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Between Contract and Restitution - The Proper Protection of Distributors in Light of Recent Developments in Israeli Law

Miguel Deutch

PERSPECTIVES

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I. General

A. PREFACE

Israeli law lacks a statutory arrangement dealing with the status of distributors as a specific economic group. Cases regarding the status of this important class of economic operators are, therefore, settled in the courts under the application of general principles of law. Since an initiative to establish a statutory regulation regarding the activities of commercial agents has not been successful,[1] the operation of commercial agents is as well regulated through general principles of law. In calling for reform, some authorities have expressed concern that the pertinent legal situation is unsatisfactory.[2] As a result the Ministry of Justice, in order

*Doctor of Law, Senior Lecturer, Faculty of Law, Tel Aviv University.

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1. The initiative was that of the Tel Aviv-Jaffa Chamber of Commerce in 1974. *See* C.A. 442/85, M. Zohar v. Travanol Laboratories (Israel) Ltd., 41(3) PISKEI DIN [P.D.] 661 (1990) (Isr.) [hereinafter *Zohar*].

2. *See* C.A. 80/71, Moshiov v. Pazgaz Ltd., 26(1) P.D. 360, 363-64 (1972); Mo. (Ha.) 941/70 (unpublished).

to consider possible legislation in this field, has prepared a research position concerning the protection of commercial agents.[3]

A distributor may invest monies, efforts, and time in order to establish the goodwill of a producer's product or services in the local market. Such investment occurs particularly when the distributor is granted exclusivity regarding the distribution of a specific product or service. The exclusive distributor's expectations and reliance are quite high, therefore, and all legal systems should consider the proper legal protection due these interests, including those concerning the distributor's relationships with the producer and his rights toward third parties who do not honor his exclusivity.

Continental laws deal exhaustively with the status of the commercial agent. Yet, in general, these laws neglect the need to provide the distributor with special protection.[4] As mentioned, Israel has not enacted a special statute in regard to distributors or commercial agents. In addition, until 1990 the courts have examined the status of distributors only incidentally, and mainly within the lower courts, without holding a solid discussion regarding the issue.[5] However, several cases dealing with some of the cardinal aspects relating to legal protection for distributors have recently come before the Israeli Supreme Court. These cases provide an adequate platform for the discussion of basic features in the status of the distributor.

This article first analyzes the developments in Israeli law concerning the distributor's status and the lessons to be learned from these developments. Additionally, this article establishes a proper structural model concerning distributor status in relation to the issues raised in Israeli case law. Furthermore, this discussion includes some comparative law observations. A survey of distributor protection needs also raises important general questions concerning the boundaries and

3. *See* Rikardo Ben-Oliel, *Commercial Agency in a Comparative View—the Need for Specific Legislation*, 40(1) HAPRAKLIT 67 (1990) (Hebrew).

4. For a worldwide survey of the status of commercial agents and distributors, and the different protection granted to each class by the continental laws, see Karl G. Herold & David D. Knoll, *Negotiating and Drafting International Distribution, Agency, and Representative Agreements: The United States Exporter's Perspective*, 21 INT'L LAW. 939 (1987); *see also* Ben-Oliel, *supra* note 3, and continental legislation described therein; Handelsgesetzbuch [Commercial Code] [HGB] ¶¶ 84-92 (Germany); Code of Obligations [Co] ¶¶ 418a-418v (Switz.); Codice Civile [Civil Law] [C.c.], ¶¶ 1742-1753 (Italy). Belgium, unlike other continental jurisdictions, provides wide statutory protection only to distributors and not to commercial agents. *See* Herold & Knoll, *supra*, at 955, 973; Thad W. Simons, *Termination of Sales Agents and Distributors in Belgium*, 17 INT'L LAW. 752 (1983). The European Community has issued a directive on the protection of commercial agents, dealing with varied aspects of commercial agents' interests: the period of termination notice; compensation to be paid to the distributor following termination; and the right of the commercial agent to cooperation, information, and reward, during the period of contract. *See* Council Directive 86/653, 1986 O.J. (L 382) 17.

5. *See* C.A. 80/71, Moshiov v. Pazgaz Ltd., 26(1) P.D. 360; Mo. (T.A) 215/81 (unpublished); Mo. (Ha.) 1210/83, Farghe v. Dubek Ltd., [1984] 1 PSAKIM MEHOSIIM [P.M.] 504; Mo. (T.A) 9626/72 (unpublished); Mo. (Ha.) 941/70 (unpublished); C.A. 687/76, Bleivis v. Pik, 32(2) P.D. 721 (1978). The unpublished cases were referred to in *Zohar, supra* note 1.

relations between unjust enrichment laws and contractual protection. This question, which is of significant and general theoretical interest, is discussed as well.

The discussion of the status of distributors focuses on two central issues: (a) the distributor's rights regarding and following the termination of contract by the producer; and (b) the protection of distributor interests against third parties.

B. The Commercial Agent vis-à-vis the Distributor—A Remark on Classification

First, analysts must differentiate between a commercial agent and a distributor. In distributing the producer's merchandise, both the commercial agent and the distributor are likely to create or participate in the creation of the producer's goodwill in the local market. The commercial agent acts on behalf of the producer and markets the product as the producer's legal agent. Sales agreements concluded by the commercial agent legally bind the customer and the producer, but not the commercial agent.

The distributor, on the other hand, acts on his own behalf in purchasing the products from the producer and selling them to customers. Unlike the commercial agent, the distributor takes upon himself the commercial risk and is at the vagaries of an unsuccessful market.[6]

An important question is whether the law should protect one category of dealers more than another. The continental legislation focuses on the protection of the commercial agent. Those systems base their viewpoint on the theory that distributor status does not justify special legal protection since the distributor is a more independent dealer thus more capable of protecting himself. Yet this approach is questionable. The distributor assumes risks not taken by the commercial agent. In this sense, therefore, the distributor's interests should receive more protection than those of the commercial agent.[7]

In light of the foregoing analysis, legislation granting special protection to one type of dealer or another should be based on notions of justice and reasonable commercial practice, and not according to the legal classification of the dealer. To illuminate the problem, this article focuses on the status of the independent

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6. For this distinction, see Ben-Oliel, *supra* note 3; FRITZ STAUBACH, THE GERMAN LAW OF AGENCY AND DISTRIBUTORSHIP AGREEMENTS 229 (1977); *Zohar*, *supra* note 1, at 677-78; Harold & Knoll, *supra* note 4, at 954.

7. *Zohar*, *supra* note 1, at 619. For the commercial risks borne by the distributor, see Thomas E. Carbonneau, *Exclusive Distributorship Agreements in French Law*, 28 INT'L & COMP. L.Q. 91, 94 (1979); JEAN GUYENOT, THE FRENCH LAW OF AGENCY AND DISTRIBUTORSHIP AGREEMENTS 221-22, 235, 253 (1976) (referred to in *Zohar*, *supra* note 1, at 687-89). As stated in *Zohar*, following an examination of continental laws, the continental courts frequently apply to distributors, by way of analogy, statutory arrangements applying in the context of commercial agents. *See* George Vorbrugg & Dirk Mahler, *Agency and Distributorship Agreements under German Law*, 19 INT'L LAW. 607, 611, 618 (1985); STAUBACH, *supra* note 6, at 239, 240-42; GUYENOT, *supra*, at 222; Carbonneau, *supra*, at 92, 94 (referred to in *Zohar*, *supra* note 1, at 689).

distributor who acts on his own behalf, and who in so doing, takes upon himself the commercial risks of a weak market.

II. Distributor's Rights following Termination of the Contract

A. The *Zohar* Case: Arguments, Decision, and Preliminary Criticism

The distributor naturally expects that the period of the contract shall properly reflect the period required for ensuring his investments and his basic interests. This is all the more true when the distributor attempts to penetrate the market with a new product. These expectations may find expression when the parties agree upon them in the contract; if not provided for, these expectations will remain unregulated. Disputes deriving from terminations of contracts are the principle cause of litigation between suppliers and distributors. The *Zohar* case, decided by the Israeli Supreme Court in 1990, exhaustively discussed this subject.

1. *The* Zohar *Case: Background and Material Facts*

In *Zohar* the plaintiff (a distributor) entered into a contract with the defendant (a producer) according to which the defendant granted the plaintiff exclusivity in the distribution in Israel of medicines and medical equipment not previously distributed in that country. The agreement was for an unspecified period. The plaintiff operated in accordance with the contract for a period of six years. He derived his profits from the difference between two prices: that which he paid to the producer when he purchased the products, and that which he received for the products when he sold them to the public. Whether the agreement included an obligation on the part of the distributor to purchase minimum quantities as a condition for his exclusivity is unclear from the facts as given by the Court.

During the six years of contractual relations, the distributor invested time and money in creating goodwill for the products in Israel, resulting in the establishment of business relations with twenty to twenty-five clients, representing the peak market potential in this field in Israel. After six years, upon giving a notice of seventy days, the producer terminated the contract because, in an effort to reduce its marketing costs, it had decided to market its products through subsidiary companies. The Court emphasized that the producer had made this decision three years prior to the giving of the notice, without notification to the distributor. The distributor challenged the legality of the act of termination, and claimed compensation.

All five judges in *Zohar* concluded that the distributor is entitled to a sum representing his expected profits during one additional year. Three of the judges (Judges Barak, Orr, and Beiski) based their decision upon contract law, while two others (Chief Justice Shamgar and Judge Netanyahu) based their decision upon unjust enrichment laws.

The following discussion examines the judges' reasoning in *Zohar*.

2. *A Contractual Implied Duty to Reimburse the Distributor?*

The Supreme Court in *Zohar* rejected the plaintiff's allegation that a contractual provision should be inferred to provide that the producer should reimburse the distributor for his loss of profits in case the actual period of the contract had not met the distributor's expectations.[8] The plaintiff based his allegation on the finding that he had invested time and money in building goodwill, expecting that he would be reimbursed through his earnings during a sufficiently long period of engagement.

Similarly, the plaintiff did not prove usage regarding such reimbursement.[9] The Court therefore concluded that once the termination of the contract was valid and permissible, and reasonable notice had been given, no further contractual obligation[10] regarding this issue existed, unless a specific undertaking arose from the circumstances.

The Court attributed the obligation to deliver "reasonable notice" as a condition to termination—a major weight in the protection of a distributor's interests. Yet, courts should not follow this approach. Instead, if a court is to infer contractual protection for the distributor's expectations for a minimum period of engagement (and it should not), then the court should base the protection on a "reimbursement term" and not on a "nontermination" one.

3. *An In Rem Right in the Distribution?*

Claims have been raised before the Israeli courts that a distributor owns an in rem right in the distribution. This allegation has been dealt with, at times sympathetically,[11] and at other times, less so.[12]

The term "in rem right" in this context is quite misleading. Even the supporters of this approach have no intention of referring to the basic juridical concept of such a right since it is obvious that only an obligatory nexus exists between the distributor and the producer. The argument is actually that the distributor acquired an asset (the right of distribution), and that the asset is not subject to cancellation by the producer, just as any individual may not appropriate any other asset. The notion of "distribution rights" as "property" is designated here only for the purpose of expressing the invulnerability of the right.

Yet, such an approach must be dismissed. Indeed, the right to distribute, like

8. *Zohar, supra* note 1, at 671.

9. *Id.* at 672.

10. For a discussion of the possibility of the establishment of an obligation deriving from an *ex lege* source, the unjust enrichment laws, as differing from a contractual source, see discussion *infra* part II.C.

11. C.C. (T.A.) 1626/68, Behiri v. Mifalei Helen Curtis Israel (1967) Ltd., 62 P.M. 127 (1968); Mo. (T.A.) 9626/72 (unpublished).

12. Mo. (T.A.) 215/81 (unpublished); Mo. (Ha.) 1210/83, Farghe v. Dubek Ltd., [1984] 1 P.M. 504.

other obligatory rights, is deemed to be a proprietary right and, in this sense, an asset.[13] Thus, for example, an obligatory right may be subject to sale by way of assignment. Nevertheless, the distributor's obligatory right, like other rights of the same type, may be subject to the power of the other party to cancel it, in a broader or narrower mode, all according to its terms and laws of contract. Even according to labor law, in cases in which a party has a right to life tenure, it would still not be accurate to describe the right as an in rem right, but rather as an obligatory right, for the worker's life.

Yet, the question still before us is whether the distributor may be protected through the concept of tenure after a suitably lengthy period wherein he expressed a proven measure of reliability. The answer to this question is clearly in the negative. Assuming that the contract was indefinite in regard to its cessation, the general rule of contract law is that it may be terminated at will upon delivery of due notice. The notion of tenure in employment contracts is based upon special enactments or upon collective agreements applying to the parties involved. Since the distributor lacks the support of such a legal instrument he is not entitled to tenure unless the agreement provided for such right.[14] As expected, the Supreme Court in *Zohar* summarily rejected the allegation that the distributor owns a "property right" in the distribution.[15]

4. *An In Rem Right in the Goodwill?*

In accordance with the situation in *Zohar*, the sole distributor, as mentioned, may create goodwill for the product in the local market or may do so in conjunction with the producer, who contributes its share to such goodwill. In the event the distributor penetrates the product into the market, he will probably allege, as in *Zohar*, that he owns a property right in the goodwill and that upon termination of the contract he is entitled to compensation for the appropriation of this right by the producer.

The issue of whether the right to goodwill should indeed be acknowledged as a property right is beyond the scope of this article.[16] The Court in *Zohar* and in the *Leibovitz* case[17] concluded that the producer owns the goodwill although the distributor creates such goodwill. Based on these findings, the Court in *Zohar* rejected the distributor's contention.

13. For Israeli law, see, e.g., 1 DANIEL FRIEDMAN & NILI COHEN, CONTRACTS 81, 99-100 (1991) (Hebrew).

14. Indeed, in France the suggestion was raised that distributors should be granted protection similar to that applying when employment contracts are concerned (*see* Carbonneau, *supra* note 7, at 93-94). As stated by Carbonneau, this suggestion has not been adopted by French courts.

15. *Zohar, supra* note 1, at 681-82.

16. *See generally* Miguel Deutch, *The Exclusive Distributor and Protection of Goodwill*, 20 MISHPATIM 525 (1991) (Hebrew) (negating this contention).

17. C.A. L. 371/89, Leibovitz v. A. & Et. I. Eliahu Ltd., 44(2) P.D. 309 (1990).

5. *The "Reasonable Notice" Concept*

As a general rule, Israeli jurisprudence acknowledges that a continuing contract, with unlimited length of time, is not deemed to be eternal, but rather is subject to the right of each party to terminate it at will, on delivery of reasonable notice.[18] American law also follows this approach.[19] English cases have held that no preliminary presumption exists that a contract unspecified in period is subject to termination, rather than being irrevocable; a court must determine this issue according to the regular rules of interpretation.[20] In applying these rules, courts clearly tend to favor the finding of a termination right according to commercial reasonableness.[21] And legal literature has raised a view supporting a presumption against irrevocability.[22]

The Court in *Zohar* derived from this general rule the right of the producer to terminate the contract at will, as well as the right of the distributor to be given a "reasonable notice," when the contract is being terminated.

All five judges in *Zohar* agreed that two interests are to be reflected in the length of the notice. The first is the interest of the distributor in looking for alternate activities and markets following termination of the contract. The second is the interest of the distributor in receiving reimbursement for his investments and in realizing reasonable profits from the deal.

It seems that this approach unduly compiles and compresses two different questions into the concept of "reasonable notice." One question is: once the notice of termination is given, when should it come into effect? The second is: when should the notice be given in relation to the date of the beginning of the contract? This question deals with the issue of whether the distributor is entitled to a minimum period of engagement beginning on the date when the contract was entered into. The second question, contrary to the first one, is concerned with the length of the contract from its beginning, up to the date of its termination, and not with the period of the notice.

The question dealing with the notice period (from the date of its delivery until the termination of the contract) relates to the interest of the distributor in his search for alternatives. Only when notice is delivered does the distributor become aware of the need to seek alternatives, which require a suitable length of time. The question dealing with the length of the contract relates to the interest of the

18. *Zohar, supra* note 1, at 671; C.A. 46/74, Mordob v. Shechtman, 29(1) P.D. 477 (1974).

19. U.S. law, however, recognizes the possibility that in certain relationships (of which producer-distributor relationships might be one, as hereafter detailed), the contract may be terminated at will only after a minimum period. *See* E. ALLAN FARNSWORTH, CONTRACTS 556-57 (2d ed. 1990).

20. Spenborough Corp. v. Cooke Sons & Co., [1967] 1 All E.R. 959 (Eng. Ch.); Martin-Baker Aircraft Co. v. Canadian Flight Equip. Ltd., [1955] 2 All E.R. 722 (Eng. Q.B.).

21. *See* the cases cited *supra* note 20.

22. *See* A.R. Carnegie, *Terminability of Contracts of Unspecified Duration*, 85 LAW Q. REV. 392 (1969).

distributor in that the duration of the contract shall suffice to reimburse him for his investments and realize a profit.

The Court in *Zohar* concluded that the "reasonable notice" concept protects the distributor's interests of seeking alternatives, being reimbursed for his expenditures, and realizing a profit. This author theorizes that the courts are unduly broadening the concept of "reasonable notice." The obligation of giving reasonable notice is meant to relate only to the length of the period of notice (from the date of its delivery to the date of the contract's termination), and to protect the interest of the distributor only in his search for alternatives. The "reasonable notice" obligation derives from general concepts of contract law, referring to contracts unspecified in period. Since each party may dictate the termination of the contract, the party opposing the termination is in no position to plan alternatives until notice is given. Consequently, he is entitled to a reasonable period for reorganization. The "reasonable notice" rule is not meant to guarantee a minimum period of engagement. The "minimum period" allegation is based upon an "external" legal creation, designed to limit the application of the rule that an unspecified term agreement may be terminated any time, at will, and by notice. It is not an "internal" segment of the mechanism dealing with the mode of executing a wish to terminate a contract, a wish whose effect is recognized in the law.

English law seems to takes a similar approach to that taken by the Court in *Zohar*. English law also views the protection of the distributor's interests, other than those relating to reorganization, as a purpose of the "reasonable notice" concept.[23] But American case law does make a distinction between the two "reasonable periods" and their purpose. Thus, in *Cambee's Furniture v. Doughboy Recreational, Inc.*[24] the court determined that the distributor may be entitled "to rely on the supply agreement . . . for a reasonable time so as *to recoup its investment*"[25] and stated that "[i]n *addition*, we have held the distributor is entitled to reasonable notice in order to arrange his affairs or to seek alternate sources of supply."[26] Other authorities also make this distinction.[27] Thus, American law

23. *See* Decro-Wall Int'l S.A. v. Practitioners in Mktg. Ltd., [1971] 2 All E.R. 216 (Eng. C.A.); Martin-Baker Aircraft Co. v. Canadian Flight Equipment Ltd., [1955] 2 All E.R. 722 (Eng. Q.B.).

24. 825 F.2d 167 (8th Cir. 1987).

25. *Id.* at 172 (quoting Famous Brands, Inc. v. David Sherman Corp., 814 F.2d 517, 521 n.6 (8th Cir. 1987)) (emphasis added).

26. *Cambee's Furniture*, 825 F.2d at 172 n.7 (emphasis added); *see also id.* at 173 ("Thus, we hold that a distributor is entitled to a reasonable period to recoup its investment, during which the agreement may not be terminated without good cause. After the reasonable recoupment period has expired, the distributorship agreement becomes terminable at will upon reasonable notice.") (Citations omitted.)

27. *See* J.C. Millet Co. v. Park & Tilford Distillers Corp., 123 F. Supp. 484, 493 (N.D. Cal. 1954) ("[D]istributorship contract indefinite as to time could be terminated by either party only after a reasonable time by giving prior reasonable notice" (footnote omitted), mentioning, after this statement, different lengths of time for each period); *see also* FARNSWORTH, *supra* note 19, at 556 n.34. For the implication of a minimum period of contract as a method for enabling the distributor

does not protect interests other than those relating to the reorganization of the distributor's business by the "reasonable notice" mechanism. Instead, American law protects such interests by the implied term notion, which leads to the inference of a "minimum period" obligation.

Yet the question arises whether this distinction is of any practical or theoretical importance, or whether it is only a matter of semantic accuracy in terminology. In particular, the issue arises as to whether it makes any difference that the decision regarding the interest seeking protection is based on the "reasonable notice" institution or that of the minimum period due to an implied obligation. Some may allege no harm in compressing all the interests into the "reasonable notice" concept. If there is justification for protection, it may be equally granted within either of these institutions, or, alternatively, be denied according to each of them.

Yet, substantial results may accrue from the overloading of the "reasonable notice" institution with inappropriate tasks. Such overloading may lead to legal confusion, since it does not fit the regular expectations held by the merchants regarding the meanings of this institution, namely, its designation to deal only with the interest of gaining time to seek alternatives.

Consider, for example, a case in which the parties have agreed that either side may terminate the contract upon a notice of ninety days. Since the parties have fixed the length of the period between the delivery of the notice and its coming into effect, the "reasonable period" rule has no room in this situation. The parties have agreed which period is reasonable according to their wish. The question is whether this means that by such agreement the parties have also exhausted the interest of the distributor to a minimum period between the formation of the contract and the date of the notice. If the answer is yes, then nothing prevents the producer from giving notice even a month after the formation of the contract. Yet in such a case, the parties have obviously not taken a stand concerning the issue of minimum engagement. The existence or the absence of a right to such a minimum period is to be determined according to the techniques dealing with the finding of implied terms. But the "reasonable notice" rule itself does not relate to this issue, and the provision of the parties regarding the length of the notice does not thereby negate the possibility that a right to a minimum period of contract should be inferred, if justified. On the one hand, the Court in *Zohar* rejected the allegation that an implied term is to be inferred (imposing a duty of compensation). On the other hand, however, the Court based the entire contractual protection upon the period of notice to be given, according to the "reasonable notice" institution.

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to recover his investments in labor and money, see, e.g., Ridings v. Thoele, Inc., 739 S.W.2d 547, 549 (Mo. 1987) (without connecting it to the reasonable notice); Miskimen v. Kansas City Star Co., 684 S.W.2d 394, 399 (Miss. Ct. App. 1984). Yet, a somewhat different approach emerges from Bak-A-Lum Corp. of Am. v. Alcoa Bldg. Prods., Inc., 351 A.2d 349 (N.J. 1976). The court preferred to relate the interest of the distributor to be reimbursed for some new investments to the reasonable period of notice, and not to the notion of the minimum period of the contract's duration. *Id.* at 352.

Thus, the "reasonable notice" concept does not lead to the Court's conclusion. Nor is there room to find an inherent implied condition protecting the interests of the distributor. The answer (although in the negative) lies within the laws and concepts of implied terms, and not within the institution of the "reasonable notice."

The above-mentioned proposition concerning the "reasonable notice" concept may be fortified by another argument. Consider, for example, a case in which the parties have fixed no period of notice. If the distributor is likely to realize his expected profits only after a five-year connection with the producer, and if the producer delivers notice of termination after only a month from the beginning of the agreement, after the distributor has made massive investments, shall the producer then be obliged to give a "reasonable notice" of almost five years ahead? The proper view regarding this issue is that the "reasonable notice" institution does not fit such purposes, and according to its rationale is not designed to protect the distributor's interests in regard to his expected reasonable profits or in regard to reimbursement for investments he made. If the law is to protect such interests, lacking a specific contractual provision, this protection must be allocated within other legal institutions. The "reasonable notice" concept serves to protect only the interest of the distributor in seeking alternatives, following the termination of the contract.

This conclusion contradicts the common opinion of all the judges in *Zohar*, who granted protection within the "reasonable notice" concept, also to the distributor's interest to be reimbursed for his investments and to earn reasonable profits. Moreover, two of the judges[28] found that the "reasonable period" concept serves an even more far-reaching purpose: Its length must be such as to enable the distributor to receive, in addition, due consideration for his efforts and investments to create the goodwill in Israel and for the profits that the *producer* would likely realize in the future, due to this goodwill. These two judges concluded that, in light of these large contractually protected interests, the period of notice that had been delivered was shorter than that required by contract law; ergo, the Court found that the producer had breached the contract.

Two other judges[29] did not deny the protection of this additional interest, but preferred to assign it to the field of unjust enrichment laws. They concluded that notice had been lawfully given and the producer had not breached the contract, taking into consideration the interests that deserve contractual protection in their opinion (the interests to be reimbursed for investments and to earn reasonable profits). The fifth judge, Judge Orr, rejected the claim based upon unjust enrichment laws and stated that a degree of duplication exists between the right of the distributor to protect his interest to realization of profits from the deal and his alleged right to receive a share in the future profits of the producer. In addition,

28. Judge Barak and Judge Beiski.
29. Chief Justice Shamgar and Judge Netanyahu.

the judge concluded that such interest essentially does not deserve any protection at all because: (1) the parties contemplated that the producer would retain ownership of the goodwill; (2) the possibility existed that after the termination of the contract, some of the clients would cease to acquire the producer's merchandise because of their special relations with the distributor; and (3) the distributor himself has increased his own goodwill, along with that of the producer. Nevertheless, Judge Orr joined the opinion that the distributor was entitled to an additional year due to his protected interests to be reimbursed for investments and to earn reasonable profits, and that the producer had breached the contract.

As mentioned above, the "reasonable period of notice" institution should not protect the interest of the distributor to reimbursement for his investments. Thus, the decision in *Zohar* is not justified. Therefore, this institution will obviously not protect the more far-reaching interest of the distributor to participate in the profits of the producer.

B. Contractual Protection of the Distributor's Interests: The Proper Approach

Contrary to the opinion held in *Zohar*, a court should deny the validity of the argument that aims to solve the issue of the distributor's proper protection within the "reasonable period of notice" institution. Yet a court may possibly be requested to grant protection by implying a contract term that prescribes a "minimum period" obligation relating to the period between the formation of the contract and its termination. The principal issue is whether such contractual obligation is to be inferred, and, if the answer is in the positive, which interests of the distributor may be subject to such protection.

The *Zohar* decision indicates that the following interests are worthwhile (besides the interest of receiving a sufficient period for reorganization, which is undoubtedly protected by the "reasonable notice" concept): (1) the recovery of the distributor's investments in money and efforts; (2) the distributor's expectations of a profitable engagement; and (3) the distributor's expectations of receiving a share in the future profits to be made by the producer from the goodwill created by the distributor.

Even if these interests, all or in part, are justified and should be protected, such protection does not need to be founded on the contract, but may be derived from another source: the unjust enrichment laws. If this body of law applies in the event that the court denies the contractual cause,[30] then its very applicability may affect the answer to the contractual issue. The courts base their findings of implied terms upon judicial notions of fairness and reasonableness.[31] Thus, the pressure to apply

30. *See* discussion *infra* part II.C.

31. *See, e.g.*, Gunter H. Treitel, The Law of Contract 193 (1991).

the "implied terms" technique may lessen when the court takes into account the alternative of applying unjust enrichment laws.

A court may prima facie imply two types of provisions regarding a minimum period of engagement: (1) the producer has no right to terminate the contract within a minimum period, and (2) the producer is under a duty to reimburse the distributor if the producer terminates the contract within this period, although termination is deemed to be valid and legitimate.

In respect of these alternate contentions, the length of the minimum period should be prescribed according to the legitimate interests selected by law for protection.

1. *A Nontermination Inferred Clause*

Alternative (1) is not appropriate, although it has gained wide recognition, not only in the *Zohar* case, but also in American jurisprudence.[32] Such an approach means that a producer's notice given before the termination of the minimum period is deemed to be a breach of contract, which entitles the distributor not only to monetary rights, but also to enforcement of the contract, unless an exception to enforcement applies. Israeli law acknowledges an exception to enforcement in cases involving "personal services,"[33] but it is doubtful whether the relationship between a producer and an independent distributor can be classified as such.[34] Hence, alternative (1) may entitle the distributor to enforce the contract and keep the producer engaged for the rest of the minimum period. With regards to damages, the distributor shall be entitled not only to compensation for the loss of his profits, but also to consequential losses like the damage to his goodwill because of the premature severance of the commercial connection.

Alternative (1) does not lead to a desirable result. Besides cases in which the distributor undertakes to purchase minimum quantities, the quality of his activities is difficult to measure. The producer may not be satisfied with the distributor's activity, and yet not be entitled to allege the commission of a breach. Without the distributor's acts constituting a breach, the producer has no right to rescind the contract within the minimum period. Thus, the significance of the implication of

32. *See* authorities cited *supra* notes 26, 27. The protected interest is seemingly limited to the contractual period required in order for the distributor to be reimbursed for the investments in money and time, and does not include the interest to achieve a profitable deal. *See also Zohar, supra* note 1, at 702.

33. Section 3(4) of the Contracts (Remedies for Breach of Contract) Law, 5733-1973, SEFER HUKIM [S.H.] 16.

34. Judge Barak in *Zohar, supra* note 1, at 704, assumes that at least in certain cases, enforcement of the contract between the distributor and the producer may be granted. It seems that as Judge Netanyahu envisages the relationships between the distributor and the producer as fiduciary relations (*see infra* note 35), she would deny the right to enforcement. Concerning the commercial agent, the well-established approach in Israeli law is that he is under a fiduciary duty toward the producer. *See* C.A. 605/88, Tabori Ltd. v. Maianot Hagalil Ltd., 45(2) P.D. 1, 13-14 (1991), and authorities cited within.

a nontermination clause is that the producer is legally tied to the distributor for a specified period, an obligation the producer did not explicitly agree to undertake.[35]

Obviously, the producer may promise a minimum period, but such a promise must be inferred according to the regular tests to be carefully applied in suitable cases, upon examination of the concrete deal and its circumstances. No consideration inherently established in the situation necessarily leads to the assumption that a producer intends to promise a minimum period that would prevent the producer from contractually terminating the deal and thus subjecting itself to the sanctions deriving from a breach of contract. The "natural inference" opposes such a conclusion. In the typical case, the distributor is probably aware of the absence of stability and assurance latent in a contract lacking a minimum period clause. If such a period has not been promised, it is often because the parties have not reached a commercial agreement regarding this question, and the producer refused to promise a minimum period. The distributor, therefore, did not pay for such a restriction—so why should he be contractually entitled to it? Usually the omission in the contract is intentional. Thus, no room exists for finding an implied minimum period obligation as a general and inherent assumption. Nothing prevents the inference of a minimum period obligation in concrete cases on the basis of appropriate evidence, but such an obligation is not to be assumed a priori.

From this conclusion, however, it should not be inferred that the producer has no limitations on terminating a contract unspecified in period. The rule prescribing that rights are to be exercised in good faith applies in Israeli law.[36] American law also acknowledges this phenomenon as an effect of the general implied covenant of good faith and fair dealing.[37] This rule may restrict termination of the contract, absent a relevant motive. Yet, the restriction upon the right to terminate the

35. Judge Netanyahu (in *Zohar, supra* note 1, at 703) stated that the relationships between the producer and the distributor are based upon trust. Thus the need to avoid a compulsory long-term connection between these parties justifies a result that does not expand the contractual protection to the interest of the producer to be granted a share in the producer's future profits, due to the goodwill that had been built by the distributor. Whether fiduciary relations are indeed established between an independent distributor and the producer is doubtful since the distributor does not act as a legal agent of the producer. Yet, Judge Netanyahu's opinion indicates the need not to impose upon the parties an undesirably long connection. This argument may, in principle, also justify the denial of contractual protection to other interests in the absence of sufficient specific ground to infer such protection.

36. *See* secs. 39 and 61(b) of the Law of Contracts (General Part), 5733-1973, S.H. 118; *see also* C.A. 241/81, Shemen Taasiot v. Hebrat Tavlin Ltd., 39(1) P.D. 561, 578 (1985); C.A. 499/81, Uda v. Haduri, 38(4) P.D. 729, 743 (1985); C.A. 700/81, Paz v. Paz, 38(2) P.D. 736, 742 (1984).

37. *See* Association Group Life, Inc. v. Catholic War Veterans of the U.S.A., 293 A.2d 382, 384 (N.J. 1972); Bak-A-Lum Corp. of Am. v. Alcoa Bldg. Prods., Inc., 351 A.2d 349, 352 (N.J. 1976). It should also be mentioned that in the case of *Bak-A-Lum Corp.* the lack of good faith in the act of termination served as one of the considerations affecting the reasonable period for termination. The approach of the Israeli Court in *Zohar* was similar. For a long period the producer concealed from the distributor the fact that it had decided to terminate the contract, and the lack of good faith deriving from such omission was considered by the court while prescribing the reasonable period.

contract, according to the good faith rule, has its weakness. The rule prevents improper manipulations, but the very insistence of the producer to realize his right to terminate the contract shall not of itself deny the effect of termination, according to the Israeli law.[38]

The conclusion, then, is that no minimum period clause preventing termination should be generally presumed, either as a separate clause, or within the institution of "reasonable notice." Nevertheless, the legal remedies are not limited to a contractual protection of the distributor's interests, but include as well the possibility of applying unjust enrichment laws. Thus, denial of the allegation claiming the implication of a nontermination clause, in light of its far-reaching preference of the distributor's interests, does not mean that the law neglects the distributor's interests, but rather that they are to be considered within a more balanced framework.

2. *An Inferred Contractual Duty to Reimburse the Distributor*

A minimum period term should not generally be inferred without concrete factual support. Notwithstanding, is there a justification for inferring a more restricted contractual obligation that provides the distributor with a right to monetary reimbursement for his investments and for the loss of expected profits because the period of the contract was actually shorter than the reasonable minimum period he expected?

The approach implying a contractual right for distributors to be reimbursed for investments in time and money, because of the insufficient period that has elapsed until termination of the contract, may indeed be found in American common law.[39]

Even though the implication of such a term involves a more restricted intervention in the contents of the agreement between the parties, it may hardly be justified. As regarding the loss of profits, the producer, it is assumed, did not promise a specific period of engagement. Why should it be inferred that the producer promised the distributor a profitable engagement at all? As regarding a possible obligation to reimburse the distributor it seems that the application of the unjust enrichment laws, with their defenses, balances, and restrictions, better regulates this issue, since the justification for such reimbursement is based on the rationale underlying these laws.

C. Distributor's Protection by Means of Unjust Enrichment Laws

1. *The General Framework and Court's Attitude in the* Zohar *Case*

Two judges in *Zohar* (Chief Justice Shamgar and Judge Netanyahu) granted the distributor a remedy within the unjust enrichment laws, in order to protect the distributor's interest in receiving a share in the future profits that the producer would likely earn from the goodwill created by the distributor. These judges

38. *See, e.g.*, C.A. 323/80, Iltit Ltd. v. Bank Leumi LeIsrael, 37(2) P.D. 673, 685 (1983).
39. *See* Gibbs v. Bardahl Oil Co., 331 S.W.2d 614, 621-22 (Mo. 1960).

concluded that the law of contracts does not assure this interest. Two of the other judges (Judge Barak and Judge Beiski) rejected the unjust enrichment claim, since they decided that this interest is already protected by contract.[40] According to all the judges, the distributor's interests for reimbursement and making a profitable deal are already protected by the contract.

At this stage, this article deals with two questions:

(1) May unjust enrichment laws intervene and provide the distributor with protection not granted by the contract?

(2) If the answer is in the affirmative, which interests may the unjust enrichment laws protect?

Contrary to the Court's conclusion in *Zohar*, courts should not infer a contractual protection regarding the distributor's expectations to gain profits from the deal. Further, a court should not grant any contractual protection to a distributor's expectations to a share in the producer's profits derived from the goodwill. Yet the question now posed is different: It is assumed that the distributor received no promise concerning a minimum period. Nevertheless, the distributor expected his interests to be satisfied through an appropriate period of engagement, and the distributor's activity was conducted on the basis of this expectation. The distributor argues that he has produced or has participated in the production of a new asset: the goodwill of the product in the local market. Despite the fact that he has created the asset, he is not its owner, since the producer is regarded as such.[41] The distributor expected to be rewarded for the creation of the asset from the current profits to be made during a sufficiently long period of contract. These expectations have failed. If contractual protection of the interests accompanying this activity is negated, as it should be,[42] should unjust enrichment laws provide the distributor with a proper remedy, canceling out the results derived from the lack of contractual protection?

2. *The Framework of the Relation Between Contract and the Unjust Enrichment Laws: Applicability-Governing Principles*

Contractual relations are established between the producer and the distributor. May unjust enrichment laws "invade" the contractual territory, supplementing arrangements not prescribed by contract? The operative question is to what extent are the unjust enrichment laws to be envisaged as residual. This article now examines the basic structure of the relation between contract and the applicability of unjust enrichment laws to producer-distributor relations. Specifically, this discussion deals with the question of whether unjust enrichment laws are applicable at all, in light of the existence of the contract and its arrangements.

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40. As mentioned above, one of the judges, Judge Orr, did not actually conceive this interest as deserving protection at all. *See supra* part II.A.5.

41. *See also* discussion *supra* part II.A.4.

42. With the exception of the interest to be given a sufficient period for reorganization of activities, which, as mentioned, is protected by the "reasonable notice" concept.

In the past, Israeli jurisprudence has concluded that the very existence of contractual relations between the parties negates the supplementary application of unjust enrichment laws.[43] However, in 1988, the Israeli Supreme Court, in a majority opinion, deviated from this approach.[44]

According to the majority opinion, the existence of a contract is not decisive per se. The arrangements of the contract are to be analyzed and conclusions are to be derived from the actual attitude of the contract toward the relevant interests. The unjust enrichment laws can be compared to an eagle that spreads its wings over other bodies of law, including contract law. The only question is whether the application of unjust enrichment laws contradicts notions of justice, like the principle that a party should not be granted double compensation.[45]

It is apparent that, in the event the contract regulates the interest in question by prescribing that the enrichment on the account of the interest has been duly achieved according to contract, unjust enrichment laws do not apply. Such enrichment is "just" since it is part of the contractual consideration. Unjust enrichment laws may grant further remedy to the distributor, following termination of contractual relations between him and the producer, when either of two principal situations exist, which are discussed in the following paragraphs.

The first situation is when the contract prescribes prohibition of the enrichment, or if the enrichment results from a contractually prohibited act. Thus, if the parties in a specific case prescribe a minimum period clause, and the producer does not honor this obligation, then the distributor shall be entitled either to compensation for his losses according to contract law, because the period has been shortened, or he shall be entitled to the profits gained by the producer, according to unjust enrichment laws. Obviously, the amount of loss subject to recovery as compensation may not necessarily be equal to the profits that will be restituted. The distributor may have been losing money so no compensation will have accrued. But the producer may still profit from the termination of the contract when it saves reductions in the selling price he has granted to the distributor according to contract, as in *Zohar*.

Thus, the unjust enrichment laws may apply where the producer breaches the

43. *See* C.A. 146/68, Dolgin v. Yeshuah, 22(2) P.D. 302, 304 (1968); C.A. 160/60, Elwa Ltd. v. Aloni, 15 P.D. 1757, 1764 (1961); C.A. 437/80, Zigel v. Rozner, 37(4) P.D 29, 39 (1983).

44. F.H. 20/82, Adres Ltd. v. Harlo & Jones G.M.B.H., 42(1) P.D. 221 (1988); *see also* Daniel Friedmann, *Restitution of Profits Gained by Breach of Contract*, 104 LAW Q. REV. 383 (1988) (a note on this case). *Adres* was followed by the Supreme Court in C.A. 588/87, Cohen v. Shemesh, 45(5) P.D. 297 (1991).

45. Another contention may successfully be raised, stating that in the context of the issue being discussed—the distributor's rights following upon termination of the contract—the question arises only after the contract ceases to exist. Thus the former existence of the contract might not prevent the applicability of unjust enrichment laws, even according to the traditional approach, which tends to negate the application of unjust enrichment laws in contractual situations. *See also Zohar, supra* note 1, at 694. For the rule stating that according to the traditional approach, the unjust enrichment laws may apply following termination of the contract, see DANIEL FRIEDMANN, THE LAW OF UNJUST ENRICHMENT 67 (1982) (Hebrew).

contract by giving insufficient notice of termination, contrary to the contract. The profits to be restored in this case are those accruing to the producer from the shortening of the period of the contract, in comparison with the period agreed upon. In such a case, although the contract itself provides the distributor with a valid claim, unjust enrichment laws protect the distributor's interests, since the producer's enrichment is unlawful. The unjust enrichment laws may thus provide the distributor with a remedy that the contract itself does not supply, or that contract law does not provide. Such is the law now in Israel.[46] In contrast, in the Anglo-American system divided opinions exist regarding the legal situation of an aggrieved party's right to restitution of benefits accrued to the breach or due to the breach.[47]

The second category on which the producer may be found accountable under unjust enrichment laws includes cases in which the contract does not regulate the justification of the producer's enrichment due to the goodwill that the distributor has produced or due to distributor's contribution to its creation. When no legal source actually provides a positive or negative answer regarding the legitimacy and justification of an enrichment on the account of another, Israeli authorities state that the Court is to decide the issue according to notions of justice.[48]

Therefore, the question is whether the typical producer-distributor contract is to be considered silent regarding the interests of the distributor accruing from the creation of the goodwill. Is there a lacuna in such a contract concerning this issue? Three of the judges in the *Zohar* case rejected the application of unjust enrichment laws in the circumstances of this case.[49] Their opinion, however, is based upon an approach that differs sharply from the opinion advocated in this article. They concluded that all justified[50] interests of the distributor are already protected by the requirement to give a reasonable period of notice. Obviously, when the distributor lawfully gives notice, these three judges would find no room for an additional intervention of unjust enrichment laws. In such case, the contract is not silent regarding the relevant interests, and it regulates their protection as part of the contract. Therefore, when the producer terminates the contract by delivering due notice, then the advantages accruing to the producer from the goodwill created

46. According to F.H. 20/82, Adres Ltd. v. Harlo & Jones G.M.B.H., 42(1) P.D. 221 (1988).

47. *See* ROBERT GOFF & GARETH JONES, THE LAW OF RESTITUTION 454-58 (3d ed. 1986); 1 GEORGE E. PALMER, LAW OF RESTITUTION 437 (1978); Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504 (1980); E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145 (1970). Undoubtedly, the breacher shall be liable for restitution if the obligation breached is one of a fiduciary type. *See, e.g.*, Friedmann, *supra*, at 551-53; *see also* FRIEDMANN, *supra* note 45, ch. 14. Yet, it is doubtful whether the producer-distributor relationships, as opposed to those between the producer and a commercial agent, should be classified as fiduciary ones. *See supra* notes 36, 37.

48. For Israeli law, see FRIEDMANN, *supra* note 45, at 51; C.A.L. 371/89, Leibovitz v. A & Et. I. Eliahu Ltd., 42(2) P.D. 309, 322-23 (1990).

49. Judges Barak, Beiski, and Orr.

50. As mentioned above, one of these three judges, Judge Orr, identified the justified interests in a way different from the other two judges.

are gained by the producer lawfully, and his enrichment is just. The producer has paid for the acquisition of the distributor's interests and expectations by undertaking the minimum period limitation ensuring these interests. The contract contains no lacuna regarding the legality of the enrichment, but rather it prescribes that the enrichment is just; otherwise the contract would grant the distributor double protection.[51] Hence, the contract may regulate and decide the justification to the enrichment either directly, through an explicit or implicit provision dealing with it, or indirectly, by the "purchase" of the relevant interest according to contract. In both cases, unjust enrichment laws do not apply. According to the author's opinion, which differs from that of the Court in *Zohar*, the typical contract should be envisaged as providing protection to only one of the possible interests, and therefore, the question still remains whether unjust enrichment laws may provide protection to other justified interests.[52]

Two judges in *Zohar*[53] indeed found that the contractual source does not protect all the interests of the distributor. It protects his interest in receiving reimbursement of his investments and the gaining of reasonable profits, but it does not cover his interest in receiving a share in the producer's future profits derived from the creation of goodwill. According to these judges, the contract does not negate residual protection by unjust enrichment laws, concerning the interest unprotected by the contract.[54]

The opinion of the Court in *Zohar* regarding the structural relations between contract and unjust enrichment laws suits the proper approach:[55] in the event the contract does not regulate, either implicitly or explicitly, the legitimacy of the producer's enrichment on the account of a specific interest of the distributor, the way is left open for the examination of the application of the unjust enrichment laws.

It seems that the two judges in the *Zohar* case (Judge Barak and Judge Beiski) who supported the expansion of contractual protection to the distributor's interest to receive a share in the producer's future profits derived from goodwill, were influenced by a tendency to reduce the applicability of unjust enrichment laws in parallel with contractual protection.[56] They found this interest deserving of protection and preferred to grant it through the contractual institutions, avoiding

51. *See also Zohar, supra* note 1, at 685.

52. The protected interest should be to receive time for reorganizing the business activities of the distributor.

53. Chief Justice Shamgar and Judge Netanyahu.

54. Another case on which the contract may generally (but not always) be envisaged as denying a right to receive a share in the producer's profits is established, according to these judges, when the length of the contract has been fixed by the parties. *See Zohar, supra* note 1, at 701. They obviously considered such prescription by the parties as often intended to establish a final arrangement of the distributor's interests concerning the contract's termination.

55. However, this only concerns the structural aspect, and does not regard the actual protection to be supplied by each cause.

56. *See Zohar, supra* note 1, at 704-05 (statements of Judges Barak and Beiski).

the troublesome dealing with the issue of the relation between contract and unjust enrichment laws. This approach, therefore, is still influenced to some extent by the traditional view supporting the a priori inapplicability of unjust enrichment laws in a case where a contract regulates the parties' relationship. Although these two judges explicitly acknowledged the deviation from the traditional approach in the Israeli law, their tendency was clearly to limit the situations in which the unjust enrichment law should apply in contractual cases.

3. *Application of the Framework of the Structural Relation Between Contract and Unjust Enrichment Laws on the Specific Interests*

This section designates the relevant interests whose protection by unjust enrichment laws may be "tolerated" by the typical contract. This discussion does not, however, deal with the actual and final justification for the protection of a discussed interest, but deals only with the applicability (as distinguished from the application) of unjust enrichment laws for the protection of a concrete interest, in light of the contractual arrangements.

It is useful to reiterate the interests of the distributor that, according to *Zohar*, may accrue as a result of termination of the contract:

(a) the need to seek alternate activities;
(b) reimbursement for investments expended in the creation of the goodwill;
(c) the reasonable profits expected to be gained from the deal; and
(d) the acquisition of a share in the profits to be made by the producer due to the goodwill.

This article has already argued that in a typical contract no term concerning a minimum period to the contract is to be inferred at all unless specific indications lead to a contrary answer. Interest (a) above—and this interest alone—is contractually protected by another factor: the "reasonable notice" institution.

According to such approach, protection of interests (b)-(d) above is not granted at all by contract. In *Zohar*, as mentioned, two judges (Chief Justice Shamgar and Judge Netanyahu) opined that interests (a)-(d) were already protected contractually, and therefore rejected the claim based upon unjust enrichment laws.

One judge—Judge Orr—agreed with the above-mentioned judges regarding interests (a)-(c), but envisaged interest (d) as duplicating interest (c), and therefore unprotectable. The other two judges (Chief Justice Shamgar and Judge Netanyahu) opined that interest (d) was beyond contractual protection, but protected by unjust enrichment laws.

The denial of contractual protection to interests (b)-(d) may even be classified as a positively implied rejection of such protection, made by the parties to the contract, and not as just a lacuna.[57] Even if the contract definitively rejects contractual protection for a specific interest, it does not necessarily also reject a remedy

57. *See* discussion *supra* part II.B.1.

based upon another source of law—the unjust enrichment laws. Sufficient grounds are present to imply that a producer has no inherent intention of providing the distributor with the far-reaching protection of contract law, unless such protection is indicated by the circumstances. These grounds focus on the unreasonableness of a conclusion whereby the producer might find itself contractually bound to an unsatisfactory distributor for a long period, unless specific circumstantial evidence is supplied for such a finding.

But these grounds do not yet lead to the conclusion that the parties intended to deny a differently characterized protection through unjust enrichment laws. Unless the producer has purchased an interest within the consideration of the contract,[58] and assuming that a contract does not protect interests (b)-(d),[59] no prior objection is to be supported preventing their protection by the unjust enrichment laws, if such protection is indeed justified by such laws themselves.

Clearly, if application of the unjust enrichment laws grants multiple remedies, the multiplicity itself is sufficient to deny their application. The problem of multiplicity may arise regarding interests (c) and (d). As Judge Orr asked: Why should the distributor enjoy both the protection of his interest to the profits he would have made and a share in the future profits of the producer? Are not the expected profits of the distributor due to the fact that he created the future earnings of the producer?

The answer depends upon the type of profits referred to. In the *Zohar* case, the two judges who cumulated unjust enrichment laws to the contractual protection, Chief Justice Shamgar and Judge Netanyahu, found that the "reasonable profits" of the distributor had already been achieved within the period that had passed until the termination of the contract, but that satisfaction of the distributor's interest to a share in the future earnings of the producer required an additional period.

Actually, if the interest to the "reasonable profits" is calculated without taking into account the creation of the goodwill, there is indeed no multiplicity of remedies. But Chief Judge Shamgar and Judge Netanyahu did not specify the meaning of "reasonable profits" in this context, and thus the issue of multiplicity, in relation to the Court's opinions, is not assessable.[60]

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58. Thus, as Judge Netanyahu has mentioned, if the producer undertook to provide the distributor with social benefits, or with high-rate commissions in comparison to usage, such undertakings may be conceived as designed to compensate the distributor for his interests following termination. *See Zohar, supra* note 1, at 694.

59. Nonetheless, as aforementioned, even when a contract does protect a given interest, then if the contractual duty was breached (as when a minimum period obligation has been dishonored), unjust enrichment laws may also apply, granting a better remedy to the distributor.

60. Judge Netanyahu has indeed tried to contradict the duplicity contention, stating that each cause deals with another interest: the contractual cause, with the interest of the distributor to a profitable deal; the unjust enrichment cause, with the earnings of the producer. Yet, if the contractually protected interest to a profitable deal includes the profits to be made by the distributor due to the production of the goodwill, then, assuming the producer has honored the contractual obligation, the problem of duplicity remains. *See Zohar, supra* note 1, at 695.

4. *The Application of Unjust Enrichment Laws and Its Results*

The pattern of the relation between unjust enrichment laws and the contractual arrangements has been configured above. In addition, the relevant interests of the distributor, whose protection by unjust enrichment laws is not precluded a priori, were allocated.[61] Yet by assuming that the contract, or other principle (like the need to prevent multiplicity of protection) does not negate the protection of a specific interest by the unjust enrichment laws, it may not yet be concluded that the application of these laws leads to a positive answer concerning protection. The above conclusion only removes a preliminary obstacle that might have otherwise accrued.

This article now discusses the solution granted by unjust enrichment laws themselves, following the producer's termination of the contract.

a. The Basic Cause

For what reason, if any, should the distributor be entitled to restitution regarding his creation of the goodwill? The constitution of a right to restitution requires the establishment of a good legal cause according to the categories that have been developed within the framework of unjust enrichment laws. Such good reason is present in cases, like *Zohar*, in which the distributor has indeed created or participated in the creation of the goodwill of the product in the local market: the distributor participates in the creation of an asset (the goodwill) as a byproduct of his function as a distributor. The producer is obviously not indifferent to this activity since he profits from it. The distributor acts on the basis of certain expectations and assumptions. He expects to be remunerated for his activity by the profits he will make during the run of a contract of a sufficient length of time to enable him to do so. However, these expectations do not reach the level of a legal contractual right, since the termination of the contract in the typical situation is legal. As mentioned, no "minimum period" is inherently to be inferred, and no reimbursement term may be allocated. Yet these expectations still have some force, and they deserve the attention of the law. The goodwill was created and granted to the producer under the assumption—ultimately proven wrong—that the contract would last long enough for the distributor to satisfy his interests. When this assumption fails, the basis for granting the goodwill made by the distributor is nullified. One of the acknowledged causes for restitution is the failure of a condition that accompanied the transfer of an advantage to the other party.[62]

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61. This is subject to the problem of duplicity regarding interests (c)-(d) mentioned above, whose answer depends upon the definition of the "profits" being taken into account.

62. In Israel, see FRIEDMANN, *supra* note 45, at 386. The issue to what extent this rule also applies to services rendered is problematic in British law, although that law supports such a conclusion in appropriate cases. For the discussion concerning services granted under a wrong assumption that a contract will materialize, see GOFF & JONES, *supra* note 47, at 506; *see also* FRIEDMANN, *supra* note 45, at 387.

b. The Application of Defenses Against Restitution

Can the producer allege that the distributor is making a voluntary contribution, or that a distributor is acting officiously in conferring the benefit, claiming that such a notion justifies the denial of restitution? The answer is in the negative. In Anglo-American law,[63] for example, and to some extent also in Israeli law,[64] the officious granting of an advantage does not entitle one to restitution. Nevertheless, if a party accepted receipt of the advantage in full awareness of the other party's intention to grant it ungratuitously, the beneficiary may be accountable for restitution, although its consent did not reach the level of contractual obligation.[65] Even silence may be considered as consent where the beneficiary was aware that the benefactor expected to be reimbursed, and where the beneficiary failed to warn the benefactor about its opposition to paying the benefactor for the advantage.[66]

Such is the situation in the issue under discussion: The distributor does not act gratuitously, but expects to be reimbursed; the situation is a commercial one; and the producer is aware of the expectations of the distributor. The producer even frequently requests the distributor to increase the goodwill, or encourages him to do so. The result is that the producer accepts receipt of the service, while he is aware of the distributor's expectations regarding remuneration. The defense against restitution should therefore be rejected.

Another central rule of unjust enrichment laws is that activities performed to promote the aims and advantages of the acting party do not entitle that party to restitution from other parties who may benefit from the activities.[67] The distributor functions in order to improve his own interests in distribution; the creation of the goodwill is merely a byproduct of these efforts. May the producer allege that since the creation of the goodwill redounds to the benefit of the distributor, he is not entitled to reimbursement?

This rule obviously does not apply in our case. The creation of the goodwill

63. For the application of the principle in British law, see GOFF & JONES, *supra* note 47, at 42-44; *see also* SAMUEL J. STOLJAR, THE LAW OF QUASI-CONTRACT 185 *et seq.* (2d ed. 1989); for American law, see RESTATEMENT ON RESTITUTION § 2 (1937); FRIEDMANN, *supra* note 45, ch. 5.

64. The general rule denying restitution when an officious granting is concerned has been adopted by the Israeli precedents. *See, e.g.*, C.A. 16/65, Burger v. State of Israel, 19(2) P.D. 228, 238-39 (1965); *see also* FRIEDMANN, *supra* note 45, ch. 5. Yet, the Israeli statute on restitution, the Unjust Enrichment Law, 5738-1979, sec. 5, S.H. 42, provides a specific arrangement, entitling a party to restitution when a voluntary granting was made, with the purpose of keeping the other's health or property.

65. The law in Israel regarding this issue is similar to that of the Anglo-American system. For Israeli law, see FRIEDMANN, *supra* note 45, at 129-43; for Anglo-American law, see GOFF & JONES, *supra* note 47, at 43, and Idaho Lumber, Inc. v. Buck, 710 P.2d 647, 655 (Idaho Ct. App. 1985). Yet, in the case of Puttkammer v. Minth, 266 N.W.2d 361, 365 (Wis. 1978), the approach of the court was less favorable towards such an argument.

66. For Israeli law, see FRIEDMANN, *supra* note 45, at 131-32.

67. FRIEDMANN, *supra* note 45, at 115. For American law, see John P. Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409 (1974); for British law, see GOFF & JONES, *supra* note 47, at 39-42.

does not come to the producer as a windfall, but rather as the result of a common effort. The distributor acts not only for his own sake, but also for the promotion of the common interest,[68] at the request of the producer.[69] Therefore, this proviso regarding the right of restitution does not apply here.

The law regarding the application of the unjust enrichment cause can be summarized as follows: the distributor creates, or participates in the production of, a new asset—the goodwill—as a by-product of and incidental to his marketing activity. This asset benefits the producer since it enriches itself with the goodwill being created. Assuming that no consideration has been promised to the distributor vis-à-vis this creation, and assuming that no minimum period of engagement has been promised, explicitly or implicitly, to cover the legitimate distributor's interests, then the result is that the distributor provides the producer with a benefit for which the distributor has not been duly paid if the duration of the contract does not meet his reasonable expectations. Certainly, the distributor did not expect to receive separate remuneration for his share in the creation of the goodwill, but neither did he agree to build the goodwill gratuitously. His aim was to be repaid out of the profit he expected to earn from the arrangement, had it lasted for a sufficient length of time.[70] The assumption now, as mentioned, is that the distributor has no legal right to challenge the termination of the contract due to any minimum period clause, since he did not acquire contractual protection regarding such a minimum period. Nevertheless, he expected such minimum period to be maintained as a precondition to granting the goodwill, and unjust enrichment laws should honor these expectations, although such expectations did not suffice to establish a contractual cause.

The justification for such an opinion clearly emerges, for instance, in a case in which the distributor made vast investments during the first months of the arrangement, aiming to promote the penetration of the product into the market, and immediately after this activity the producer terminated the contract. Notions of justice (which play a central role in the application of unjust enrichment laws) obviously do not tolerate a result in which the distributor shall not receive a proper protection in such circumstances.

68. For Israeli law, see FRIEDMANN, *supra* note 45, at 118-23. This exception has also been acknowledged in American law. *See* Puttkammer v. Minth, 266 N.W.2d 361 (Wis. 1978). Following examination of previous cases, the court stated: "These cases are exceptions to the general rule. They rest on the proposition that interests of the owner and occupant or procurer of services are closely intermingled and the benefits of the transaction are by prearrangement to be shared between them." *Id.* at 365; *see also* Idaho Lumber, Inc. v. Buck, 710 P.2d 647, 661 (Idaho Ct. App. 1985). A similar nexus of interests exists in our discussed issue.

69. With regard to the factor of request, on behalf of the defendant, as an element that might provide restitution in such cases, see GOFF & JONES, *supra* note 47, at 41.

70. Obviously, a difficult question here is what should be regarded as a "sufficient period" for this purpose. This is a separate issue, which is dealt with below in part II.C.4.c.i.

c. The Protected Interests and the Amount of Restitution: The Features of the Solution

Once a court concludes that the distributor's expectations are protected by unjust enrichment laws, the question turns to the amount of the restitution and which, if any, of the distributor's interests shall be granted protection.

i. *The Protected Interests.* Courts will find grounds for restitution when the distributor incidentally participates in the production of an asset (the goodwill), for which the contract did not reimburse him. The goodwill is created according to the producer's request and acceptance. Based on these rules, the result should be that the distributor is entitled to a *quantum meruit* for the creation of the goodwill. Thus, the enrichment of the producer, with regard to the goodwill, should be measured, not in terms of the profits that the producer is likely to earn because of the goodwill, but in terms of the money that the producer has saved, that is, the due price of the service (the creation of the goodwill) the producer received without paying for it. The following discussion expands the justification for such a conclusion.

The goodwill in the legal market is built as a result of a production process to which both the producer and the distributor contribute. The producer contributes the quality of the product, the punctuality in supply, the quantities required, and the goodwill the product enjoys in other countries.[71] The distributor contributes the efforts and the monies required in order to effect the penetration of the product into the local market. According to general principles, independent cooperation in the production of an asset may lead to co-ownership of the asset.[72] Yet, co-ownership is not a factor in the situation under discussion. Authorities have prescribed, with a high degree of accord, that any goodwill that has been created is owned exclusively by the producer,[73] and such a conclusion indeed meets the regular parties' expectations. Yet the distributor is not just transferring an asset to another party without an existing framework to the relationship. The distributor is acting at the service of the producer. His maximal protected interest is to be paid for his services and his investments. In light of this view, the distributor does not own any protected interest in the profits derived from the future goodwill. The appropriate *quantum meruit* should be calculated by taking into account a variety of factors that may include: the difficulty of introducing the specific product to the market; the investments being made; the width of the market; the length of time needed to perform the task; and (but only as one of the factors) the profit the producer is likely to make as a result of the goodwill.

Upon further analysis, the system for assessing *quantum meruit* according to unjust enrichment laws breaks down into two different patterns of calculation.

71. This last element is undoubtedly one that influences the prospects of the improvement of the goodwill on the local scene.

72. In Israeli law, according to secs. 4 and 6 of the Movable Property Law, 5731-1970.

73. C.A.L. 371/89, Leibovitz v. A & Et. I. Eliahu Ltd., 42(2) P.D. 309 (1990).

One focuses on the value of the advantage provided to the grantee; the other measures the fees according to the costs to the grantee had he hired a similar service from someone else.[74] The proper method to be applied in our issue is the latter, since the distributor's services were granted at the will of the producer, without an agreement upon the price. The benefit received by the producer is actually the price it ought to pay, should the parties reach an agreement, and not the reasonable cost of such a service.[75]

The value of the goodwill may play a role in the calculation only as one of the relevant factors, but not as an exclusive one. Hence, the unjust enrichment laws do not protect the interest of the distributor to receive a share in the producer's profits due to the goodwill. This conclusion is contrary to the opinion of Chief Justice Shamgar and Judge Netanyahu, in *Zohar*, who found it appropriate to protect this interest within the unjust enrichment laws.

The proper model regarding the protection of the distributor's interests should thus be as follows: The application of unjust enrichment laws is justified by the failure of the distributor's reasonable assumption, according to which the contract shall last a "sufficient period." The sufficient period should be established according to the period in which the distributor might have reasonably been remunerated for the creation of the goodwill through the overall profits of the arrangement, up to a sum equal to the *quantum meruit* sum.

The length of the sufficient period, namely, the reasonable assumption underlying the creation of the goodwill, should be prescribed according to the reasonable expectations prevailing on the date the agreement was formed. The date of the formation of the agreement should be the relevant date on which the length of the sufficient period is finally determined. The law should also protect the legitimate interests of the producer. Although the law obliges the producer to reimburse the distributor, the producer has not promised the distributor such a profitable arrangement, nor has the producer undertaken to reimburse the distributor for the

74. *See* FRIEDMANN, *supra* note 45, at 425.

75. This conclusion is supported by the opinion of Prof. Friedmann concerning the system for assessing *quantum meruit* in general. *Id.* He also argues that the advantage accruing to a party that has received a service upon its request is that the request was fulfilled, and thus the costs of such service are the appropriate measure to the assessment of restitution. American law appears similar. *See* Idaho Lumber, Inc. v. Buck, 710 P.2d 647, 658 n.5 (Idaho Ct. App. 1985) (emphasis in original):

> If the reasonable value of the materials and labor furnished by Idaho Lumber in making the improvements were less than the value of the benefit bestowed upon Buck, then, of course, the lesser figure would be the maximum amount of Idaho Lumber's recovery from Buck. This is so because once Idaho Lumber has been paid—from any source—for the value of the labor and materials furnished, it would not be *unjust* for Buck to retain the full value of the benefit bestowed upon him.

It should be emphasized that the matter being discussed involves a case of service supply and is not a situation analogous to the supply of an asset. The distributor is indeed producing an asset (the goodwill), but the right to the goodwill is immediately placed in the ownership of the producer, and thus the distributor is not to be deemed as transferring an existing asset to the producer's ownership. Moreover, the distributor is acting in relation to materials owned by the producer. The "material" for the production of the goodwill is being supplied by the producer (the product's quality and the supply of the products themselves), while the distributor is conferring services, using these materials.

creation of the goodwill. The allocation of risks concerning the issue of restitution should be made on the date of the formation of the contract, since that is the date on which the producer changed its position by entering into a contractual obligation. The expectations and assumptions should thus be crystallized on the date of the agreement.

This conclusion is similar to that applicable to contractual allocation of risks. Nevertheless, it should be reemphasized that this crystallization of the expectations is not based upon the contractual doctrines of risks allocation, but upon the fact that on the date on which the contract was formed, the producer changed its position, and after that date it had no right to turn the wheel back.

In determining whether an enrichment is just or not, a court should take into account the legitimate expectations of both parties.[76] Also, a court should maintain a process of balancing the mutual interests regarding the cause based upon the unjust enrichment laws, and not only concerning the contractual allocation of risks. As a result of this balancing, the minimum period of the contract that served as the condition to the creation of the goodwill by the distributor should be determined on the date of the formation of the contract. This period is therefore not flexible, and should not vary according to the distributor's actual success or failure in realizing the reasonable expectations concerning the period within which he shall be reimbursed for creating the goodwill.[77]

In light of the aforesaid, it is clear that contrary to the approach in *Zohar*, the unjust enrichment laws do not protect per se the distributor's interest in making a profitable arrangement, or even the interest in being reimbursed for investments that enable the creation of the goodwill. However, the law protects the interest of the distributor to be paid a *quantum meruit* for his contribution to the creation of the goodwill.

ii. *The Amount of the Restitution.* Several complicated questions arise concerning the calculation of the *quantum meruit*. The first to be considered is how should the actual profitability of the distributor's investments affect his rights. It

76. FRIEDMANN, *supra* note 45, at 692-93. In this context, it should be recalled that change of position is recognized as a general defense in restitution. *See* RESTATEMENT OF RESTITUTION § 142 (1937); GOFF & JONES, *supra* note 47, ch. 39. The policy latent in this general rule supports this author's conclusion concerning the date on which the length of the minimum period should be determined.

77. This approach is contrary to the basic view of the British court in the case of Decro-Wall Int'l S.A. v. Practitioners in Mktg. Ltd., [1971] 2 All E.R. 216 (C.A.). The court in that case prescribed, concerning the contractual protection of the distributor's interests according to the "reasonable notice" institution, that the reasonableness of the notice is to be decided according to the circumstances prevailing on the date notice was given (as aforementioned, British common law favors the view granting to the "reasonable notice" concept a wide range of influence in the protection of the distributor's interests).

Obviously, while taking this suggested approach, the system should require that the predicted reasonable expectations concerning the amount of the investments likely to be made by the distributor should be taken into account without considering unexpected investments being made afterwards by the distributor.

has already been argued above that the length of the minimum period, whose continuance serves as the condition to the creation of the goodwill by the distributor, should be prescribed in relation to the date of the formation of the contract. Yet this conclusion should not lead to an assumption that the actual profitability of the arrangement, as far as the distributor is concerned, should be deemed meaningless when the amount of restitution is being considered. Take, for example, a case where the producer has terminated the contract prior to the expiration of the minimum period that served as the basis underlying the distributor's appointment. If it is proved that the arrangement is unprofitable to the distributor and would have remained so until the expiration of the minimum period, then the distributor shall obviously be denied restitution. No reason exists why the distributor should be conferred an advantage that he would not otherwise have received.

The law is similar when only partial profitability is proved, as compared to the full expected profitability. Consider, for instance, the following circumstances: On the date the contract was formed, the distributor's expectation was that he was likely to be remunerated for the building of the goodwill within five years from that date. The producer terminated the contract after three years. The arrangement was profitable to the distributor, albeit less so than expected. The distributor is being remunerated for the creation of the goodwill, throughout the overall contractual profits, at an unsatisfactory annual rate of 15 percent of the total *quantum meruit*, and this rate is not likely to be improved. During these years, he has been remunerated up to 45 percent of the expected fees. What method of calculation should apply? The distributor will allege that since the assumption for the granting of the contract has failed, he is entitled to his full fees, less the 45 percent he has already received.

This allegation must be rejected. The distributor should not be entitled to better the position he would have achieved if his expectations regarding the length of the contract had been fulfilled. In such a case, the distributor should be entitled only to an additional 30 percent of the *quantum meruit*.

A basic question affecting the calculation is which of the distributor's profits should be taken into account. This author has argued that the minimum period of the contract, the duration of which serves as the condition to the building of the goodwill, is to be prescribed according to the reasonable period within which the distributor expected that the profits were likely to amount to the reasonable fees. But the distributor's profits are derived from two different sources. Some of them result from regular sales activity that exploits the existing goodwill of the product. In this sense, the distributor acts merely as a retailer. The rest result from the increase in the goodwill that the distributor himself has created.

Only the profits from the second source should be taken into account. The distributor would have realized profits from the first source, even if he had not created the goodwill. Thus they should not be considered while assessing the *quantum meruit*. This distinction applies not only in regard to the prescription of

the minimum period of the contract, but also concerning the actual profits that are to be deducted from the account, when restitution is demanded because of a premature termination of the contract. Obviously, the distributor is entitled only to restitution of the *quantum meruit* fees that he has not yet recovered. When assessing the sum to be deducted, one has to consider only the sums that the distributor earned due to the increased goodwill that he himself created.

Another situation arises when the contract between the producer and the distributor allows for compensation of the distributor for his creation of goodwill. Two alternatives exist. The first is that the parties have prescribed a liquidated reimbursement sum to be paid without linkage to the actual continuation of the contract. In such a case, the promised remuneration clearly satisfies the distributor's interests. The second alternative may be that the remuneration is executed periodically as a special reduction from the purchase price. In such a case, the remuneration is dependent upon the length of the contract, and the process of distributor rights' allocation should be executed according to the regular rules prescribed above. The proper *quantum meruit* should be assessed as follows: If the period of the contract is actually shorter than the minimum period required according to the principles detailed above, the distributor should be entitled to restitution, while remuneration actually paid by the producer should be deducted from the final sums payable to the distributor.

The approach of Chief Justice Shamgar and Judge Netanyahu in *Zohar*, who decided to grant a remedy within the framework of the unjust enrichment laws, is also troublesome concerning the calculation of restitution. They opined that a contractual cause protected the distributor's interest to earn reasonable profits, to recoup investments, and to have a suitable period to seek alternate activities. They concluded that the distributor had actually earned reasonable profits during the six years, and that no contractual remedy was available to him. Yet because the creation of the goodwill enriched the producer, the producer had to reimburse the distributor for it. The Court measured the enrichment as composed from the reductions in the selling prices, which the producer had saved due to the termination of the arrangement, for the period of one additional year. Reimbursement should be granted, notwithstanding the fact that the distributor had already made reasonable profits.

It is not necessary to once again indulge in criticism of these judges' approaches regarding the issue of contractual protection.[78] But their view regarding unjust enrichment laws is debatable as well. First, the interest of the distributor in receiving a share in the producer's future profit is in no way protectable. Protection under unjust enrichment laws is only afforded to the interest of the distributor to *quantum meruit*. Second, the approach of these judges toward the question of whether the distributor has earned reasonable profits is unsatisfactory in this

78. See, especially, discussion *supra* part II.A.5.

context. As mentioned above, the relevant profits to be taken into account are those derived from the increase in goodwill ascribed to the activity of the distributor. The judges made no remarks, nor did they perform any examination, to explain their reasoning for prescribing that the distributor had already made "reasonable profits." It might be that the distributor had already been remunerated for the *quantum meruit*, from the profits he had made. Assuming this probability, why should the distributor be paid double (first, by remuneration from the creation of goodwill; and second, by receiving a share in the benefits accruing from the goodwill to the producer)? The Court did not make any economic examination, nor any comment, regarding this issue, nor did it differentiate between the possible sources that could have produced the distributor's reasonable profits. The distributor in this case to a large extent built the Israeli market, and a considerable portion of his profits was certainly the result of the goodwill he had created. Therefore, these profits should be considered as payment for the *quantum meruit* to which the distributor is entitled.

Third, even if the distributor should receive a share in the producer's future profits, it is not clear why the one-year saving of the payments to the distributor necessarily expressed the enrichment of the producer. Judge Netanyahu mentioned two reasons for the calculation: the unfair conduct of the producer who decided to terminate the contract three years early before giving notice to the distributor about his decision, and the fact that the product was inexpensive and its amortization was very short.

The lack of good faith may indeed be a factor to be taken into account within the general framework of unjust enrichment laws.[79] In addition, lack of good faith has also served as a relevant factor within the rule implying a minimum period contractual clause in American case law.[80] Yet this factor, like the other element stated by the Court, still does not explain why, and according to what calculation, the saving of one-year payments to the distributor has indeed expressed the producer's enrichment. In order to justify the Court's conclusion, the distributor should have presented to the Court a suitable factual ground regarding the amount of the enrichment.

III. Commissions for Returning Clients

A related issue has recently been raised before the Israeli Supreme Court in the case of *C.A. 528/86 Polgat Industries Ltd. v. Brechner Estate*.[81] The distributor in this case claimed that he was entitled to receive commissions on some returning business deals made after termination of the contract, with clients who became customers of the producer solely through the distributor's efforts during the period of

79. For Israel, see FRIEDMANN, *supra* note 45, at 695.
80. *See* Bak-A-Lum Corp. of Am. v. Alcoa Bldg. Prods., Inc., 351 A.2d 349 (N.J. 1976).
81. 44(3) P.D. 821 (1990).

his contract. The Court stated that no usage or other contractual term is to be inferred, and consequently, the distributor does not possess such a contractual right.

The plaintiff did not allege a right according to unjust enrichment laws, and the Court did not survey this possibility. Yet this issue deserves some elaboration.

The distributor's contribution to the deal with the returning client was effected by the creation of the initial connection with the client, namely, by the creation of the goodwill. The goodwill thus created by the distributor serves as the basis for the further income. It seems, then, that the answer to the question of whether the distributor is entitled to participation in profits accruing from such further deals derives directly from the general answer regarding the right of the distributor to remuneration, in consideration for the building of the goodwill. The right of the distributor to reimbursement regarding this future income should be examined within the framework of his alleged right to receive a share in the producer's future profits deriving from goodwill. The distributor is entitled only to a *quantum meruit*, and thus should have no share in such subsequent deals. If the approach in *Zohar* is to be applied, and assuming that the termination of the contract has been validly effected, it seems that although a majority of the judges in *Zohar* would conclude that no further right accrues in favor of the distributor regarding returning clients,[82] two of the judges[83] would have treated such an allegation with some sympathy.[84]

IV. The Protection of the Distributor's Exclusivity

This article has discussed the status of the distributor vis-à-vis the producer in Israeli law. It is worthwhile now to briefly examine the distributor's status under Israeli law concerning third parties, since such a discussion will provide a complete description of the distributor's situation.

The distributor's principal incentive to invest monies and effort is present when he has been nominated as an exclusive distributor, while he expects his exclusivity to be honored also by competitors, so that he will enjoy the fruits of his activity. Hence, are these distributor's expectations protected under Israeli law?

The most problematic question arises when the exclusivity is infringed by a competitor executing "parallel imports," namely, when the competitor purchases the products from another distributor in a foreign country, and not directly from the producer.[85] The question here is what shall be the outcome of balancing the

82. Judges Barak, Beiski, and Orr.

83. Judges Netanyahu and Shamgar.

84. If the contract was unspecified in period, and the distributor had not yet received a share in the producer's profits, as mentioned above, the distributor may be entitled to a portion in his further deals, as part of his right to such a share according to unjust enrichment laws, acknowledged by these two judges.

85. Direct purchase from the producer is less troublesome. When the distributor is aware of the exclusivity, he is liable, according to Israeli law, upon a claim of illegal intervention in contractual relations and even if he is not, the distributor still must preserve his claim against the producer, who is prohibited from performing acts that affect the exclusivity.

policy aiming to respect the distributor's expectations to exclusivity, against the principle of the freedom of trade, which purports to protect the activity of the competitor?[86]

Following conflicting decisions by the Israeli district courts[87] concerning the distributor's rights toward a parallel importer, the Israeli Supreme Court in *Leibovitz* has recently established the law as follows.[88]

The goodwill of the products, having been built by the distributor, is conceived as being owned by the producer, and not by the distributor. The right to the goodwill is indeed classified as an in rem right, but it is owned by the producer, and not by the distributor. No in rem claim is thus available on behalf of the distributor.

Although the producer owns the right to the goodwill, it is not provided as well with an in rem right against the parallel importer. The Court concluded that by selling the product, the producer exhausts his interests regarding the sold product and is not entitled to control its further disposition. Thus, a distributor's claim against the producer requiring the producer to apply measures for protecting the distributor's exclusivity is ineffective. The producer has no legal cause against the parallel importer, as it does not possess any legal force against the parallel importer, whose operation may assist the distributor.[89]

The competitor, by its intervention, is not committing the producer to breach its contract with the distributor, and thus the competitor is not performing a tort. The distributor's interest in exclusivity, when his relationship with competitors is concerned, should be classified as a mere expectation. Certainly, expectations are subject to protection by means of unjust enrichment laws, but the extent of their protection is quite limited since the intensity of these laws' protection varies according to the strength of the protected interest.[90] Expectations occupy a low place on this scale. Thus, the distributor should be granted a legal claim against the competitor's distributor only when the competitor's actions are involved with improper behavior, namely, when unfair competition is involved.

The Court in the *Leibovitz* case obviously intended to strengthen competition. Consequently, the distributor's expectations are frustrated. This result, although probably envisaged as justified by the principles of the freedom of competition, and by the Israeli positive law, faces the distributor with a dilemma: He will not profit sufficiently from the deal unless he invests in the creation of goodwill; but

86. Freedom of trade is protected in Israel as a constitutional right by a recent law: The Basic Act: Freedom of Trade, S.H. (1992) 114.

87. Koifman Agencies Ltd. v. Colombo Ltd. (unpublished); C.A. (Je.) 389/89, Mo. 924/89, United Sport (1984) Ltd. v. Shirazi Sport Ltd., [1990] 2 P.M. 397 (1989); Mo. (T.A.) 3446/89, Rason Ltd. v. El-Shrad Ltd. (unpublished).

88. C.A.L. 371/89, Leibovitz v. A & Et. I. Eliahu Ltd., 42(2) P.D. 309 (1990). For a detailed analysis and criticism of the *Leibovitz* decision, see Deutch, *supra* note 16.

89. The Court actually applied a concept quite close to the notion of "nonderogation from grant." *See, e.g.*, Ward v. Kirkland, [1966] 1 All E.R. 609 (Eng. Ch.); Deutch, *supra* note 16, at 549-51.

90. *See* FRIEDMANN, *supra* note 45, at 46.

once he has established the goodwill it is likely to attract competitors who will exploit his success, while he may remain without protection against such intervention.

In summary, it may be stated that Israeli law does not supply the exclusive distributor with a solid protection for his exclusivity against competitors who purchase the products from others than the producer. The distributor is protected only in those exceptional cases where the means being applied by the competitor are unlawful or indecent.[91] An in-depth analysis of this approach is beyond the scope of this article. However, a brief remark should be made regarding the Israeli Supreme Court's approach in the *Leibovitz* case. Exploitation of the commercial advantages accruing from the acts of a competitor may not be considered tortious behavior in order to maintain freedom of competition.[92] Yet, when unjust enrichment laws are concerned, unfair competition that might not support a tortious cause may undermine the legitimacy of an advantage accruing to the competitor. Unfairness, for this purpose, should not necessarily be founded upon unfair means; rather, the unfairness may accrue from the circumstances themselves. Thus, the expectations of the distributor, whose actions have enriched the competitor, derive from a contractual right that the distributor has purchased and paid for. Is not the very competition, in cases where the competitor is aware of the distributor's exclusivity, to be considered as unfair and indecent?

Notwithstanding the mentioned contention, it seems that the Court in the *Leibovitz* case has presented the proper model for this issue. The distributor is acting for his own purposes while he is building up the goodwill. Such an allegation, as described above,[93] is not available to the producer, since the producer and the distributor are tied together in a common enterprise. But this allegation is obviously available to third parties, namely, to competitors who do not share with the

91. The producer may demand a promise from the foreign distributor with whom the producer is engaged, who sells the products to the parallel importer, that he shall not sell the products to a local competitor, and that he shall demand such promise from subsequent distributors. Yet, it is doubtful whether the producer is implicitly regarded to be under an obligation toward the local exclusive distributor to demand such an undertaking from the foreign distributor. At any rate, the local exclusive distributor should not have a claim, if the foreign distributor has indeed promised the producer not to sell to local competitors, but dishonored this promise, or such breach was committed by a subsequent distributor in the chain. In such a case, even if the producer is entitled to damages against a foreign distributor, and such right is subject to subrogation in favor of the local exclusive distributor, this remedy may yet be unsatisfactory: The producer's right to compensation, which is subject to subrogation, does not include compensation for the affected interests of the local exclusive distributor. The distributor's interests may be fortified by contractual arrangements with the producer, conferring the distributor with the power to apply for an injunction on behalf of the producer.

92. For American law on this issue, see RESTATEMENT OF TORTS chs. 34-36 (1938). The *Restatement (Second) of Torts* has omitted these chapters, as "the law of Unfair Competition and Trade Regulation is no more dependent upon Tort law than it is on many other general fields of the law and upon broad statutory developments, particularly at the federal level." 4 RESTATEMENT (SECOND) OF TORTS 1 (1979). Israeli law does not acknowledge the existence of a general tort of unfair competition. *See* C.A. 352/69, Manhattan Ltd. v. Hamegaper Ltd., 23(2) P.D. 373, 381 (1969).

93. *See* discussion *supra* part II.C.4.b.

distributor a common enterprise. Broader application of unjust enrichment laws, in order to prevent competitors from taking advantage in these situations, might sharply affect the constitutional right to free competition. Therefore, the Court's solution in the *Leibovitz* case, limiting the competitors only when they have used indecent means, seem to balance the conflicting interests in an acceptable manner.

V. Conclusion

Israeli authorities have recently elaborated the approach of the Israeli law regarding the status of distributors in relation to two relevant phases: the first, relating to distributor's rights toward the producer; and the second, dealing with distributor's rights toward third parties. The problems arise when the distributor operates as an exclusive distributor, building up the goodwill for the product and heavily involving his interests.

The survey of distributor's rights toward the producer focused on his rights concerning and following termination of the distributorship contract: legitimacy of the termination; the right of the distributor to receive a "reasonable notice" and its meaning; and the distributor's right to be reimbursed for his investments while building up the producer's goodwill. The decision on these issues involves considerably complicated problems regarding the relationship between contractual claims and possible protection by means of unjust enrichment laws.

The Israeli Supreme Court has granted the distributor an excessively far-reaching protection toward the producer concerning both the identification of the interests that deserve protection and the legal device for such protection. The Court has acknowledged as legitimate all possible interests of the distributor. Several judges have acknowledged the presence of a contractual claim for such protection, while others have afforded protection by combining contractual and unjust enrichment laws. Nevertheless, the Court's approach should not be followed. The relevant interest deserving protection[94] should be limited to the gaining of a *quantum meruit* for the service that the distributor has supplied, namely, the building of the goodwill. The interests accruing from the building of goodwill should be protected only by the unjust enrichment laws, rather than by the assumption of a contractual implied term, or the "reasonable notice" concept.

In comparison to the excessive protection that the Israeli system has granted to the distributor in regard to his relationship with the producer, the weakness of the protection of his exclusivity toward third parties—competitors who do not honor the exclusivity and who engage in parallel imports—becomes noticeable. The distributor has no claim against such competitors unless illegal or indecent acts accompany the competition. This result is justified by the constitutional aspect of the freedom of competition.

94. This is in addition to the interest in receiving time for reorganization of the business.