Israel

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1. AGENCY

1.1. Introduction

In selecting an appropriate system of distribution in Israel, a foreign business entity must take into account the size of the country, its market conditions, financing requirements, brand recognition, and different legal regulations as well as profit margins on the product, retailing sophistication, and the need for post-sales service.

Israel passed the Agency Contract (Commercial Agent and Supplier) Act (hereinafter "The Agency Contract Act" or "the Act") in 2012.[1] The Act draws its inspiration from the Council Directive 86/653/EEC of December 18, 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.

Prior to the passage of the Act, Israel had no law dealing specifically with commercial agents and distributors and differed in this respect from many European countries, where specific statutory regulations govern commercial agency and distribution. However, other Israeli legislation was responsible for governing several aspects of these transactions, such as the form of the contract, rights, and duties of the principal and the commercial agent, and termination and compensation conditions, similar to that of European countries.

1.1.1. Definition

Legal agency is defined by section 1(a) of the Israeli Law of Agency, 5725-1965 (hereinafter "The Agency Law") as the granting of power to an agent to undertake, on behalf of the principal, a legal act with respect to a third party. A foreign entity, for example, could decide to vest an Israeli representative or employee with authority to act in its name with binding force, thus making the representative a legal agent. The granting of such authority is recommended only if the foreign entity either trusts the

[1] Due to the recent passage of the Agency Contract Act, the Supreme Court has yet to rule on the correct interpretation and application of the Act. As a result, the rulings brought forth in this chapter pertaining to the Act are rulings issued by the District Courts that guide lower courts but do not bind them.

It is worth mentioning that the Tel Aviv magistrate court in the case of *Yossi Doron et al. v. Denies Chitrock et al.* 46178-03-17 [2020] states that the purpose of the law is to give the agency contract a higher status due to the power gap between the parties to the contract.

representative to make appropriate decisions or can exercise significant control over the representative's actions. This would be the case if the legal agent were to be an employee or a wholly owned subsidiary of the foreign entity.

Two points are worth noting here. First, delegation of powers, strictly speaking, is not the only way one can create an agency relationship. Second, in certain cases, the agency relationship itself, or, alternatively, the principal's identity, is not visible to the business community (causing the agent to act as an "undisclosed agent" as far as third parties are concerned). There are many reasons why the principal may prefer to keep things this way. For example, a principal may wish to operate simultaneously in two countries which are in a state of political conflict. Section 7 of the Agency Law provides that, where an agency is undisclosed, both agent and principal are jointly and severally liable to third parties. By contrast, any rights vis-à-vis third parties belong only to the agent unless the nature of the right in question, its particular terms, and the circumstances of the case allow the principal to "adopt" the right.

An interesting illustration of both these points was provided by *Deri Avraham et al. v. Yogev Yaniv et al.* 1180/05: a certified public accountant, who had been running a private consultancy practice for over twenty years, wanted to quit private practice so that he could hold public office. He wanted his son to take over his practice, but the son was still several years away from qualifying as an accountant. To bridge this time gap, the father decided to transfer his practice—including all client accounts—into the hands of a third party, for no immediate consideration. The only condition attached to the contract of transfer was an option that the son, once qualified, would be entitled to join the third party at the practice and choose to be either a 50% or a 70% partner. The claim was that of which, between the time the contract was signed and the time the son sought to exercise his option, the third party was running the practice as the son's agent. The magistrates' court rejected this claim. After all, at no time did the said third party represent to any party with whom he had dealt that he was acting on anyone's behalf other than his own.

However, the Haifa District Court overturned the lower court's ruling on this point: Since section 7 of the Agency Law allows for an "undisclosed agency" relationship, the court determined that an agency relationship between the parties did in fact exist during the period in question in respect to at least a 50% share of the practice.

Conferring authority on another entity remains the usual manner in which an agency relationship is established. Under the Agency Law, this may be done orally or in writing (section 3). As the legal agent's acts will bind the principal, it is essential for the principal to agree on the extent of the agent's authority and his power to bind the principal, so that even if the agent exceeds the limits of his authority, the principal nevertheless remains protected. Pursuant to section 5(a) of the Agency Law, the scope and limits of the agent's authority are primarily determined by the agency agreement.

If the agreement does not include a stipulation limiting the agent's authority, section 5(a) of the Agency Law is applicable. Under this provision, agency extends to any act reasonably required for the proper performance of the principal's objective. The agency does not extend, however, to proceedings before any court, tribunal, or arbitrator nor does it extend to a compromise, renunciation, or gratuitous act.

Section 6 of the Agency Law absolves the principal from liability for actions undertaken by the agent that are beyond the scope of the agent's authority. A third party unaware of the lack of authority may either regard the agent as the counterparty to the transaction or withdraw from the transaction and claim damages from the agent.

Agency by estoppel arises where the principal acts in such a way as to falsely lead a third party to believe that he has authorized the agent to act on his behalf, and the third party, under such belief, enters into transactions with the apparent agent within the scope of the agent's apparent authority. In this case, the principal is estopped from denying the fact of the agent's authority. In other words, such acts bind the principal.

It is important to note that not only can the agency itself be established by the principal's actions but the scope of the agency is determined by those actions too. Furthermore, there is no need to ask the supposed agent if he is indeed an agent.[2]

If the agent does not disclose the agency relationship to the third party, he and his principal will be jointly and severally bound by the act, but only the agent will be entitled. However, the principal may assume any right of the agent, provided this is consistent with such right by reason of the nature thereof or by reason of the circumstances (section 7 of the Agency Law).

Section 8 of the Agency Law lists the basic obligations of the legal agent. These include loyalty, disclosure of information, promotion of the principal's interests, and a prohibition on representing different principals regarding the same issue unless otherwise agreed to by the principals concerned. These obligations may be overridden by the parties. In case of an infringement of the agent's duties, the principal is entitled to the remedies provided for breach of contract according to section 9 of the Agency Law.

The principal is obligated under section 11 of the Agency Law to indemnify the legal agent for reasonable expenditures and liabilities incurred as a result of the agency. Pursuant to section 14 of the Agency Law, the agency terminates upon revocation by the principal or the agent, the death of either party, loss of capacity by either party, bankruptcy of either party, or the cessation of activity by a corporate entity which was a party to the agency relationship.

1.1.2. Distinction Between Commercial Agents and Similar Persons

If a principal wishes to reserve for himself the actual conclusion of business transactions but requires assistance in finding potential clients, negotiating business deals, and in promoting sales activity, he may seek to cooperate with a commercial agent. In business practice, the terms "commercial agent" or "sales representative" are not confined to agency in the legal sense but are used to describe a variety of types of commercial representatives, such as a legal or commercial agent, an employee, or a distributor. These relationships differ according to the degree of independence of the commercial representative and his relationship to the principal or manufacturer.

[2] Tel Aviv District Court in *Tol interactions Ltd. v. Mconomy B.V* 17911-11-15 [2020].

The least independent is the employee, who is an integral part of the legal entity of the manufacturer. Following the employee comes the commercial agent, who is a separate legal entity, usually representing only one manufacturer and acting in that manufacturer's name, on his account, and under his direction. Section 1 of the Agency Contract Act defines "commercial agent" as a person who engages in finding new customers or in an activity intended to create new business dealings between customers and the "provider," with regard to acquiring goods marketed by the "provider." A "provider" is the manufacturer of merchandise or the manufacturer's marketing representative who holds the rights to use the reputation and the trademarks (registered or unregistered) related to the merchandise. A "commercial agency contract" is defined as a contract between the provider and the commercial agent wherein the provider empowers the commercial agent with an ongoing authorization to locate new customers or to create new contracts with existing customers, for the purpose of acquiring the merchandise which is marketed by the provider, outside of an established employer-employee relationship.

A distributor is an independent contractor acting in his own name and for his own account. A distributor may, however, also assume the duties of an agent and vice versa: a "commercial agent" may buy and sell merchandise from a manufacturer in his own name and for his own account, thus acting in the capacity of a distributor; Likewise, a "distributor" may also perform related maintenance services or sales of another range of goods in the name and for the account of the same manufacturer, thus acting in the capacity of a commercial agent.

The decision as to whether to do business via an agent or via a distributor depends on the amount of control the foreign entity wishes to exercise over the distribution channel and the amount of economic risk that the foreign entity is willing to assume. The commercial agent is obliged to follow the directives of his principal, while a distributor is generally subject to less control and to a large extent shields the foreign entity from customers' claims, since he acts in his own name and for his own account. The extent of this protection is, however, narrower in cases of tort claims involving bodily injuries.

In *Yitzchak Mizrachi v. Paltziv Ein Hanaztiv Cooperative Society* 52235-05-17 [2020], the Tel Aviv Magistrate's Court ruled that although the defendant issued a business card and an e-mail address on its servers, the plaintiff is not a commercial agent and these were issued for practical and comfort reasons alone. The court based this ruling on the fact that there was no contact between the defendant and the clients, and all payments were paid from the clients to the plaintiff, while the plaintiff paid the defendant separately.

In the Tel Aviv Magistrate's Court in *Stream Line MW Ltd. v. Morris Weinshtock* 1848-05-17 the court ruled that the fact that someone is named a commercial agent does not necessarily mean that he is in fact a commercial agent and one must make sure that he factually fits the criteria.

In a different case in the *Tel Aviv magistrate court Reuven Yefet v. Tishlovet Mifali Mazon—Naknik Nharia Cosher Zoglovek Ltd.* 2283-07-15 [2020], it is implied that the fact that one is *not* described as a commercial agent is reason enough to say that he is not, in fact, a commercial agent. Another point worth noting in the same case is that when the contract is signed before the law was excepted, a party

that wants to be described as a commercial agent must prove that the parties agreed to apply the law on their agreement.

1.1.3. Independent Commercial Agents

Independent commercial agents are independent contractors who act in the principal's name, for his account and under his direction in a long-term relationship. They solicit and help to conclude business transactions. As remuneration, they usually receive a commission, i.e., a percentage of the value of the transactions concluded between the principal and a third party that are attributable to the agent's activity. A commercial agent may be vested with legal authority to bind the principal directly in certain fields of business. The extent of this authority depends on the agency agreement.

The criterion of a long-term relationship distinguishes the commercial agent from the commercial broker, who also finds and negotiates business for a principal but only on a per-project or periodic basis.

Often, though not always, commercial agents act for more than one principal, and one of the most difficult tasks in this field is to design and negotiate proper noncompetition clauses suiting both the agent and the relevant principal(s).

In OM 314/99 *Condominium Committee of Shabtai Ha'Negbi St. 46 Gilo v. Hefzibah Company for Building, Construction and Development, Ltd.,* it was held that under section 4 of the Agency Law, any person authorized to act as an agent may perform any action that she is competent to perform, but her rights and obligations will be subject to the general rules of legal ability. It should be noted that, in the ruling, a "person" includes corporate entities, nonprofit organizations, and under certain circumstances even unincorporated groups.

An agency is created by the granting of written or oral permission from the principal to the agent; notification of the same to a third party; or by an individual's conduct with respect to either the principal or the agent. An implied-in-fact agency is determined to have been established when a reasonable person would conclude that an agency relationship exists. Thus, the determination is particularly conditioned on an examination of individual and specific circumstances.

In CC (Jerusalem) 851/89 *Elio Trading Export Establishment v. Modern Company for Olive Press—Bethlehem*, the District Court held that a supplier's signature on a printed receipt bearing the name and address of an agent constituted demonstration by the supplier to third parties that the agent is authorized to receive money in the supplier's name and constitutes implied-in-fact permission.

In CA (Haifa) 4285/96 *Kibbutz Givat Oz v. Abu Asaba Gamil*, the court held that a marketing representative issuing invoices bearing the manufacturer's name in a meeting between the marketer and a customer and in the presence of the manufacturer has not demonstrated the establishment of implied-in-fact agency.

An agency agreement, like all other contracts under Israeli law, must be created by accepted practice for that type of agreement and in good faith; details not established by the agreement itself will be

determined by the accepted practice between the parties or, in the absence of such, according to accepted policies in such agreements.

1.1.4. Sales Representatives

Sales representatives are employees of the manufacturer for all intents and purposes unless they are independent contractors as detailed below. They are subject to the labor laws and to personal employment contracts if these have been entered into. These representatives are employed in promoting sales of products manufactured by their employer and are not allowed to compete with their employer by representing other manufacturers. Their remuneration may be based on either a salary, a commission, or a combination of both, depending on the terms of employment negotiated between the parties and the employee's performance.

1.2. Basic Aspects of Commercial Agency Agreements under Israeli Law and Court Practice

1.2.1. Formalities

In the past, due to the lack of specific statutory regulations in Israel, the rights and duties of the principal and the commercial agent depended largely on the stipulations of the underlying contractual agreement. With the institution of the Agency Contract Act, some rights and duties are now regulated as will be shown below.

There are no statutory prerequisites as to the form and content of an agency agreement. Pursuant to section 23 of the Law of Contracts 5733-1973, a contract may be made orally, in writing, or in some other form. The principle of freedom of contract is established under section 24 of the Law of Contracts. Pursuant to section 61(a) of the Law of Contracts, said law applies when no other law, including special contract provisions on the matter in question, is deemed to apply; thus, the agency contract itself will be subject to the general provisions of the Law of Contracts.

The Law of Contracts (Remedies for Breach of Contract), 5730-1970, establishes remedies in the event of a breach of contractual obligation, including remedies of specific performance, termination, and compensation. Generally, a breach of contract entitles the party abiding by the contract to claim specific performance from the other party. However, contracts for the rendering of personal services are not enforceable under section 3(2) of the law.

Case law has extended this provision to agency and distribution agreements as these usually entail the rendering of personal services and require mutual trust which, in the court's opinion, cannot be enforced.

In a similar vein, an injunction preventing the termination of a distribution agreement prior to a hearing on the main action will likely not be granted by the courts. This view was expressed in the precedent-setting case of PCA 5284/95 *Gigi Cosmetics Laboratories Ltd. v. Shell Beauty Agencies Ltd.* by Justice Strassberg-Cohen. This decision appears to overrule previous conflicting District and Supreme Court decisions granting injunctions in similar cases.

In PCA 3144/03 *Elbit Medical Imaging Ltd. v. Harefuah Serviços de Saude S/C Ltd.*, the Supreme Court held that the parties to a contract are entitled to select explicitly the law that will govern their contract as long as the selection is in good faith and provided that there is no reason to reject that selection on the basis of public policy. Therefore, in the event that the parties selected to apply to the contract a different law than the Israeli law, the Law of Contracts (Remedies for Breach of Contract) would not apply and specific performance as a remedy for the breach might be mandated.[3]

If one of the parties to the relationship is a corporate entity, the interior procedures of the entity must be evaluated in order to guarantee that it is authorized to enter into the relationship.

1.2.2. Exclusivity

As the principal's sole representative, a commercial agent is often allocated a certain sales territory or group of customers. In return, he may be obliged not to promote the sale of competitive products. How strictly the principal is required to protect the agent's exclusivity varies according to the agency agreement.

The principal may reserve for himself the right to make direct sales to customers of the group or region assigned to the agent. He may then be obliged to pay a commission to the exclusive agent for such direct sales, especially when the agent is required to include such reserved customers in his general promotional and other activities. Alternatively, the principal's right to make direct sales may be excluded in the contract.

The question of whether "exclusivity" bars a principal from appointing additional agents or whether the principal himself may make direct sales lacks consistent ruling under Israeli law. An agreement between a supplier and an agent or distributor that does not address the matter of exclusivity will not be interpreted automatically as granting exclusivity to the agent.

The meaning of "exclusivity" is conditioned on the agreement between the parties. In circumstances in which the language of the agreement is unclear, any conflict between the parties will be resolved by accepted doctrines of interpretation or general practice in the field. Conflict resolution in this context will give weight to promoting the business venture behind the agreement, and insofar as is possible, the courts will prefer to enforce a contract as long as this is reasonable from a commercial standpoint.

Court rulings indicate that the burden of proving exclusivity belongs to the party claiming the exclusivity. With few exceptions, Israeli law does not include directives requiring granting of exclusivity to an agent or distributor or regarding the extent of the exclusivity.

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[3] The Elbit ruling was adopted by several later court decisions. In PCA 5860/16 *Facebook Inc. v. Ohad ben Hamu Esther Hayut* Chief Justice of the Supreme Court of Israel pointed out that the Elbit ruling applies only in commercial agreements if an equal bargaining power between the parties to the contract is given. In CA 8205/16 *Contrastock OY. v. Thor Horizon* Supreme Court justice Neal Hendel added that even if very special circumstances were proven in order to reject the selection of a foreign jurisdiction the Israeli Court would not accept the jurisdiction if another Forum is more convenient or appropriate to adjudicate a matter according to the "Forum non convenience" doctrine.

1.2.3. Consideration of the Agent

The agent's consideration will usually be contractually agreed upon between the parties. In practice, there are various ways of remunerating the agent depending on the nature of the relationship with the principal. For instance, in the father-son accountants' case above (*Deri Avraham),* [4] the District Court held that the agent's remuneration for running the practice pending the son's arrival consisted of all the net profit made by the practice during that period.

An agent who manages a branch office, which constitutes an integral part of the legal entity of the manufacturer, may receive remuneration on a so-called cost-plus basis. In this case, the manufacturer reimburses all of the branch's expenses with a certain percentage added as the branch's profit. Independent contractors usually work on a commission basis, with their remuneration determined as a percentage of payment received by the manufacturer for sales of the product brought about by the agent. The "transfer pricing" method is discussed under "Obligations of the Supplier" (section 2.2.4 below).

1.2.4. Territory

The Agency Contract Act did not address the issues involved in the definition of the agent's territory. Therefore, the definition of an agent's territory still depends largely on the provisions of the agency agreement. When drafting a so-called territory clause, it is advisable to be aware of the limiting implications of defining the agent's territory as simply "the State of Israel"; in light of historical and current political events, this definition no longer includes the Palestinian Autonomous Areas, which at present officially comprises of Gaza and various cities in Judea and Samaria. In January 2000, the Palestinian Legislative Council passed a law "Concerning the Organization and Regulation of the Operations of Commercial Agents" according to which, all commercial agents operating in the Palestinian Autonomous Areas must be Palestinian. Therefore, foreign companies should be aware that an Israeli importer may no longer act as a distributor in the Palestinian Autonomous Areas, as had been the case heretofore.

1.2.5. Obligations of the Principal

The duties of the principal arise from the agency agreement. These will generally include the duty to remunerate the agent for transactions concluded and to supply the agent with merchantable goods. The principal may also be required to supply necessary promotional material, such as samples, price lists, promotional literature, conditions of sale, and other necessary information. The principal's duty is essentially one of support.

In CC (Tel Aviv) 26905/05 *Yossi Kazimirsky v. Karmei Zvi Segal Brothers, Ltd.*, the Magistrate's Court held that when an agent causes damage to a third party in a manner that may reasonably be connected to performance of the agency, the principal may be held accountable for the damage, particularly when the third party relied on the demonstration of agency and in this reliance harmed his own position.

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[4] CA 1180/05 *Deri Avraham et al. v. Yogev Yaniv et al*.

1.2.6. Obligations of the Agent

The duties of the agent are also primarily determined by the agency agreement. Contractual obligations usually ensure that solicitation of business and sales promotion is carried out in a manner consistent with the principal's instructions. Additionally, the agent is generally bound to act in the interests of the principal, visit existing and new customers, advertise, and transmit required information to the principal.

The agent must also exercise confidentiality regarding trade secrets. Under Israeli law, a trade secret is defined as any information about either the internal, technical, or administrative functioning of a business (equipment and machinery, know-how, market research, samples, etc.) or its external relationships (customers, advertising techniques, etc.). In addition, in order for the disclosure of such information to be considered a breach of confidentiality by the agent, the disclosure should have the effect of saving the competing party time, money, or effort it would have otherwise have had to invest in order to obtain such knowledge.

If the commercial agent is granted the authority of a legal agent in a certain field of business activity, the extent of his authority is governed by the Agency Law as described above (section 1.1.1).

In PCA 4588/96 *Israel Harmetz v. Zalman Margolis*, the Supreme Court held that when an agent or distributor has authority in a field, unless that authority is explicitly limited by the permitting document or another agreement between the parties, the agency extends itself to any reasonable or acceptable action necessary for correct execution of its purpose.

1.2.7. Duration

The duration of the agency relationship depends on the terms of the agency agreement. Where this has not been formally specified, such as when there is no written agreement or where the written agreement makes no mention of duration, the agreement may be terminated by either party by giving reasonable notice. The Israeli courts have dealt quite extensively with this issue and the prevalent view has been that no agreement can be expected to continue indefinitely. In the past few years, the courts have made it very clear that it is not acceptable in the commercial world for a contract to remain in force forever. Neither is it an appropriate policy, economically or socially (The latest judgment given by the Supreme Court in this spirit was in *Lufthansa German Airlines v. Travel Agents Association of Tourism in Israel*). Hence, a reasonable notice period can be as long as one year or even more, depending on the circumstances.

The Agency Contract Act brought about dramatic change in this area since it instituted compulsory guidelines that bind both the agent and the principal; no circumvention is allowed excepting that which may benefit the agent. The Agency Contract Act states that a proper and reasonable notice period depends on the duration of the relationship between the agent and the principal. When the relationship has lasted for six months or less, an agent must be given two weeks' notice prior to termination. If there has been a longer relationship, a longer advance notice period is deemed appropriate. If an agent has maintained a relationship with a principal for more than five years, notice of termination must be given at least six months in advance.

Agency may be terminated by either the agent or the principal or by death, loss of capacity, bankruptcy, or insolvency of either party. The parties can determine the methods for termination of the agency in advance via the agency contract; for example, a predetermined date of termination.

In the event that the agency has been authorized to protect the rights of another person or the agent itself, and this right is conditioned on the performance of the object of the agency, the agency will not be terminated even by death, loss of capacity, insolvency, or by the principal, unless the agent itself is aware of the event leading to termination. Until that date, the agent is authorized to continue to act as if the agency were still valid.

If a third party is unaware of the termination of an agency, she is authorized to continue to see it as valid.

Israeli law does not require a manufacturer and an agent to enter into an agreement for the entirety of a given period and does not address the renewal of contracts. When parties have established the duration of an agreement but do not address the method of renewal or extension of the agreement, the agreement is terminated at the date agreed upon by the parties. If one of the parties concludes the agreement before the conclusion of the period without justified cause, the one-sided termination will constitute breach of the contract and the offending party may be required to pay damages for the breach.

A "silent" agreement is, by virtue of its silence on the matter of duration, considered valid for an indeterminate period. Such an agreement may be terminated by one party by way of notice to the other party. Usually, such a notification must be delivered in reasonable advance of the desired date of termination. The courts have traditionally recognized an agent's right to benefit from the fruits of his investment and his need to perform the necessary business adaptations stemming from the termination of an agency agreement and thus have, on various occasions, determined periods of two, three, six, or even twelve months to be "reasonable."

However, in one instance of a "silent" agreement (CA 80/71 *Moshaiyov v. Pazgaz Marketing Company, Ltd.*), the Supreme Court held that when the termination of the agreement results from a betrayal of trust by the agent, the agreement may be terminated effective immediately or with little notice. In a recent case, the Supreme Court defined the doctrine of "reasonable advance notice" where an agreement is not "silent." The court also held that in the case of a written agreement containing explicit conditions regarding the circumstances under which the agreement may be terminated, the agreement may be terminated only when these conditions are met.

In the absence of a notification of the conclusion of a periodically renewed agreement for an additional period, the agreement is not assumed to be extended indefinitely even if the prior renewal periods were lengthy. An agreement explicitly designating a periodic renewal for an additional year continues to be renewed even when a particular formula for renewal is not performed and becomes an indefinite agreement—which can be terminated with reasonable advance notice.

In CA 528/86 *Polgat Industries, Ltd. v. Estate of the Late Yaakov Blechner*, the Supreme Court noted that Israeli law does not require a manufacturer and an agent to engage in an agreement for any particular

period of time but did not address the renewal of agreements. When the parties have established a term for the agreement but not the method of renewal or extension, the agreement will be terminated at the date agreed upon by the parties. If one of the parties terminates the agreement before the conclusion of this term without reasonable cause, the termination will constitute a breach of the agreement and the offending party may be required to make damage payments to the other.

In HCJ 59/80 *Beer Sheva Public Transit Services, Ltd. v. National Labor Court in Jerusalem*, the Supreme Court held that the parties were entitled to enter into an agreement by which the supplier could terminate the agreement without cause. Nevertheless, in light of the legal obligation to realize this right in good faith and according to the accepted practice, a court may interfere with the termination if it does not comply with this legal condition.

1.2.8. Compensation upon Termination

Upon termination of a relationship, it becomes important to determine if, and to what extent, the principal must compensate the commercial agent for the market as well as for the goodwill that the latter created for the principal's products. The Agency Law makes no stipulations regarding compensation upon termination. If the agreement between the parties expressly deals with commissions, it often contains a provision stating that commissions will be paid for transactions concluded in business relationships which were established during the existence of the agency/distribution relationship even if the transactions occur after termination of the relationship.

In *Polgat Industries Ltd. v. Estate Blechner* (above), the Supreme Court denied the claim by a commercial agent's estate for commissions in respect of orders procured by the sole commercial agent while he was alive but which were formally received only after his death. The grounds for denial were based on the determination that it had not been proven that the oral agreement between the parties included such a provision and that the plaintiff did not specifically claim compensation for unjust enrichment. The court refused to read into the agency agreement an implied provision entitling the estate to commissions of this nature.

Contrary to the Agency Law, the Agency Contract Act makes stipulations regarding the compensation due at termination. If prior notice of termination is not given to the agent, this is considered a violation of the Agency Contract Act; the principal must then compensate the agent for the appropriate advance notice period at a pro rata rate equal to the average profit earned during the six months prior to termination.

Section 5 of the Act provides that, in the event the commercial agency contract is terminated, the commercial agent is entitled to compensation under the following circumstances: (1) the commercial agency contract has been valid for at least one year; (2) during the contract period, the commercial agent was the contributing factor in acquiring new customers and or expanding the scope of the business; (3) the commercial agent's contribution as specified above continues to benefit the principal even though the contract has been terminated. The Agency Contract Act has a few limitations. The first is in situations where the agency agreement was in effect for less than a year; in this case, the agent is not entitled to receive any remedy. Another problematic aspect of the Agency Contract Act is that the Agency Contract Act allows the principal himself to evaluate the cost of the relationship between the

agent and himself. The total value of the relationship is ultimately based on the principal's financial calculation. Finally, compensation payable to the agent or distributor at termination on the grounds of breach of contract is calculated on the basis of the representative's annual profits during the preceding years. This method of calculation is subject to interpretation and manipulation. These criteria resemble to some extent the German and United Kingdom (U.K.) rules on compensation upon termination.

To emphasize, if the contract is terminated as a result of a breach, the provider is not required to compensate the commercial agent. Furthermore, the court may, at its discretion, diminish the compensation amount or abolish it completely.

Parties to an agreement are entitled to establish that an agent will continue to receive commissions after the termination of an agreement in relation to orders that were completed before or after the closing of the deal or in relation to clients provided to the supplier by the agent. In the event that the agreement does not include explicit instructions in this regard, the court will establish the right (or lack thereof) of the agent to continue to receive commission payments in accordance with the parties' intentions as indicated by the agreement or, in the absence thereof, in accordance with the specific circumstances.

The topic of compensation following termination is discussed in greater detail in section 2.2.7 below.

1.2.9. Noncompetition after Termination

As former agents may use the trade secrets of their principals, either by going into business themselves or by using information gained from the principal for the benefit of a competitor, it is customary to agree upon a contractual exclusion of competition for a specific period of time or in a specific area. However, the stipulated period may not be unreasonably long and the territory may not be unduly broad as this would constitute an unreasonable restraint of trade.

The precedents set forth by the Israeli courts with respect to this issue are similar to those set out in EU regulation (Commission Regulation (EU) No. 330/2010) implemented in the U.K. The court takes into account the proposed length of time, geographical area, and professional activities for which competition is to be excluded as well as the rights of the manufacturer which are to be protected by such a clause and assesses whether the contractual noncompetition clause is reasonable in the circumstances of the case.

As a general rule, the degree of permitted exclusion of competition depends on the bargaining position and the commercial standing of the contracting parties. However, it is generally held by the courts that the provisions of a contract that had been entered into voluntarily by the agent must be observed. An agent is not released from his obligation of noncompetition if he was aware of the meaning and impact of such a clause, and would not have been granted the position of agent had he not agreed to the noncompetition clause. In particular, this applies to relationships of long duration.

In 1994, the Knesset passed the Basic Law: Vocational Freedom, which like all Basic Laws is considered to be vested with constitutional authority. According to this Basic Law, the freedom to choose and pursue one's occupation of choice may not be infringed upon, except by another law which: (a) is compatible with the values of the State of Israel, (b) is designed to advance a proper purpose, and (c) does not

permit infringement beyond the necessary minimum. This Basic Law elevated vocational freedom to the level of a basic right with wide protection, thus narrowing the courts' endorsement of noncompetition clauses.

As the validity of a noncompetition clause now depends on the circumstance of each individual case, it is wise to seek qualified legal advice to avoid the invalidation of such a clause by the courts.

One final aspect which is important to consider in this respect is that of taxation of payments made in exchange for noncompetition. Assuming a noncompetition clause has been rendered valid by the court and assuming the clause compensates an agent for not competing, the question is how such payments should be related to in terms of taxation.

Tax laws in Israel make a clear distinction between capital income and yielding income, within a source-based tax system. The tax on yielding income in Israel can reach a percentage as much as double that of capital income.

In a given judgment, AA 29425-01-11 *Barnea v. Kfar Saba Assessor*, the Center Region District Court determined that the right to compete is considered an "asset" as it is defined by the Income Tax Ordinance. Thus, waiving this right by way of signing an agreement with a noncompetition clause, in return for monetary compensation, constitutes a sale subject to capital gains tax.

In principle, under Israeli law, a distributor or agent does not have a property right regarding the distribution or agency; no law determines that an agent or distributor maintains a right to transfer his right of distribution and there is no similar general practice. CA 49/83 *Amisragaz v. American Israel Gas* held that directives in an agreement entitling a supplier to terminate the distribution or agency at any time and without advance notice or reasonable cause would grant additional support to the rule that an agent does not have a property right to the agency or distribution.

CA 2850/99 *Shimon Ben Hamo v. Tene Noga, Ltd.* further held that rights to distribution are contractual and not property and cannot be granted indefinitely, as this does not settle with standard commercial practice or common sense.[5]

2. DISTRIBUTION

2.1. Definition

Distributors are independent contractors who buy and sell in their own name and for their own account but who generally maintain a long-term business relationship with the manufacturer and thus become de facto a part of the manufacturer's distribution system.

[5] The definition of the distribution rights as contractual rights rather than as proprietary rights was mentioned in CA 7338/00 *Tnuva v. The Late Yinon Shar'abi and Heirs*. Judge Heshin preferred to describe distribution rights as quasi-proprietary rights. Whether to define distribution rights as contractual rights or as proprietary rights is discussed in greater detail in the following section.

2.2. Basic Aspects of Distribution Agreements under Israeli Law and Court Practice

2.2.1. Formalities

There are no specific laws dealing with distributors and there are no formal requirements to be observed when concluding a distribution agreement. The principle of freedom of contract applies to distribution agreements as it does to agency agreements. Again, however, the practice in matters such as the form of the contract, the rights and duties of the parties, termination conditions, and compensation is similar to that followed in European jurisdictions.

In Israel, it is generally held that proprietary rights take precedence over reliance on anticipatory factors in commercial relationships.

In PCA 371/89 *Ilan Leibowitz v. A & Y Eliyahu, Ltd. et al.*, which dealt with the distribution in Israel of Parker and Cross pens, several exclusive distributors, who had anticipated continuing their business relationships with existing clients, were deemed to have contravened other distributors' rights to vocational freedom and free competition. It was decided that the expectation of an exclusive distributor to conduct further business with its own clients does not override the rights of others to vocational freedom and free competition.

The perception in Israel is, therefore, that reliance on anticipatory factors and actions taken based on commercial expectations are less protected than property rights. This is due to preference accorded to other considerations and interests that are taken into account, such as the public interest in free competition.

Moreover, in certain cases, distributors had claimed to proprietary rights in the goodwill of the product that they had labored to introduce and distribute to the market. The courts had nevertheless decided many times that a distributor does not have any part in the goodwill of the product. For example, in CC (Center) 59338-12-13 *Ts.M.L. Medical Ltd. v. Composite Resources Inc* [2017], a distributor of an innovative tourniquet introduced the tourniquet to the Israeli Defense Forces. Due to organizational and budgetary considerations, however, the IDF elected to purchase the tourniquets from the American exclusive distributor and not from the Israeli one. Even though the Central District Court found, as a matter of fact, that the IDF purchased the product as a direct result of the Israeli supplier's effort, the court nevertheless ruled that the distributor was not entitled to any share in the profit made by the manufacturer in this transaction, in the absence of an existing contractual claim to such profits. The court also rejected a claim to a share of the profits on the basis of the manufacturer's unjust enrichment from the transaction, since the court found that the enrichment resulted from the manufacturer's contractual rights, and thus was not "unjust."

The perception in Israel regarding this issue is, therefore, that the right of distribution is not a proprietary right and that the goodwill of the product being distributed belongs solely to the manufacturer.

However, in *Ben Hamo v. Tene Noga Ltd.* [6] mentioned above Justice Strassberg-Cohen had noted that the classification of the distribution right shall be decided on a case-by-case basis in light of the characteristics of the right within the specific context in question. In CA 7338/00 *Tnuva v. The Late Yinon Shar'abi and Heirs*, it had been stated by Justice Heshin that there is no dispute that the origin of the distribution right emanates from an agreement between the manufacturer and the distributor, and there is also no dispute that the right is not a proprietary right in the conventional sense of the concept "proprietary right." However, at the same time, the right has several aspects of a quasi-proprietary right.[7]

It should be noted, however, that a recent case, CA 4710/12 *Barack Gas Agencies Ltd. v. Gush Dan Assessor*, disputed the general perception that had been prevalent until now and held that although distributors may not have any right to the goodwill of the product, nonetheless, their own right of distribution can be considered as "goodwill," which has value and can be sold and taxed as well. Hence, this broader interpretation of "goodwill" may allow the right of distribution to be seen as a true proprietary right. Later cases established that a distributor wishing to claim "goodwill" in relation to a product which he is distributing, or a distributor seeking reparations for a breach of contract resulting in harm to the distributor's "goodwill," must prove that he in fact created "goodwill" for his own business that is separate from the "goodwill" that belongs to the manufacturer. Thus, for example, in CC (Center) 41514-09-12 *BP Eastern Mediterranean Ltd. v. Prince Motor Oil Israel Ltd.*, the Central District Court determined that the distributor (Prince Motor Oil) had not proved the existence of "goodwill" separate from the "goodwill" attached to BP's products, since the distributor had not brought forth any evidence regarding the scope of their business, the number of clients, the marketing investments made by the distributor, or the "habit" acquired by the customers in purchasing BP products through the distributor.

2.2.2. Exclusivity

A distributor may represent one or more suppliers under an exclusive distribution agreement. The principal's right to make direct sales, as well as the distributor's right to a commission on those direct sales, may be stipulated in the distribution agreement or excluded.

The Israeli courts have dealt quite extensively with the issue of parallel imports. The prevalent view was expressed by Chief Justice Shamgar in *Leibowitz*,[8] in which it was decided that a third party may import a product from someone other than the manufacturer even if the manufacturer has entered into an exclusive distribution agreement with an Israeli distributor.

Exclusive distribution agreements are often construed as impinging on free competition. In Israel, under a general exemption issued by the General Director of the Antitrust Authority, such agreements do not in

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[6] CA 2850/99 *Shimon Ben Hamo v. Tene Noga, Ltd*.

[7] In CA 2953/04 *Tnuva Marketing Center of Agricultural Products Ltd. v. Yaacov Hacham* Supreme Court Justice Edna Arbel explained that it is not clear whether distribution rights are contractual or proprietary rights. She mentioned Justice Heshins opinion to describe distribution rights as quasi- proprietary rights. According to her opinion it is necessary to examine every case on an individual basis.

[8] PCA 371/89 *Ilan Leibowitz v. A & Y Eliyahu, Ltd. et al*.

principle fall under the category of "restrictive arrangements" (having an adverse effect on business competition), which are generally prohibited under the Restrictive Trade Practices Law 5748-1988. This exemption is, however, subject to several specified conditions, all of which are intended to guarantee that the effect of such an agreement is not to create a monopoly (for instance, the exemption may not be relied upon where there is no regular supply of alternative goods to the territory, or where both parties to the agreement are in fact business competitors, etc.).

In CC (Tel Aviv) 35723-02-15 *HaKerem—Alcoholic Beverages Ltd. v. Arodon Ltd.*, a premium vodka supplier attempted to terminate a contract with an exclusive distributor on the grounds that the contract created a "restrictive arrangement," *inter alia*. The court awarded the distributor approximately NIS 25 million in damages and ruled that the supplier had terminated the contract wrongfully and the claim that the contract represented a "restrictive arrangement" had been made in bad faith.

In another case, C.A. 7629/12 *Elad Menachem Suissa & 42 Importer Warehouses Ltd. v. Tommy Hilfiger*, the Supreme Court discussed for the first time the limitations that may be imposed on the activities of "parallel importers" as well as advertising and marketing associated with their operation and causes of action available to "official" or "exclusive" importers against such "parallel importers." More specifically, this case dealt with a situation where the manufacturer's trademark may be harmed by the activities of the parallel importer.

Parallel imports, in and of themselves, do not constitute a violation of the trademark belonging to the manufacturer and do not constitute unjust enrichment of the parallel importer. However, this does not mean that there is no restriction on the activities of those engaged in parallel imports. These restrictions stem from three different sources: Trademark Law, Commercial Torts Law, and the Law of Unjust Enrichment.

The main relevant "test" for the purpose of discussing the marketing of products imported in the form of parallel imports will be the "sponsorship" test. In other words, the parallel importer shall be compelled to prove that the consumer does not receive the impression (or at least that no reasonable probability for such an impression is created) that the parallel importer's activity enjoys the support and sponsorship of the trademark owner.

In 7934/20 *Jafora Tabori Ltd. v. Ben Shalush Import and Export Ltd*. The Supreme Court held that the marketing in Israel of "Schwepps" beverages that are imported from Ukraine is not protected by the protection of parallel imports because it infringes the "Schwepps" trademark that is owned by "Jafora Tabori" Ltd. According to the Supreme Court, when the imported products are protected by an Israeli trademark, they can only be imported when the original trademark owner holds the Israeli trademark, or if the products were originally bought from the Israeli trade owner and imported to Israel to resell them. Parallel imports that violate the rights of the trademark owner in Israel are not legitimate.

Judge Alex Stein held that considering the principle of territorial protection and the right of exclusivity that Jafora has in the marketing and distribution of Schwepps products in Israel, Ben Shalush company is not authorized to import Schwepps products from Ukraine, and that this is a violation of Jafora's trademark. Judge Stein noted that this type of parallel imports will harm the ability of consumers in

Israel who wish to buy Jafora's Schweppes products, to identify and buy the right products, and will even lead to an erosion of Jafora's incentive to invest in the quality of the products that sold in Israel. Stein clarified that the trademark is limited to the borders of the country in which it was registered, in such a way that the state recognizes it and grants its owner exclusive territorial rights, and therefore the trademarks of Schwepps that have been registered and recognized in countries outside of Israel are not related, since their operation is limited to the borders of every state and its specific laws. According to Stein, parallel imports are a legitimate commercial practice if it respects the existing regime of trademarks and does not violate it. The Supreme Court redefined the possibility of parallel importation, and determined that it will only be possible in one of three cases: when there is no registered trademark in Israel related to the imported products, when the imported products bear a registered trademark in Israel but the trademark owner in the country where they were purchased is the same owner, or if the imported products were purchased from the owner of the original trademark in Israel.

2.2.3. Territory

The same considerations apply here as in Agency (subject to necessary changes), *see* section 1.2.4 above.

2.2.4. Obligations of the Supplier

The rights and duties of the supplier depend upon the distribution agreement. Generally, a supplier undertakes to supply the distributor with goods upon order or request in a timely manner, in conformity with the quality and quantity specifications agreed to by the parties.

In return for distributing the goods, the supplier will remunerate the distributor either on a commission basis or by a different method agreed upon by the parties, such as "cost-plus" (discussed in section 1.2.3 above) or "transfer pricing."

In the latter method, the distributor purchases the product from the manufacturer at a discount price and resells it to the customer at a higher price. The distributor's profit is the difference between the discounted purchase price and the resale price, less the distributor's expenses. In practice, it is customary to combine more than one remuneration method.

Other supplier obligations to the distributor often include the provision of sales promotion materials such as demo sets, leaflets and brochures, advertising and explanatory material. Similarly, the supplier is also generally responsible for making after-sales service and back-up assistance available to the distributor.

2.2.5. Obligations of the Distributor

The rights and duties of the distributor depend upon the distribution agreement. In CA 2953/04 *Tnuva Marketing Center of Agricultural Products Ltd. v. Yaacov Hacham*, the Supreme Court found that the agreement between the parties established a trust relationship imposing fiduciary obligations on the distributor. The court further found that, as the distributor assumed all of the obligations of trustees and agents, such as the obligation to act diligently and in a trustworthy manner in the fulfillment of duties as an agent or trustee, the distributor was obligated to act in accordance with the Agency Law as well as

the Trust Law, 5739-1979.[9] In CA 4309/06 *Bshara Varur v. Vitman Ice Cream (1979) Ltd*., the Supreme Court found that a fundamental breach of a distribution agreement, such as a distributor's distribution of competing products while a valid agreement with the manufacturer was in force, may deprive the distributor of his right to a notification period prior to the termination of the agreement, as was decided in this case.

Less onerous obligations may require the distributor to carry out advertising and other promotional activities. He may be obliged to train sales personnel in accordance with the instructions of the supplier. He may be required to purchase minimum quantities and to maintain sufficient inventories of product and spare parts. He may have to obtain insurance, maintain product registrations, or otherwise ensure that the products can be distributed in compliance with the laws of the State of Israel. He may be obliged to report on sales developments and on new customers. He may have to forecast orders, show evidence of promotional activities, and provide information to ensure product traceability.

He must respect the supplier/manufacturer's intellectual property rights and may be obligated to guard against their violation by third parties. He may be contractually prevented from taking on competitive products or doing business in a region other than the one assigned to him. He may also be prevented from taking on competitive business after the termination of the distribution agreement in a certain territory and/or for a certain period of time.

2.2.6. Term

In distribution agreements of unlimited duration, the general rule is that either of the parties may bring about termination of the agreement by unilaterally giving reasonable notice at any time. The distributor cannot force the supplier to continue the relationship as it is considered to be a relationship of personal trust and service that cannot be coercive. However, termination without reasonable advance notification by the supplier generally constitutes a breach of contract, subjecting the supplier to liability for damages.

In the leading CA 442/85 *Moshe Zohar et al. v. Travenol Laboratories (Israel) Ltd*. *et al.*, decided by the Supreme Court, a strong minority opinion was delivered *inter alia* by Justice Netanyahu (Chief Justice Shamgar concurring) concerning the issue of reasonable notice. In her opinion, the reasonableness of the notice is a function of two elements: the reasonable period of time between the commencement of the relationship and the termination, and the period of time between the notice and the actual termination. The purpose of the former is to give the distributor sufficient time to obtain a reasonable profit and to return his investments in time, effort, and costs. The latter serves to give the distributor sufficient time to reorganize in view of the pending termination and to seek alternative means of income. The facts in this particular case dealt with a distribution agreement for an unlimited period for products with a short shelf life and a limited potential market. The product was previously unknown to the Israeli market and was introduced solely as a result of the efforts of the distributor. The agreement was terminated by the manufacturer after approximately six years. The minority opinion favored a notice period of seventy days as sufficient under the circumstances. Regarding the issue of compensation,

[9] *See also* CA 262/86 *Walter Rot. v. Deak and co. Inc*.

however, the minority felt that the distributor should be compensated, in the amount of one year's profits, on the grounds that ruling otherwise would result in unjust enrichment of the manufacturer.

The majority opinion, delivered by Justice Barak, reached the same result on different legal grounds. The majority was of the opinion that the purpose of advance notice is to allow the distributor to enjoy the results of his investment in time, money, and labor and to enable him to profit from the market he created and the customers he found. The reasonable expectation of the distributor is that the distribution agreement shall continue and remain valid for a further period of time during which he would reap the fruits of his efforts. The formal expression of this expectation is the period of time between receipt of advance notice and the date of termination. Under the circumstances, in this case, a period of one year was deemed reasonable. Justice Beisky, who concurred in the majority opinion, held that the contractual cause of action should be exhausted prior to applying the laws of unjust enrichment.

According to a 1998 ruling of the Nazareth District Court, CC (Nazareth) 768/98 *Ionidil Ltd. v. Fleer Espanola SA et al*., the considerations that should be taken into account when determining the length of a reasonable notice period are: the nature of the product, the length of time necessary to penetrate the market, the costs and investments necessary and invested to distribute the product, the strength of the supplier-distributor relationship, and the degree to which customers depend on the distributors.

In the Supreme Court decision of CA 47/88 *Menachem Herschtik et al. v. Yachin Chakal Ltd.,* several distributors litigated their claim for compensation against a manufacturer of food products who had terminated their distribution relationships of eighteen and nineteen years with notice of only three months. The distributors, relying on the general rule given above, argued that the appropriate period of advance notice should be one year. The Supreme Court, however, considered three months to be adequate under the circumstances of the case as no significant investment on the part of the distributors had been required in the previous years in order to continue distributing the products, and the distributors had not invested at all in broadening their client market. Furthermore, the Supreme Court noted that the distributors suffered no significant damages as a result of losing their distributorships.

The differences between the minority and majority opinions in *Travenol* [10] have not yet been reconciled by the Supreme Court. However, in the latter *Estate Nikola Hinawi et al. v. Mivshelet Sheichar Leumit et al*. involving a distributorship of more than thirty years, the Supreme Court ruled that one-year advanced notice is a reasonable time period given the circumstances of that specific case. The reasoning and holdings of the above precedents continue, as evidenced by the Tel Aviv District Court case of CC (Tel Aviv) 1623/97 *Shell Beauty Agencies Ltd. v. Gigi Cosmetics Laboratories Ltd.* where the issue of whether a notice period is reasonable was held to be at the discretion of the court based on the specific facts of the case and not defined by law. Under the circumstances, the termination with forty-eight hours' notice of an open-ended exclusive oral distribution agreement, which was executed by the parties for seven years, was held unreasonable. The court held that, under the circumstances, a reasonable notice period should have been eight months and granted damages to the distributor for the early termination of the agreement based on the average profit during the relevant period.

[10] CA 442/85 *Moshe Zohar et al. v. Travenol Laboratories (Israel) Ltd. et al*.

In CC 214-07 *M.D Attias Food Agencies Ltd v. Henkel Soad Ltd.*, a manufacturer terminated a distribution agreement of thirty-two years with a distributor of food products. The manufacturer gave the distributor three months' advance notification, as stated in the agreement. The distributor claimed that he deserved a twenty-four-month period, considering the long business relationship. The District Court of Haifa decided that when a distribution agreement contains a clause determining the period of advance notification, the court will not change it. It was decided that the court will consider the circumstances and determine an appropriate notification period only if the distribution agreement itself does not specify the length of the advance notification period.

In CC (Jerusalem) 2325/00 *Cohen v. T.M.L. Micro Computers, Ltd.*, the Jerusalem District Court held that eighteen months' notice was reasonable for a distributor of computer software who had established the market for the manufacturer and founded, with great effort, a large customer base. The court in this case had also decided as mentioned, *inter alia*, on the grounds of the long relationship between the manufacturer and the distributor.

However, the courts have ruled in favor of the distributor for a longer early notice, also in cases where the parties have had a short relationship and where the distributor had not yet been able to return his investments or see the fruits of his labor. It had been determined that the notice period should then be extended beyond one year as well. Such was CC (Tel Aviv) 1908/08 *Danshar Ltd. v. Banketbakerij Merba B.V.* where it had been determined by the District Court of Tel Aviv that the reasonable notice period should be sixteen months, given the short period during which the distributor enjoyed the fruits of the distribution contract. On the other hand, in the event that contractual relationship had lasted for a long period which indeed did allow the distributor to enjoy the fruits of his investment, it had been determined by the Supreme Court in the abovementioned *Bshara Varur* [11] that the aim of the early notice period is no longer for the distributor to enjoy the fruits of establishing the marketing network and clientele base (according to the purposes outlined by the majority opinion in *Travenol*), as the "fruit" had already been reaped in this case, but rather only to serve as a preparatory period in order to reorganize and seek other means of income (as had been held by the minority opinion in *Travenol*).

In LCA 1760/15 *HaNadlanist Consulting Management and Real Estate Marketing Ltd. v. Fresh Kitchen (2012) Ltd.*, as opposed to previously mentioned cases where the supplier terminated the relationship (or gave short notice of same) and the distributor approached the court to enforce the agreement, the supplier was the one to approach the courts, requesting to terminate its relationship with the distributor. Nonetheless, here too, the Supreme Court ruled that although one cannot force the parties to maintain a business relationship against their will, the proper remedy for this situation is still compensation.

To avoid uncertainty as to advance notice and compensation, it is wise for a principal to enter into an agreement for a limited period of time, in which case the distributor is generally not entitled to compensation upon termination. Alternatively, when the contract is open-ended, a clause detailing the period of advance notification, conforming to the reasonability requirements discussed above, should be inserted. If no such clause is included, a principal must, upon terminating a distribution agreement of

[11] CA 4309/06 *Bshara Varur v. Vitman Ice Cream (1979) Ltd*.

unlimited duration without adequate notice, expect to pay compensation for the market created and yielded by the agent or distributor amounting to as much profit as the agent or distributor would have earned during a period of up to one year or even more.

2.2.7. Compensation upon Termination

As mentioned above, the majority opinion of the court in *Travenol* [12] held that a distributor is entitled to contractual compensation when sufficient notice is not given prior to termination. The minority opinion compensated the distributor mainly on the grounds of unjust enrichment. The difference between the minority and majority opinion may be illustrated by a case where a distributor invests substantial efforts and yet creates a small market. According to the minority opinion, such a case would award the distributor greater contractual compensation and lesser compensation under unjust enrichment. In contrast, where a distributor invests little effort but creates a substantial market, the contractual compensation would be less while compensation under unjust enrichment would be greater. The majority opinion, based on the contractual claim only, would take the size of the market created by the distributor into account when deciding on compensation in terms of the length of the period of reasonable advance notice.

The Israeli courts have adopted *Travenol* as a precedent and have followed it in a number of decisions. Examples include CC (Tel Aviv) 1081/95 *Chakir Agencies Ltd. v. East 3M*, where the Tel Aviv District Court held that the distributor was entitled to compensation for loss of foreseen future revenue for a period of one year as well as additional compensation for having been adversely affected by the termination of the distributorship; CC (Nazareth) 1202/00 *Gamzu Letova Shaul v. Lamit Import and Export Ltd.*, in which the Nazareth District Court found that an exclusive distributor of cigarettes was entitled to compensation for the termination of the distribution agreement in an amount equal to the distributor's commissions earned over a seven-month period. The court noted that the determination of the compensation amount involved, among other considerations, the period of the relationship between the parties (seven years) and the distributor's entitlement to profit from its efforts to establish a market for the manufacturer's products.

A step further was taken in CC (Haifa) 957/92 *Shaul Bitkover v. Oxygen Commerce Warehouse (1980) Ltd.*, involving a twenty-five-year distributorship for the distribution of industrial gas, where the Haifa District Court held that the manufacturer must act in good faith and in a manner customary for the termination of a distributorship relationship with an exclusive distributor. The manufacturer must give the distributor reasonable advance notice and provide an adequate opportunity for him to reorganize and adjust to the changes. The court found that the twenty-five-year relationship between the parties, and the fact that the product was not "simple" and its distribution involved a large investment, entitled the distributor to eighteen months advance notice of termination. The compensation amount was calculated based upon the net income of the distributor during the year immediately preceding the year of termination.

The leading principle in decisions on the termination of exclusive distribution agreements is that each case is judged on its own unique merits so as to determine the reasonableness of the notice period, and

[12] CA 442/85 *Moshe Zohar et al. v. Travenol Laboratories (Israel) Ltd. et al*.

as a result, the amount of compensation due to a distributor. In most cases, a notice period of six months to one year has been found to be reasonable. However, the courts will not hesitate to rule that a longer notice period is warranted under certain circumstances and declare that compensation be paid accordingly, as aforementioned in section 2.2.6.

A further possible ground for compensation upon termination is that of goodwill. However, it has been held by the courts that, while the distributor may contribute to the goodwill of the product, this is done within the framework of his contractual duties, and he is therefore not entitled to additional compensation on these grounds upon termination of the distribution agreement.

Finally, one question that has come before the courts on several occasions is whether the distributor is entitled to any compensation if it is the *distributor* himself who is found to be in breach of the distribution agreement. Two possible grounds have been commonly invoked in making such claims, both of which have been consistently and robustly rejected by the courts—most recently by the Supreme Court in CA 1319/06 *Moshe Shalak et al. v. Tene Noga (Marketing) 1981 Ltd. et al.* The distributor in that case was found to have breached the agreement by habitually stealing goods from the manufacturer. He nonetheless claimed damages in contract for the manufacturer's termination of the distribution agreement without notice. The court was resolute in holding that, at least in cases where such a flagrant breach by the distributor himself is what led the manufacturer to terminate the contract, the manufacturer's subsequent termination did not amount to a breach of contract.

This brings us to the distributor's alternative cause of action. He contended that during the period during which he had acted as the manufacturer's distributor, there was substantial growth in the sales volumes of the manufacturer's products within the territory—entitling him (the distributor) to compensation for the latter's unjust enrichment. The court seemed even less impressed by this claim.

In 61460-02-17 *Ramnoe Organic Industries Ltd. v. Organic Shelli Ltd*. Refers to the issue of canceling a distribution agreement after its extension and contrary to the provisions of the agreement. The claim was rejected due to the lack of reliable data from which to derive the relative share of the sales of the imported product out of the plaintiff's total sales and in the absence of proven data regarding the amount of work hours spent by the employees of the plaintiff company in the production of the product as well as additional data regarding the various expenses involved in this activity, it is not possible to estimate in a reasonable way the loss of the plaintiff's profits from the termination of the contract, this is because the plaintiff did not meet the burden of bringing the evidence and data that she had and there was no reasonable reason for not bringing them.

In CA 687/76 *Beno Bleiweis v. Yehiel Meir Pick*, the Supreme Court held that the agent was not entitled to damages based on the goodwill acquired by the supplier as a result of the agent's contributions to the supplier.

Israeli courts have noted that in certain circumstances, the termination of a distribution agreement, after the distributor has invested years of effort and resources, without appropriate compensation, is to be considered unjust. Therefore, despite the above, in certain cases, the courts will be entitled to find cause

for compensation to an agent or distributor for loss of the agency or distribution based on the Law of Unjust Enrichment, 5739-1979.

2.2.8. Noncompetition after Termination

The promotion of free competition is an integral and essential element of a free market economy.

The court in *Leibowitz* discussed the benefits to the general public of free competition and endorsed the view that this should be encouraged. The aforesaid should be viewed in light of the discussion of agent noncompetition clauses in section 1.2.9 above which applies equally to distributors, subject to the necessary changes.

The Restrictive Practices Law, 5748-1988 also encourages free competition by limiting restrictive business arrangements, defined as arrangements made between parties who run businesses under which at least one of them is bound in a manner which may prevent or reduce free competition between it and (some of) the other parties, or between it and a third party. The law further limits mergers of companies and monopolies.

On October 29, 1999, the Commercial Torts Law 5759-1999 came into effect. This law prohibits actions which conflict with the norms of fair trade and fair competition and forbids acts such as false designations of origin, false advertising, false descriptions, intentional interference, and trade secret infringement.

It seems that the legislature is attempting to draw a line between vocational freedom, the protection of fair trade, and the encouragement of free competition.

3. CONCLUSION

Although significant progress has been made, Israeli law relating to commercial agents and distributors still lacks clarity. The Knesset took the initiative to regulate this important segment of commercial activity, but the Agency Contract Act is not all-encompassing. Therefore, with the exception of several of the Agency Contract Act provisions discussed above, the current legal framework is still delineated by Israeli common law as interpreted by the courts. Furthermore, the Agency Contract Act itself has several limitations: The first is that the Agency Contract Act only provides compensation in situations where the agency agreement was in effect for at least one year prior to its termination—and this effectively prevents any agent, whose tenure under the agency agreement is eleven months or less, from receiving any remedy. Second, the Agency Contract Act allows the principal himself to evaluate the cost of the relationship, which means that the total value of the relationship is ultimately based on the principal's financial calculation. Finally, the amount of compensation payable to an agent whose agreement has been terminated is based on an assessment of lost potential future "profit," and this figure is subject to interpretation and manipulation. It is therefore recommended that any foreign principal who wishes to appoint a commercial agent or distributor in Israel should obtain prior counsel, both in order to properly consider the specific facts and circumstances of the proposed transaction, and in order to structure the agreement in accordance with Israeli law and practice.

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