A. Introduction - Israeli Civil Law

Standard contracts in Israel are regulated by the Standard Contracts Law, 5743-1982 (hereinafter: Standard Contracts Law), whose amended version is attached to this article, and which is part of the Israeli Civil legislation.

Under Israeli legislation, different laws apply to the field of Contract Law, such as the Contracts (General Provisions) Law, 5734-1973; the Contracts (Remedies for Breach of Contract) Law, 5732-1971; and the Standard Contracts Law, mentioned above.

Other laws regulate specific contracts, such as the Insurance Contract Law, 5742-1981; the Contract for Supplies and Services Law, 5735-1974; the Sale Contract Law, 5729-1968; the Guarantee law, 5728-1967, and the Lease Law, 5732-1971.

A standard contract review under Israeli legislation is not done solely under the Standard Contracts Law. Under Art. 24 of the Standard Contracts Law, the provisions of the law do not derogate from the provisions of any other law under which a contract or a condition in a contract may be void or voidable, and they do not bar a plea against a contract or a condition in a contract. Accordingly, a standard contract can be reviewed under the Standard Contracts Law, but also under the general contractual legislation, under consumers' contracts legislation, and under specific contracts legislation, as applicable.

It is also to be noted that a major project is under way, aimed to unify Israeli Civil Law under a modern and comprehensive Civil Code, in which the provisions of the Standard Contracts Law will also find their proper place.

B. The Standard Contracts Law

I. The aim of the Standard Contracts Law

The Standard Contracts Law starts with a declaration of principles – stating as its aim the protection of customers from unduly disadvantageous conditions in standard contracts. The Standard Contracts Law substitutes the 1964 Standard Contracts Law, and strives to learn the lessons drawn from the practical failure of the 1964 law.

The Standard Contracts Law sets forth two systems of standard contracts' review. The first, review by a special court established by the Standard Contracts Law, the Standard Contracts Tribunal, sitting in Jerusalem; the other, review by the various Israeli Courts, when a claim is raised concerning an unduly disadvantageous condition in a standard contract. The aim of both systems is to protect customers, and each of them will be examined further on in this article.

It is to be stressed, that although the Standard Contracts Law is intended to protect customers from unduly disadvantageous conditions of standard contracts, its aim is not to force upon the supplier contractual provisions which are advantageous to the customer. The contract has to be balanced, and neither the Standard Contract

contractual provisions dealing with liability for injuries are more likely to be scrutinized under Art. 30. This distinction, however, does not apply to review under the Standard Contracts Law.

The 1964 law had basically no legal, economical or social impact, due to its many shortcomings: a numerus clausus of unduly disadvantageous conditions; the problematic definition of “standard contract”, which caused prolonged judicial controversies about secondary issues.

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2 Thus, for example, a provision in a standard contract can also be reviewed under Art. 30 of the Contracts (General Provisions) Law, which states the nullity of a contract which contravenes public policy. The courts, however, have drawn a distinction between business and trade contractual provisions and other contractual provisions, such as those dealing with the parties' responsibility for bodily injuries; Israeli judicature states that Art. 30 is to be applied only in exceptional cases to contractual provisions of a pecuniary matter, whereas

3 The 1964 law had basically no legal, economical or social impact, due to its many shortcomings: a numerus clausus of unduly disadvantageous conditions; the problematic definition of "standard contract", which caused prolonged judicial controversies about secondary issues.
Tribunal nor a regular Court has the authority to coerce suppliers to add provisions to their standard contracts, even reasonable ones.4

Minor defects and mistakes, which do not amount to a basic failing in the contract, and are not per se unduly disadvantageous to customers, do not warrant the judicial intervention of the Tribunal. Likewise, the quality and the nature of the service given, are issues left to the supplier’s discretion, and the Tribunal or the Courts will not oblige the supplier to give a service which he is not willing or able to provide.

II. The application of the Standard Contracts Law

The Standard Contracts Law covers a broad and comprehensive field of application. It is not an average consumer law, and its area of pertinence is much broader. The term “customer” is defined as “the person to whom a supplier proposes that an engagement between them shall be in accordance with a standard contract, irrespective of whether he is the recipient or the giver of anything”5. Accordingly, the Standard Contracts Law applies also to a contract drawn between two suppliers, as long as one of them proposes that their engagement shall be in accordance with a standard contract. The Standard Contracts Law protects every person who enters into a standard contract, in every kind of business activity and for whatever purpose.6

See para. 69 of the Standard Contracts Tribunal decision, CO 2030/01, Ituran, Location and Control Services Ltd. v. Attorney General. The Tribunal stated that even if it is desirable to limit the customer’s liability for false alarm calls, it is not empowered to compel the supplier to add to its contract a provision in these terms. Nevertheless, the Tribunal added, the absence of such a provision will be weighed in the review of other provisions of the standard contract (para. 73, ditto).

On the other hand, the term “consumer” is defined in the Consumer’s Protection Law, 5742-1981, as follows: “a person who buys goods or receives a service from a vendor during the course of the vendor’s business, for a use which is primarily personal, domestic or familiar”.7

Art. 22 of the Standard Contracts Law states clearly that the law applies equally to the State. Thus, the law empowers the State to file applications for approval of standard contracts drafted by it, and it allows for application of annulment to be filed against unduly disadvantageous conditions in standard contracts drafted by the State.

III. Meaning of “standard contract”

Art. 2 of the Standard Contracts Law defines a “standard contract” as “the text of a contract, all or part of the conditions of which have been determined in advance by one party in order to serve as conditions of many contracts between him and persons undefined as to number or identity”.

The law strives to deal with the case in which the provisions of a contract are set beforehand by the supplier: The presumption of the law is that, in general, there is a marked gap in information, knowledge, experience and ability to bargain, which causes a substantial inequality between the parties. Two options only are available to the customer wishing to consider the transaction: accept its conditions as they are or reject the transaction.

The pre-condition for a contract to be considered a standard contract is that its provisions be drafted having in mind an indefinite number of future agreements. The relevant consideration in this context is the intention of the supplier, and not what actually happened.

In the case in which the identity of some customers is known, the question of whether we are dealing with a standard contract will be decided on the merits of each

In this case, under art. 12 (c), if the Tribunal finds that the respondents to the application in the circumstances are not to be regarded as sufficient, the Tribunal may appoint a lawyer who is not a civil servant to plead before it as a respondent, and he may appeal against the Tribunal’s decisions. The article also states that the lawyer’s remuneration and expenses, as determined by the Tribunal, shall be borne by the Treasury.
case. A contract which is proposed to a known group of customers, whose personal identity is not known (such as a contract to buy flats in a building whose construction has been already completed), will be considered a standard contract. The relevant frame of time to examine the question of whether the number and the identity of the customers is known is at the time of the drafting of the contract.

According to the text of the law, a contract will be considered a standard contract even if only part of its condition have been set in advance by a party. This prevents attempts to claim the Standard Contract Law does not apply by leaving a limited number of provisions open to individual bargaining.

The onus of proof regarding the question whether a contract is a standard contract lies upon the party who raises such a claim in legal proceedings, meaning, as a rule, the customer. However, the test is a formal one, and all the customer has to do is to prove the existence of the elements of the definition set forth in art. 2 of the law. The customer does not have to prove that in practice there was no opportunity to modify provisions which he proved are unduly disadvantageous. If the supplier claims the customer did negotiate to modify a specific provision, or that the customer was given an opportunity to do so and that the customer was aware of this, but preferred not to do so, the onus of proof that the law does not apply rests upon the customer.

The definition of the term “condition” in art. 2 of the Standard Contract Law allows for separate scrutiny of each contractual provision, and exemption of specific provision from the field of application of the Standard Contract Law. Therefore, even if the customer proved, that the contract between him and the supplier falls within the definition of “standard contract” according to the law, it is still possible, that specific provisions of the contract, upon which the parties did negotiate, will not be reviewed under the provisions of the law.

IV. “Unduly disadvantageous condition”

Under the Standard Contract Law, the Tribunal and the Courts have the authority to declare null a condition in a standard contract which – considering all the conditions of the contract and other circumstances – causes unduly disadvantage to customers or an unfair advantage to the supplier, likely to lead to a deprivation to customers. Such a condition is defined in the Standard Contract Law an “unduly disadvantageous condition”.

According to the definition of “condition” in the Standard Contract Law, even a stipulation which is not expressly mentioned in a standard contract, but referred to therein, is likely to be examined under the terms of the law, as well as other conditions which form part of the transaction, such as stipulations which the supplier customarily makes orally, conditions which appear on the supplier’s signposts at the entrance of his place of business, and the suppliers’ Articles of association, if referred to in the contract.

In general, the definition is broad and leaves ample discretion to the Tribunal or the Court. In principle, the scrutiny is two-tiered: on one level, the courts examines the relationship between the parties and their typical interests; on the other level, court examines the legal and social concept of what is reasonable and fair in the specific kind of relationship. On both levels, the finding that unduly disadvantage exists reflects the reasonable balance set by the Israeli society between economic, social and moral considerations. Thus, for example, Art. 3 of the Standard Contract Law states specifically that, when considering whether a condition is unduly disadvantageous, the Tribunal or the Courts have to weigh also “other considerations” of the specific contract; these can be, for example, the status of the supplier in the market, its being a monopoly, whether the goods are of an essential nature, and so forth.


Standard contracts Law, Art. 3. 9

9 “A stipulation in a standard contract, including a stipulation referred therein, as well as any other stipulation which is part of the engagement, but not including a stipulation specifically agreed upon by the customer and the supplier for the purposes of a particular contract.” - Standard contracts Law, Art. 2.

10 ACA 1185/97 Heirs and Estate Administrators of the late Hinda Milgrom v. Mishan Housing for the Elderly, Israeli Judgments 52 (4), 165.
The choice of an open and flexible test for the existence of unduly disadvantage reflects the knowledge that not all situations can be foreseen in advance. The advantage in considering the totality of the circumstances surrounding a contract above the necessity to conclude absolute nullity (and thus its being included in a “black list”) lies in its flexibility and in the possibility of adapting the sanction of nullity to the specific circumstances of the particular contract. In some standard contracts, a condition can be considered unduly disadvantageous; but the very same condition, in other contracts or in other circumstances, can be considered as reasonable.

A good example in this context is the Tribunal decision in the Ituran case12, according to which the fact that the company had been declared a monopoly in the field of car location systems places upon it a heavier duty of fairness and reasonability. The Tribunal also took into consideration the fact that some of the company’s customers do not conduct business with it by their own free will, but following a request of their insurance companies, as a precondition to the issuing of car-theft insurance policies. The Tribunal concluded that as long as Ituran is a monopoly, it cannot refuse to give its services for unreasonable causes; therefore, the provision of its standard contract, according to which the company can end the contract to its own unfettered discretion, is an unduly disadvantageous condition.

Another example of “other circumstances” is the case in which the supplier whose contract is being considered by the Tribunal or the Court gives its services to the public under a license or a concession issued by a statutory authority. These circumstances have been held to place upon the supplier a special duty to justify to the public the granting of the license or the concession, above the general standard of behaviour expected from a supplier under private law.13

The identity of the customer is relevant also. A claim often heard in this context is that, even if there is some modicum of justification for the scrutiny of a standard contract between two businesses, in the case in which one if them drafted it, the actual judicial intervention should take place only in exceptional cases. The rationale for this claim stems from the consideration that the concern about information gaps, which is the basis for judicial intervention in a consumer standard contract is much weaker when the contract is made between two businessmen, whose level of knowledge and accessibility to information is the same.

Besides the general provision of Art. 3. of the Standard Contracts Law, Art. 4 sets forth a list of conditions which are presumed to be unduly disadvantageous14. A contractual stipulation which can be classified under one of the presumptions will be, prima facie, deemed to be unduly disadvantageous, and the burden to prove it is not is placed upon the supplier:

The list of presumptions can be divided into three groups:

conditions which limit the supplier’s responsibility15 or harm the customer’s (a) rights, under the law or under the contract, if the condition were not existent16 17;

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12 CO 2030/01, Ituran, Location and Control Services Ltd. v. Attorney General (not yet published). The Ituran company sells car alarm and security systems. On July 16th, 2001, the company was declared a monopoly in the field of car locating systems by the Head of the Antitrust Authority, since the company was shown to hold 80% of the market, deemed to be a stand-alone branch in the business of car security systems.


14 This lists relates both to the obligations of the customer and to those of the supplier.

15 Not every condition limiting the supplier’s responsibility will be deemed to be unduly disadvantageous; the condition has to be examined taking into account the splitting of risks and the distribution of damages between the supplier and the customer. Among other considerations which are relevant in this context: the nature of the contract – as a consumer contract or as a business contract; the
conditions which limit the customer’s freedom of contract\textsuperscript{18}, or which (b) enable the supplier to change the terms of the contract unilaterally\textsuperscript{19};

identity of the supplier; whether the goods are essential; the price of the goods or the services and its relationship to the probable risks (goods and services which are relatively inexpensive could become much more costly if the supplier would have to bear full responsibility. Such is the case of laundry services or courier services, for instance).

\textsuperscript{16}Art. 4 (1) of the Standard Contracts Law makes a distinction between exemption from statutory responsibility (in this context, statutory responsibility includes also responsibility under judicial rulings) and exemption from contractual responsibility. Whereas exemption from statutory responsibility is also deemed to be unduly disadvantageous, exemption from contractual responsibility has to be “unreasonable in order to be considered unduly disadvantageous. The same distinction exists in art. 4 (6) between the limitation or the denial of a remedy to which the customer is entitled by law, and the limitation or the denial of a remedy to which the customer is entitled by the contract. In this context as well, the contractual limitation or denial will have to be unreasonable to be considered unduly disadvantageous.

\textsuperscript{17}Some examples of unduly disadvantageous conditions in this context: a stipulation under which the acceptance of a house by its buyer is to be deemed final proof of it being built satisfactorily; a condition under which the supplier has the right to rescind the contract immediately and without notice; the denial of the customer’s right to rescind the contract; a stipulation under which, should the customer initiate legal proceedings against the supplier, the customer will always bear the supplier’s legal expenses, even in the case in which the court finds for the customer.

\textsuperscript{18}Not every condition which limits freedom of contract will be deemed unduly disadvantageous under art. 4 (5) of the law, but only a condition intended to prohibit the customer from entering into transactions with the supplier’s competitors. Such is the obligation placed upon purchasers of housing, in the purchase contract, to hire maintenance companies under contracts which cannot be rescinded for the first ten years. Also the condition which obliges customers who take a money loans from a supplier, to insure their life with the insurance company chosen by the supplier, will be deemed unduly disadvantageous.

conditions which hamper the customer’s rights, whether by limiting the (c) customer’s access to courts, or by limiting his rights to present his case in court\textsuperscript{20}.

\textsuperscript{19}A condition setting forth the unfettered right of a supplier of sheltered housing to change the dwellings of the customers within the housing complex is deemed unduly disadvantageous under art. 4 (2) of the law; a condition giving the supplier the unlimited right to change the price of the goods or the services provided is deemed unduly disadvantageous under art. 4 (4) of the law; the vague definition of the dates set forth for the completion of the supplier’s obligations also establishes the presumption of unduly disadvantage under art. 4 (2) of the law. This specific issue raises often in the case of building contracts; such a stipulation practically denies the customer the right to rescind the contract due to the supplier’s delay.

Nevertheless, if the change in the stipulated price is made conditional upon circumstances which are not in the supplier’s control (for example – a tax raise), it could be argued that there is no unduly disadvantage presumption. In this case, a distinction is made between a fixed term contract and a contract for an indefinite period of time; usually, in a fixed term contract there is no cause to leave the supplier unfettered discretion to increase the price, whereas in a long term contract, sometimes there is no rule of thumb for price increase, even if it is important to allow for price increase only under circumstances which are not in the supplier’s control.

A clause allowing for a delay in the compliance of a contractual obligation could be deemed reasonable, upon two conditions: (a) the cause of the delay lies without the supplier’s control; (b) the supplier undertakes to make reasonable efforts to fulfill his obligation, not withstanding the delaying factor.

Art. 4 (7), for instance, states that a condition which shifts the burden of proof from the supplier to the customer is deemed to be unduly disadvantageous. As for banks’ statements and documents, a condition which allows reliance upon banks’ books will not be deemed to be unduly disadvantageous upon two conditions: (a) the registration was made during the normal course of banking business; (b) the copy has been checked and found identical to the original. Banks’ statements and documents, though, cannot be final but only \textit{prima facie} evidence.
Unlike the presumptions set forth in Art. 4, Art. 5 of the Standard Contracts Law states that a condition in a standard contract denying or limiting the customer’s right to access to courts shall be void. This provision reflects the stringent approach to the limitation of the right to apply to judicial authorities, and it does not allow proof of reasonability to prevent the sanction of nullity. Given the presumptions of Art. 4, however, Art. 5 is given a narrow interpretation, and is applied only to particularly severe limitation of right of access to courts.

V. Standard Contracts Law – Restrictions on Applicability

Art. 23 of the Standard Contracts Law sets forth restrictions on its applicability. Under Art. 23, the law will not apply on each of the following:

a condition determining the monetary consideration to be paid by the customer; the reason underlying this provision is that, unlike other stipulations in a standard contract, the monetary consideration is very much at the centre of the customer’s attention, and the object of negotiation and comparison. Furthermore, it is difficult for the Tribunal to approve a price beforehand for a long period of time, or to decide what is a price which is not unduly disadvantageous.

a condition conforming with conditions laid down or approved by an enactment; the rationale underlying this exemption is based upon two principles: the first stems from the presumption that a provision fixed by law is not unduly disadvantageous; the second is based on the importance of economic stability, which is enhanced by giving effect to the supplier’s reliance on the law. Therefore, when the supplier in a standard contract provision relies upon a legislative permissive disposition, there is no reason to review the legislative rule, which aimed at realise the intention of reasonable contractual parties, under the provisions of the Standard Contracts Law.

a condition conforming with conditions laid down by an international agreement to which the State of Israel is a party; the motive for this exemption is that the procedure by which conventions are signed provides ample guarantee as to the scrupulous check of all their provisions;

a collective agreement under the Collective Agreements Law, 5717-1957, provided it has been made in writing and that it prescribes rates of wages.

As per arbitration proceedings, see art. 4 (8) - (10) of the Standard Contracts law. As to a stipulation stating that a dispute shall be decided by arbitration – as long as the arbitration agreement is a customary one, the condition will not be deemed unduly disadvantageous, since arbitration is an institution regulated by law. However, condition allowing the supplier to choose the place of arbitration, or an arbitration clause in circumstances when the suppliers has more leverage in choosing the arbitrators or the arbitration’s place – will be deemed unduly disadvantageous.

As opposed to an individual labour contract between a worker and an employer, which is not a result of a collective agreement.
The Standard Contracts Tribunal was created by the Standard Contracts Law\textsuperscript{23} in order to make possible the review of standard contracts. The Tribunal is a court which examines the text of standard contracts, and it is empowered to grant advance approval to a standard contract, and to annul unduly disadvantageous conditions in a standard contract, or to modify them in order to eliminate the unduly disadvantage.

The Tribunal hear cases by a bench of three; the President of the Tribunal and the Deputy President have the authority to instruct that the case shall be heard by a greater, uneven, number of members\textsuperscript{24}.

Every bench consists of the President, or the Deputy President, and of other members, at least half of whom are not civil servants, and one of whom is the representative of a consumers’ organization\textsuperscript{25}.

The Tribunal’s activity is governed by both the Standard Contracts Law and the Administrative Courts Law, 5753-1992, which applies to all Israeli administrative tribunals – \textit{mutatis mutandis}. Accordingly, the Tribunal is not bound by the rules of evidence and procedure applying to regular courts, apart from the rules dealing with immunity of witnesses, and conditional to the rules of procedure enacted under the Standard Contracts Law. The Tribunal has the authority to ascertain fact of its own initiative\textsuperscript{26}. The exemption from the standard rules of evidence and procedure is intended to bring about a greater flexibility and straightforwardness in the proceedings held by the Tribunal.

The Tribunal reviews the abstract standard contract, unlike the Courts, which examine the contract at the background of a specific dispute between a supplier and a consumer. Furthermore, unlike the Courts’ decisions, which bind only the actual parties to the proceedings, the decisions of the Tribunal have a wider field of pertinence; they apply to all the contracts which will be made in the future with the same text, and, in some instances, also to contracts which have been made in the past. The Tribunal sets the standard for “reasonableness” and “fairness” in the field of standard contracts, taking into consideration the social, economic and moral values of the whole public.

The proceedings held by the Tribunal are not traditional adversary proceedings; their fulcrum is the protection of consumers which are not a party to them, and not a “dispute” between the parties. Therefore, the Tribunal does not consider itself bound by the parties’ claims; it is fully empowered to decide that a specific provision of a standard contract is unduly disadvantageous, even if no claim to this effect has been made, conditional to the supplier’s right of hearing\textsuperscript{27}.

As already stated above, the Tribunal has two types of authority: the approval of a standard contract and the annulment of an unduly disadvantageous clause in a standard contract.

Let us examine these authorities.

\textbf{1. Standard Contract’s Approval}

Any supplier is entitled to request the Tribunal to certify that the standard contract which he uses does not contain any unduly disadvantageous provisions\textsuperscript{28}. Once a standard contract is approved by the Tribunal, no plea can be made that the contract contains unduly disadvantageous conditions for a period of five years, or for a shorter period, as decided\textsuperscript{29} by the Tribunal. The possibility to obtain approval in

\textsuperscript{23} Standard Contracts Law, Art. 6 (a).
\textsuperscript{24} Standard Contracts Law, Art. 7 (a).
\textsuperscript{25} Standard Contracts Law, Art. 7 (b).
\textsuperscript{26} According to Art 9 (b) of the Standard Contracts Law, the President of the Tribunal and the Deputy President are authorized to summon witnesses and request documents and evidence.

\textsuperscript{27} Hence, the Tribunal will not bar an unduly disadvantage claim just because it was not raised at the beginning of the proceedings MA 5017, 5022/98, \textit{Golden Tower Housing for the Elderly Ltd} v. \textit{Attorney General}, Takdin 58, 2003 (4), 1069.
\textsuperscript{28} Standard Contracts Law, Art. 12.
\textsuperscript{29} Standard Contracts Law, Art. 14 (b).
advance is intended to give the supplier legal and business certainty in using the standard contract.

The respondents in approval proceedings are the Attorney General and the respondents designated in the regulations issued under the Standard Contracts Law (the Israeli Consumer’s Committee and the Consumers’ Protection Agency). The respondents are entitled to make objections to the standard contract’s provisions in the approval proceedings. In addition, the Tribunal is empowered to summon any other party as a respondent; this authority guarantees that all the proper respondents are parties to the proceedings.

The identity of the respondents in approval proceedings derives from the broad character of the Tribunal’s decisions in these proceedings, which requires a proper and professional representation of all the relevant issues and considerations. A private party can request the Tribunal to be added as respondent, but the main feature of the proceedings as public interest proceedings remains, as the Tribunal’s task to make general policy findings, and not to decide on specific controversies. Whilst on one hand there is the risk that the additions of private parties will deviate the proceedings in the adversary direction, it is important that a party who could be directly influenced by the outcome of the proceedings, and could add to their content due to its experience and expertise, makes its claims and is able to voice its plea before the Tribunal.

The Tribunal may give the approval to the standard contract, or refuse to grant it, if in its opinion the contract contains one or more unduly disadvantageous conditions. Should the Tribunal find one or more conditions unduly disadvantageous, the condition shall be deemed to have been declared void by the Tribunal.

The Tribunal does not have the authority to approve a standard contract conditionally, or subject to changes; should the Tribunal find that the contract needs to be amended, it has to issue directives in the matter. In this case, the Tribunal will not approve the contract until after it has received an amended version thereof, as per its directive. The Tribunal will have to consider whether its instructions have been fulfilled and whether the unduly disadvantage has been eliminated.

It is important to notice, that the approval of the Tribunal is given to the contract as a whole and not to its individual provisions.

As mentioned above, the maximum period of validity of the Tribunal’s approval is five years. The Tribunal can decide that the period of validity of the approval be shorter. A good example in this matter is the Tribunal’s decision in the matter of the Shopping Channel. The applicant, a company which sold merchandise on television using a marketing technique known as “distant selling”, had been granted an operating license by the Communication Ministry, and it requested the Tribunal to approve its standard contract until the expiry of the license. The Attorney General argued that since the contract dealt with a novel form of transaction, still in its adjustment period, it wouldn’t be just to approve the contract for a long period, and the Tribunal should make room for the possibility of changing its decision according with factual practice. The Tribunal accepted the Attorney General’s claim and decided to limit the approval to a period of two years, which, in the Tribunal’s opinion, was a suitable period to test the provisions of the contract in practice, and on the other hand, left enough time till the end of the license to allow for amendments to the contract’s provisions, should they be needed.

In the case in which the business practice of a supplier is regulated by a license issued by a statutory body, such as portable phone companies, the standard contract drafted by them have to comply with the provisions of the license. Nevertheless, the wording of the license is not a valid defense against claims of unduly disadvantageous conditions in the licensee’s. Thus, in many instances, the statutory bodies empowered

30 Such is the case, for instance when the State requests the approval of a standard contract drafted by it. In such a case, as mentioned above, the Tribunal may appoint an advocate who is not a civil servant to appear before it as a respondent: art. 12 (c) of the Standard Contracts Law.

31 See para. 10 of the Tribunal’s decision in MA 805/95, K.I.D. Shopping Channel v. Attorney General et al., takdin 58, 98 (1), 21865 (hereinafter – Shopping Channel).
to give licenses to suppliers specifically require the supplier in the license to request approval for its standard contracts from the Tribunal32.

In this issue a distinction should be drawn between technical and professional matters, which lay within the licensing body's expertise, and about which the Tribunal will not, as a rule, exercise its discretion, and legal and contractual matters, which will be scrutinized by the Tribunal during the approval proceedings33.

The “immunity” of a standard contract which has been approved by the Tribunal is limited by the condition set forth in Art. 14 (c) of the Standard Contracts Law. This provision entitles the Attorney General to petition the Tribunal for the annulment of a condition in a standard contract it has approved, even within the period of validity of the approval. This, however, is an exceptional step, limited to “special reasons, which justify the annulment”. The annulment of the condition does not cause the cancellation of the approval of the contract, but only to the voidability of the condition.

Since the approval of a standard contract is, as mentioned above, limited in time, some suppliers petition the Tribunal for an extension of the approval. The proceedings are, in principle, identical to approval proceedings, but the Tribunal bears in mind that the contract has already been approved in the past, and focuses especially on recent legislative or juridical developments, and on changes in circumstances.

A widespread phenomenon, which constitutes a problem, is the supplier’s withdrawal of its approval petition, in an advanced stage of the proceedings, when it realizes that no agreement can be reached with the Attorney General or with the Consumers’ Protection bodies. In suitable circumstances, for instance when a great deal of effort has been put in the proceedings, the Tribunal is asked by the Attorney General to make the cancellation of the petition conditional to expenses. The Tribunal, as a rule, does not order petitioners to pay expenses, neither in approval nor in annulment proceedings, since the proceedings serve a public interest and are not characterized by the existence of a “civil law dispute”34. However, when the Tribunal reaches the conclusion that the proceeding were misused or that an exceptional amount of work has been put into the proceedings by the respondents before the petitioner’s request to close the file, it will order the petitioners to pay the respondents’ expenses. In suitable cases, the Attorney General may decide to file for annulment of unduly disadvantageous clauses existing in the petitioner’s standard contract upon the closing of the approval proceedings.

II. Proceedings for the annulment of unduly disadvantageous conditions

Under Art. 17 of the Standard Contracts Law, the Tribunal is empowered to cancel or modify an unduly disadvantageous condition, to the extent necessary to eliminate the unduly disadvantage. In fact, this is not a discretionary authority, and the Tribunal has to cancel or modify the condition, once it finds it is unduly disadvantageous.

Entitled to petition the tribunal in annulment proceedings are those mentioned in the law – the Attorney General and the Head of the Authority for Consumers’ Protection35. Entitled to petition the Tribunal are also customers’ organizations or

32 Such was the case in the Shopping Channel matter. Article 9.2.2 of the license issued by the Communication Ministry stated that “For its transactions on the Shopping Channel, the licensee will be entitled to use only a standard contract which has been approved by the Standard Contracts Tribunal..”. Article 9.2.3 of the license stated “The licensee will be entitled to transfer to the [Communications’ – S.A.] Ministry a copy of its standard contract upon the filing of approval proceedings before the Tribunal, in order to obtain from the Ministry a temporary permit to make use of the sale contract, until the Tribunal will hand its decision, and subject to its terms.”.

33 SCF 1/95, Cellcom Israel Ltd. v. Attorney General at al. (not yet published).

34 See the Shopping Channel decision.

35 The Standard Contract Regulations also authorize the Attorney General and the Head of the Authority for Consumers’ Protection to request copies of standard contract from suppliers, in order to review them. The supplier thus requested has to comply with the request within fifteen days, or within the period set forth in the request itself.
public bodies\textsuperscript{36}, as designated by the regulation enacted under the law. Regulation 4 of the Standard Contracts Regulations, 5743-1983, thus empowers Israel’s Consumers’ Committee, the Consumers’ Protection Authority, and the Bank of Israel. Furthermore, the law empowers the Minister of Justice to approve a customers’ organization which has not been designated by the regulations to file for annulment in a specific matter\textsuperscript{37}.

The respondent to the annulment petition is the supplier, whose contract the petition is addressing; the Tribunal may allow a representative organization of suppliers, or some other agency involved in the matter, to join the case as a respondent.

The annulment of a condition brings about its cancellation and obliteration from the contract.

Unlike a standard contract approval, the validity of an annulment is not limited in time, and it remains in force as long as the Tribunal has not rescinded or changed its decision. The Tribunal is empowered to apply its decision also to contracts which have been signed before the decision, and have not yet been effectuated in full\textsuperscript{38}.

The Tribunal's decisions can be appealed before the Supreme Court within 45 days by every person or body who appeared before the Tribunal as petitioner or respondent, under the law or the regulations\textsuperscript{39}.

### III. Enforcement of the Tribunal’s decisions

The Standard Contracts Law does not prescribe a sanction against a supplier who disregards a decision of the Tribunal regarding the cancellation or the amendment of an unduly disadvantageous condition. This is treated as a general case of contempt of Court.

The Prosecutor General’s Office has the ability to prosecute criminally a supplier for not complying with Tribunal’s directives, but not much use is made of this kind of proceedings, if at all\textsuperscript{40}.

In this context it is important to distinguish between a supplier who petitioned the Tribunal for the approval of a standard contract, and a supplier who was a respondent in annulment proceedings; it does not appear always justified to apply such a harsh sanction against suppliers who have petitioned the Tribunal for the approval of their standard contracts, and then, for whatever reasons, mostly of an economic nature, have decided not to proceed with the proceedings, or not to use the standard contract as approved by the Tribunal.

It is also important to take into account, that the undertaking of criminal proceedings against a supplier who has not complied with the Tribunal’s decision would deter other suppliers from seek approval for their standard contracts. On the other hand, in principle, it is easier to understand the application of criminal sanctions against a supplier whose contractual condition has been found to be an unduly disadvantageous condition in a standard contract, and thus void,

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\textsuperscript{36} Some public bodies do regulate fields in which use is made of standard contracts. Examples are the Banks’ Supervisors and the Insurance Companies’ Supervisor.

\textsuperscript{37} Standard Contracts Law, Art 16 (a). The Minister of Justice exercises this Authority under the conditions set forth by the Attorney General in his directives, and according to the considerations examined further on in this article. Amongst the organizations and bodies which have been designated by the Minister of Justice under this authority are the Israel Football Players’ Organization; the Engineers and Architects Academicians’ Organization; the Israel’s Pharmacists’ Union; and the Community Advocacy Organization.

\textsuperscript{38} Standard Contracts Law, Art. 18 (b). The Tribunal can make such a retroactive applicability subject to conditions, such as its limitation for a period of time, make the applicability limited to specific goods or services, or to a defined group of customers.

\textsuperscript{39} Standard Contracts Law, Art. 10.

\textsuperscript{40} This is possible under Art. 287 (a) of the Criminal Law, 5737 – 1977, which states as follows: "Whoever breaches a directive lawfully given by a Court or by a body or a person which is acting in an official capacity, and who is authorized in the same matter, is liable of two years of detention", or alternatively under the Contempt of Court Act.
and who persists in making use of it. Nevertheless, this requires findings, which are a result of detection and investigation, for which not always there are means.

D. The Courts’ Authority in regard to Standard Contracts

Under the Standard Contracts Law, the Courts have also the authority to examine unduly disadvantageous conditions in standard contracts. Art. 3 compels the Court to annul or amend a condition in a standard contract which the Court found unduly disadvantageous. Upon exercising its authority, the Court has to take into account both the totality of the contract's provisions, together with all other relevant circumstances, and also the specific facts of the case.41

In the Courts, unlike what happens during proceedings which take place before the Tribunal, the customer himself can raise a claim of unduly disadvantage. An unduly disadvantage claim is usually raised during proceedings where the main claim is of another nature. Another possibility to raise an unduly advantage claim, is by initiating proceedings for a judgment to declare the condition to be unduly disadvantageous.

The Standard Contracts Law strikes a balance between the Tribunal and the Court, according a preferential status to the decisions of the Tribunal, both because of the "immunity" which they can grant the suppliers and his standard contract by approving it, and because of the more general field of application of the Tribunal's findings in annulment proceedings.

In the case of concurrent proceedings before the Tribunal and before a Court, each of them may continue examining the contract in parallel; nevertheless, the Tribunal has the discretion, should the circumstances of the case so require, to postpone the proceedings being held before it, until a judgment is given by the Court.42

Taking into account the public relevance of standard contracts, the Standard Contracts law compels the Court to notify the Attorney General of an unduly advantage claim being made in a case which is being heard by it.43 Under the Civil Proceedings Ordinance (Attorney General's Appearance in Court) [New Version], the Attorney General may, at his discretion, join any judicial proceedings, and make his arguments before the Court, if in his opinion a right of a public nature or a public interest is likely to be influenced by the proceedings taking place before the Court.

The duty of notification concerning a claim of an unduly disadvantage condition in a standard contract serves another important purpose: by bringing to the Attorney General's attention the existence of problematic standard contracts, the procedure enables him to get a general picture of standard contracts and consider the possibility to file for annulment proceedings before the Tribunal regarding the specific standard contract subject of the notification.

E. Activities in the field of Standard Contracts

As mentioned above, entitled to plead before the Tribunal are only those designated as such under the Standard Contracts Law: the Attorney General, the

41 Standard Contracts Law, Art. 19. It should be stressed, that the Courts do not have such an authority in the case in which the specific standard contract before them has been approved by the Tribunal, since such a contract is, as mentioned beforehand "immune" to claims of unduly disadvantage for a period of five years from the Tribunal's decision or for a shorter period, as decided by the Tribunal.

42 Standard Contracts Law, Art. 21 (b). The rationale underlying this provision is based on two principles: the first, not to prolong judicial proceedings, in any judicial instance, especially since the postponement of the Court's proceedings because of the concurrent Tribunal's proceedings might impair the customer's rights, taking also into account that usually the claim of unduly disadvantage in a standard contract is usually one of many claims raised in a Court case; the second, that the Tribunal is the judicial body empowered to make broad application findings.

43 Standard Contracts Law, Art. 20.
Head of the Consumers' Protection Authority, various governmental agencies, customers' organizations which have been especially designated in the Standard Contracts Regulations, 5743-1983, and organizations which have been especially approved by the Minister of Justice to appear in specific proceedings.

I. The Attorney General's Sphere of Activity

The Attorney General has empowered the Civil Law Department in the Legislation and Counselling Unit in the Ministry of Justice to act on his behalf in the field of standard contracts. The members of the Department appear before the Tribunal as respondents in approval proceedings, as representatives of the Attorney General. Sometimes, the members of the Department appear before the Tribunal together with the representatives of the State's Prosecutor.

The Civil Law Department dedicates a vast amount of time and energies in formulating policy guidelines and creating legal norms in the various contexts in which use is made of standard contracts. Likewise, the Civil Law Department assists various other bodies who deal in this matter, such as the Bank of Israel, the Head of Israeli Consumer’s Committee, the Consumers’ Protection Agency and other consumers' protection organizations.

The task of examining unduly disadvantageous conditions in standard contracts requires, naturally, the studying of the subject of the contract and prolonged contacts with the supplier, with governmental agencies who have expertise or authority in the matter and with other bodies who are versed in the matter. It is to be noted, that the Attorney General does not, as a rule, file in the Tribunal for annulment proceedings regarding specific contractual provisions only, although the Standard Contracts law allows him to do so, but he rather examines the whole standard contract and files for the annulment of all the conditions in the standard contract which, in his opinion, are unduly disadvantageous.

It is the Civil Law Department policy, in its role as a petitioner before the Tribunal in annulment proceedings, and as respondent before the Tribunal in approval proceedings, as well as representative of the Attorney General in proceedings held before the Courts, to bring about a situation in which there is, for each field, a standard contract model, which has been judicially examined and which can serve as example and basis to all suppliers operating in the same field.

The Civil Law Department also deals with various other subjects, which are related to the field of standard contract law, such as class actions. Thus, not long ago, the Attorney General, exercising his authority under the Civil Proceedings Ordinance (Attorney General’s Appearance in Court) [New Version], joined the representative claim filed against Club Hotel International (ICA) Ltd. and Club Hotel (Management) (1996) Ltd., and opposed the compromise which was about to be reached since, inter alia, it comported the change of the standard contract which was used by the companies, by including conditions which were unduly disadvantageous for all their customers. The step was taken by the Attorney General taking into consideration that, under class actions legislation, once a compromise agreement is reached and approved by the court, whoever did not opt-out of the group is considered as agreeing to the compromise, and is barred from raising any claim against it in any future judicial proceedings relating to it, including a claim based on an unduly disadvantageous condition in a standard contract.

Filing of annulment proceedings

Soon after the Standard Contract law came into effect, the Attorney General determined a set of priorities for dealing with standard contracts in various subjects. The principles underlying the Attorney General's policy were, mainly, the application

44 At the time of writing, the Department is dealing with about 20 proceedings for approval of standard contracts pending before the Tribunal, amongst whom petitions related to elderly housing standard contracts, tourism services standard contract.

45 Under Israeli Law, the possibility to file a class action is limited to specific cases, usually related to consumers' protection issues.

46 CC (Tel Aviv) 2560/01 (CMR 23736/01) Birnboim v. Club Hotel, (not yet published).
of the contract, the value of the goods or the services subject of the contract, their
classification as essential goods or services, the features of the customers of the same
goods and services, the structure of the suppliers, and the complexity of the contract.

With the passing of time, it became clear that keeping to this set of priorities was not
such an easy task, for a number of reasons: the Attorney General is a respondent to
all approval proceedings and has to deal with all the petitions for approval filed
before the Tribunal, without regard to their character or to the public importance of
the standard contract subject matter of the petition. Thus it came to be that the
Attorney General and its representatives dealt with contracts which were not
necessarily within the prescribed set of priorities. Furthermore, as mentioned above,
Art. 20 of the Standard Contracts Law prescribes that, once an unduly disadvantageous
claim has been made before a Court, the Court has a duty to notify the Attorney
General, so that he can consider whether to join the proceedings. Under this
provision, the Attorney General is notified of the existence of various standard
contracts, dealing with different matters, and he has to decide whether to join in the
proceedings, without regard to the set priorities. Furthermore, taking into account
the importance of giving due consideration to the public’s complaints and the
grievances of various bodies, within reasonable time, it is clear that not always the
standard contracts which fall into the preset priorities are those to be examined.

The set priorities change also when specific issues, who are under the supervision of
another governmental office or agency, are object of the office’s or the agency’s
scrutiny. If these issues were part of the preset priorities, and it is clear that the
office or the agency gave due consideration the issue of standard contracts law, and
more so in the case in which, as the result of the scrutiny, changes are made in the
legislation, the need to file for annulment proceedings subsides.

Nevertheless, the priorities which were set shortly after the Standard Contracts Law
came into effect have not been neglected. In the last few years, annulment
proceedings have been filed regarding standard contracts whose subject matter was
emergency medical treatment, distance selling, elevators’ installation and
maintenance, and import of cars – weighty subjects, in which the impact on
consumers’ protection is major, given the identity of the customers as not particularly
strong consumers.

As mentioned above, the Standard Contract Law compels a Court before whom a
claim as been made concerning an unduly disadvantageous condition in a standard
contract, to notify the Attorney General 47. The Attorney General may, at his
discretion, join any such judicial proceedings, if, in his opinion, a right of a public
nature or a public interest is likely to be influenced by the proceedings taking
place before the Court; in this manner, the Attorney General informs the Court of
his opinion, brings his arguments before the Court and brings to its knowledge
the relevant judicial findings of the Tribunal, as relevant.

Every decision in the matter requires the examination of the court writs which have
been filed by the parties, the scrutiny of the relevant standard contract and of its
alleged unduly disadvantageous conditions.

Should the Attorney General decide to join the proceedings 48, his representatives
plead on his behalf the Court and they may, in this fashion help to the development
of a coherent and uniform judicature and assist in the cancellation of an unduly


47 Standard Contract Law, Art. 20.

48 Relevant consideration to the decision are, among the others, whether the
parties have legal representation; whether the main claim made against the
standard contract is legal or rests in the specific facts of the case; whether the
standard contract issue is central to the case; whether the claim is raised in more
than one case; whether the customers are especially weak ones; whether in the
past a decision has been made to join similar proceedings; the existence of any
governmental directives or rules applying to the specific type of standard
contract subject of the unduly disadvantage claim before the Court. In addition,
the nature of the claim is also examined: a general, unspecified claim is less
likely to be the subject of a decision by the Attorney General to join the
proceedings than a detailed and focused one.
disadvantageous condition. Due to budgetary and time considerations, the decision to join Court proceedings is made in particularly important cases only49.

The Ministry of Justice’s website

Within the general e-government project promoted by the Israeli Government, the Ministry of Justice of the State of Israel has launched its own website. Due to the wide importance of the subject of standard contracts for the public at large, and the vast amount of activity done by the Civil Law Department in this subject, wide space has been dedicated to this subject in the website50. In this part of the website recent Tribunal’s judgments can be found, as well as a list of pending files before the Tribunal. It is also planned to add a link to relevant recent judgments issued by the Courts. The scope is to assure maximum access to the public to all the relevant materials in the subject of standard contract law, in order to widen its knowledge, develop awareness to it and make the public at large part of the decision making process.

The website is at present in its first stages and it is planned to expand and encompass more and more publications.

II. The activity of the Bank of Israel

Amongst the agencies entitled to file the Tribunal for annulment of unduly disadvantageous conditions in standard contracts is the Bank of Israel51. The Bank of Israel is Israel’s Central Bank, which was established by statute52. It fulfills many functions, which were given to it by different laws, amongst which are the application of monetary policy, economic counselling to the Israeli Government, banks’ supervision and the representation of the State before international economic and monetary institutions.

The Bank of Israel has in recent years filed before the Tribunal for the annulment of unduly disadvantageous conditions in banks’ standard contracts and has taken part, together with the Attorney General’s representatives, in the preparation of the annulment petition which has been filed against Leumi Bank for Israel Ltd.53.

III. Consumers’ organizations which have been approved for a particular matter

As mentioned above, consumers’ organizations which have been approved for a particular matter are entitled to file for annulment in that matter. The intention of the provision is to strike a balance between the acknowledgement of the public importance of standard contracts, and the need to make sure that legal issues be presented before the Tribunal in a professional manner, since the dire consequences which might stem by their incorrect representation, taking into account the particular nature of the Tribunal decision as basis for immunity of a condition which has received the Tribunal’s approval, and the damages which might be caused to suppliers by the wrongful cancellation of a condition which was not, in fact, unduly disadvantageous.

In the exercise of his authority, the Minister is advised by a team composed of members of the Ministry of Justice and the Trade, Industry and Employment Ministry. The team examines the organization according to criteria which has been established in a directive issued by the Attorney General.

The preconditions for approval are: that the organization be incorporated54; that the organization be able to state its case in a responsible manner55; and that the organization be able to state its case in a responsible manner.

50 http://www.justice.gov.il/yoetz/vhakika/nosimmishpatim/hozimahidim/default.a
sp
51 Standard Contracts Regulations, reg. 4.
52 Bank of Israel Law, 5714-1954.
53 195/97 Attorney General v. Leumi Bank of Israel Ltd.
54 The Minister of Justice is entitled also to approve an organization which is not incorporated, if it is a branch of a corporation whose aims do not contravene the aims of the organization or the law.
organization be active for the three years preceding to the application for approval. An organization which has been approved is required to refrain from political activity and to certify the absence of conflict of interests.

The approval is granted for a three-year period, and during this period it can be rescinded if the condition it was granted subject to have elapsed, or if the organization has stopped acting in a regular and responsible manner. Some of the organizations which have been approved by the Minister of Justice have filed for annulment before the Tribunal and their claims have been heard by it. Others have preferred not to file for annulment, and for other still, the approval was enough to bring the supplier to amend the unduly disadvantageous conditions in the standard contract. Thus, the mere existence of the Standard Contracts Law and the possibility that private parties challenge a standard contract are sometimes enough to bring about more balanced standard contracts.

Closing Remarks

The 1982 Standard Contract Law strives to amend the problems created by the 1964 Law, and aims to protect customers from unduly disadvantageous conditions in standard contracts, by striking a balance between the parties' rights, whilst taking into account their disparity. At the beginning, the law was applied mainly by the representatives of the Attorney General; with the passing of time, the law became more and more known by the general public and increasingly frequent use of it is being made made by the Courts. Nevertheless, a great amount of effort is still needed to ensure that the Law's provisions are fully implemented. The Ministry of Justice acts in many ways to reach this aim, and to rend the general public familiar with the

55 Proof to this effect can serve a fixed address, the existence of a managerial and a secretarial structure, fixed opening hours, and the existence of sufficient funds for a reasonable level of activity.

56 Thus, for instance MA 11/85, Israel Footballers' Union v. Israel's Football Association et al. (the Tribunal's decision was reviewed in appeal by the Supreme Court in CA 825/88, Israel's Football Association v. Israel Footballers' Union, see above, footnote 20; SCF 6/91, Israeli Pharmacists' Union v. Maccabi Health Fund; MA 90/96, Community Advocacy Organization v. Amidar, Israel's National Housing Company Ltd. et al.