Goldfarb Seligman
Law Offices | Established 1930

TEL AVIV
Ampa Tower, 98 Yigal Alon St.
Tel Aviv 6789141, Israel
Tel +972 (3) 608-9999
Fax +972 (3) 608-9909
INFO@GOLDFARB.COM

ZURICH
14 Mittelstrasse
Zurich 8008, Switzerland
Tel +41 (44) 818 08 00
Fax +41 (44) 818 08 01
ZURICH@GOLDFARB.COM

WWW.GOLDFARB.COM

Should Courts Defer to the Regulator's Interpretation of its Own Regulation?

In a relatively rare process, the Israeli Supreme Court recently reexamined its own ruling regarding the interpretation of regulations issued by the regulator and the judicial review of such interpretations. The ruling, by an extended panel of seven Supreme Court Justices headed by Deputy Chief Justice, Hanan Melcer, in one of his last rulings prior to retirement, was decided by the slightest majority (four Justices vs. three). It presented an interesting perspective on the Court's position regarding the relationship between regulatory authorities and the entities they oversee.

In this landmark ruling commonly referred to as the "Seligman Ruling", the Israeli Supreme Court looked at the Capital Market, Insurance and Savings Authority Commissioner's (the "**Commissioner**") interpretation of its own guidelines and examined whether such interpretation should prevail over other possible interpretations.

The Supreme Court ruled that there is no deference given to the regulator's interpretation of directives it issues, explaining that each case should be examined separately, and its own unique circumstances should be considered. The Court added that when interpreting the directives of a regulatory authority, the authority's position should be considered as a professional expert opinion, but its interpretation is not conclusive.

This ruling overturned the Supreme Court's previous ruling in the same case, which stated that courts should uphold the regulator's interpretations of its own regulations unless there are substantial reasons not to do so, such as interpretations mired by a conflict of interest or ulterior motives.

The Israeli Supreme Court further noted that awarding excess deference to the regulator's interpretation may incentivize regulatory authorities to intentionally promulgate ambiguous regulations in order to grant themselves significant leeway in interpreting them in the future.

With regard to the judicial review itself, the "Seligman Ruling" set specific parameters for examining a regulator’s interpretation:

1. Whether the interpretation relates to a technical or professional field - in which case, the regulator usually possesses a distinct advantage of expertise, in contrast to a case in which the interpretation relates to a legal position - in which case the court has the advantage as an interpreter of law.

2. Whether the regulations were created by the regulator currently interpreting them, or were created by previous regulators, which positions the current regulator as an external interpreter.

3. Whether there is a concern about the regulator's considerations in the case, such as cases in which the regulator acts under a conflict of interest or pursuant to ulterior motives. This includes cases in which the regulator acts in favor of powerful and influential entities and against the interest of the public ("a captive regulator"); cases in which the market is characterized with "revolving doors" (regulators appointed to senior market positions upon their retirement, and vice versa); or cases in which the regulator takes into account considerations such as market reputation or stability.

4. Whether the regulator consulted with - or held a hearing for - involved parties prior to reaching its interpretation.

In the specific case reviewed by the Supreme Court in the "Seligman Ruling", the Court (as part of a preliminary hearing of a class action proceeding) examined the parameters mentioned above and rejected the Commissioner's interpretation of the guidelines according to which the insurance companies acted.

The Court noted that the insurance market is a centralized market with the insurance companies on the one hand as sophisticated, powerful and knowledgeable players, while, on the other hand, the insured public is a large unorganized group suffering from a lack of information and cohesion. Therefore, the Court ruled that in this case, a concern arises regarding the "captive regulator" phenomenon, in which the regulator acts in favor of powerful and influential entities against the interest of the public. Consequently, the Court decided that deference afforded to the regulator's position would be minimal.

As stated above, the presiding majority ruled to uphold the original District Court ruling and to overturn the former Supreme Court ruling. The overturned ruling, supported by the minority opinion, stated that the default interpretation is the regulator's position, and only under unusual circumstances should a court deviate from this position and offer an alternative interpretation.

It should be noted that, although in this case the Court's ruling was against the overseen entities who sought to rely upon the regulator's position, it is plausible that in future cases we will see this ruling supporting the position of overseen entities that are challenging a regulator's interpretation of its own regulations, if they perceive the interpretation as contrary to their interest.

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Adv. Rami Sofer

Partner, Head of the Corporate,
Finance and Infrastructure Department

rami.sofer@goldfarb.com

+972-3-608-9369

Adv. Yael Zhout

Senior Counsel, Corporate, Finance
and Infrastructure Department

yael.zhout@goldfarb.com

+972-3-608-9355