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The International Comparative Legal Guide to: **Lending & Secured Finance 2019**

7th Edition

A practical cross-border insight into lending and secured finance

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EDITORIAL

Welcome to the seventh edition of *The International Comparative Legal Guide to: Lending & Secured Finance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of lending and secured finance.

It is divided into three main sections:

Three editorial chapters. These are overview chapters and have been contributed by the LSTA, the LMA and the APLMA.

Twenty-five general chapters. These chapters are designed to provide readers with an overview of key issues affecting lending and secured finance, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in lending and secured finance laws and regulations in 51 jurisdictions.

All chapters are written by leading lending and secured finance lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Thomas Mellor of Morgan, Lewis & Bockius LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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Shiri Ish Shalom



1 Overview

1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

The total assets managed by institutional investors have grown rapidly over the last few years. Data from the Bank of Israel indicates that, as of April 2018, pension funds, provident funds and insurance companies manage assets of \$454 billion, an increase of more than 250% over the past 10 years. In light of the high percentage of the provision for long-term savings in Israel (amongst the highest in the world), the growth of institutional assets is expected to continue rapidly.

The share of capital allocated by institutional investors to investment funds have grown at a steady pace over the last 10 years (from 1.8% in 2008 to 3.6% in 2017, at a growth rate of approximately 0.2% per year; the growth rate of direct loans provided by institutional lenders in 2018 was more moderate, although still high – 0.1%). In parallel to the steady growth of direct lending by institutional lenders, the bank corporate debt in Israel is continuously decreasing.

As indicated in the data above, alternative investments are consistently gaining traction as an asset class and institutional investors are key players in the Israeli syndicated loans market (syndicated loans issued in conjunction with institutional investors reached 70% in the year 2015 and have continued to grow over the last few years).

Although the role of institutional investors in the Israeli lending market is growing rapidly, alternative investments still have not grown to their full potential to serve as a material funding resource to the business sector. Thus, the share capital allocated by institutional investors to alternative investments in Israel – 5.3% of the total managed assets in 2017 – is still relatively low in comparison to North America and Europe, in which nearly 30% of the total managed assets were allocated to alternative investments. In addition, the size of the syndicated loan market in Israel is relatively low in comparison to other developed countries, in which the syndicated loan market provides credit similar in size to corporate bonds.

As institutional investors continue to increase their activity in the loan markets and as the relatively young hedge fund industry is growing rapidly, the size and role of the syndicated loan market in corporate financing is expected to increase significantly in the upcoming years.

1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

Significant syndicated lending transactions for 2017–2018 include:

- (i) In 2017, the Jerusalem Municipality entered into a NIS 1 billion financing agreement with a consortium of three Israeli banks and two insurance funds for the construction of 1,000 new classrooms throughout the city of Jerusalem.
- (ii) In 2018, Enlight Renewable Energy Ltd., which deals in solar and wind energy in Israel and Europe, signed an agreement with a consortium headed by Bank Hapoalim and two Israeli insurance funds for the financing of the Valley of Tears wind turbines farm project on the Golan Heights. The lending consortium will provide a non-recourse NIS 525 million loan, which will cover the construction period.
- (iii) In 2018, the Greek energy company Energean signed a \$1.275 billion financing deal for the development of Israel's Tanin and Karish offshore natural gas fields. The syndication is led by Bank Hapoalim, which will provide \$375 million, and three foreign lenders will each provide \$300 million – Morgan Stanley, Societe Generale and Natixis.
- (iv) In 2018, Israel Power Management (IPM) power plant at Be'er Tuvia closed a NIS 1.6 billion financing transaction with Deutsche Bank and Israel's Bank Hapoalim for construction of the company's 450 megawatt combined cycle technology private power plant. Deutsche Bank led an international financing consortium that includes Credit Suisse, KfW, and other European banks and Bank Hapoalim led a consortium of local banks and institutional investors.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, inter-company guaranties by parent and sister companies are common practice in Israel.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

While any board decision is subject to corporate governance issues and applicable law, there are no special enforceability, director

liability or other concerns in connection with disproportionately small (or no) benefit to the guaranteeing/securing company.

2.3 Is lack of corporate power an issue?

While lack of corporate power may be an issue with respect to any corporate decision or action under applicable corporate law, there are no special concerns relating to inter-company guaranties. In any case, in order to mitigate corporate power concerns, lenders usually require appropriate legal opinions and/or representations, including confirmed board resolutions.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Generally, no.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No, they are not.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No, there are not.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

In Israel, all types of assets may serve as collateral to secure lending obligations. Mortgages, charges (fixed and floating), assignments, pledges and liens are common types of security in loan transactions.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is common practice in Israel to execute general security agreements, which govern the creation of security over the borrower's assets in order to secure its obligation towards the lender. Such agreement shall usually include an obligation by the borrower to create a fixed charge over ascertained and definite assets, a floating charge over changing assets, a mortgage over real estate property and the assignment of any rights and interest in contracts, bank accounts, receivables, etc. Each of the above types of security is governed by different laws, registration procedures, etc.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes. Such security is usually created by way of mortgage in case of real property/land or fixed charge in case of a plant, machinery and equipment.

The mortgage or charge is created by an agreement between the debtor and the creditor. If the collateral is immovable property, the

agreement must be in writing. A charge over an asset of a company must also be evidenced in writing.

A mortgage over land is filed with the Israeli Land Registry and Settlement of Rights. A charge over a company's plant, machinery or equipment is filed with the Israeli Companies Registry.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes. This is usually done by way of assignment or floating charge. An assignment requires written notice to the relevant third-party debtor, while a floating charge requires due filing with the Israeli Companies Registry.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. Cash deposits can be taken as security by way of floating charge.

3.6 Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes, collateral security can be taken over shares.

Shares in Israel may be certificated. The share certificate, however, is not required to effect the security interest.

Share pledge/hypothec agreements may be governed by foreign law, provided that the registration requirements (including Hebrew forms) are complied with.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, as a floating charge.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, it can.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Registration requirements differ pursuant to the type of assets secured (see questions 3.3–3.7 above).

There are no notarisation or stamp duty requirements in connection with the creation of security under Israeli law.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Generally, no. There are prescribed forms for filing and the fees are generally minor. Note, however, that mortgages, foreign ownership

and non-resident signatories may require translations and additional procedures and fees.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Generally, no.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Generally, no.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Yes, powers of attorney, deeds and certain execution procedures may be required.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Under Israeli law, a company may purchase or guarantee the acquisition of its own shares. Where such actions are deemed "distribution of dividends", the company must comply with the limitations and restrictions that govern dividend distributions.

(b) Shares of any company which directly or indirectly owns shares in the company

See above.

(c) Shares in a sister subsidiary

See above.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes, it will.

5.2 If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable in Israel (see question 5.1 above).

5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Loans and guarantees can generally be assigned contractually.

6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Answer not available at this time.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Answer not available at this time.

6.3 Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to, or guarantee and/or grant of, security from a company in your jurisdiction?

Answer not available at this time.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Answer not available at this time.

6.5 Are there any adverse consequences for a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Answer not available at this time.

7 Judicial Enforcement

7.1 Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in your jurisdiction enforce a contract that has a foreign governing law?

The choice of foreign law to govern any contract will be recognised and upheld by the Israeli courts with respect to the contractual obligations therein, subject to any conflict with any mandatory provision of Israeli law.

7.2 Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a “foreign judgment”) without re-examination of the merits of the case?

The recognition of foreign judgments in the State of Israel is governed by the Enforcement of Foreign Judgments Law 1958 (the “**Enforcement Law**”). Recognition of a foreign judgment under the Enforcement Law is available, but not automatic. The plaintiff would be required to have effected proper service of process on the respondent company. A foreign judgment can be enforced if (i) it satisfies the requirements and procedures of the Enforcement Law, and (ii) the defendant company is unable to demonstrate, to the satisfaction of the Court in Israel, that one or more of the defences to enforcement provided for under the Enforcement Law applies.

The Israeli courts would be required to be satisfied that: (a) the foreign judgment was obtained by a competent court having jurisdiction under the laws of the state and province in which the foreign judgment was obtained (the “**Foreign State**”); (b) the foreign judgment is final, conclusive and enforceable against the defendant company in the Foreign State; (c) the performance or observation of the foreign judgment is lawful, enforceable and not contrary to public policy under the laws of the State of Israel; and (d) the foreign judgment is a fully valid and enforceable judgment under the laws of the Foreign State.

The defendant company would have defences to the enforcement of the foreign judgment by the Israeli Courts, including for any one or more of the following reasons: (a) under the laws of the Foreign State, judgments given by Israeli competent courts are not enforceable in the Foreign State; (b) the rendering court in Foreign State did not have subject matter jurisdiction; (c) the judgment was the result of a fraud upon the Foreign State court; (d) the foreign judgment conflicts with another final and conclusive judgment still in effect between the same parties and regarding the same subject matter; (e) the foreign judgment may harm the sovereignty or security of Israel; or (f) the request for enforcement of the foreign judgment was submitted to the Israeli courts more than five years after the foreign judgment date, subject to certain exceptions determined in the Enforcement Law.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in your jurisdiction against the assets of the company?

- (a) If the suit pertains to a fixed sum deriving from a contract or undertaking evidenced in writing, it can be submitted in “summary procedure” (“fast-track” proceedings). Preparation of such claim varies pursuant to the complexity of the facts giving rise thereto, and can be filed immediately after its preparation. If the defaulting company does not submit a request for defence within 30 days of receipt of the claim, the plaintiff is entitled to obtain a judgment in his favour from the court. The length of time for obtaining such judgment (days/months) is influenced by the complexity of the case and the workload of the relevant court. Enforcement of the judgment against the assets of the company may require proceedings

before the Law Enforcement and Collection Authority and their length will vary pursuant to the type of assets which are the subject matter of the enforcement proceedings.

- (b) Whereas recognition of a foreign judgment under the Israeli Enforcement Law is not automatic (see the answer to question 7.2 above), the length of proceedings for such enforcement varies according to the complexity of the case and claims raised by both parties pursuant to the Enforcement Law. The length of such proceeding is also influenced by the workload of the relevant hearing court and may take several months or even years.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?

While enforcement may be subject to restrictions, timing issues and regulatory requirements or consents deriving from the type of security, there are no special restrictions or regulatory requirements related directly to enforcement of collateral security.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?

No, foreign lenders have the same status as domestic lenders in connection with filing a suit against an Israeli company or foreclosure on collateral security.

7.6 Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes, a moratorium may apply to lenders’ claims and security enforcement during bankruptcy or reorganisation proceedings.

7.7 Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?

Under the Israeli Arbitration Act, parties may request the courts to approve an arbitral award, thereby giving such award the effect of a court ruling.

The Arbitration Act provides for two methods to contest an arbitration award before the courts: (1) request for annulment of the award on the grounds of specific causes set forth in the Arbitration Act, such as an award outside the jurisdiction of the arbitrator, unlawful appointment of the arbitrator or bias of the arbitrator; and (2) submission of an appeal, provided, however, that such right was granted and agreed in advance between the parties in the arbitration agreement executed thereby.

When reviewing an annulment request, the courts will not re-examine the merits of the arbitration award, and their review shall be limited to determining compliance with basic procedural requirements pursuant to parameters and causes defined in the Arbitration Act.

In appeal proceedings, the arbitration award may be re-examined by the court on its merits.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

As noted above, security may be subject to moratorium during bankruptcy proceedings, unless the bankruptcy Court expressly approves enforcement.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Yes, there are.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

No, there are not.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Creditors may apply to the Law Enforcement and Collection System Authority (an administrative authority primarily authorised to execute court judgments).

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

Generally, yes, subject to international law principles and excluding a limited number of foreign jurisdictions such as Iran and Syria.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

Generally, yes, save for specific matters protected under international law (e.g. diplomatic immunity).

10 Licensing

10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e. a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank versus a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

There are no licensing and other eligibility requirements in Israel for local or foreign lenders to a company. There are also no licensing and other eligibility requirements in Israel for an agent under a syndicated facility. Note, however, that certain regulatory requirements or restrictions may apply to certain types of lenders/agents (such as banks and mutual funds, etc.).

11 Other Matters

11.1 Are there any other material considerations which should be taken into account by lenders when participating in financings in your jurisdiction?

The introduction of the LSTA – Loan Syndications and Trading Association and its documentation is certainly the most important development in Israel's corporate loan syndication market. While local market participants and law firm still use various forms of documentation that often include certain LMA provisions and provide for limited liquidity, we are proud to work with the LSTA on a set of secondary market documents drafted for the Israeli Market with liquidity in mind. In light of the well-recognised importance of liquidity in functioning financial markets, the development of the secondary loan market as a liquid asset class constitutes a mutual goal for investors, companies and financing institutions. The LSTA introduced its documents in March in a seminar at the TLV Hilton Hotel and plans to publish and post initial secondary market documentation on the LSTA website by end of Q1 2019. We believe that the Israel LSTA documents will be widely adopted and will have a significant impact on Israel's corporate loan market and its liquidity in the near future.

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L A W O F F I C E

E. Schaffer & Co. is a commercial law firm advising international and domestic banks and financial institutions, prominent public and private corporations, start-up companies, investors and entrepreneurs on transactional and regulatory affairs. The firm draws on a wealth of transactional experience and a sound understanding of corporate law, banking and bankruptcy law and regulation, and international capital markets. The firm advises international and domestic clients on all aspects of bank financing and corporate finance, delivering a diligent, innovative, effective and all-inclusive portfolio of legal solutions under one roof.

E. Schaffer & Co. is the only firm in Israel to join the LSTA and its Israel and U.S.-trained Banking & Finance team has gained unparalleled expertise serving as lead counsel for banks and financial institutions in complex cross-border financing transactions, including syndicated loans origination and trading, secured lending, debt and collateral assignments, inter-creditor agreements, refinancing transactions, ISDA and derivatives, factoring and complex financial instruments.

The firm's Corporate and Commercial Law practice provides broad services across commercial law, corporate law and securities law to international and domestic clients in a range of industries. Our New York and Israel licensed professionals have gained extensive experience providing ongoing legal support to private and public companies and serving as lead counsel for corporate clients, pension funds and private investors in connection with a variety of commercial agreements, investment transactions and cross-border mergers & acquisitions.

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- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

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