

**International
Comparative
Legal Guides**



Practical cross-border insights into derivatives law

**Derivatives
2022**

Third Edition

Contributing Editor:

Jonathan Gilmour
Travers Smith LLP

ICLG.com

Expert Analysis Chapters

- 1** **Smart Contracts in the Derivatives Space: An Overview of the Key Issues for Buy-side Market Participants**
Jonathan Gilmour & Vanessa Kalijnikoff Battaglia, Travers Smith LLP
- 5** **Negotiating ISDA Master Agreements for Corporate Counterparties**
Meyer C. Dworkin & Michele Babkine, Davis Polk & Wardwell LLP
- 10** **Hedging the Refinanced Cross-Border Credit Agreement**
Felicity Caramanna, Credit Agricole Corporate and Investment Bank

Q&A Chapters

- 13** **Australia**
Gilbert + Tobin: Louise McCoach, Simon Lynch, Peter Reeves & Peter Bowden
- 20** **Canada**
Cassels Brock & Blackwell LLP: Charles Newman, Mike Tallim & Richard Ngo
- 27** **Cayman Islands**
Maples Group: Tina Meigh & Hailee Robinson
- 32** **England & Wales**
Travers Smith LLP: Jonathan Gilmour & Vanessa Kalijnikoff Battaglia
- 42** **France**
Jeantet AARPI: Jean-François Adelle & Thibault Mercier
- 51** **Germany**
Hengeler Mueller: Stefan Krauss & Christian Schmies
- 58** **Hong Kong**
Mayer Brown: Vincent K.P. Sum & Sylvia Leung
- 65** **India**
MVKini: Ravi Kini, Abhijit Bhandarkar & Simran Hasija
- 72** **Israel**
Yigal Arnon & Co.: Shiri Shaham & Shai Margalit
- 77** **Japan**
Nagashima Ohno & Tsunematsu: Ichiro Oya, Masayuki Fukuda, Hideaki Suda & Tsutomu Endo
- 84** **Luxembourg**
GSK Stockmann: Andreas Heinzman, Valerio Scollo & Julia Kaalikoski
- 90** **Netherlands**
Keijzer & Cie: Nicole Batist & Marc Keijzer
- 98** **Portugal**
Morais Leitão, Galvão Teles, Soares da Silva & Associados: Maria Soares do Lago, Elmano Sousa Costa, Raquel Mauricio & Carolina Nagy Correia
- 104** **Spain**
Cuatrecasas: Tania Esteban & Arnau Pastor
- 113** **USA**
Paul, Weiss, Rifkind, Wharton & Garrison LLP: Manuel S. Frey & Anastasia V. Peterson

Israel

Yigal Arnon & Co.



Shiri Shaham



Shai Margalit

1 Documentation and Formalities

1.1 Please provide an overview of the documentation (or framework of documentation) on which derivatives transactions are typically entered into in your jurisdiction. Please note whether there are variances in the documentation for certain types of derivatives transactions or counterparties; for example, differences between over-the-counter (“OTC”) and exchange-traded derivatives (“ETD”) or for particular asset classes.

It is common in Israel to use the International Swaps and Derivatives Association (“ISDA”) documentation to document transactions in derivatives, including: the ISDA Master Agreement with a negotiated Schedule; the Credit Support Annex (“CSA”); and the Confirmation.

Israeli banks often use their own forms (in Hebrew) created to document derivatives transactions with less sophisticated clients.

1.2 Are there any particular documentary or execution requirements in your jurisdiction? For example, requirements as to notaries, number of signatories, or corporate authorisations.

A notary confirmation is not required for this type of transaction. An agreement signed by a corporate entity should be properly authorised by the entity’s organs. Typically, a resolution of the board of directors is required and is sufficient, unless specified otherwise in the governing corporate documents of the corporate entity. The number and identity of the signatories is determined by the board of directors, either in a specific resolution authorising the transaction or in a general resolution regarding signature rights.

1.3 Which governing law is most often specified in ISDA documentation in your jurisdiction? Will the courts in your jurisdiction give effect to any choice of foreign law in the parties’ derivatives documentation? If the parties do not specify a choice of law in their derivatives contracts, what are the main principles in your jurisdiction that will determine the governing law of the contract?

It is more common to see English law selected as the governing law in ISDA documentation, since the NY law CSA is less supported by Israeli netting legislation. In ISDA agreements between two Israeli parties, Israeli law is often selected as the governing law. Israeli law recognises the freedom of contracting

parties to have their contractual relationships governed by foreign law, and Israeli courts generally respect the contracting parties’ choice of law and apply the relevant foreign law to the legal issues in question. Insolvency of the Israeli counterparty may be an exception to this rule, and the insolvency court may use its discretion in this point if the application of the foreign law prejudices the other creditors of the insolvent party. The contents of the foreign law on the relevant questions should be proved to the court by way of expert witness opinions.

2 Credit Support

2.1 What forms of credit support are typically provided for derivatives transactions in your jurisdiction? How is this typically documented? For example, under an ISDA Credit Support Annex or Credit Support Deed.

In most cases, the types of assets that serve as credit support are cash and securities. The credit support arrangement is usually documented under the ISDA CSA. The English law CSA is more commonly used since, as detailed in the Israeli industry collateral opinion provided to ISDA, the transfer approach under the English law CSA is more compatible with Israeli netting legislation than the security interest approach reflected in the NY law CSA.

2.2 Where transactions are collateralised, would this typically be by way of title transfer, by way of security, or a mixture of both methods?

The Israeli netting legislation – the Financial Assets Agreements Law, 2006 (the “Netting Legislation”) – supports the transfer approach reflected in the English law CSA, and recognises the title transfer thereunder. Transactions can be collateralised by way of security, but this would trigger the requirement to register the security interest in Israel and would raise certain legal uncertainties, and therefore this approach is less frequently taken. However, certain ISDA documentation relating to Initial Margin and Variation Margin does reflect the security interest approach.

2.3 What types of assets are acceptable in your jurisdiction as credit support for obligations under derivatives documentation?

Under Israeli law, any type of asset can serve as credit support. However, the Netting Legislation supports the transfer of title only with respect to cash and securities.

2.4 Are there specific margining requirements in your jurisdiction to collateralise all or certain classes of derivatives transactions? For example, are there requirements as to the posting of initial margin or variation margin between counterparties?

There are no specific margining requirements of general applicability. Certain types of financial institutions, such as banks, may be subject to specific regulation in this respect in connection with their regulatory capital requirements.

2.5 Does your jurisdiction recognise the role of an agent or trustee to enter into relevant agreements or appropriate collateral/enforce security (as applicable)? Does your jurisdiction recognise trusts?

Yes, Israeli law does recognise the ability of a trustee or an agent to enter into agreements, including collateral agreements, and to enforce rights under security interests, on behalf of other parties. Trusts are recognised under Israeli law.

2.6 What are the required formalities to create and/or perfect a valid security over an asset? Are there any regulatory or similar consents required with respect to the enforcement of security?

A security interest (also referred to as a pledge) is created by way of an agreement between the grantor and the recipient of the security interest. The primary method of perfection with respect to security interests created by Israeli companies is registration of the pledge with the Israeli Companies Registrar within 21 days of the creation of the pledge. Registration is typically required also with respect to security interests created by other Israeli corporate entities.

The main method of realisation (enforcement) of a security interest is by a judicial order, either of the court or of the Head of the Debt Collection Office. Self-realisation is usually not permitted, with the exception of cash and where the debtor's consent to self-realisation was obtained after the creditor became entitled to enforce the security interests. There are further exceptions applicable to certain types of Israeli regulated financial institutions.

3 Regulatory Issues

3.1 Please provide an overview of the key derivatives regulation(s) applicable in your jurisdiction and the regulatory authorities with principal oversight.

There are no specific derivatives or swaps regulations in place other than the Netting Legislation, which enables close-out netting and collateralisation via title transfer. The Netting Legislation resolved certain uncertainties that used to exist in Israeli law in connection with transactions in derivatives.

The regulatory authorities with principal oversight over the banking and finance systems in Israel are the Bank of Israel, the Capital Market, Insurance and Savings Authority and the Israel Securities Authority.

3.2 Are there any regulatory changes anticipated, or incoming, in your jurisdiction that are likely to have an impact on entry into derivatives transactions and/

or counterparties to derivatives transactions? If so, what are these key changes and their timeline for implementation?

The Israeli Ministry of Justice and the Bank of Israel are considering certain changes to the Netting Legislation, which, if adopted, will extend the types of transactions covered thereunder. To the best of our knowledge, these discussions are in preliminary stages, and no proposed amendment has yet been published.

3.3 Are there any further practical or regulatory requirements for counterparties wishing to enter into derivatives transactions in your jurisdiction? For example, obtaining and/or maintaining certain licences, consents or authorisations (governmental, regulatory, shareholder or otherwise) or the delegating of certain regulatory responsibilities to an entity with broader regulatory permissions.

No, the entry into derivatives transactions does not trigger any requirement for a licence, consent or authorisation, nor any other regulatory requirement.

Please note that the Netting Legislation applies to derivatives transactions in which both parties are corporate entities and at least one party is a "financial institution" as defined therein. The definition includes various entities licensed in Israel, such as banks, insurance companies, pension funds, etc., as well as similar types of non-Israeli entities that are subject to supervision by the relevant competent authorities in their home jurisdiction. The definition also includes the Bank of Israel.

Certain large volume derivatives transactions involving Israeli currency trigger reporting requirements under orders promulgated by the Bank of Israel, as part of its monetary supervision.

3.4 Does your jurisdiction provide any exemptions from regulatory requirements and/or for special treatment for certain types of counterparties (such as pension funds or public bodies)?

Other than detailed in question 3.3 above, there are no specific exemptions or special treatment for specific types of counterparties.

4 Insolvency / Bankruptcy

4.1 In what circumstances of distress would a default and/or termination right (each as applicable) arise in your jurisdiction?

The Financial Assets Law provides that Close-out Provisions in a Framework Agreement (as such terms are defined under the Financial Assets Law) are valid notwithstanding insolvency proceedings.

The Insolvency and Economic Rehabilitation Law, 2018 (the "Insolvency Law") includes two insolvency proceedings for corporations – rehabilitation proceedings and liquidation proceedings (collectively, the "Insolvency Proceedings"), as further detailed below:

- (a) Rehabilitation proceedings – the court will order the commencement of rehabilitation proceedings if: (i) there is a reasonable prospect of the economic rehabilitation of the corporation; (ii) there is no reasonable concern that the rehabilitation proceedings will prejudice the creditors'

interests; and (iii) there are adequate sources to finance the expenses of the rehabilitation proceedings. At the end of these proceedings, the corporation either returns to the solvency track or enters into liquidation proceedings, in which its assets are realised, and the proceeds are distributed among the creditors.

- (b) Liquidation proceedings – if one or more of the conditions of the rehabilitation proceedings are not met, the court will order the commencement of liquidation proceedings.

Generally, any motion filed by a corporation for relief under the Insolvency Law, as well as any motion filed against a corporation by a third-party creditor that is not dismissed within a specified time, would lead to a default and termination right under derivatives transactions with Israeli counterparties.

4.2 Are there any automatic stay of creditor action or regulatory intervention regimes in your jurisdiction that may protect the insolvent/bankrupt counterparty or impact the recovery of the close-out amount from an insolvent/bankrupt counterparty? If so, what is the length of such stay of action?

Under the Insolvency Proceedings, the court issues a “moratorium order”, which restricts creditors from filing claims against the corporation and from undertaking execution and/or recovery actions against its assets without the court’s approval and subject to conditions stipulated by the court.

Concurrently with the issuance of the abovementioned order, the court shall appoint a trustee, who endeavours, for a limited period of time, to operate the corporation’s business and reach arrangements with the creditors, under the supervision of the court.

The proceedings of corporate rehabilitation and the issuance of a moratorium order will remain in effect for a limited duration of up to nine months, which can be extended by the court for additional three-month periods.

4.3 In what circumstances (if any) could an insolvency/bankruptcy official render derivatives transactions void or voidable in your jurisdiction?

Subject to the terms specified under the Netting Legislation, Close-out Provisions in a Framework Agreement are valid notwithstanding insolvency proceedings.

The Insolvency Law sets forth three pre-insolvency “suspect periods” in which transactions can be nullified under different conditions, as follows:

- (i) The court may order the nullification of a transaction or action performed during the three-month period preceding the filing of the insolvency application that led to the repayment of a debt to a creditor or to its advancement in the priority order, and which took place prior to the issuance of a proceedings commencement order, including a collection action, a transfer of title in an asset or the creation of a security interest, if, at the time of the performance of the transaction or action, the corporation was insolvent and, as a result of the transaction, the creditor received a larger portion of its debt than the portion that it was entitled to according to the priority order.
- (ii) The court may order the nullification of a transaction or action performed during the two-year period preceding the filing of the insolvency application that reduced the pool of assets available to the creditors, if the transaction or action was performed without consideration or with

inadequate consideration under the circumstances, and, at the time of execution of the transaction or action, the debtor was insolvent or the performance of the transaction led to the insolvency.

- (iii) If the action that reduced the pool of assets available for the creditors was done for the purpose of extracting the asset from the pool, it can be nullified even if it was conducted during the seven-year period preceding the filing of the insolvency application and even if the debtor was not insolvent during such time.

4.4 Are there clawback provisions specified in the legislation of your jurisdiction that could apply to derivatives transactions? If so, in what circumstances could such clawback provisions apply?

Yes, subject to the fulfilment of the terms under the suspect periods described in question 4.3 above.

4.5 In your jurisdiction, could an insolvency/bankruptcy-related close-out of derivatives transactions be deemed to take effect prior to an insolvency/bankruptcy taking effect?

Yes. Please note that a provision that deems termination to take effect prior to the filing of an insolvency motion might be treated as an event triggered by the insolvency filing.

4.6 Would a court in your jurisdiction give effect to contractual provisions in a contract (even if such contract is governed by the laws of another country) that have the effect of distributing payments to parties in the order specified in the contract?

Israeli law recognises the freedom of contracting parties to have their contractual relationships governed by foreign law. Israeli courts generally respect the contracting parties’ choice of law and apply the relevant foreign law to the legal issues in question.

However, as mentioned above, insolvency of the Israeli counterparty, where rights of third parties are involved, may be an exception to this rule.

Any contractual provision that addresses distribution of payments among the parties to the contract would be respected as long as it does not interfere with the rights of other creditors under the Insolvency Law. However, the debtor cannot agree to give a certain creditor priority over any other creditor, and the order of priority as stipulated in the Insolvency Law shall apply.

5 Close-out Netting

5.1 Has an industry-standard legal opinion been produced in your jurisdiction in respect of the enforceability of close-out netting and/or set-off provisions in derivatives documentation? What are the key legal considerations for parties wishing to net their exposures when closing out derivatives transactions in your jurisdiction?

An Israeli ISDA netting opinion exists. In order to benefit from the recognition of the close-out netting arrangements under the Netting Legislation, the agreement in question must fall within the scope of such legislation, namely, to be deemed a “Framework Agreement” as defined therein.

5.2 Are there any restrictions in your jurisdiction on close-out netting in respect of all derivatives transactions under a single master agreement, including in the event of an early termination of transactions?

In general, subject to the terms of the Netting Legislation, netting with respect to a broad range of derivatives transactions under a single master agreement will be recognised by Israeli law.

5.3 Is Automatic Early Termination (“AET”) typically applied/disapplied in your jurisdiction and/or in respect of entities established in your jurisdiction?

With respect to transactions that comply with the Netting Legislation, AET will generally apply. However, AET may not be recognised regarding transactions that do not fall within the scope of the Netting Legislation.

5.4 Is it possible for the termination currency to be denominated in a currency other than your domestic currency? Can judgment debts be applied in a currency other than your domestic currency?

In general, it is possible for the termination currency to be denominated in a currency other than NIS, and judgment debts can be applied in a currency other than NIS.

6 Taxation

6.1 Are derivatives transactions taxed as income or capital in your jurisdiction? Does your answer depend on the asset class?

The Israeli Income Tax Ordinance and its regulations provide that income generated from derivatives should be classified for tax purposes as a business income or capital gain, depending on the circumstances of each case. Such classification (and respected tax rate) is determined according to the nature of the transaction generating the income and, in some cases, according to the type of derivative. The Israeli courts determine the relevant factors in this respect, such as the investor's identity, the circumstances under which the income was generated, and the type of income. Other relevant factors that should be examined may be the proficiency and expertise of the investor, number and duration of transactions performed, the period of time in which the investor held the derivatives, amount of investment, etc.

6.2 Would part of any payment in respect of derivatives transactions be subject to withholding taxes in your jurisdiction? Does your answer depend on the asset class? If so, what are the typical methods for reducing or limiting exposure to withholding taxes?

Income tax regulations provide that any payment with respect to derivatives requires the payer to withhold tax prior to transferring the funds to the recipient. The regulations further provide an exemption from such withholding requirement

upon payment made by a financial institution to a non-Israeli resident of consideration who is exempt from capital gains tax. The recipient is required to submit to the financial institution a declaration stating that he is a foreign resident for tax purposes and exempt from withholding tax in Israel.

6.3 Are there any relevant taxation exclusions or exceptions for certain classes of derivatives?

No, there are no relevant taxation exclusions or exceptions for certain classes of derivatives.

7 Bespoke Jurisdictional Matters

7.1 Are there any material considerations that should be considered by market participants wishing to enter into derivatives transactions in your jurisdiction? Please include any cross-border issues that apply when posting or receiving collateral with foreign counterparties (e.g. restrictions on foreign currencies) or restrictions on transferability (e.g. assignment and novation, including notice mechanics, timings, etc.).

There are no specific cross-border issues that non-Israeli market participants should consider when entering into derivatives transactions with Israeli counterparties or when posting or receiving collateral. There are also no restrictions on movement of foreign currencies into and outside of Israel, although some transactions trigger reporting requirements. Furthermore, there are no restrictions on transferability of contractual rights.

8 Market Trends

8.1 What has been the most significant change(s), if any, to the way in which derivatives are transacted and/or documented in recent years?

In general, there is an ongoing trend by which the local market players, in particular Israeli insurance companies and pension funds, are entering into more and more transactions in derivatives, both with Israeli and foreign banks, including more sophisticated and exotic transactions. Furthermore, these entities have become quite familiar with ISDA documentation, and therefore the period of negotiating a typical transaction is becoming shorter.

8.2 What, if any, ongoing or upcoming legal, commercial or technological developments do you see as having the greatest impact on the market for derivatives transactions in your jurisdiction? For example, developments that might have an impact on commercial terms, the volume of trades and/or the main types of products traded, smart contracts or other technological solutions.

As part of the fast growth of the Israeli fintech arena, we are starting to see an increase in the use by local market participants of technological-based tools in derivatives transactions.



Shiri Shaham has extensive experience in a wide range of corporate, commercial, securities, financing and banking matters and is considered a leading lawyer in her areas of practice.

Shiri has represented numerous clients in mergers and acquisitions, public securities and debt offerings, and in private placements and joint ventures. She has also represented domestic and international banks and financial institutions in complex financing transactions as well as on regulatory matters, and advises leading international financial institutions, such as ISDA, ICMA and ISLA, on Israeli legal issues.

Shiri lectures at leading domestic and international conferences on mergers and acquisitions, corporate governance and Israeli financial laws.

Yigal Arnon & Co.

1 Azrieli Center

Tel Aviv

Israel

Tel: +972 3 608 7777

Email: shiri@arnon.co.il

URL: www.arnon.co.il



Shai Margalit is a partner at Yigal Arnon & Co. His practice focuses on complex financing transactions, insolvency law, mergers and acquisitions, and public offerings, including public offerings of equity and debt securities.

Shai represents investment funds, banks, insurance companies, financial institutions, as well as other lenders in Israel and abroad in high-value and complex financing and credit facilities, including acquisitions, financings, restructurings, loan syndications, debt arrangements, securitisations, and the purchase and sale of large credit portfolios. Shai also represents companies, borrowers, and bondholders in various insolvency proceedings.

In addition, Shai advises financial institutions, such as ISDA, ICMA and ISLA, on Israeli legal and regulatory issues.

Yigal Arnon & Co.

1 Azrieli Center

Tel Aviv

Israel

Tel: +972 3 608 7777

Email: shaim@arnon.co.il

URL: www.arnon.co.il

The main focus of our banking practice is financing transactions, where we typically represent the lenders, though we represent high-profile borrowers as well. We have also developed a unique expertise on matters related to credit card companies and novel payment apps, and in the last couple of years we have been involved in the main transactions conducted in Israel in these areas.

Our expertise includes cross-border and local complex financing transactions, regulation (international and Israeli), litigation, ongoing consultation to industry professionals, negotiating ISDA and other industry-based transactions and related legal advice, creating and enforcing security interests, restructuring and insolvency debt collection and advising on financial products and services.

We handle some of the biggest and most high-profile finance transactions in Israel and provide legal services to virtually all major banks in Israel, to a

leading credit card company and to the major leading international banks and financial institutions. Our cases involve financing that rises to scopes of millions of dollars and financing to top projects, situations and companies in the local market and cross-border deals that include external companies.

www.arnon.co.il



YIGAL ARNON & Co.
LAW FIRM

ICLG.com



Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Technology Sourcing
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms