Introduction to Franchise Law in Israel

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Israel has not regulated the legal relationship between a franchisor and a franchisee through specific legislation, and so Israel does not have an American-style franchise disclosure law that requires franchisors to furnish a franchise disclosure document to potential franchisees. In the absence of specific legislation, the normative framework applicable in Israel to franchisor-franchisee relationships is based chiefly on general contract laws and rulings handed down by the courts regarding franchise agreements.[1] This normative framework is supplemented by special antitrust rules that apply to franchise agreements.[2]

Against this normative framework, this article provides an introductory overview to Israeli franchising law. First, the article will discuss the legal definition of the term "franchise agreement," as established in the Special Antitrust Rules,[3] and which is occasionally used by the courts in Israel in other legal areas. Second, it will address when an employer-employee relationship exists between a franchisor and franchisee. Third, the article will consider when a franchisor is deemed as the employer of the franchisee's employees. Fourth, we address whether and when the courts are entitled to repeal clauses of a franchise agreement that they believe are disadvantageous to the franchisee. The fifth section of the article addresses under

1. *See infra* Parts I–VII.
2. *See infra* Part VIII.
3. Antitrust Rules (Block Exemption for Franchise Agreements) (Temporary Provision), 5761-2001, § 1, KT 6096 p. 672 (Isr.).

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what circumstances one of the parties to the franchise agreement is entitled to terminate the agreement when the agreement is for an indefinite period. Sixth, this paper will consider the remedies available to a court in the event that one of the parties has unlawfully terminated the franchise relationship. Seventh, we will examine the position of Israeli law on whether a franchisor involved in a legal dispute with a franchisee is entitled to obtain an interlocutory injunction—even before the final ruling on the parties' dispute is rendered—ordering the franchisee to vacate the premises of the franchise location. Finally, we will present the main principles of the Israeli antitrust laws Rules applied to franchise agreements.

I. Defining the Franchise Agreement

A. *General*

Israeli legislation does not expressly define what constitutes a franchise agreement. However, a franchise agreement has been meticulously defined through secondary legislation, (i.e., in the Antitrust Rules enacted by the Antitrust Commissioner and Minister of Industry and Trade).[4] The definition found in these rules is of paramount importance in antitrust matters, to which these rules pertain, though the courts occasionally make use of this definition when deciding on disputes that exceed antitrust issues and which revolve around the bilateral relationship between the parties.[5] Under the Antitrust Rules, a franchise is defined as:

> A contract by which a franchisor or master franchisee grants to a franchisee the right to make use of the franchise for the purpose of marketing goods or certain types of goods, and which includes all of the following: (1) use of a standard brand name or trademark or service mark, and the standard characteristics of the goods sold or of the sale and its execution, which are material to the marketing and sale of said goods; (2) transfer of knowledge material to the marketing and sale of said goods from the franchisor to the franchisee; (3) provision of commercial or technical assistance to the franchisee by the franchisor, throughout the term of the agreement.[6]

The following sections describe in further detail each of the main elements of this definition.

B. *Existence of Contract*

As evident from the earlier definition of "franchise agreement," a primary and essential component for defining such an agreement is the existence of a contract.[7] Whether a contract exists is determined by the provisions of the Contracts Law.[8] The provisions of the Contracts Law state that a contract

4. *Id.*
5. *See infra* Part I.F.
6. Antitrust Rules, *supra* note 3.
7. *Id.*
8. Contracts Law (General Part), 5733-1973, SH No. 694 p. 118 (Isr.).

is made, generally, through an "offer" and "acceptance."[9] An offer by a franchisor or franchisee is an application attesting to them being of the mind to enter into a contract, and its specificity is such that the contract can be made once the offer is accepted.[10] Acceptance generally comes in the form of notice by the offeree—the franchisor or franchisee—delivered to the offeror and attesting to the offeree being of the mind to enter into the contract with the offeror per the offer made.[11] According to Israeli law, a franchise agreement may also be made by way of conduct, presuming this conduct attests to an intention to establish a binding legal relationship.[12]

As for the form of the contract, Israeli contract law is relatively liberal, and the rule is that a franchise contract may be made verbally, in writing, or in some other form, regardless of the franchise value.[13] Nonetheless, if the franchise contract contains an element of a real estate transaction that is relatively long-term (e.g., leasing the franchise location for a period exceeding five years), the real estate transaction might require a written document.[14]

C. *The Parties to the Contract*

According to the definition of "franchise agreement," there are two types of franchise agreements, distinguished by the parties to these agreements:[15] one type of franchise agreement is between a franchisor and a franchisee; the second type might exist between a master franchisee and a franchisee. Note that the Antitrust Rules do not define any of the above-specified parties. However, although unrelated to the Antitrust Rules, the definition of a "franchise" found in the Consumer Protection Law is instructive. Under the Consumer Protection Law, a franchisee is the "holder of the right to make use of the name of a dealer whose financial accounting is kept separate from that of said dealer."[16] This means that one of the main characteristics of a franchisee is that it maintains an accounting system separate from that of the franchisor or master franchisee.

D. *Franchise*

Another essential component in the franchise agreement definition is the existence of a franchise, which the franchisee is entitled to make use of under permission from the franchisor or master franchisee.[17] Franchise is defined in the Antitrust Rules as the granting of rights to make use of either of the

9. *Id.* §§ 2, 5.
10. *Id.* § 2.
11. *Id.* § 5.
12. On acceptance of contract by conduct, see, in general, Supreme Court Ruling in CA 355/89 Estate of Nicola Hinawi (of blessed memory) v. National Brewery Ltd. 46 (2) PD 70, 74 (1992) (Isr.); *see also* Contracts Law, *supra* note 8, § 6(a).
13. Contracts Law, *supra* note 8, § 23.
14. Land Law, 5729-1969, §§ 8, 79, SH No. 575 p. 259 (Isr.).
15. Antitrust Rules, *supra* note 3.
16. Consumer Protection Law, 5741-1981, § 1, SH No. 1023 p. 248 (Isr.).
17. Antitrust Rules, *supra* note 3.

following: intellectual property or industrial knowledge.[18] These assets may be protected by a trademark, service mark, copyright, patent, design rights, or some other form of intellectual property protection.[19] Alternatively, these assets may be characterized as unique brand names, designs, or models.[20] These intellectual property rights must be so intertwined in the agreement that they constitute an integral part of the goods sold by the franchisee in the eyes of the consumer.[21] Note that the purposes for using the franchise, per the definition of a franchise agreement in the Antitrust Rules, must be to market *goods* or certain types of *goods*.[22] Ostensibly, this restriction makes it seem as though the marketing of services that do not meet the definition of goods does not fall under the definition. This raises some difficulties, since many franchise agreements are based on the provision of services, such as accommodations or insurance.

E. *Uniformity, Knowledge Transfer, and Assistance*

A franchise agreement includes, under its definition in the Antitrust Rules, three more cumulative features:[23] First, the franchise agreement must include provision of commercial or technical assistance from the franchisor to the franchisee for the term of the agreement. Second, the franchise agreement must include a transfer of knowledge from the franchisor to the franchisee that is material to the marketing and selling of goods (i.e., requiring a transfer of practical, confidential, material, and identifiable knowledge), which is not patent protected, resulting from clinical trials or valuable experience gained by the franchisor, and which is valuable to the franchisee in a way that improves its competitive standing. Third, the franchise agreement must be uniform in terms of two main elements in aggregate: (1) the use of a standard brand name or trademark or service mark; (2) the use of the standard characteristics of the goods sold or of the sale and its execution, which are material to the marketing and sale of said goods.

F. *The Term 'Franchise Agreement' in Non-Antitrust Case Law*

Even though the definition of the term 'franchise agreement' is limited to the Antitrust Rules, Courts sometimes nonetheless utilize the definition in resolving legal disputes not necessarily related to antitrust law. For example, in *Hummus Eliyahu of Yokneam v. Shlomi Mashita*, the court was asked to decide what rights were granted to a franchisee under a verbal franchise agreement.[24] More specifically, a food franchisor claimed that a payment it

18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. File No. 36621-12-17 Civil Case (District Court – Central District), Hummus Eliyahu of Yokneam v. Shlomi Mashita (Dec. 19, 2018) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

received from the franchisee only granted the franchisee the limited right to prepare food in the manner provided by the franchisor; it did not also grant the franchisee the right to use the franchisor's trademark.[25] The franchisee, on the other hand, claimed that the payment made to the franchisor also granted him the right to make use of the trademark.[26] In its ruling, the court agreed with the franchisee, basing its decision in part on the legal definition of the term 'franchise agreement' in the Antitrust Rules, whereby the franchisee makes use of the franchisor's trademark.[27]

II. Is There an Employee-Employer Relationship Between Franchisors and Franchisees?

An important question under Israeli case law is whether and when an employee-employer relationship exists between a franchisee and the franchisor. First, we will briefly discuss the general rulings on when, principally, two parties have an employee-employer relationship. Second, we will present the position in Israel on this matter with respect to franchise agreements.

The courts in Israel have developed two major legal tests to assess whether two parties have an employee-employer relationship. According to the first test, titled the 'supervision and authority test,' the court examines the degree of supervision practiced by one party over the activity of the other party.[28] Under this test, an employee is a person subject to the authority and supervision of the other party, receives from this party instructions on how to act, or is obligated under the terms and condition of the contract between the parties to abide by these instructions.[29]

The second test is the 'organizational integration test.'[30] Under this test, the court examines the degree to which a person integrates into the organizational system of the other party's facility, and to what extent this person is an integral part of the facility.[31] The integration test has two facets: according to the first facet, known as the "positive facet," a person is deemed an employee if he positively constitutes part of the facility's organizational system.[32] According to the second facet, known as the "negative facet," a person is deemed an employee if he does not run his own business that serves the facility as an external vendor.[33]

The court applied these tests to the relationship between a franchisor and franchisee in appeal filed with the Israel National Labor Court—the

25. *Id.* ¶ 5.
26. *Id.* ¶ 8.
27. *Id.* ¶ 11.a.
28. File No. 4157/13 Supreme Court, Ilana v. Tax Assessor Rehovot (Feb. 3, 2015) (Isr.), Nevo Legal Database (by subscription, in Hebrew).
29. CA 5378/90 Physical Culture Association Hapoel Tiberias v. Tax Assessor Tiberias 48(2) PD 416, 430 (1994) (Isr.).
30. File No. 4157/13 Supreme Court, Ilana, *supra* note 28.
31. HCJ 5168/93 Shmuel Mor v. Israel National Labor Court 50(4) PD 628, 639 (1996) (Isr.).
32. *Id.* at 643.
33. *Id.*

appellate court for rulings handed down by the regional labor courts—in the matter of *Schreiber v. Topper Fashion Factories*.[34] In that case, the appellant claimed that she was an employee of a franchisor operating clothing stores.[35] The franchisor claimed that the relationship was a franchise relationship with an independent business, meaning that there never was an employee-employer relationship between the parties.[36] The court rejected the appellant's claim and accepted the franchisor's claim.[37] In this context, the court ruled that it was satisfied with the judicial analysis from the lower court (i.e., the Regional Labor Court of Jerusalem).[38] According to this analysis, the supervision and authority test does not lead to the conclusion that a franchisee is an employee of the franchisor.[39] Specifically, the court ruled that the franchisee-franchisor relationship necessitates, by its very nature, a special examination of the relationship between the parties.[40] This is due to the fact that the franchisor's reputation is affected by the franchisee's conduct, and, since it is desirous of maintaining this reputation, the franchisor must enforce stricter supervision over the franchisee's work than that normally employed between an independent contractor and a client.[41] The court also rejected the appellant's claim under the negative facet of the integration test.[42] Specifically, the lower court ruled, and the Israel National Labor Court agreed, that the appellant ran her own business, since she herself carried the risks for the business's profits and its losses.[43] Addressing the opportunity for profit, the lower court ruled that, pursuant to the agreement between the parties, the appellant herself could have increased her profits by increasing the sales turnover in the store.[44] In particular, the appellant was entitled to initiate sales promotions, fashion shows, and advertising.[45] As for the risk of loss, the lower court ruled that, pursuant to the agreement between the parties, the appellant was totally and explicitly responsible for any missing inventory, bad checks, and cash register discrepancies.[46] In light of the foregoing, the court ruled that there was no employee-employer relationship between the appellant and the franchisor.[47]

34. File No. 156/99 National Labor Court, Schreiber v. Topper Fashion Factories (Jul. 02, 2000) (Isr.), Nevo Legal Database (by subscription, in Hebrew).
35. *Id.* ¶ 3.
36. *Id.* ¶ 4.
37. *Id.* ¶ 18.
38. *Id.* ¶¶ 16–17.
39. *Id.* ¶ 6.
40. *Id.* ¶ 5.
41. *Id.*
42. *Id.* ¶ 7.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* ¶¶ 16–17.

III. Is There an Employment Relationship Between the Franchisee's Employees and the Franchisor?

According to Israeli law, the principal presumption is that there is an employment relationship between the employee and the entity making use of their labor, and the party challenging this presumption, bears the burden of proving that a third party is the employee's employer.[48] In a case where an employee alleges that a third party is their employer, the court examines the following factors: (1) how the parties defined their relationship; (2) who has the power to terminate the employee's employment; (3) who hired the employee; (4) who sets the overall terms of the employee's employment, including salary; (5) who pays the employee's salary; (6) who grants the employee leave; (7) how was the relationship between the parties reported to the Income Tax Authority, the National Insurance Institute, and other authorities requiring a statement regarding the identity of the employer; (8) who oversees the employee's work; and (9) who owns the equipment used by the employee in carrying out his work. [49]

Whether a franchisor is an employer of a franchisee's employees has been addressed in several rulings. For example, in *Traore v. Café Café Israel*,[50] the plaintiff claimed that he was employed as a dishwasher and busboy in a kitchen by a coffee shop franchisor.[51] The employee claimed that the franchisor violated his rights as an employee because it failed to pay him his full salary and did not provide him with various social benefits during the term of his employment, including health insurance.[52] The plaintiff further claimed that he was forced to leave his place of employment under circumstances entitling him to severance pay from the franchisor.[53] The Regional Labor Court of Tel Aviv-Yaffo dismissed the claim.[54] More specifically, the court ruled that the plaintiff had the burden of proof to show that there was an employee-employer relationship between him and the franchisor.[55] The court noted that the plaintiff had failed to produce evidence demonstrating the franchisor's alleged liability.[56] The court added that throughout the judicial proceeding that the plaintiff did not refute the franchisor's claim that every franchisee in the franchise chain constitutes a distinctly independent business unit, and that the sole relationship between the franchisor and the

48. Hearing 52/142-3 (National) Hassan Alia Al-Harinat – Kfar Ruth, 24(1) PD 535, 541 (1992) (Isr.).
49. *Id.* at 541–42.
50. File No. 11456-07-14 Regional Labor Court (Tel Aviv), Traore v. Café Café Israel (May 21, 2018) (Isr.), Nevo Legal Database (by subscription, in Hebrew).
51. *Id.* ¶ 1.
52. *Id.*
53. *Id.*
54. *Id.* ¶ 47.
55. *Id.* ¶ 33.
56. *Id.*

franchisees is a relationship based on the right granted to them to make use of its reputation and intellectual property.[57]

Similarly, in *Romanov v. Cafeneto Ra'anana*,[58] a franchisee's kitchen workers filed a claim in the Regional Labor Court of Tel Aviv against both the franchisee and franchisor seeking pecuniary compensation over their termination.[59] The franchisor filed a motion to dismiss, claiming that it and the franchisee's kitchen workers had no employee-employer relationship. In response to this motion, the kitchen workers argued that the franchisor was their joint employer because (1) the franchisor sets the location's operating hours, including the working hours of the employees; (2) the location carried the franchisor's logo; (3) the location's menu is established by the franchisor; (4) the kitchen workers underwent training classes with the franchisor before starting work.[60] Based on these claims by the kitchen workers, the court denied the franchisor's motion to dismiss.[61] The court noted that at such a preliminary stage the claim cannot be stricken out, and the kitchen workers' claims must be examined through proper judicial proceedings.[62] The court also noted that it must examine the nature of the relationship formed between the franchisee and the franchisor as well as the terms and conditions of the franchise agreement, which may contain provisions regarding the franchisee's employees.[63] Thereafter, the Court approved a settlement between the franchisee and the kitchen workers, pursuant to which the franchisee agreed to pay severance to the kitchen workers.[64]

Finally, in *Abuharon v. SSA Fashion Ltd.*,[65] the plaintiff, who worked as a salesperson in a lingerie and swimwear store, claimed that she and the franchisor had an employee-employer relationship.[66] Accordingly, she demanded severance pay from the franchisor, as well as compensation for failure to make provident-fund contributions, sick pay, and pay for unused vacation days and convalescence.[67] In support of claim, the plaintiff presented to the court cash register paper rolls imprinted with the franchisor's name.[68] The court dismissed the case, holding that it afforded no evidentiary weight to the fact that the franchisor's name was printed on the cash register paper.[69] The mere use of the franchisor's name was insufficient to establish an employment relationship, and, in any event, during the period the franchisee

57. *Id.* ¶ 42.
58. File No. 7788-10-13 Regional Labor Court (Tel Aviv), Romanov v. Cafeneto Ra'anana (May 20, 2015) (Isr.), Nevo Legal Database (by subscription, in Hebrew).
59. *Id.* ¶ 10.
60. *Id.*
61. *Id.* ¶ 28.
62. *Id.* ¶ 26.
63. *Id.*
64. File No. 7788-10-13 Regional Labor Court (Tel Aviv), Romanov, *supra* note 58.
65. File No. 53763-05-11 Regional Labor Court (Beersheba), Abuharon v. SSA Fashion Ltd. (June 26, 2012) (Isr.), Nevo Legal Database (by subscription, in Hebrew).
66. *Id.* ¶ 10.
67. *Id.*
68. *Id.* ¶ 28.
69. *Id.* ¶ 35.

used the franchisor's name on the cash register paper rolls, the franchisee was the one that issued paychecks to the plaintiff.[70]

IV. Franchise Contract as a Standard Form Contract

One of the important legal questions arising in Israel law regarding franchise agreements is whether these agreements are legally defined as "standard contracts" under the Standard Form Contracts Law.[71] This question has dramatic legal implications because, under this law, if the franchise agreement is defined as a standard contract, then the court is entitled to repeal or revise contract provisions if it concludes that the provisions are disadvantageous to the franchisee.[72]

The basis of the Standard Form Contracts Law is the presumption that, in standard contracts, there is usually an inherent inequality between the contract vendor and the client signing it.[73] This inequality exists due to the disparity in the proficiency, knowledge, and bargaining power of the parties to the standard contract.[74] In light of this discrepancy between the parties, the main stated goal of the law is to protect the client signing a standard contract against terms and conditions that may be disadvantageous to the client.[75]

One of the main definitions in this law is for the term "standard contract."[76] A "standard contract" is a boilerplate contract whose terms and conditions, in whole or in part, have been established in advance by one party to be used as the basis for many contracts between this party and persons of an indeterminate number or identity.[77] Pursuant to this definition, the courts in Israel have established that the following contracts constitute standard contracts: a contract for opening a checking account between a bank and a

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70. *Id.*

71. See, for example, the following rulings: File No. 11787/06 District Court (Jerusalem) Elgraby v. Yellow Cup Concessionaires (Apr. 28, 2009) (Isr.), Nevo Legal Database (by subscription, in Hebrew); File No. 23759-07-13 District Court (Central-Lod), Barnea v. Pet Buy Israel (Aug. 7, 2018) (Isr.), Nevo Legal Database (by subscription, in Hebrew); File No. 33650-07-12 Magistrate Court (Haifa), Café Greg Meod v. Misholim BaSharon (Feb. 10, 2016) (Isr.), Nevo Legal Database (by subscription, in Hebrew); File. No. 60297-06-14, Magistrate Court (Tel Aviv), Breitner v. YS Mel Fashion (July 5, 2017) (Isr.), Nevo Legal Database (by subscription, in Hebrew); File No. 6298/00 Magistrate Court (Jerusalem), Mituv Real Estate v. Rosman (March 19, 2002) (Isr.), Nevo Legal Database (by subscription, in Hebrew); File No. 2631/02 Magistrate Court (Rishon LeZion), Shemesh v. Mifal HaPais (May 13, 2004) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

72. Standard Form Contracts Law, 5743-1982, § 3, SH No. 1068 p. 8 (Isr.).

73. *See* Draft Bill of Standard Form Contracts Law, 5742-1981, HH No. 1556 pp. 27–28. "Client" is defined, pursuant to the law, as an entity to which the vendor is proposing that their engagement be made under a standard contract. Standard Form Contracts Law, *supra* note 72, § 2. "Vendor" is defined in the law as an entity proposing that an engagement with it be made under a standard contract. *Id.*

74. *Id.*

75. *Id.* § 2.

76. *Id.*

77. *Id.*

client,[78] a contract for purchasing an apartment between a buyer and a contractor,[79] and a contract between Facebook and its users.[80]

In the event of standard contract, the law confers upon the court the power to repeal or revise the terms of a contract which—when taking into account the entirety of its terms and other circumstances—are disadvantageous to clients or constitute an unfair advantage for the vendor that could bring an undue disadvantage to clients.[81] The law also establishes a list of contract provisions presumed to be disadvantageous to the client.[82] For example, the following conditions fall under the rebuttable presumption of undue disadvantage:[83] (1) a condition which confers on the vendor an unreasonable right to terminate performance of the contract;[84] (2) a condition which confers on the vendor the right to unilaterally modify, after the contract has been made, a price or any other material obligation imposed on the client, unless the modification is the result of factors over which the vendor has no control;[85] (3) a condition which restricts the client's freedom to enter into or not to enter into an engagement with another person;[86] (4) a condition which restricts the statutory rights or remedies at the client's disposal; and (5) a condition which unreasonably restricts the client's rights by virtue of the contract.[87]

The question of whether a franchise agreement is subject to the Standard Form Contracts Law has arisen more than once in Israeli case law.[88] In several cases, the courts responded positively to this question and repealed provisions in the franchise agreement accordingly. For example, in *Elgraby v. Yellow Cup Concessionaires*,[89] the court determined that the franchise agreement for the sale of natural juices and ancillary products was drafted in its entirety by the franchisor, and, as such, it must be deemed a standard

78. File No. 6916/04 Supreme Court, Bank Leumi of Israel Ltd. v. Attorney General of Israel (Feb. 18, 2010) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

79. CA 1846/92 Naftali Levy v. Mabat Construction Ltd. 47(4) PD 49, 62 (1993) (Isr.).

80. File No. 5860/16 Supreme Court, Facebook, Inc. v. Ohad Ben Hamo (May 31, 2018) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

81. Draft Bill of Standard Form Contracts Law, *supra* note 73.

82. *Id.* § 4.

83. *Id.* § 4(2).

84. *Id.* § 4(4).

85. *Id.* § 4(5).

86. *Id.* § 4(6).

87. *Id.*

88. *See*, *e.g.*, File No. 11787/06 District Court (Jerusalem) Elgraby v. Yellow Cup Concessionaires (Apr. 28, 2009), Nevo Legal Database (by subscription, in Hebrew); File No. 23759-07-13 District Court (Central-Lod), Barnea v. Pet Buy Israel (Aug. 7, 2018), Nevo Legal Database (by subscription, in Hebrew); File No. 33650-07-12 Magistrate Court (Haifa), Café Greg Meod v. Misholim BaSharon (Feb. 10, 2016), Nevo Legal Database (by subscription, in Hebrew); File. No. 60297-06-14, Magistrate Court (Tel Aviv), Breitner v. YS Mel Fashion (July 5, 2017), Nevo Legal Database (by subscription, in Hebrew); File No. 6298/00 Magistrate Court (Jerusalem), Mituv Real Estate v. Rosman (Mar. 19, 2002), Nevo Legal Database (by subscription, in Hebrew); File No. 2631/02 Magistrate Court (Rishon LeZion), Shemesh v. Mifal HaPais (May 13, 2004), Nevo Legal Database (by subscription, in Hebrew).

89. File No. 11787/06 District Court (Jerusalem) Elgraby v. Yellow Cup Concessionaires (Apr, 28, 2009), Nevo Legal Database (by subscription, in Hebrew).

contract.[90] In light of this ruling, the court ordered the repeal of a provision in the franchise agreement granting the franchisor the right to unilaterally change the products the franchisee is entitled to sell, as well as to reduce the size of the stand in which franchisee sells products.[91] In addition, in *Barnea v. Pet Bay Israel*,[92] the court determined that the franchise agreement to sell pet food and products is a standard contract because its terms and conditions were predetermined by the franchisor.[93] In this context, the court dismissed the franchisor's claim that the Standard Form Contracts Law was only designed to protect the end-user buying a product or service and not the franchisee acquiring a franchise.[94] After ruling that the franchise agreement was a standard form contract, the court struck out the following provisions of the agreement: (1) a clause prohibiting the franchisee from transferring the franchise agreement to a third party without the franchisor's prior written consent;[95] (b) a clause requiring the franchisee to transfer the franchise to the franchisor upon demand *without any consideration*;[96] and (c) a clause prohibiting the franchisee from selling, not through the chain, pet food and products in the franchise location.[97]

Conversely, other rulings favor the franchisor. For example, in *Café Greg Meod v. Misholim BaSharon*,[98] the court concluded that a franchise agreement for establishing a café is not a standard contract because the franchisees had years of extensive experience in running businesses in general and in the restaurant industry specifically.[99] Similarly, in *Breitner v. YS Mel Fashion*,[100] the court determined that a franchise agreement for operating a clothing store is not a standard contract because "it is a franchise agreement the likes of which there are many."[101] In addition, in *Mituv Real Estate v. Rosman*,[102] the court stated that a franchise agreement for establishing a real estate

90. *Id.* ¶ 5(b). In this context, the court rejected the franchisor's claim whereby the franchisee's father is an attorney, and therefore the franchisee could have used his help. *Id*.

91. *Id*. In this context, the court relied on Section 4(4) of the Standard Form Contracts Law. For information about Section 4(4) of the Law, *see supra* note 84 and accompanying text.

92. File No. 23759-07-13 District Court (Central-Lod), Barnea v. Pet Buy Israel (Aug. 7, 2018), Nevo Legal Database (by subscription, in Hebrew).

93. *Id.* paras. 32–33.

94. *Id.* ¶ 30.

95. *Id.* ¶ 38. In this context, the court relied on Section 4(5) of the Standard Form Contracts Law. For information about Section 4(5) of the Law, *see supra* note 85 and accompanying text.

96. *Id.* In this context, the court relied on Section 4(6) of the Standard Form Contracts Law. For information about Section 4(6) of the Law, *see supra* note 86 and accompanying text.

97. *Id.* ¶ 42. In this context, the court opined that this clause in the contract limits the franchisee's right to freedom of occupation, pursuant to Basic Law: Freedom of Occupation. As such, the court relied on Section 4(6) of the Standard Form Contracts Law. For information about Section 4(6) of the Law, *see supra* note 86 and accompanying text.

98. File No. 33650-07-12 Magistrate Court (Haifa), Café Greg Meod v. Misholim BaSharon (Feb. 10, 2016) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

99. *Id.* ¶ 30.

100. File. No. 60297-06-14, Magistrate Court (Tel Aviv), Breitner v. YS Mel Fashion (July 5, 2017) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

101. *Id.* ¶ 67.

102. File No. 6298/00 Magistrate Court (Jerusalem), Mituv Real Estate v. Rosman (Mar. 19, 2002) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

brokerage agency is not a standard contract, because modifications were made to the franchise agreement's appendices at the request of the franchisees.[103] It is interesting to note that in another ruling, the court reached a similar conclusion to that made by the court in *Mituv Real Estate*, though based on opposite reasoning. In *Shemesh v. Mifal HaPais*,[104] the court ruled that a franchise agreement for selling lottery tickets and scratchcards is not a standard contract because the body of the agreement was acceptable to the franchisees when signing the franchise agreement, and they *did not* request to modify any of its terms and conditions.[105] One of the more compelling rulings dealing with the question of the applicability of the Standard Form Contracts Law to franchise agreements revolved whether an arbitration clause in a franchise agreement, *in and of itself*, constitutes a provision that is disadvantageous to the franchisee in such a manner as to be justly repealed. The issue arose in *Perov v. Yiftach*,[106] which involved a franchise agreement signed between the parties for providing business mentorship services.[107] The franchise agreement contained an arbitration provision requiring that any dispute between the parties be adjudicated by the Arbitration Institute of the Israel Bar Association.[108] The franchisee filed a claim with the court petitioning to rescind the arbitration clause. The franchisee alleged that the arbitration clause constituted a "disadvantageous provision" under the Standard Form Contracts Law.[109] The franchisee based its claim on a section of the Standard Form Contracts Law, which presumes any clause specifying that all disputes between the parties be brought for arbitration to be a disadvantageous provision.[110] Although the court first determined that the franchise agreement falls under the definition of a standard contract and, as such, it is subject to the Standard Form Contracts Law,[111] the court went on to specify that under the circumstances of the case, the presumption that the arbitration clause is disadvantageous holds no weight.[112] The court was of the opinion that when taking into account the totality of the terms and conditions and the circumstantial framework for making the contract, the arbitration clause does not confer upon the franchisor an unfair advantage and it is not disadvantageous to the franchisee.[113] First, the court noted that there was no reason to believe that the arbitration clause was intended to make it

103. *Id.* at 4.
104. File No. 2631/02 Magistrate Court (Rishon LeZion), Shemesh v. Mifal HaPais (May 13, 2004) (Isr.), Nevo Legal Database (by subscription, in Hebrew).
105. *Id.* ¶ 14.
106. File No. 12748-03-16 District Court (Beersheba District), Perov v. Yiftach (June 14, 2016) (Isr.), Nevo Legal Database (by subscription, in Hebrew).
107. *Id.* at 1.
108. *Id.* at 3.
109. *Id.* at 1.
110. *Id.* at 2.
111. *Id.*
112. *Id.* at 5.
113. *Id.*

difficult for the franchisee to file a claim.[114] The likely disputes and disagreements between the parties to a franchise agreement are not trivial and of negligible value, and instead are most likely require comprehensive factual and legal examination.[115] Second, no inherently significant power discrepancies existed between the parties, unlike parties to common and conventional consumer contracts.[116] It is worth mentioning that the court's decision is inconsistent with the position taken by franchisee advocates who believe that franchisees have similar characteristics to consumers and, as such, require special protection.[117]

V. Termination of a Contract of Indefinite Duration

Franchise agreements may sometimes, although not frequently, be entered into for an indefinite period of time.[118] Under Israeli law, there is a presumption that contracts with an indefinite term are not perpetual and that each party is entitled to unilaterally terminate them at any time and for any reason whatsoever.[119] This is subject to the party wishing to terminate the contract providing the other party with prior notice of its intent to terminate the contract a reasonable amount of time in advance.[120] Principally speaking, the purpose of "reasonable amount of time" is to afford the other party time to make arrangements for new business relationships, as well as to recoup the investments it made in performing the terminated contract, if any such investments had been made.[121]

But the presumption that a contract for an indefinite duration can be unilaterally terminated at any time and for any reason can be rebutted by the party facing termination.[122] For instance, if evidence suggests that the parties intended on that termination would only be available when certain conditions are met, then the presumption does not apply.[123] In such a case, a party cannot unilaterally terminate the contract at any time and for any reason; rather, the contract may only be terminated if the certain conditions arising from the parties' intentions have been satisfied.[124]

114. *Id.*

115. *Id.*

116. *Id.*

117. *See, e.g.*, Jenny Buchan, Franchisees as Consumers (2013); *see also* Robert W. Emerson, *Franchisees as Consumers: The South African Example*, 37 Fordham Int'l L.J. 455 (2014).

118. *See, e.g.*, File No. 5925/06 Supreme Court, Eli Blum v. Anglo-Saxon Property Agents (Feb. 12, 2008) (Isr.), Nevo Legal Database (by subscription, in Hebrew); File No. 1384/06, Magistrate Court (Haifa), Ben Zaken v. Gil (Feb. 2, 2006) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

119. *Id.* ¶ 38.

120. CA 442/85 Zohar v. Travenol Laboratories (Israel) Ltd. 44(3) PD 661, 706.

121. *Id.*

122. File No. 2491/90 Civil Appeal, Travel Agents Ass'n v. Airlines Panel (May 3, 1994) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

123. *Id.* ¶ 15.

124. *Id.*

For example, *Eli Blum v. Anglo-Saxon Property Agents*[125] involved a franchise agreement between a franchisee and a real estate brokerage franchisor.[126] The agreement was for an indefinite term.[127] Around nine years after the franchisee had integrated into the franchisor's chain, the franchisor notified him that it was terminating the agreement.[128] The franchisor terminated the contract without any breach of contract on the part of the franchisee and without any grounds for terminating the contract pursuant to the franchise agreement.[129] The franchisor claimed that it was entitled to terminate the contract at any time and for any reason.[130] The Supreme Court rejected this claim and ruled that the unilateral termination of the contract without cause was not lawful.[131] As an initial matter, the court did recognize the presumption that a contract for an unlimited period of time can be terminated without cause.[132] But the court held that the presumption had been rebutted by the franchisee.[133] The franchise agreement contained provisions explicitly specifying the circumstances under which each party may terminate the agreement.[134] Specifically, the agreement provided that the franchisor could only terminate the agreement if one of the conditions specified in a closed list of conditions was met, which included, for example, the franchisee's death or the franchisee being declared bankrupt.[135] The court concluded that the language of the contract evinced an intention of the parties to limit the franchisor's right to terminate the contract for any reason. The court also noted that this intent by the parties—precluding the franchisor from exercising a sweeping right to termination—was consistent with logical business practice.[136] Granting the franchisor such broad termination rights would significantly reduce the franchisee's incentive to develop the franchise, and it may even cause franchisees to avoid purchasing the franchise due to the constant fear of it being terminated without cause.[137] It is worth noting that this position by the court is ostensibly inconsistent the position taken franchisor advocates, who believe that granting sweeping termination rights makes sound business sense. From their perspective, a broad termination right deters the franchisee from providing suboptimal service to

125. File No. 5925/06 Supreme Court, Eli Blum v. Anglo-Saxon Property Agents, ¶ 1 (Feb. 12, 2008) (Isr.), Nevo Legal Database (by subscription, in Hebrew).
126. *Id.* ¶ 1.
127. *Id.*
128. *Id.* ¶¶ 2–3.
129. *Id.* ¶ 50.
130. *Id.*
131. *Id.* ¶¶ 47, 50, 51.
132. *Id.* ¶ 38.
133. *Id.* ¶ 43.
134. *Id.* ¶ 41.
135. *Id.* ¶ 40.
136. *Id.* ¶ 45.
137. *Id.*

its customers, while free-riding on the efforts of the franchisor and the other franchisees in building the franchise's reputation.[138]

VI. Franchise Contract Enforcement

According to Israeli law, the injured party from a breach of contract is entitled, as a general rule, to the remedy of contract enforcement.[139] In Israel's legal system, the enforcement remedy is considered primary and essential.[140] The fundamental approach in Israeli Supreme Court case law is that "a contract must be kept . . . keeping promises is the basis of our life, as a society and as a nation."[141] Only in extraordinary cases, most of which are prescribed by law, is the injured party not entitled to contract enforcement.[142] One of the main exceptions to the enforcement remedy states that the injured party from a breach of contract is not entitled to its enforcement if "enforcement of the contract under the circumstances of the matter is unjust."[143] When examining whether enforcement is unjust, the court may consider the totality of circumstances pertaining to the matter.[144] In this context, the court is entitled to take into account both the circumstances present when the parties executed the contract, and the circumstances occurring after execution.[145] When weighing all of these circumstances, the court may also examine (1) what were the motivations behind the breaching party's breach; (2) what is the severity of the breach; and (3) what is the damage caused to the breaching party if the contract is enforced.[146] Similarly, with respecting to the injured party, the court will examine (1) any contributory negligence to the breach on the part of the injured party; (2) the injured party fulfilling its undertakings pursuant to the contract; (3) how the injured party may be damaged if the contract is not enforced.[147] Applying all of these factors, courts appear to retain a relatively wide latitude of discretion. Nonetheless, the Supreme Court has cautioned lower courts to interpret the totality of

138. *See* Erin Ann O'Hara, *Economics, Public Choice, and the Potential Conflict of Laws*, Geo L.J. 941, 945 (2002); Larry E. Ribstein, *Choosing Law by Contract*, 18 J. Corp. L. 245, 248 (1993).

139. Contracts Law (Breach of Contract Remedies), 5731-1970, §§ 2, 3, SH No. 610 p. 16 (Isr.). Israeli law follows the civil-law rule, whereby "the injured party is ordinarily entitled to enforced performance of the contract, subject to certain exceptions." *See* Leon Yehuda Anidjar, Ori Katz & Eyal Zamir, *Enforced Performance in Common-Law Versus Civil Law Systems: An Empirical Study of a Legal Transformation*, Am. J. Comp. L. (forthcoming 2019), available at https://ssrn.com/abstract=3294452.

140. CA 3380/97 Tamgar Construction & Development Ltd. v. Goshen 52(4) PD 673, 688 (1998) (Isr.).

141. FH 20/82 Adras Building Materials Ltd. v. Harlow & Jones GmbH PD 42(1) 221, 278 (1988) (Isr.).

142. *See* Contracts Law (Breach of Contract Remedies), *supra* note 139, § 3

143. *See id.* § 3(4).

144. File No. 5131/10 Supreme Court, Rachel Azimov v. Efraim Binyamini (Mar. 7, 2013) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

145. *Id.*

146. *Id.*

147. *Id.*

circumstances exception with caution, so as not to undermine the enforcement remedy, which is of paramount importance in Israel.[148]

In franchising, the Israeli Supreme Court has declined to apply the enforcement remedy. For example, in *Anglo-Saxon Property Agents Ltd. v. Eli Blum*,[149] a real estate brokerage franchisor unlawfully terminated the contract with the franchisee, in breach of the franchise agreement's provisions.[150] In response, the franchisee appealed to the Supreme Court and requested that it enforce the franchise agreement.[151] The court ruled that enforcement of the contract would be unjust.[152] Among other things, the court noted that (1) after the termination of the contract, the franchise location was transferred to a new franchisee who was not a party to the litigation, and enforcement of the original contract could harm the new franchisee; (2) around ten years had already passed since the contract was terminated;[153] (3) the franchisor's breach of contract carried relatively little moral negligence on its part, if at all;[154] and (4) the franchisor entered into an agreement with a new franchisee, in lieu of the existing franchisee, only after a lower court ruled that the termination of the contract by the franchisor was made lawfully, and after two motions filed by the franchisee for a stay were denied.[155] Accordingly, the court ruled that enforcing the contract under the circumstances was unjust, and the franchisee's petition for the enforcement remedy was denied.[156] This, ruling is significant because it is contrary to court's legal preference for granting the enforcement remedy.[157]

VII. Provisional Remedy to Vacate Franchisee

Israel has comprehensive regulations regarding provisional remedies, including temporary foreclosure, stay of exit, asset seizure, and interim receivership.[158] Generally, these provisional remedies are designed to maintain the status quo during the pendency of litigation, until the court issues a final ruling.[159] Nevertheless, in certain cases, Israeli law enables a litigant to obtain, even before the ruling, an interlocutory injunction that *changes* the

148. *Id.* ¶ 16.
149. File No. 4232/13 Supreme Court, Anglo-Saxon Property Agents Ltd. v. Eli Blum (Jan. 29, 2015) (Isr.), Nevo Legal Database (by subscription, in Hebrew).
150. *Id.* ¶ 5.
151. *Id.* ¶ 6.
152. *Id.* ¶ 17.
153. *Id.*
154. *Id.* ¶ 16. Specifically, the franchisor conducted a lengthy negotiation with the franchisee regarding their dispute before giving unlawful notice of termination. As part of this negotiation, the franchisor attempted to compromise with the franchisee, and gave the franchisee several grace periods before terminating the contract. *Id.*
155. *Id.*
156. *Id.* ¶ 17.
157. *See supra* note 140 and accompanying text.
158. *See*, *inter alia*, Civil Procedure Regulations, 5744-1984, KT 4685 p. 2220, Chap. 28 (Isr.).
159. Uri Goren, Issues in Civil Procedure 860 (12th ed. 2015).

legal status quo.[160] Courts only issue these injunctions under extraordinary circumstances,[161] such as where an injunction is essential for preventing a very harsh result or when the potential damage, without the injunction, cannot be rectified through appropriate pecuniary compensation.[162]

In *HaNadlanist Real Estate Consulting Management and Marketing Ltd. v. Fresh Kitchen (2012) Ltd.* ("*Fresh Kitchen Matter*"), the Supreme Court granted an exceptional injunction that changed the status quo.[163] In this case, a dispute broke out between a restaurant franchisor and its franchisee, during which the franchisor notified the franchisee of immediate termination of the agreement.[164] Following this notice, the parties appointed an arbitrator to resolve their dispute.[165] Soon after, the arbitrator's appointment, and before the arbitration proceeding commenced, the franchisor sought interlocutory relief from the court, requesting that the franchisee vacate the leased franchise location.[166] The Supreme Court ruled that the franchisor was entitled to receive an injunction, despite it changing the status quo.[167] At the heart of the ruling, the court noted that (1) the franchisor and franchisee had a long-standing business dispute;[168] and (2) the trust crisis between the parties was so severe that it was apparent they were intent on parting ways, not continuing together.[169] Based on these circumstances, the court concluded that it is not right to force the franchisor to continue its engagement with the franchisee.[170] The court opined that the franchisor must be allowed to make free use of the franchise, with a lingering possibility that the franchisor would be ordered to pay the franchisee a monetary compensation for breaching the franchise agreement, in the event that the arbitration proceeding determined that the franchisor did not have lawful grounds to terminate the franchise agreement.[171]

Following the decision by the Supreme Court in the *Fresh Kitchen* case,[172] the lower courts have been asked, more than once, to deliberate on motions for interlocutory injunctions filed by franchisors to evict franchisees from leased locations. Typically, and perhaps unsurprisingly, the lower courts

160. An interlocutory injunction will be issued by virtue of the Courts Law [Consolidated Version], 5744-1984, § 75 (Isr.).

161. File No. 5843/05 Supreme Court, South Judea Association of Cities for Environmental Protection v. Sharon Dan Investments Ltd. (Dec. 13, 2005) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

162. *Id.*

163. File No. 1760/15 Supreme Court, HaNadlanist Real Estate Consulting Management & Marketing Ltd. v. Fresh Kitchen (2012) Ltd. (Apr. 2, 2015) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

164. *Id.* ¶ 2.

165. *Id.*

166. *Id.* ¶ 3.

167. *Id.* ¶ 9.

168. *Id.* ¶ 10.

169. *Id.*

170. *Id.*

171. *Id.*

172. *See supra* note 163.

have ruled, in accordance with the Supreme Court's decision, that franchisees must vacate leased premises.[173] In some of these decisions, the courts ordered the franchisor to deposit a bond to guarantee any damage caused to the franchisee as a result of the injunction, in the event the franchisor's claim is ultimately rejected.[174] For example, in *Castro Model Ltd. v. Levy*, the court ordered a group of retail fashion franchisees to vacate their locations, even before issuing any substantive decisions in the main legal dispute between the franchisor and the franchisees.[175] But the court also ordered the franchisor to deposit a third-party guarantee or an independent bank guarantee in the amount of $35,000.[176] Similarly, in *Orgad HSN v. Kfir and Jonathan Ltd.*, the court granted a fast-food franchisor an interlocutory injunction ordering the franchisee to vacate the premises and hand over possession of the franchise to the franchisor.[177] In addition, the court ordered the franchisor to deposit a $50,000 guarantee. Conversely, however, in *SYHA Holdings Ltd. v. Ilia Sosonov*, although the court granted the franchisor an injunction compelling the franchisee to vacate the location,[178] it did not require the franchisor to deposit a guarantee. The court did not provide any explicit reasoning for its decision not to require a bond.

Despite some of the rulings made by the lower courts granting the franchisor injunctions compelling the franchisee to vacate the premises,[179] there are several lower court decisions that refuse to issue such an injunction. For example, in *Talker v. Johnny Crispy*, the court refused to accept a motion filed by a sandwich and salad shop franchisor for an interlocutory injunction ordering the franchisee to vacate its leased premises.[180] The court opined that the dispute between the parties—which related to the franchisee's purported failure to provide a bank guarantee, and to sell a new type of bread—did not arise to an unbridgeable gap between parties.[181] Similarly, in *City*

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173. *See*, *e.g.*, File No. 42700-03-18 Magistrate Court (Tel Aviv), Castro Model Ltd. v. Levy (July 1, 2018) (Isr.), Nevo Legal Database (by subscription, in Hebrew); File No. 27548-07-18 Magistrate Court (Tel Aviv), Orgad HSN v. Kfir and Jonathan Ltd. (July 23, 2018) (Isr.), Nevo Legal Database (by subscription, in Hebrew); File No. 30594-04-17 Magistrate Court (Tel Aviv), SYHA Holdings Ltd. v. Ilia Sosonov (Apr. 30, 2017) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

174. *See*, *e.g.*, File No. 42700-03-18 Magistrate Court (Tel Aviv), Castro Model Ltd. v. Levy (July 1, 2018) (Isr.), Nevo Legal Database (by subscription, in Hebrew); File No. 27548-07-18 Magistrate Court (Tel Aviv), Orgad HSN v. Kfir and Jonathan Ltd. (July 23, 2018) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

175. File No. 42700-03-18 Magistrate Court (Tel Aviv), Castro Model Ltd. v. Levy (July 1, 2018) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

176. *Id.* ¶ 25.5.

177. File No. 42700-03-18 Magistrate Court (Tel Aviv), Castro Model Ltd. v. Levy (July 1, 2018) (Isr.), Nevo Legal Database (by subscription, in Hebrew); File No. 27548-07-18 Magistrate Court (Tel Aviv), Orgad HSN v. Kfir and Jonathan Ltd. (July 23, 2018) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

178. File No. 30594-04-17 Magistrate Court (Tel Aviv), SYHA Holdings Ltd. v. Ilia Sosonov (Apr. 30, 2017) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

179. *See supra* note 173.

180. File No. 48974-07-17 District Court (Beersheba), Talker v. Johnny Crispy Ltd. (Aug. 14, 2017) (Isr.), Nevo Legal Database (by subscription, in Hebrew).

181. *Id.* at 4.

Espresso Bar Israel Ltd. v. Rodriguez, the court refused to grant a coffee shop franchisor an injunction ordering the franchisee to vacate its premises.[182] Among other things, the court noted that:[183] (1) the franchisor mistakenly drafted its motion as a request to *maintain* the status quo, while the true goal of the request was to *change* the status quo. Specifically, while the franchisor drafted its motion as a request to prohibit the franchisee from preventing the franchisor to enter and operate the franchise premises, the true purpose of the motion was to transfer the premises from the franchisee to the franchisor; (2) the real estate rights of the franchisee to the premises are worthy of the court's protection; and (3) the franchisor acted in bad faith by allegedly attempting to take over the franchisee's location itself, before appealing to the court for an interlocutory injunction directing the franchisee to vacate the premises. As a result, the facts and circumstances of the specific case are critical to determining whether a court is likely to grant injunctive or other interim relief.

VIII. Antitrust

In general, antitrust laws in Israel state that a person shall not be a party to a restraint of trade.[184] A restraint of trade is defined as an arrangement made between persons running businesses whereby at least one party restricts itself in a manner that could prevent or reduce the business competition between itself and the other parties to the arrangement, or between itself and another person who is not a party to the arrangement.[185] In light of this definition, the law generally views as a restraint of trade an arrangement in which one of the following is restricted: (1) the price demanded, offered, or paid; (2) dividing the market, in whole or in part, by business location or by the persons or types of persons with which business is to be done; (3) the number of assets or services in the business, their quality, or type.[186]

The legal ramifications arising from the existence of a restraint of trade could be serious. For example, on a criminal level, a party to an illegal restraint of trade may be sentenced to five years in prison or a fine that could exceed \$2 million.[187] In addition, the Antitrust Commissioner may impose a financial sanction of up to \$1 million on a party to an illegal restraint of trade.[188] In the event a corporation breaks the law, with a turnover exceeding \$10 million, the Antitrust Commissioner may impose a financial sanction in the amount of up to eight percent of the turnover, provided this amount

182. File No. 15690-04-15 Magistrate Court (Tel Aviv), City Espresso Bar Israel Ltd. v. Julio Rodriguez (May 14, 2015) (Isr.), Nevo Legal Database (by subscription, in Hebrew).
183. *Id.* ¶ 12.
184. Economic Competition Law, 5748-1988, §4, SH No. 1258 p. 128 (Isr.).
185. *Id.* § 2(a).
186. *Id.* § 2(b).
187. *Id.* § 47(a)(1).
188. *Id.* § 50(d).

does not exceed $100 million.[189] Additionally, in a civil contract, a restraint of trade is usually deemed illegal and, as such, is considered void.[190]

Against this broad definition of the term "restraint of trade" and the dramatic legal implications it may have, Israeli law has recognized several exceptions under which a person is entitled to be a party to a restraint of trade.[191] Franchising happens to be one of the main exceptions to the rules relating to restraints of trade (Franchising Exemption or Exemption).[192]

The Franchising Exemption extends to (1) the franchise territory; (2) the type or quality of product sold by the franchisee; (3) the type of persons to whom the franchisee can sell goods or services; (4) the quantity of products the franchisee is entitled to sell; (5) the product price; and (6) knowledge pertaining to the franchise.[193]

First, with respect to the franchise territory, the Exemption applies to (1) an undertaking by the franchisor not to grant another franchisee a license to open a franchise in the agreement territory or some part thereof;[194] (2) an undertaking by the franchisor not to provide to another franchisee the goods in the franchise agreement or substitute goods within the franchise territory;[195] and (3) an undertaking by the franchisor not to compete with the franchisee, within the franchise territory or some part thereof.[196] The Exemption also permits an undertaking by the franchisee to make use of the franchise license only within the franchise territory.[197] Nevertheless, according to the Franchising Exemption, the franchisee may not be prohibited from selling the goods in the franchise agreement to a consumer (or another franchisee) located outside the agreement area.[198]

In addition to the above restrictions regarding the franchise territory, under certain circumstances, the Franchising Exemption applies to the *type or quality of the product* sold by the franchisee. First, the agreement may contain an undertaking by the franchisee not to manufacture, sell, or use substitute goods.[199] Second, the franchise agreement may contain an undertaking by the franchisee to sell goods that meet the quality standards specified by the franchisor in the franchise agreement.[200] However, the exemption from

189. *Id.*
190. *See supra* note 8, § 30.
191. *See*, *inter alia*, *supra* note 184, § 4.
192. Antitrust Rules (Block Exemption for Franchise Agreements) (Temporary Provision), 5761-2001, § 1, KT 6096 p.672 (Isr.).
193. *Id.*
194. *Id.* § 2(b)(1).
195. *Id.* § 2(b)(2).
196. *Id.*
197. *Id.* § 2(b)(4). In this context, the exemption also states that the franchisee is entitled to undertake to refrain from actively promoting the goods in the franchise agreements outside the agreement area.
198. *Id.* §§ 2(b)(4), 3(6).
199. *Id.* § 2(b)(5). However, the exemption rules state that a franchisee is not entitled to make this undertaking with respect to ancillary goods to the goods in the franchise agreement, or with respect to selling substitutes to the goods in the agreement. *Id.*
200. *Id.* § 2(b)(6).

scrutiny under antitrust laws does not apply to a franchise agreement in which the franchisor specified quality standards for goods, but precluded the franchisee from purchasing these goods from a specific source, even though they meet the quality standards established by the franchisor.[201] When quality standards are not explicitly established (such as, for example, due to product specifications), the franchise agreement may contain an undertaking by the franchisee to only sell goods produced by or for the franchisor.[202] But in such a case, the franchise agreement cannot preclude the franchisee from purchasing these products from other franchisees or authorized distributors.[203]

The Franchising Exemption is also available in certain cases relating to restrictions regarding market division by the *type of persons* to whom the franchisee may sell the franchise products. As such, the Exemption states that a franchise agreement may include a restriction on the franchisee selling the goods specified in the franchise agreement to the following: end-users, other franchisees, and authorized distributors.[204] The Exemption also addresses restrictions on the *amount of products* that the franchisee is supposed to buy or sell. Specifically, the franchise agreement may include an undertaking by the franchisee to (1) reach a specified sales turnover[205] and (2) hold a certain inventory.[206]

The Franchising Exemption also addresses restrictions on *product price*. For example, the Exemption permits, generally, the inclusion of an undertaking by the franchisee regarding the price that will be charged for the goods in the franchise agreement.[207] And, in addition to the foregoing, the Exemption also permits the inclusion in the franchise agreement of certain restrictions pertaining to franchisee use of *know how*. For instance, the franchise agreement may contain an undertaking by the franchisee to never make use of the franchisor's know how for any other purpose than to operate the franchise itself.[208] In connection with this restriction, the franchise agreement may also include an undertaking by the franchisee not to disclose to third parties any information imparted to it by the franchisor.[209] Nonetheless, the exemption from scrutiny under antitrust laws shall not apply to a franchise agreement in which the franchisor has limited the franchisee from using the authorized know how after the termination of the agreement.[210]

It is also worth noting that the list of restrictions specified above, and which can principally be included in a franchise agreement, is not a closed list. Further restrictions may be included in franchise agreements, provided

201. *Id*. § 3(3).
202. *Id*. § 2(b)(7).
203. *Id*. § 3(7).
204. *Id*. § 2(b)(11).
205. *Id*. § 2(b)(12).
206. *Id*.
207. *Id*. § 2(b)(14).
208. *Id*. § 2(b)(8).
209. *Id*.
210. *Id*. § 3(4).

the additional restrictions are necessary to carry out the franchise agreement and do not hinder competition in the product market or some part thereof.[211] Also, the list of restrictions that can be included in a franchise agreement is subject to reservations and is not absolute. For example, a franchise agreement is not exempt from antitrust law scrutiny if the agreement meets one of the following conditions: (1) the parties to the franchise agreement are actual competitors;[212] (2) a party to the agreement has a monopoly in the product market or a similar product market, or the franchisor's market share for said product exceeds thirty percent;[213] (3) the agreement obligates the franchisee for a period exceeding ten consecutive years, and the franchisee is not afforded the option of terminating the agreement via prior notice given a reasonable amount of time in advance;[214] and (4) the main point of the agreement is to reduce or prevent competition.[215] Careful scrutiny of the restraint of trade rules for franchise agreements is critical to ensure that franchisors do not run afoul of Israeli antitrust law.

IX. Summary and Conclusions

In Israel, relatively detailed antitrust rules regulate what franchisors and franchisees are permitted and prohibited from doing.[216] Despite these rules, Israel does not have specific legislation to mandate pre-sale disclosure or to regulate the rights and duties of franchisors and franchisees in terms of their internal relationship. The authors believe that it would be advantageous to consolidate through specific legislation the laws applicable to the relationship between franchisors and franchisees. Such legislation could have the effect of consolidating the disparate lines of cases in a variety of areas and, it is hoped, achieve more consistency in the decisions, leading to more commercial certainty related to this business model.

211. *Id.* § 2(a).
212. *Id.* § 3(1).
213. *Id.* § 3(8).
214. *Id.* § 3(9).
215. *Id.* § 3(10).
216. *See supra* Part VIII.