a price for its neglect even when it is not warned of the consequences. Lastly, I would emphasize that a distinction should be drawn between prior notice to a defendant in a class action – as addressed in the *Mei Hagalil* case in regard to a defendant that is a public agency, and that does not arise in the instant case (and, thus, need not be addressed) – and the question before the Court regarding a notice intended to test the performance of a labor union that is not the defendant in the class action.

106. *The question of the distinction between rights deriving from a collective agreement and obligatory rights* – My colleague argues that sec. 10 (3) of Schedule Two should be understood such that the limitation it places upon class actions apply solely to violations of rights under a collective agreement, as opposed to class actions directed at violations of obligatory rights granted to workers by shield laws. Here, too, I disagree, although, as I explained above, I too am of the opinion that there is practical significance to the nature of the right that the labor union

fails to enforce. Obligatory rights are rights over which there is no discretion as to their strict enforcement. Therefore, as I explained (para. 82 above), where a complaint to the labor union does not prompt immediate action, there is a presumption that the union is not acting to protect workers' rights, and the road to a class action is paved. In such circumstances, there is no need to "threaten" the initiation of a class action. Rather, as already explained, I hold the contrary opinion. As opposed to this, when we are concerned with a violation of rights deriving from a collective agreement, the labor union may have greater discretion as to its course of action vis-à-vis the employer. However, I believe that sec. 10 (3) was intended to preserve the status of the labor union as a significant actor in a workplace subject to a collective agreement regarding workers' rights. Holding that the labor union has no standing with the employer in regard to the violation of obligatory rights, and that there is no need to serve it notice prior to filing a class action, may unnecessarily undermine the union's status, and ultimately harm the workers themselves. Indeed, in many respects, the disagreements between my colleague and myself on this point are only of theoretical interest rather than practical import, as even he believes that prior notice must be served upon the union in regard to a violation of obligatory rights, before filing a class action. However, in principle, I see a problem with my colleague's assertion that even though he believes that sec. 10 (3) does not apply *ab initio* to a violation of obligatory rights, a class action cannot proceed without prior notice to the labor union. As I explained above, notice to the union is required in order to "clear the hurdle" presented by sec. 10 (3) (i.e., in order to test whether workers' rights are "regulated"). It is not prior notice to a potential defendant. In any event, if the workers' request for the enforcement of his obligatory rights is not addressed within a reasonable period of time, then, in my opinion, the limitation established by sec. 10 (3) would not apply. I state all this only for clarification, inasmuch as I do not believe that there is any practical significance to the difference of opinion on this point.

Before Concluding

107. The advantage of the interpretation we have found to be appropriate for sec. 10 (3) of Schedule Two, in general, becomes clear in light of the history of the enforcement of workers' rights in the security industry, and of unempowered workers in the secondary market in general. The history revealed by the cases adjudicated in the security industry shows that the labor unions did not act for the benefit of workers whose rights were violated over the course of years, and

that they awoke only late in the game, after a number of requests were filed for the certification of class actions in the industry.

108. In a broader historical view, one might add that the maintaining of the status of labor unions, which is of considerable importance, is dependent, first and foremost, upon the unions themselves. A review of the annals of the defense of workers' rights shows that the particular challenge presented by defense of the rights of unempowered classes of workers is nothing new, and concerned the leaders of the labor movement from its earliest days. In 1934, Berl Kaztnelson wrote the following:

> "I therefore see the purpose of our professional struggle in times of economic boom not in strengthening the bargaining power of the privileged sectors of the labor force, who are the first to benefit from the economic circumstances, but rather in the ongoing concern for the weakest, most overlooked strata of society that are the first to suffer the hardships and bear the losses of booms, and the last to enjoy the benefits, and for whom every small improvement of their living and working conditions requires special exertion" (in: Berl Katznelson, *Beit Avodah – A Collection of Essays on the Question of the Histadrut*, 89, 99 (1965) (Hebrew)).

Yitzhak Tabenkin, one of the leaders of the Histadrut, wrote even more forcefully in 1955:

> "Indeed, the trend to equality is steadily weakening in our Histadrut, and differentiation of status is growing. Let no one say that the Histadrut cannot act in this area. It does not have to accustom itself to the 'strong', to the 'privileged', and abandon the underprivileged to their own devices" (Yitzhak Tabenkin, "Toward a Renewal of the Values of the Histadrut," in *B'darkhei Hashlihut – A Selection of Comments on the Question of the Histadrut and the Labor Movement*, 82, 86 (Avraham Tarshish & Aryeh Fialkov, eds. 1969) (Hebrew)).

It is only right and proper that sec. 10 (3) of Schedule Two of the Class Actions Law be given an interpretation that serves that important objective of protecting the weaker members of the workforce, and an interpretation that, as explained above, provides appropriate incentives for workers' representatives in this regard.

109. In light of all the above, the petitions are denied. The Petitioner in HCJ 1893/11, the Trade Association, will pay the costs of Respondent 2 in that petition, Yigal Viron, in the amount of NIS 30,000, and the costs of Respondent 5, Kav La'oved, in the amount of NIS 30,000. The Petitioner in HCJ 1965/11, Tevel, will bear the costs of Respondent 2 in that petition, Yigal Viron, in the amount of NIS 30,000, and the costs of Respondent 5, Kav La'oved, in the amount of NIS 15,000. The Petitioner in HCJ 9325/12, Amishav, will bear the costs of Respondents 2-4, the class action plaintiffs Ilan Buskilla, Sergei Zandel and Vlad Konstantinovsky, in the amount of NIS 15,000 each, and the costs of Kav La'oved in the amount of NIS 15,000. The Trade Association, which asked to join this petition, will bear the costs of the class-action plaintiffs Ilan Buskilla, Sergei Zandel and Vlad Konstantinovsky in the amount of NIS 10,000 each. Under the circumstances, we do not find it appropriate to assess costs against the Petitioner in HCJ 7644/13, the class-action plaintiff in that matter, German Yashiev.

Justice

Justice H. Melcer:

1. I concur with the result proposed by my colleague Justice D. Barak-Erez, and with the main points of her thoughtful, learned opinion.

2. Due to the importance of the matter, I nevertheless feel the need to clarify certain points, and make a few comments on matters on which we somewhat differ. I will, therefore, set them out in order.

3. Section 2 **[Note to editor: this should be "3"]** of the Class Actions Law, 5766-2006 (hereinafter: *the Class Actions Law*, or *the Law*) states in the matter at hand: "A class action shall be brought only as an action specified in Schedule Two". Section 10 of the Second Schedule to the Class Actions Law, which is the focus of the petition, reads as follows:

“10. (1) A suit for a cause of action that is within the exclusive jurisdiction of a District Labor Court under section 24 (a) (1), (1A) or 3 of the Labor Courts Law, 5729-1969, provided that no relief is claimed for delayed pension, compensation for delayed wages or compensation for delayed severance pay under the provisions of sections 16, 17 or 20 of the Wage Protection Law, 5718-1958.

(2) A suit by a worker for a cause of action under section 6A of the Minimum Wage Law, 5747-1987, a suit by a worker for a cause of action under sections 2 and 3 of the Right to Work while Sitting Law, 5767-2007, or under the Employment of Employees by Manpower Contractors Law, 5756-1996.

(3) In this section –

‘Suit’—with the exception of a suit by a worker who is subject to a collective agreement that regulates the terms of his employment, and the employer of that worker, or a trade association of which it is a member, is a party to that collective agreement;

‘Collective Agreement – a collective agreement under the Collective Agreements Law, 5717-1957, or a written collective arrangement.”

3. It seems to me that the question of the interpretation of sec. 10 (3) of Schedule Two of the Class Actions Law, 5766-2006, above, in regard to the possibility of initiating a class action for workers subject to a collective agreement as defined by the Law (i.e., including a written collective arrangement) is complex. It is all the more so when the issues before the court concern a (justified) change in the case law by the National Labor Court in the framework of LabA 629/07 *Viron v. Tevel Security, Cleaning and Services Ltd.* (Jan. 3, 2011) (hereinafter: the *Viron* case) *per* Judge Varda Viret-Livneh (with Judge Amiram Rabinovich and Public Representative Ilan Segev concurring with some reservations), as against the dissenting opinion of President Steve Adler and Labor Representative Mr. Shalom Habshush. We therefore heard these petitions as if an order nisi had been granted, and did not see fit to deny them simply on the basis of the rules under which this Court intervenes in the judgments of the National Labor Court, even

though I see no reason to deviate from our basic approach on this subject, as explained by my colleague Justice Z. Zylbertal.

4. I accept the proposition presented by my colleague (hereinafter: *Proposition A*) according to which when there is no action by the relevant labor union to enforce the violated rights of workers covered by a collective agreement as defined by the Law, the restriction set out in sec. 10 (3) of Schedule Two of the Law is removed. My reason for this is grounded primarily on the principle that we must guard the guards themselves.

However, I am of the opinion that not only is sec. 10 (3) of Schedule Two inapplicable when we are concerned with a right that derives from a collective agreement, but also when we are concerned with obligatory rights deriving from labor shield laws (hereinafter: *Proposition B*). In this regard, I believe that we should adopt the view expressed by Professor Alon Klement and Professor Sharon Rabin-Margalioth in their important article, "Employment Class Actions: Did the Rules of the Game Change?" 31 *Iyuney Mishpat, Tel Aviv University Law Journal* 369 (2009) (Hebrew)) (hereinafter: *Klement & Rabin-Margalioth*) as they presented it, rather than as presented by my colleague in para. 82 of her opinion.

To my way of thinking, this is required by the rules of purposive interpretation, otherwise the result would be that the very existence of a collective agreement as defined by the Law, would appear to preclude a class action even for a right that is not mentioned, or that does not derive from the collective agreement, as defined by the Law. This would be especially true for obligatory rights that cannot be stipulated or restricted even by a collective agreement. Any other view – if accepted – would limit access to the courts, which is a constitutional right (see: the sources cited in para. 14 of my opinion in CFH 5698/11 *State of Israel v. Dirani* (Jan. 15, 2015)) and would be contrary to the very purpose of law, which is meant to provide operative, effective relief to anyone whose rights are violated (see: Elisheva Barak-Ussoskin, "From the Heights of Nebo – Class Action and Labor Law: Can they exist together? In light of the Class Actions Law, 5766-2006," *Gabriel Bach Volume* 577 (David Hahn et al, eds., 2011) (Hebrew); and cf. the persuasive dissent of Justice Kagan (Breyer and Ginsburg, JJ concurring) in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), that bears certain similarities to the legal issues before us, and see Imre Stephen Szalai, "More than Class Action Killers: the Impact

of Concepcion and American Express on Employment Arbitration," 35 *Berkeley J. Emp. & Lab. L.* 31 (2014), which strongly criticizes the majority opinion in the American Express case and its possible application to labor law).

5. Recognizing that each of the above two propositions negates the exception established under sec. 10 (3) of Schedule Two of the Law is also consistent with the idea that *exceptions should be narrowly construed* (see: HCJ 4672/90 *Ariel Electrical Engineering, Traffic Lights and Control Ltd. v. Haifa Municipality,* 46 (3) IsrSC 267 (1992); HCJ 11088/05 *Hayeb v. Israel Lands Administration* (Aug. 19, 2010); LCA 3788/06 *Yefet v. Yediot Aharonot Ltd*. (Jan. 19, 2012)).

A somewhat similar idea that supports the merger of the two propositions that make the restriction an exception was raised by Moran Savorai in her article "The Purpose of Representation Mechanisms in Labor Law: The Class Action Mechanism versus the Traditional Tools of Collective Labor Law," *Elika* **[Note to editor: This should be "Elisheva". "Elika" is the judge's nickname]** *Barak- Ussoskin Volume* 597 (2012) (Hebrew), for her own reasons.

6. Therefore, in accordance with my approach, in the presence of either *one* of the above two propositions, the discretion granted the labor court does not extend to the question whether the exception under sec. 10 (3) of Schedule Two of the Law has been met, but only to the meeting of the other conditions set forth in sec. 8 of the Class Actions Law for the certification of a class action. The difference between my approach and that of my colleague is that while my colleague is of the opinion that this would hold only in regard to Proposition A (see: para 78 of her opinion), I am of the opinion that this result is required both by Proposition A and by Proposition B. I am also of the opinion that there is no need for a "voir dire" or other separate, interim proceeding in regard to the applicability or inapplicability of the exception, but rather all of these questions can be addressed together in the course of deciding whether or not to certify the class action. That is what was done in the *Viron* case, and it is the accepted procedure in regard to the certification of class actions that do not concern labor law – see: LCA 8268/96 *Reichart v. Shemesh*, 55 (5) IsrSC 276, 290 (2001); and my opinion in LCA 5154/08 *Kost Forer Gabbay & Kasierer, Accountants v. Kedmi* (April 2, 2009), and the citations there.

7. According to my colleague, before filing a class action and the request for its certification, the class-action plaintiff must first serve notice upon the representative labor union (see: paras. 85 and 86 of her opinion). While I agree, I do not accept the view that such notice must be directed solely at enforcing the personal rights of the worker, as opposed to a specific warning of the possible intention to file a class action. My colleague is of the opinion that there is no need to "warn" the labor union of a possible class action. In her view, the labor union should muster in response to a workers' complaint of a serious infringement of his rights, whether or not it is "warned" of the possibility that the worker may file a class action (*ibid*., para. 86). In my opinion, the labor union should be reminded of its duties and given a "first right" to act, while emphasizing that if it not act, the worker will be free to initiate a class action. I believe that the worker should also do so in regard to obligatory rights that derive from labor shield laws. In such matters, the union may, at times, act on behalf of the worker in accordance with explicit legal provisions (see, e.g: sec. 7 of the Minimum Wage Law, 5747-1958 **[Note to editor: This should be "1987"]**; sec. 28 (b) of the Wage Protection Law, 5718-1958; sec. 13B of the Employment of Women Law, 5714-1954), and it would appear that the union could also file a class action on the worker's behalf under the combined provisions of secs. 3 and 4 (a) (3) of the Class Actions Law, as a possible alternative to declaring a labor dispute (in this regard, my view differs from that of Klement & Rabin-Margalioth, who argue that a labor union can only declare a labor dispute). In my opinion, the prior notice that the worker must send to the representative labor organization should comprise the following elements:

(a) Details of the claimed violation by the employer.

(b) A demand that the labor union take steps to enforce the worker's rights.

(c) An explanation emphasizing that if the labor union not act with due speed and diligence, it may be exposed to a suit for inadequate representation (in this regard, I agree with my colleague that the scope of that cause of action should be expanded).

(d) Notice that the complainant reserves the right to file a class action against the employer if the union fails to act, or if its efforts do not bear fruit within a reasonable period of time (in this regard, I agree that a reasonable time before the limitation of actions comes into force is the "upper limit" of the waiting period before filing the class action, although it is possible that even

if the worker does not do so before the limitation period expires, he will still have a cause of action for negligence against the labor union, jointly and severally with the cause of action for inadequate representation. And cf: CA 479/65 *Wieder v. Gideon Harnoy*, 20 (1) IsrSC 468 (1996)).

8. In my opinion, the need to include all the above elements in the prior notice derives from the duty of good faith, and also reflects the balance that must be struck between the means that collective labor law places at the disposal of the labor union and recourse to class actions, which I believe is the default option in such cases.

Moreover, in my view, this is also the conclusion to be drawn from this Court's recent decision in AAA 2978/13 *Mei Hagalil – District Sewage Corporation Ltd. v. Younes* (July 23, 2015), for the many reasons elaborated there, *mutatis mutandis* to the instant case. It is also required for the purpose of the "scrutiny of the relevant factual and legal grounds" that must be carried out before requesting certification of a class action (see and compare: LAA 4303/12 *Inslar v. Emek Hefer Regional Council* (Jan. 22, 2012); and recently, LAA 582/15 *Amit Yosha v. Hod Hasharon Municipality* (Aug. 22, 2015)). Therefore, if the labor union is not made aware of the alternative of a class action, the potential class-action plaintiff may be placing an obstacle in the union's path (as it may not know what it is expected to do), and may trip over it himself (if he is unaware of what the union may have done or intends to do, if anything).

It would appear to me that the distinctions that my colleague suggests in these contexts are not consistent with the rationales that she gives in justification of Proposition A, which she presents in order to ground the dismissal of the barrier to class actions under sec. 10 (3) of Schedule Two of the Law. Moreover, following her approach, it is hard to identify how the presumption regarding the representative organization's omissions in realizing obligatory rights would work if the worker is not required to specify what is stated above in para. 7, while explaining that the worker may act on his own if the union remains complacent.

9. Therefore, subject to the above two reservations, which I believe to be significant for the protection of workers' rights, I concur in the opinion of Justice D. Barak Erez.

Justice

Justice Z. Zylbertal

1. I concur in my colleague Justice D. Barak-Erez's comprehensive opinion, but would like to explain my view in regard to one aspect of the matter, and comment upon the points of disagreement between my colleagues.

A discussion of the place of class actions in labor law, *inter alia* in view of the provisions of sec. 10 (3) of Schedule Two of the Class Actions Law, 5766-2006 (hereinafter: *Schedule Two*), requires that, first and foremost, we address considerations from the field of labor law, and collective labor law in particular, as my colleague's opinion demonstrates. A significant part of the discussion focused upon the manner for ensuring the effective protection of the rights of unempowered workers, and the role of a representative labor organization in this campaign. Another question addressed was that of the most effective means for achieving those objectives, and what the consequences would be of strengthening the role of class actions in collective labor law. For that reason, and in addition to all that has been said by my colleague Justice D. Barak-Erez, I would like to stress that it would be most proper that the intervention of this Court in the decisions of the National Labor Court in the subject at hand be limited. This was stated more than once in regard to matters at the core of labor law and within the special expertise of the Labor Court. Inasmuch as the High Court of Justice does not hold appellate jurisdiction over the decisions of the National Labor Court, intervention in its decisions should be reserved for those relatively rare cases that concern a conspicuous, substantive legal error in an area of public, social or economic significance, and that resulted in an injustice that cannot be ignored. In other words: intervention should be reserved primarily to cases in which a substantive legal error is found in the decision, and justice requires the intercession of this Court in order to prevent a miscarriage of justice (HCJ 739/10 *Anonymous v. Anonymous*, paras. 8-11 (May 30, 2012), and the cases cited there).

Indeed, as my colleague noted, it has been further held that another test for the intervention of this Court is the general, public importance of the problem, the scope of its attendant implications, or the fundamental nature of the issue raised. But it would seem that such is the case primarily when we are concerned with questions that affect legal issues that go

beyond the scope of labor law. In my opinion, we must restrain ourselves from excessive intervention even – or, perhaps, especially – when we are concerned with original or precedent-setting decisions on broad issues firmly rooted in labor law. Even if there may be alternative approaches or solutions to those arrived at by the National Labor Court (although I agree with its decisions), the instant cases certainly are not examples of decisions that present a substantive legal error that caused a miscarriage of justice. Therefore, in my opinion, these petitions could have been denied on the basis of the guidelines governing the intervention of the High Court of Justice in the decisions of the National Labor Court.

2. My colleagues presented a disagreement on two points: the content of the application to the labor union prior to filing a class action (must that application include notice of the intention to file a class action against the employer), and in regard to the distinction between the violation of obligatory rights deriving form shield laws and violations of rights deriving from a collective agreement in regard to the application of sec. 10 (3) of Schedule Two.

These issues were not argued by the parties, and more importantly, no factual foundation, grounded in evidence submitted to the trial court, was laid. As a result, what my colleagues stated in their regard was largely obiter dicta and in the realm of academic theory. In keeping with my view that this Court should act with restraint in regard to issues given to the jurisdiction of the labor courts, as sated above, I believe that we should refrain as much as possible from establishing rules in areas that have not yet passed through the "crucible" of the various instances of the labor courts, as it is best that the decisions of this Court be founded, first and foremost, upon approaches developed by the labor courts, which have special expertise and experience in the said field. This is all the more true when we are concerned with matters that are not founded upon factual foundations established by a duly constituted court. Or as aptly stated by President M. Naor, and as repeatedly expressed in the case law of this Court, "the law arises from the facts":

> "As Justice M. Naor has emphasized in hearings before this Court, 'the law arises from the facts'. This statement reflects an axiom of the judicial task, grounded in the deeply rooted principal *ex facto jus oritur* [see: HCJ 7957/04 *Marabeh v. Prime Minister of Israel*, 60 (2) 477, 525 (2005)]. **[Note to editor: This judgement appears in [2005] (2)**

> **IsrLR 106]** The desire to establish a particular legal rule cannot ignore the factual foundation of the case upon which the rule is developed" (CrimFH 5852/10 *State of Israel v. Shemesh* (Jan. 1, 2012), para. 3 of the opinion of Y. Danziger, J.).

Indeed, there is no Supreme Court case-law rule in regard to the questions addressed by my colleagues, and precisely for that reason, it is inappropriate that the Supreme Court express its binding opinion in this matter in the absence of a concrete factual foundation, and even to be the first to state its opinion, even before the labor courts have addressed these issues.

Under these circumstances, I see no need to take a firm stand in the debate between my colleagues, and I will suffice in presenting the main points of my preliminary view, while stressing that the rule should properly be developed only after it is required in a proceeding in which the factual footings are laid out such that we may set our opinions, *inter alia*, upon that foundation.

3. In sec. 10 (3) of Schedule Two, the legislature expressed its view that when labor relations are regulated by a collective agreement, a class action cannot proceed. Indeed, as my colleague Justice Barak-Erez explained, that provision should not be applied strictly, and when a labor union forsakes its duty to represent the workers whose rights were violated, a worker should be allowed to file a class action against his employer. In this, we have no disagreement. However, despite the door opened for initiating class actions, the starting point must, in my view, be the legislature's fundamental view that prefers the resolution of labor disputes within the framework of collective labor relations, to the extent that they exist and function, as against the use of class actions.

Therefore, I believe that, as a rule, and in order to realize the basic preference for resolving employee-employer disputes within the framework of collective labor relations, if the dispute falls within it, it is best to exhaust that framework to the extent possible before stating that it has failed and that the path has been paved for a class action. For this reason, I would expect that when a worker turns to the labor union with a request that it act in defense of his rights, he should also inform it of his intention to file a class action if the union not act as a union should in protecting its members. My colleague Justice Barak-Erez believes that in order to put the labor union to a "true test" and ascertain whether it acts to defend workers' rights in practice,

such a “threat” of a class action against the employer should not be included in the notice sent to the union. My colleague is also of the opinion that requiring such a warning of the intention to file a class action would result in the union not having an incentive to defend the rights of unempowered workers who do not intend to initiate class actions. These are practical concerns that I do not take lightly. However, I believe that for the present, before such possible scenarios have been brought to light in an actual case, against a factual background, the starting point must be the full disclosure of all the intentions of the worker applying to the labor union, in order to fully realize the basic approach of the legislature that where there are collective labor relations, it is preferable that disputes be resolved in that framework. In that framework, all cards should be on the table as long as it has not been *proved* that such a course will lead to real harm to the worker, such as to justify deviating from the principal established in sec. 10 (3) of the Schedule. Should it transpire, as my colleague expects, that this approach – which my colleague Justice Melcer addressed at length, and for which he brought additional support – will result in some “failure” that must be corrected, then we can revisit the said approach.

4. As for the second issue disputed by my colleagues, I prefer the approach of my colleague Justice Barak-Erez. This, in particular, where my colleague Justice Melcer believes that even in the case of a violation of an obligatory right deriving from shield laws, the worker must first turn to the labor union before filing a class action, and must even give prior notice of his intention to file such an action. As noted, there is barely any practical difference between the two approaches. However, it seems to me that the approach of Justice Barak-Erez better expresses the legislative intent in regard to the place of class actions where there are collective labor relations. Here, too, it would be best to allow the case law to develop, and leave it flexible. If it transpire that the difference in approach expressed by my colleagues has real consequences, or that ensuring true protection of workers’ rights requires it, then we shall be free to revisit the issue, first in the district labor courts – on the basis of factual findings – and then in the National Labor Court. But not first in this Court.

Justice

The petitions are therefore denied.

Given this 15th of Elul 5775 (Aug. 30, 2015).

Justice	Justice	Justice