Bank Secrecy in Israel

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Introduction

One of the characteristics of the banking system in Israel is the high level of bank secrecy, despite the fact that there is no law in Israel that requires bank secrecy; rather, the law is based on banking practice backed by court rulings.[1]

Bank secrecy is one of the key obligations imposed on a bank *vis-à-vis* its customers, by virtue of which the bank is prohibited from disclosing information relating to a customer's business to third parties. Bank secrecy embodies not only the customer's interest, but also the interest of society as a whole, which considers the right to privacy to be one of the basic human rights, and most certainly a fundamental right when it comes to an individual's financial affairs.

Despite the incontestable importance of bank secrecy, it is not, however, an absolute principle. There are certain exceptions when the bank is permitted — and, at times, is even obligated — to disclose information in connection with its customers. In this respect, in recent years, bank secrecy in Israel has undergone a gradual process of the expansion of the exceptions that render bank secrecy subordinate to the obligations of disclosure by virtue of the law.

These exceptions have been significantly expanded, both in terms of the number of the laws that allow the disclosure of such information and in terms of the scope of use that the recipients of the information are allowed to make of the disclosed information. As a result of this process, bank secrecy is gradually losing its power. This

1 Ben-Oliel, *Banking Law General Part* (1996), at p. 107; Plato-Shinar, "Bank Secrecy as Reflected in the Right to Privacy", 1 *Kiryat Hamishpat* (2001), at p. 279; Pilpel, "Bank Secrecy: Its Scope and Exceptions", 11 *Bar-Ilan Law Review* (1994), at p. 125; Stein, "Bank-Customer Privilege in the Laws of Evidence", 25 *Mishpatim* (1995), at p. 45; Gelfand, "Is It Necessary to Protect Bank Secrecy by Law?", 33 *Quarterly Banking Review* (1995), at p. 69.

chapter is intended to criticize the process of the weakening of bank secrecy, and to propose ways to strengthen that power.

The Legal Basis for Bank Secrecy in Israel

There is no law in Israel that imposes a duty of bank secrecy on banks.[2] However, there are various legal sources on which an attempt may be made to lay a foundation for bank secrecy, where the underlying basis is the right to privacy.

The right to privacy was set forth in the Israeli legislation for the first time in 1981, in the Privacy Protection Law, 5741-1981. This Law is detailed legislation, which not only establishes the right to privacy *per se*, but also formalizes the various aspects in relation to that privacy. Section 1 of the Law determines: "A person shall not violate the privacy of another, without his consent." According to Section 4, a violation of privacy constitutes a tortious civil wrong and, according to Section 5, in certain cases it also is deemed to be a criminal offense.

Section 2 of the Privacy Protection Law defines a closed list of cases that constitute a violation of privacy. Section 2(8) determines:

> "Breach of the duty of secrecy with regard to the affairs of a person that was determined in an agreement, whether impliedly or expressly, shall be deemed to be a violation of privacy."

The banks in Israel do not tend to expressly specify their obligation to maintain confidentiality in banking agreements and, therefore,

2 Banking Ordinance, Section 15A, which prohibits a person from disclosing information and documents that were submitted to him pursuant to the Banking Ordinance or the Banking (Licensing) Law, was interpreted by the courts as a section that imposes secrecy on the employees of the Bank of Israel; CA 174/88 *Gozlan* vs. *Compagnie Parisienne De Participation*, PD 42(1) 563, 566; CA 1917/92 *Skoler* vs. *Jerby*, PD 47(5) 764, 769. Another approach is put forth by Pilpel, "Bank Secrecy: Its Scope and Exceptions", 11 *Bar-Ilan Law Review* (1994), at pp. 125 and 133. In ACA 6546/94 *Bank Igud* vs. *Azulai*, PD 49(4) 54, 66–67, it was determined that the section gives rise to a claim of privilege that prevents the receipt of information not only from the Bank of Israel, but also from commercial banks. For the sake of comparison, consider Swiss law, where bank secrecy is set forth in the law and breach of this security constitutes a criminal offense that is strictly enforceable: Federal Law on Banks and Savings Banks, SR 952.02, Article 47.

Section 2 will provide protection only if the implied obligation that arises from the agreements is recognized.[3]

Section 2(7) of the Privacy Protection Law states "A breach of the duty of confidentiality as set forth in the law with regard to the private affairs of a person" shall be deemed to be a violation of privacy. As will be discussed later, even though there is no law in Israel that determines bank secrecy, it is possible to lay a foundation for such secrecy, based on various laws in the Israeli legal system.

In addition, Section 2(9) of the Privacy Protection Law determines:

> "Use of knowledge of the private affairs of a person or the submission of such knowledge to another, which is not for the purpose for which it was provided",

is a violation of privacy. "Use" is defined in Section 3 of the Privacy Protection Law as including disclosure, transfer, and submission. Sections 2(7), 2(8), and 2(9) relate solely to the "private" affairs of a person. A narrow interpretation would give rise to the conclusion that the sections do not apply to business matters and, therefore, that business accounts or business operations of a customer are not ostensibly protected pursuant to the Privacy Protection Law.[4] This conclusion is reinforced in light of Section 3 of the Privacy Protection Law, which determines that Section 2 of the Privacy Protection Law will not apply to corporations. Thus, if a matter concerns a company's account, the company will not be able to benefit from the protection of the Privacy Protection Law.

The Privacy Protection Law may serve as a basis for bank secrecy in another manner: Chapter B of the Law concerns the protection of privacy in databases, which includes data on a person's economic situation. Hence, the law also applies to banks and to their databases. Section 8(b) of the Privacy Protection Law prohibits a bank from making use of information in its database, other than for the purpose for which the database was set up. Section 16 determines a criminal offense in the disclosure of information that reached a bank by virtue of its being kept in the database.

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3 Ben-Oliel, *Banking Law General Part* (1996), at p. 108; CA 1917/92 *Skoler* vs. *Jerby*, PD 47(5), 764, 771, 772, 775; CA 5893/91 *Tefahot Mortgage Bank Ltd*. vs. *Tsabach*, PD 48(2) 573, 590.

4 Plato-Shinar, "Bank Secrecy as Reflected in the Right to Privacy", 1 *Kiryat Hamishpat* (2001), at pp. 279 and 298, and the sources mentioned there (providing a criticism of this view).

Sections 8(b) and 16 apply not only to individuals, but also to corporations. However, they still do not provide sufficient protection to a bank's customers, because they are limited solely to the data included in the bank's database. Section 7 defines "database" as "a collection of information data which is held on magnetic or optical media and which is designated for computerized processing". Therefore, any other information that is not contained in the bank's database, including various documents, is not subject to the protection of the law.

The conclusion is that a foundation cannot be laid for bank secrecy on the Privacy Protection Law alone, and that other legal sources need to be found for this purpose.

The right to privacy was given a significant boost in 1992, with the legislation of the Basic Law: Human Dignity and Liberty. Section 7 of the Basic Law determines: "All persons have the right to privacy and to intimacy . . .". In Israel, there is no Constitution, and the various Basic Laws serve as a kind of substitute for a Constitution. Therefore, the legislation of Section 7 of the Basic Law confers a genuinely constitutional status on the right to privacy. The general text of Section 7 recognizes a broad right to privacy, with regard to both business affairs and corporations, because the term "person" also includes corporations.[5]

Another level on which a foundation may be laid for bank secrecy is on the basis of criminal offense. Pursuant to Section 496 of the Penal Law, a person who discloses secret information that was submitted to him in the course of his profession or work is committing a criminal offense. It is true that Section 496 concerns the criminal level, and therefore it does not provide to the injured customer the wide range of remedies that are available in a civil claim. However, according to Section 77 of the Penal Law, on convicting a person, the court may award compensation to the party injured by the offense up to an amount of approximately US $50,000.

Section 496 of the Penal Law ostensibly provides broader protection than that provided pursuant to the Privacy Protection Law, because it is not restricted to types of customers or to types of matters. On the other hand, Section 496 applies only to secret information that was "submitted" to the person who disclosed it, and not to any information that reached him. In addition, the application of Section 496

5 Interpretation Law, Section 4; Interpretation Ordinance, Section 1.

in case law is primarily in the context of the disclosure of commercial secrets and industrial espionage.[6] Given this, it is evident that the basis of a criminal offense also is not sufficient for laying a foundation for bank secrecy to the extent required.

In a number of matters, specific secrecy provisions have been determined. When a bank is engaging in investment consulting and marketing, it is subject to the Regulation of Engagement in Investment Counseling, Investment Marketing and Portfolio Management Law, 5755–1995 (known as the Investment Counseling Law). By virtue of this Law, the bank is required to:

> ". . . keep confidential information which the customer brought to the bank's attention, including the documents that were transferred to the bank's possession and the contents thereof, and any other detail in relation to the acts in respect of which the bank gave advice to the customer . . .".[7]

A bank acts as an agent for its customers in various transactions: making payments and bank transfers, in the execution of buy and sell orders for securities on the Stock Exchange, in the payment of checks drawn by customers, and similar transactions. In these and other operations, the bank is subject to the duty of confidentiality that is imposed on an agent in matters relating to its principal, pursuant to Israel's Agency Law.[8]

The Prohibition on Money Laundering Law imposes an obligation of confidentiality on a person who comes into possession of information in the course of the performance of the duties imposed on financial service providers. Breach of this obligation is a criminal offense. Furthermore, a person who negligently causes such disclosure of information to another, while breaching the provisions of the law or its rules in relation to information security, is committing a criminal offense.[9]

In addition to the above sources, bank secrecy also may be established based on general legal doctrines.

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6 Halm, *Privacy Protection Laws* (2005), at p. 115.

7 Regulation of Engagement in Investment Counseling, Investment Marketing and Portfolio Management Law, Section 19.

8 Agency Law, Section 8(5).

9 Prohibition on Money Laundering Law, Section 31(a).

One such doctrine is the obligation to act in good faith and in an acceptable manner.[10] Pursuant to the Contracts Law, a party to a contract must act in good faith and in an acceptable manner toward the other party.

Over the years, the principle of good faith has been transformed from a narrow contractual principle into a supreme principle, which confers broad discretion on the court. Courts make the widest use of the principle of good faith, to the extent of imposing obligations on the parties to a contract, even though no mention is made of this in the contract, all for the purpose of realizing the true purpose of the contract.[11]

In the context of bank secrecy, a customer expects — and this expectation is indeed legitimate — that the bank will keep his affairs confidential. To fulfill this expectation, the bank is subject to the obligation of keeping the information that relates to its customers confidential. In addition, pursuant to Israeli law, the obligation to act in good faith and in an acceptable manner also has been expanded to non-contractual relationships,[12] which could establish the obligation of confidentiality also *vis-à-vis* persons who are not customers of the bank and who have no contractual relation with the bank.

Another doctrine is that of fiduciary duty. Pursuant to Israeli law, the bank owes a fiduciary duty to its customers.[13] In countries that adhere to the common law system, the fiduciary duty applies solely to special cases in which there is special reliance by the customer on the bank. In Israel, however, the fiduciary duty is a sweeping obligation, which automatically applies to every customer and to all bank actions and transactions performed by a customer. The fiduciary duty applies to all types of customers and it is created automatically on the creation of the bank-customer relationship.

The fiduciary duty sets the highest standard of conduct, pursuant to which a bank is required to protect a customer's interest. The

10 Contracts Law (General Part), Section 39.

11 CA 4628/98, *The State of Israel* vs. *Apropim Shikun Veyizum*, PD 49(2), 265, 327, 328.

12 Contracts Law (General Part), Section 61(b).

13 Plato-Shinar, "The Bank's Fiduciary Duty: A Canadian-Israeli Comparison", 22 *Banking and Finance Law Review* (2006), at p. 1; Plato-Shinar, "An Angel Named 'The Bank': The Bank's Fiduciary Duty as the Basic Theory in Israeli Banking Law", approved for publication in *Common Law World Review* (2007); Plato-Shinar, "To Whom Does the Bank Owe a Fiduciary Duty?" *Quarterly Banking Review*, 39 (Issue Number 154, 2004), at p. 67; Plato-Shinar, "Construction Laws — Does the Bank Owe a Fiduciary Duty to the Buyers of Apartments?" 4 *Landlaw* (Issue 6, 2005), at p. 38.

purpose of the fiduciary duty is to prevent a bank from abusing its power. A bank is always required to prefer a customer's interests over other interests, including the bank's own personal interest. Since this is the case, by virtue of the fiduciary duty that a bank owes to its customers, it is required to keep its customers' affairs confidential.

In recent years, there has been a growing recognition of the fiduciary duty also to guarantors and other third parties. This is another trend that could lay the foundation for bank secrecy, extending even to parties who are not customers of a bank.

Bank practices, too, could serve as a source for bank secrecy. A continuous and ongoing bank practice that becomes a proven practice could constitute a binding legal source, so long as it is a reasonable practice that does not contravene the provisions of the law.[14]Bank secrecy has become an ingrained practice in Israel, as it has in other countries, and this is yet another reason to recognize its binding legal power.

Finally, consider the contractual approach, pursuant to which bank secrecy arises from the implied terms in the banking contract.[15]

Based on the combined sources mentioned above, bank secrecy has become a well-established principle in the Israeli legal system.

Scope of Bank Secrecy in Israel

Various questions arise with regard to the scope of the spread of bank secrecy.

For example, does bank secrecy apply solely to information that was submitted by a customer, or also to information that reached the bank from other sources? Does the obligation of confidentiality apply solely to information that reached the bank only in the course of the existence of a bank-customer relationship, or also to information that reached the bank prior to the engagement between the bank and the customer, or after such an engagement was terminated? Does bank secrecy apply solely to customers, or also to third parties such as guarantors? Finally, what is the date of termination of the obligation to maintain bank secrecy with reference to a customer who has ended his relationship with the bank?

14 Ben-Oliel, *Banking Law General Part* (1996), at p. 34.

15 Ben-Oliel, *Banking Law General Part* (1996), at p. 108; CA 1917/92 *Skoler* vs. *Jerby*, PD 47(5), 764, 771, 772, 775. CA 5893/91 *Tefahot Mortgage Bank Ltd*. vs. *Tsabach*, PD 48(2) 573, 590.

Scholars who remain loyal to supporting the expansion of bank secrecy believe that bank secrecy should be given broad scope.[16] Accordingly, bank secrecy would apply to every customer, whether an individual or a corporation. Bank secrecy would apply to all the customer's affairs and to all bank actions and transactions performed by the customer, whether private or business. Moreover, the name and address of the customer,[17] and even whether the customer has an account with the bank, is prohibited from disclosure.

Likewise, bank secrecy would apply to all the information possessed by a bank, in its capacity as such, whether the information reached it from the customer or whether from an external source, whether the information reached it prior to the creation of the bank-customer relationship or whether the information reached it in the course of this relationship, or whether the information reached it after the relationship ended. From the moment that the obligation of confidentiality is created, it lasts forever, even after the closing of the account and even after the death of the customer (and in the case of a corporation, even after its liquidation).

Moreover, it would be worth recognizing the obligation of confidentiality not only to customers, but also to third parties, guarantors,[18] and others about whom the bank possesses information. As soon as the obligation of confidentiality is based on the right to privacy and on other sources that are not contractual, it is no longer necessary to restrict the confidentiality to the bank-customer relationship or to other contractual relationships, such as the bank-guarantor relationship.

Accordingly, the obligation of confidentiality also will apply to a person who conducted negotiations with a bank but who, ultimately, did not become a customer of the bank — for example, a person who presented a business plan to the bank in the hope of receiving financing that, at the end of the day, was not provided. The obligation of confidentiality applies not only to an active bank, but also to a bank in dissolution.[19]

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16 This approach is advocated by Ben-Oliel, *Banking Law General Part* (1996), at pp. 107 and 112–116; Pilpel, "Bank Secrecy: Its Scope and Exceptions", 11 *Bar-Ilan Law Review* (1994), at pp. 125 and 139; CA 5893/91 *Tefahot Mortgage Bank Ltd.* vs. *Tsabach*, PD 48(2) 573, 603, 604; CA 1917/92 *Skoler* vs. *Jerby*, PD 47(5), 764, 772.

17 MCA 7951/01 *Provini Holding BV* vs. *MMMM. Ltd*., available at www.psakdin.co.il; CA 439/88 *Registrar of Databases* vs. *Ventura*, PD 48(3) 808, 821.

18 Mishkan *Bank Hapoalim* vs. *Margaliot*, *Skira Mishpatit*, Paragraph 4.

19 Bankruptcy File Number 1398/02 in the matter of *The Companies Ordinance* vs. *Trade Bank Ltd*., Paragraphs 15, 18, available at www.psakdin.co.il.

Exceptions to Confidentiality Principle

Notwithstanding its broad application, bank secrecy is not absolute; rather, it is relative. Under certain circumstances, a bank is permitted — and sometimes is even obligated — to submit information relating to its customers to third parties. This determination is not surprising, because even the right to privacy, despite being a basic right, may be violated under certain circumstances.[20] Exceptions to the obligation of confidentiality also may be found in the various sections of the law, as mentioned above, as a legal basis for bank secrecy.[21]

In all matters pertaining to bank secrecy, Israeli courts have adopted the English law and recognize four exceptions under which a bank is permitted to disclose information relating to its customers.[22] The exceptions are:

(1) When there is an obligation of disclosure pursuant to law;
(2) When there is a public interest in the disclosure of the information;
(3) When the bank itself has an interest in the disclosure of the information; and
(4) Disclosure with the customer's consent.

Each of the exceptions is discussed at length below.

Obligation of Disclosure Pursuant to Law

The main exception to bank secrecy is the obligation of disclosure pursuant to law. When there is a legal obligation of disclosure, not

20 The Basic Law: Human Dignity and Liberty, Section 8, states: "There shall be no violation of rights under this Basic Law except by a Law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such Law." The Basic Law: Human Dignity and Liberty, Sections 10 and 12, also allow violation of the right to privacy under certain circumstances. The Privacy Protection Law, Section 18, determines a list of various defenses for a person who violates the privacy of another. The Privacy Protection Law, Section 19, determines exemption from responsibility in certain cases. The Privacy Protection Law, Section 32, determines that, in certain circumstances, material that was obtained during a violation of privacy may still be used as evidence.

21 Privacy Protection Law, Section 16; Penal Law, Section 496; Regulation of Engagement in Investment Counseling, Investment Marketing and Portfolio Management Law, Section 19; Agency Law, Section 8; Prohibition on Money Laundering Law, Section 31(a).

22 CA 1917/92 *Skoler* vs. *Jerby*, PD 47(5) 764, 771; CA 5893/91 *Tefahot Mortgage Bank Ltd*. vs. *Tsabach*, PD 48(2) 573, 588.

only is a bank permitted to disclose the requested information, but it is the bank's duty to comply with the provisions of the law and to submit the information. Israeli law contains an extremely large number of provisions that order the disclosure of certain information. Beyond the large number of these provisions, some of them raise the doubt as to whether they constitute the proper balance between the right to privacy and the need for the disclosure of information.

Another problem relates to the nature of the use that the recipient of the information is allowed to make of the information, and the possibility of the leaking of the information from the recipient of the information to other entities. The Privacy Protection Law determines that public authorities may transfer information among themselves, unless such a transfer of information is restricted by law.[23] However, even if a particular law requires the authority that is receiving the information to maintain confidentiality in respect of the information, the very same law still permits that authority, under certain circumstances, to submit the information to other authorities.

There are certain laws that require a bank to disclose information. These laws can be divided into four groups, according to the identity of the recipients of the information or the interest that justifies the submission of the information.

Transfer of Information to Regulators and Government Authorities

Police. By virtue of their power to conduct investigations, police officers are authorized to conduct an oral examination of any person and to make a written record of the investigatee's notice.[24] Bank clerks are required to cooperate and to answer questions asked by the police. However, because this authority does not include a request for the submission of documents, a bank must refuse to submit documents at this stage of the investigation. Such submission will be possible only pursuant to a court order for the submission of the documents.[25]

A bank's status during the time that the police investigation is being conducted is extremely precarious. Pursuant to the instructions of the Bank of Israel,[26] if the police ask the bank not to disclose to a

23 Privacy Protection Law, Section 23(c).

24 Criminal Procedure Ordinance (Testimony), Section 2(1).

25 Criminal Procedure Ordinance (Arrest and Search), Section 43.

26 Supervision of Banks, Proper Conduct of Banking Business Regulations: Instruction Number 405, "Police Investigations".

customer that an investigation is being conducted or that a court order has been issued for the submission of documents, the bank is prohibited from doing so. Nevertheless, if the customer asks, on his own initiative, the clerk may reply that an investigation is indeed being conducted or that a court order has indeed been issued; however, the clerk may not give any details beyond this. Nevertheless, if the court order for the submission of documents included an express prohibition on disclosure to the customer, then the bank will not disclose anything to the customer.

Tax Authorities. The tax authorities have extensive power to request bank information. The various tax laws authorize the representatives of the tax authorities to request information and documents about customers of a bank,[27] whether regarding a customer who is specifically suspected of being a tax refuser (defaulter), or whether comprehensive information pertaining to a large number of its customers.[28] They also have the authority to conduct investigations and searches and to seize documents, and to make use of police powers for the purpose of preventing tax offenses, or to detect such offenses.[29]

An example of the broad powers of the tax authorities can be seen in a High Court of Justice case, *The Union of Banks* vs. *The Minister of Finance*.[30] As part of the tax reform of January 2003, banks were required to perform deduction of tax at source on the customers' income from various investment channels. The income tax regulators were not satisfied by a procedure whereby the banks would transfer the tax due from customers to the state; they also demanded a broad reporting obligation, including the names of customers, the identification details of customers, the amount of the income from the various investments, and the amount of deduction at source. A

27 Income Tax Ordinance, Sections 135(a), 137, and 142; Value Added Tax Law, Section 108; Land Taxation Law, Section 96; Purchase Tax (Goods and Services) Law, Sections 17(c), 17(d), and 18.

28 Bankruptcy File Number 1398/02, in the matter of *The Companies Ordinance* vs. *Trade Bank Ltd*., Paragraph 15, available at www.psakdin.co.il.

29 Income Tax Ordinance, Sections 135(4), 173(a), and 227; Value Added Tax Law, Section 109; Land Taxation Law, Section 97; Purchase Tax Law, Section 20.

30 High Court of Justice, 11259/02 *The Union of Banks in Israel* vs. *The Minister of Finance*.

petition to the High Court of Justice that was filed by the Union of Banks was rejected, on the grounds that the interest of effective collection prevailed over the right to privacy and bank secrecy.

As a rule, the tax authorities are required to keep information that is in their possession confidential.[31] However, in this regard, there are exceptions that allow them to submit information, whether it is information that is required for the purpose of enforcing the tax laws, or for other purposes and to other entities, such as submission to the National Insurance Institute, or to an official receiver, among others.[32] Sections also may be found regulating the exchange of information between the tax authorities in various countries, by virtue of conventions for the avoidance of double taxation. To sum up, banking information that has been submitted to the tax authorities in Israel ultimately also serves other authorities, both in Israel and abroad.

The Bank of Israel. The Supervisor of Banks has extremely broad powers of supervision, by which he may demand knowledge and documents from any bank. In certain cases, the Governor of the Bank of Israel may take and exercise the power conferred on the Supervisor. In addition, the Minister of the Police has the power to authorize the employees of the Bank of Israel to conduct investigations on banking offenses or offenses relating to the assets of their customers, and may confer police powers on them.[33]

The Bank of Israel possesses extensive information, which it is supposed to keep confidential.[34] However, provisions of various laws authorize the Bank of Israel, under certain circumstances, to transfer the information to various authorities in Israel and abroad,[35] such as to the Securities Authority (so that it may fulfill its duties), to the Director of the Capital Markets, Insurance, and Savings at the

31 Income Tax Ordinance, Sections 231 and 234; Value Added Tax Law, Section 142; Purchase Tax Law, Section 19(a) and 19(b).

32 Income Tax Ordinance, Sections 232, 235(b), and 235(c); Value Added Tax Law, Section 142. The Income Tax Ordinance, Section 235, allows the Minister of Finance to publish lists of taxpayers and various data pertaining to them. The lists are available for public inspection.

33 Banking Ordinance, Sections 5(a), 5(c), and 5(d).

34 Banking Ordinance, Section 15A.

35 Banking Ordinance, Sections 15A(a), 15A2(a), and 15A(b); Bank of Israel Law, Section 65; Checks without Cover Law, Section 15; Income Tax Ordinance, Section 140; Prohibition on Money Laundering Law, Section 31A(a); Regulations of Credit Providers Service, Section 13.

Ministry of Finance (so that he may fulfill his duties), to the tax authorities for the purpose of an investigation or criminal claim, to the supervisors of banks in other countries, to the various authorities (in accordance with the Prohibition on Money Laundering Law), and to the courts (to implement the Credit Providers Service Law), among others.

The Israeli Securities Authority. The Securities Authority may demand any knowledge and documents from any bank, and it may investigate any person, while using police powers.[36] While it is true that the Securities Law determines that information that is received by the Securities Authority is supposed to be kept confidential by it, the Law allows the transfer of the information under certain conditions, such as at the request of the Attorney General for the purpose of a criminal trial, or at the request of the court.[37] The Securities Authority also is entitled to transfer the information to the securities authorities in another country, with the approval of the Supervisor of Banks.[38]

Attaching Authorities. When a bank receives an attachment order on the assets of a customer that are supposed to be in its possession, it is required to reply to the attaching authority and to note whether, and to what degree, assets have been seized under attachment.[39] Such a reply also constitutes a violation of bank secrecy. If the attaching authority believes that the bank's reply is not correct or is incomplete, or if the bank does not reply at all to the attachment notice, the attaching authority is entitled to invite the bank to an investigation,[40] in the course of which the bank may be required to submit additional information.

The Israel Money Laundering Prohibition Authority. The Prohibition on Money Laundering Law imposes extremely broad reporting

36 Securities Law, Sections 56A and 56C; Regulation of Engagement in Investment Counseling, Investment Marketing and Portfolio Management Law, Section 29.

37 Securities Law, Section 56E; Regulation of Engagement in Investment Counseling, Investment Marketing and Portfolio Management Law, Section 29.

38 Securities Law, Section 54K5.

39 Execution Law, Sections 44 and 45; Civil Procedure Regulations, Section 376(a); Tax (Collection) Ordinance, Section a(1)(2).

40 Execution Law, Section 46; Tax (Collection) Ordinance, Section 7a(3).

obligations on banks, to report to a special database that is managed by the Israel Money Laundering Prohibition Authority. The reporting obligations are of two kinds.

The first is the obligation to report on certain transactions in excess of a certain financial amount.[41] This is a fixed obligation that is performed automatically by the bank's computing system.

The second is the obligation to report on transactions which, "in light of the information possessed by the bank, are deemed to be irregular".[42]

For the purpose of this report, the bank is required to exercise discretion to decide in which cases reporting is indeed necessary, and in which cases it is not. Since the legislator chose to use the term "irregular transactions", as distinct from "exceptional transactions", the reporting also is made in respect of transactions that are totally valid, as long as they are exceptional with regard to the activities being conducted in the account.[43] An important provision in the Prohibition on Money Laundering Law is Section 24, which gives the bank an exemption from liability in respect of a breach of the duty of confidentiality to a customer, as long as it acted in good faith pursuant to the provisions of the Law.

Another obligation that the Prohibition on Money Laundering Law imposes on banks is the identification of each customer and anyone who is related to his account, and documentation of these details.[44] Consequently, a bank possesses an enormous amount of information on customers and on third parties. Section 31(a) of the Law prohibits a bank and its employees from disclosing information that reached them in the course of the fulfillment of their duties pursuant to the Law. Breach of this provision is a criminal offense. In addition, Section 31(a) determines that anyone who negligently

41 Prohibition on Money Laundering (The Identification, Reporting, and Record Keeping Obligations of Banking Corporations) Order, Section 8.

42 Prohibition on Money Laundering (The Identification, Reporting, and Record Keeping Obligations of Banking Corporations) Order, Section 9.

43 Plato-Shinar, "Israel: The Impact of the Anti-Money Laundering Legislation on the Banking System", 7 *Journal of Money Laundering Control* (2003), at pp. 19 and 27 (for a criticism of this view); Plato-Shinar, "Bank Secrecy and the Fiduciary Duty on the Altar of the War Against Money Laundering: A Comparative Review", 3 *Netanya Academic College Law Review* (2004), at pp. 253 and 262 (discussing the reporting obligation).

44 Prohibition on Money Laundering (The Identification, Reporting, and Record Keeping Obligations of Banking Corporations) Order, Sections 2–7.

causes such a disclosure of information to another, while breaching the provisions determined in the law or by virtue thereof in relation to information security, is committing a criminal offense.

Section 30 of the Prohibition on Money Laundering Law allows the Israel Money Laundering Prohibition Authority to transfer information from the database only to three entities: to the police — for the purpose of the war against money laundering and the financing of terrorism; to the General Security Services — for the purpose of the war against terrorism and to protect the state's security; and to money laundering prohibition authorities in other countries. The transfer of the information may be at the request of these entities, or at the initiative of the Israel Money Laundering Prohibition Authority itself.

Section 30 goes on to determine that the police and the General Security Services may make use of the information also for the purpose of the investigation of additional offenses and for the purpose of discovering offenders and prosecuting them, all in accordance with the regulations as determined by the Minister of Justice.[45]

In the original text of the Law, it was expressly determined that these "additional offenses" would not include tax offenses. However, this prohibition was cancelled in the amendment made to the Law, so that, at the present time, the Minister of Justice has the liberty to determine that the information also may be used for the investigation of tax offenses. Section 30(h) firmly determines that information will not be transferred to any other authority, except for the purpose of the implementation of the Law or for the purposes specified above. The text of the section is not clear, and it is possible to infer from it that information also may be transferred to other authorities, in addition to those specified above.[46]

At the present time, a Bill Memorandum is being distributed for the amendment of the Prohibition on Money Laundering Law.[47] Among the changes proposed in the Memorandum are the expansion of the possibility to submit information from the database of the

45 Prohibition on Money Laundering Regulations (Rules for Use of Information Transferred to the Israel Police Force and the General Security Services for Investigation Of Additional Offenses, and for Transferring it to Another Authority), Section 7.

46 Plato-Shinar, "The Prohibition on Money Laundering Law: Do and Don't Do", 38 *Quarterly Banking Review* (Issue Number 150, 2003) at pp. 20 and 28 (providing a criticism of this legislation).

47 Available at http://www.justice.gov.il/MOJEng/Halbanat+Hon/.

Israel Money Laundering Prohibition Authority to other authorities and entities, such as the Military Police, the Department of Investigation of Police Officers at the Ministry of Justice, and the Securities Authority (for the purpose of the prevention and investigation of offenses of money laundering and the financing of terrorism), to the Military Intelligence Branch (i.e., the Mossad and Aman, for the purpose of the war against terrorism), to the State Attorney's Office (for the purpose of drawing up an indictment), and the transfer of information to those in charge of law enforcement.

The person in charge of the banks is the Supervisor of Banks. Other people in charge of the various authorities are (among others) the Director of the Customs and VAT Department, the Chairman of the Securities Authority, the Supervisor of Insurance, and the Director of the Capital Markets. Consequently, the information may be leaked to them, too.

International Cooperation

Pursuant to the International Legal Assistance Law, 5758–1998, a bank may be forced to submit information about its customers, or banking information that is in the possession of public authorities in Israel may be transferred to authorities abroad.

The International Legal Assistance Law was enacted for the purpose of regulating the legal cooperation between Israel and other countries. Pursuant to the Law, a foreign country may request Israel to perform a long list of legal acts, which that country needs for the purpose of a civil or criminal matter that is being conducted in the foreign country, including: the transfer of information that is in the possession of public authorities in Israel;[48] the conducting of investigations and the collection of evidence by the Israeli investigation authorities and the transfer of the results of the investigation and the evidence to the foreign country;[49] the search and seizure of documents, belongings, and various evidences pursuant to an Israeli court order and the their transfer to the foreign country;[50] the collection of evidence, the submission of information, and the delivery of documents pursuant to an Israeli court order.[51]

48 International Legal Assistance Law, Section 32(a).
49 International Legal Assistance Law, Section 28.
50 International Legal Assistance Law, Section 30.
51 International Legal Assistance Law, Sections 15 and 19.

The Israeli Minister of Justice is the competent authority to adjudicate on the application of a foreign country.[52] On the approval of the Minister, the application will be transferred for execution, and the Minister will transfer the results to the foreign country. The transfer of information also is possible at the initiative of the Minister of Justice, and without the receipt of a specific application from the foreign country.

With regard to criminal matters, the Law determines a number of restrictions on the transfer of information.

First, the Minister of Justice is authorized to order the transfer of the requested information only if an authority in Israel, corresponding to the type of foreign authority that is requesting the information, is authorized to receive such information.[53]

Second, no information will be transferred to the requesting country, until after that country has undertaken not to make any use of the information it receives, other than for the purpose for which it was requested, except with the prior consent of the Israeli Minister of Justice.[54]

Third, the Minister of Justice may make the transfer of the information and evidence contingent on the receipt of an undertaking from the foreign country that the secrecy provisions that apply in the foreign country in respect of such information also will apply to the transferred information and evidence.[55]

In this context, the Privacy Protection Regulations (Transfer of Information to Databases Outside the Borders of the State) 5761–2001 were intended to prevent the transfer of information to a country that does not maintain due protection of privacy, and they specify to which countries, and the conditions under which, information may be transferred to databases outside Israel. The Regulations do not constitute an independent source of authority for the transfer of the information, and only allow such transfer when another source exists.[56] Section 4 of the Regulations determines that they will not apply to information that is transferred pursuant to the International Legal Assistance Law, which requires that there be a specific law in this regard.

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52 International Legal Assistance Law, Sections 3, 7, and 32(b).

53 International Legal Assistance Law, Sections 3(a) and 12(a).

54 International Legal Assistance Law, Section 10.

55 International Legal Assistance Law, Section 11(c).

56 Chai, *Protection of Privacy in Israel* (2006), at p. 330.

Submission of Information Pursuant to a Court Order

When a Bank Is Not a Party to the Proceeding. Pursuant to Sections 38–39 of the Evidence Ordinance, a court may, in the course of the hearing of a proceeding that is being conducted before it, order a bank that is not a party to the proceeding, to disclose information that is in its possession and that is vital for the clarification of the proceeding. The court has broad discretion, and it may order the disclosure of banking information and the submission of documents, not only in connection with the accounts of the litigants involved in the legal proceeding, but also when the information that is requested concerns a third party.

The court's discretion, however, is not unlimited. Case law in Israel has taken an additional step forward and, based on bank secrecy and on the Privacy Protection Law, also has recognized bank privilege.[57] The privilege exempts the bank from the duty of submitting information in the course of an investigation by a competent entity, or in the course of testimony before the court or any other entity authorized to collect evidence. It was ruled that the privilege derives from the characterization of the bank's contractual obligation of confidentiality, in combination with the statutory obligation of confidentiality set forth in Section 2(8) of the Privacy Protection Law, and the status of the right to privacy as a basic right, and it is a "natural result of the essence of the matter". The privilege was perceived as having a public nature, as distinct from a contractual obligation of confidentiality.

However, given that bank secrecy is not absolute, the same goes for bank privilege. At times, the consideration of doing justice and the need to discover the truth justify the lifting of the privilege. For this reason, whenever bank information is requested, the court is required to strike a balance between bank privilege and conflicting interests. In this matter, the Supreme Court determined certain rules of balance.[58]

In any situation in which the court is requested to issue an order instructing the disclosure of banking information with regard to one of

57 CA 1917/92 *Skoler* vs. *Jerby*, PD 47(5) 764; CC (Tel Aviv) 2189/85 *Ilin* vs. *Rothenberg* (not published); CC (Haifa) 1563/95 *Keysarit Furniture Manufacture Ltd.* vs. *Ararat Insurance Company*, available at www.faxdin.co.il, in which privilege was recognized *vis-à-vis* a corporation; Kedmi, *On Evidence* (Volume B, 2003), at p. 998; Stein, "Bank-Customer Privilege in the Laws of Evidence", 25 *Mishpatim* (1995), at p. 45.

58 CA 1917/92 *Skoler* vs. *Jerby*, PD 47(5) 764, 774; Family Appeal 3542/04 *Sals* vs. *Sals*, Paragraph 13, available at http://www.court.gov.il.

the litigants, the court is required to take several factors into consideration: the degree of importance and necessity of the information; whether a *prima facie* evidentiary basis been provided to justify the disclosure of the information — because the meaningless claim that disclosure is necessary, is not sufficient; an absence of alternative evidence that does not violate privacy;[59] and, with regard to the scope of the disclosure, the information must not deviate beyond what is required to do justice in the court proceeding.

However, when information is requested about a party that is not involved in the proceeding, use of the authority must be even more cautious. Litigants cannot be given free access to inspect the accounts of a third party and, therefore, a disclosure order will be given only in rare circumstances — for example, if there is a genuine concern about the existence of a conspiracy between the holder of the account and one of the litigants, in which the bank account is actually being used by the litigant and has only been camouflaged as the account of another, or if funds were deposited in the account of the litigant to conceal them.[60]

Recently, in the case of *Sals* vs. *Sals*, an even more stringent approach was shown. If, until recently, the court has made do with the clarification of these matters without hearing the position of the third party, at present, a disclosure order will not be issued until after obtaining the response of the third party, in writing or by testimony. In addition, the court is required to ascertain that the expected violation of privacy is for an appropriate purpose and that it does not deviate beyond the required extent, given the circumstances of the matter ("the test of proportionality"). For this purpose, the court must be satisfied that, without the violation of privacy, there is no other alternative for the holding of a proper trial, must be satisfied with the necessity of the protected material, and must ensure that the extent

59 This was the case in MCA 7951/01 *Provini Holding BV* vs. *MMMM. Ltd*., available at http: www.psakdin.co.il, in which the party requesting the disclosure obtained a temporary attachment order on the accounts for which the disclosure was requested. In the course of the attachment proceedings, he would be able, in any event, to obtain disclosure and inspection of documents, with the assistance of which he would be able to obtain the requested information. For this reason, his application for a disclosure order was rejected.

60 Such circumstances were recognized in CA 174/88 *Gozlan* vs. *Compagnie Parisienne De Participation*, PD 42(1), 563, 566. In contrast, in CC (Tel Aviv) 2189/85 *Ilin* vs. *Rothenberg* (not published), such circumstances were not recognized.

of the violation will be limited solely to such degree as is necessary to achieve the proper purpose.[61]

When a Bank Is a Party to the Proceeding. The need to disclose banking information also may arise when a bank is a party to the legal proceeding. A problematic situation arises when the counter-litigant is interested — for the purpose of laying a foundation for his defense or for his claim — in information that is in the bank's possession and which concerns a third party.[62]

The disclosure of such information may be requested in the course of the procedure for the disclosure and inspection of documents,[63] in the course of the procedure for the submission of questionnaires,[64] in the course of the obligation to testify and to present documents by virtue of a summons to trial,[65] or pursuant to a court order under Section 39 of the Evidence Ordinance.

However, in this instance, too, the rules of bank privilege as set forth above will apply, and the requested information will not necessarily be permitted to be disclosed.[66]

The Checks without Cover Law

The Checks without Cover Law, 5741–1981 was enacted with the aim of fighting against the severe problem of the drawing of checks without cover (i.e., sufficient funds in the account), a problem that has reached worrying proportions in Israel. If a customer has had ten of his checks returned by the bank during a period of one year, due to a

61 Family Appeal 3542/04 *Sals* vs. *Sals*, Paragraphs 10, 14, and 15, available at http://www.court.gov.il.

62 With regard to cases in which the bank itself has an interest in the disclosure of the information, refer to the section "Protection of the Interest of the Bank" later in this chapter.

63 Civil Procedure Regulations, Regulation Numbers 112–122.

64 Civil Procedure Regulations, Regulation Numbers 105–111, 119–122.

65 Civil Procedure Regulations, Regulation Number 178.

66 This privilege was recognized in CC (Tel Aviv) 594/96 *Mishkan Bank Hapoalim* vs. *Margaliot*, *Skira Mishpatit*. The same was the case in CC (Tel Aviv) 2486/02 *The Carmelton Group Ltd.* vs. *Israel Discount Bank*, available at http://www.nevo.co.il. In contrast, in CC (Jerusalem) 6126/02 *Shiftan* vs. *Israel Discount Bank*, available at http://www.nevo.co.il, privilege was not recognized, even though the information related to third-party loans. The reason was that the case concerned, in effect, a single group of borrowers that acted jointly, while cooperating in all matters pertaining to the loan, for a joint purpose and a single economic interest. The fact that it concerned equal loans was perceived by the Court as a technical split of a single loan.

lack of cover, that customer will be subject to the sanction of a "restriction" imposed by the bank.

The extent of the restriction is that, for a period of one year, the customer will not be allowed to draw checks on the restricted account, nor will the customer be allowed to open new checking accounts at any bank.[67] This arrangement is based on cooperation between the bank performing the restriction, the Bank of Israel, and all other banks. Consequently, the Law determines that a bank that is "restricting" a customer will provide a report about this restriction to the Bank of Israel, so that the Bank of Israel can transfer the information to all other banks.[68]

The Bank of Israel may publish the numbers of the restricted accounts. In the event of a serious restriction,[69] the Bank of Israel also may publish the names of the restricted customers.

The Checks without Cover Law contains a number of additional provisions, which require a bank to disclose information in relation to its customers. Pursuant to these provisions, a bank may disclose that its customer has been restricted, if it is necessary for a criminal investigation (Section 15). In addition, the bank is required to submit to the bearer of a check that was not honored due to a lack of cover, at his request, the identification details of the drawer or the account holder (Section 12).

The Credit Data Service Law

The Credit Data Service Law, 5762–2002 is an innovative law that is intended to formalize the engagement in the sale of financial information concerning people and businesses. The Law allows entities that have received a special license for this purpose according to the law, to collect and submit credit information on individuals,[70] as well as information from which it is possible to determine the extent of their

67 Checks without Cover Law, Sections 2, 3b, and 4.

68 Checks without Cover Law, Section 13.

69 Pursuant to the Checks without Cover Law, Section 3, a serious restriction is caused in one of the following two events: if, during the regular restriction period, another bank account of the same customer is restricted, or if, during a period of three years after the termination of a regular restriction, the same account is restricted for a second time.

70 That is, "individuals", as distinct from "corporations". The Credit Data Service Law, Section 1 provides the definition of the term "customer". As stated above, the Privacy Protection Law does not apply to corporations, and therefore the submission of information in their regard does not constitute a violation of privacy.

compliance with their financial liabilities. The negative information with regard to their non-compliance with their financial liabilities is gathered and submitted without these individuals granting their consent to such disclosure.

There is no doubt that this is a law that causes severe violation of the privacy of the concerned individuals. However, balancing the right to privacy are other serious considerations, such as the improvement of the payment ethic, assistance in reaching a more correct assessment of credit risks, and the increase of competition in the field of the provision of credit to customers. The Credit Data Service Law attempts to strike a balance between the right to privacy of individuals and the above-mentioned commercial needs, *inter alia*, by restricting the ways in which information is collected, as well as information sources.[71]

Needless to say, banks are mentioned among the sources for collection of such information. Banks are institutions that engage in the provision of credit, that identify their customers with a high level of security, and that maintain a well-organized financial and accounting system.

The importance of such banking information is that it points to the financial difficulties of a person far earlier than the stage at which the information is received from the official registers. The Credit Data Service Law does not leave room for voluntary cooperation by banks; rather, it imposes on them a duty to submit the information on their own initiative.[72] Even though, ostensibly, it would be possible to require banks to submit all information with regard to the non-compliance of a customer with a financial obligation, the position of the Law is far more cautious. The Law requires the banks to submit only two types of negative information:

(1) Data with regard to warnings which a bank has sent to its customer pursuant to the Checks without Cover Law, under which, after five checks without cover have been returned to the customer, the bank is required to give the customer a warning, cautioning him against the restriction that can be expected if more of his checks are returned,[73] although the bank will only transfer this information at the expiration of sixty days from the date

71 Spanitz, "Credit Data Service Law: The Last Plateau", 45 *Hapraklit* (2001), at p. 375.

72 Credit Data Service Law, Sections 16(a)(4) and (5); Credit Providers Service Regulations, Sections 16–20.

73 Checks without Cover Law, Section 2(a1).

of sending the warning and provided that, during this period, the return of a check was not cancelled out of any of the five checks; and

(2) Data with regard to a warning in writing, that a bank has sent to its customer of its intention to initiate proceedings to collect a debt. The bank, however, will only transfer this information at the expiration of sixty days from the date of sending the warning, if, during that time, the debt is not paid and no arrangement is drawn up for its payment.

In any event, information will not be sent in connection with the debt when the source of the information lies in a loan to people without housing, who are entitled to the loan under the Housing Loans Law.[74]

The holder of a credit providers service license may submit a credit report that contains negative information about a customer, only after it also has collected positive information with regard to that customer and included such information — if any — in the report. The collection of the positive data without the customer's consent will be solely from a banking corporation, and will include information to the effect that the customer has received credit and is meeting the repayment obligations.[75]

The Assets of Holocaust Victims (Restitution to Heirs and Endowment for the Purpose of Assistance and Commemoration) Law

This new Law was enacted with the purpose of attempting to locate the assets of Holocaust victims and to return these assets to their heirs. By virtue of the Law, a government company was set up, whose task is to attend to the location and restoration of the assets (the Company for the Location and Return of the Assets of Holocaust Victims Ltd.). In the banking context, the Law determines that a bank that has "reasonable grounds to assume" that it is holding an asset of a

74 The Housing Loans Law confers on people without housing the entitlement to receive a loan at preferred conditions from the state budget or with the state's assistance, for the purpose of purchasing a flat. In practice, the loan is provided by a commercial bank. The Housing Loans Law sets forth various protections for entitled persons regarding the repayment of the loan.

75 Credit Data Service Law, Section 17. In addition, the Credit Data Service Law, Section 18, allows customers to give their consent, in advance, to the collection of positive information about them, whether from banks or from other entities, as set forth in the Law.

Holocaust victim is required to give notice thereof to the Company.[76] In addition, the Law authorizes the Company to demand information and documents from any person.[77] The Law expressly determines that the obligation of transferring information to the Company will apply, notwithstanding any obligation of confidentiality that is imposed on the entity submitting the information.[78]

From the above review, it may appear that, in Israel, there are a large number of legal provisions that require the bank to disclose information in connection with its customers. Moreover, information that is submitted by a bank to a particular authority or entity may, under various conditions, also be transferred to other authorities and entities, both in Israel and abroad. Behind these provisions lies a public interest of economic importance, which is perceived as being even more important than the individual's right to privacy, as the justification for compliance with these provisions.

Obligation of Disclosure to Other Customers and Guarantors

The previous sections discussed various legal provisions that require a bank to disclose information about its customers to various authorities and entities. This section examines a different type of disclosure obligation by virtue of the law,[79] namely, the disclosure obligation to other customers of the bank or to guarantors.

Notwithstanding that this situation also concerns a disclosure obligation by virtue of the law, a separate section is devoted to this disclosure obligation, because of the different intensity conferred on it with regard to the obligation of confidentiality. The previous section obviously preferred the disclosure obligation over confidentiality and, on the satisfaction of the conditions set forth in the various laws, a bank is required to provide full and detailed information regarding its customers. In the balance between the need for disclosure and the need for confidentiality, it is the former that has the upper hand.

Having said this, the disclosure obligation with which this section is concerned is not as strong. Moreover, in the balance between the disclosure obligation and confidentiality, they are of equal intensity.

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76 Assets of Holocaust Victims Law, Section 9.

77 Assets of Holocaust Victims Law, Section 18.

78 Assets of Holocaust Victims Law, Section 72.

79 Ben-Oliel, *Banking Law General Part* (1996), at p. 128 (providing another approach, according to which the disclosure arises from the bank's personal interest).

In light of this, the bank is not required to comply with the disclosure obligation in full and to submit detailed information; rather, it may confine itself to issuing a statement with regard to the existence of a conflict of interests.

Israeli law imposes on banks extensive obligations of disclosure to customers and to guarantors. At times, the disclosure obligations derive from provisions that prohibit misleading, by act, by omission, or in any other manner;[80] at times, they are derived from rules that impose a general standard of conduct on banks.[81] At times, the obligations of disclosure appear in an express manner, in the form of detailed rules for proper disclosure, and the bank is required to comply with all the details of these regulations.[82] When a bank is involved in investment counseling, it is subject to a specific obligation of disclosure as set forth in the Investment Counseling Law.[83] When a bank acts as an agent, it is subject to the obligation of disclosure as set forth in the Agency Law.[84] As a consequence of the imposition of such sweeping obligations of disclosure, a bank often finds itself in the delicate situation of a conflict of interests — the obligation of confidentiality to one customer versus the obligation of disclosure to another customer or guarantor.

This is precisely what happened in *Tefahot Mortgage Bank Ltd.* vs. *Tsabach*.[85] In this case, the purchasers of flats received loans from the bank for the purpose of buying the flats. The flats were purchased from the contractor, who also was a customer of the bank. At the time of the provision of the loans, the bank did not disclose to the purchasers that the contractor was in a difficult financial situation.

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80 Banking (Service to Customer) Law, Section 3, which applies both to customers and to guarantors; Contracts Law (General Part), Section 15.

81 One such standard of conduct is the principle of good faith, in the Contracts Law (General Part), Sections 12 and 39, or the tortious obligation of care, in the Civil Wrongs Ordinance, Sections 35–36. Another source for the disclosure obligation is the fiduciary obligation imposed on the bank.

82 Banking (Service to Customer) (Proper Disclosure and Submission of Documents) Regulations; with regard to guarantors: Guarantee Law, Sections 22–24, and 26; Plato-Shinar, "Guarantees Given to Banks and the Pledge of Movable Property and Securities', by Prof. Ben-Oliel", 1 *Haifa Law Review* (2004), at p. 559 (discussing the obligation of disclosure to a guarantor).

83 Regulation of Engagement in Investment Counseling, Investment Marketing and Portfolio Management Law, Section 14 and Sections 13–18.

84 Agency Law, Section 8(1).

85 CA 5893/91 *Tefahot Mortgage Bank Ltd.* vs. *Tsabach*, PD 48(2) 573, 588.

Eventually, the contractor went bankrupt, he halted the construction, and the purchasers did not receive the flats they had paid for.

The purchasers sued the bank in respect of a breach of the obligation of disclosure that the bank owed to them. The bank based its defense on the obligation of confidentiality that it owed to the contractor. The Supreme Court was required to determine which of the interests prevailed: the obligation of confidentiality to the contractor, or the obligation of disclosure to the purchasers.

The judgment reflects an attempt to strike a balance between the conflicting interests. It was ruled that the bank should have notified the purchasers that the bank had a conflict of interests, and that it should not have provided the loans without receiving the customers' consent to the conflict of interests. Since the bank did not do so, it was required to compensate the purchasers for the damage that was caused to them.[86]

In *Tefahot* vs. *Tsabach*, it was determined that the balance between the duty of disclosure to one customer and the duty of confidentiality to another customer would be achieved by way of providing notice to the customers involved of the existence of a conflict of interests. However, in other situations that have reached the courts, another balance has been created between the conflicting obligations, by preferring the duty of disclosure to the duty of confidentiality.

Thus, for example, in the conflict between the duty of confidentiality to a customer who is a guarantee and the duty of disclosure to the entity that provided the guarantee for that customer (i.e., the guarantor), the courts have preferred the guarantor's interest. It was explained that:

> ". . . the disclosure of the situation of the guarantee's account to the guarantor, when the guarantor's commitment relates to the very same account, greatly outweighs — in the balance between the two obligations — the duty of confidentiality to the holder of the account, who is sending the guarantor to give the guarantee for him".[87]

As the guarantor does not, typically, receive consideration in respect of his guarantee, and his signing of the guarantee is intended purely

86 Plato-Shinar, "Construction Loans in Israel: Bank's Liability towards Third Parties", 23 *The International Construction Law Review* (2006), at pp. 187 and 197 (providing an analysis of this judgment).

87 CA 1570/92 *Bank Mizrahi* vs. *Ziegler*, PD 49(1) 369, 388.

for the purposes of the guaranteed customer, the tendency to prefer the guarantor and to submit to him details pertaining to the guarantee's obligation or his guarantee agreement is understandable.[88]

A similar result was ruled when a bank was asked to submit information on one customer to another customer, for the purpose of a check discount that the latter received from the former.[89] Such a ruling clearly indicates a tendency toward diminishing the status of bank secrecy, and at the same time, a trend toward the strengthening of the duty of disclosure. If this process continues, cases such as *Tsabach* may be decided based on a different balance to the one adopted there, that is, clearly preferring the obligation of disclosure to the obligation of confidentiality.

Public Interest in the Disclosure of Information

A second exception to the principle of bank secrecy is the existence of a public interest in the disclosure of the information.

The term "public interest" is an obscure term, which defies a precise definition. Clearly, it is not enough for the disclosure to relate to a public interest, but it also must be clear that there is a public interest in the disclosure itself. The bank must show that it is the public interest itself that requires the bank to commit the violation of privacy. In addition, it is clear that a distinction must be made between a "public interest" and "of interest to the public". Not every interest that arouses the curiosity of the public or which interests the public will be included in this category, but only an interest that is of genuine importance for the public.[90]

However, what, precisely, is this public interest, and under what circumstances does it exist? Naturally, the recognition of the existence of a public interest entails a certain comparison between the

88 In Bankruptcy File 590/97 *HA. Mazon Ltd.* vs. *The First International Bank of Israel Ltd.* (not published), Paragraphs 36–38, the guarantor's interest was preferred, *inter alia*, due to the special circumstances of the case.

89 CA (Tel Aviv) 2344/00 *Israel Discount Bank Ltd.* vs. *Hamifras Management and Construction Company Ltd.*, Paragraph 8, available at http://www.psakdin.co.il; FH 7/81 *Panidar* vs. *Castro*, PD 37(4) 673, 691–693, where it was ruled that the fiduciary duty of an agent to his principal, by virtue of which the agent is required to keep confidential details relating to the principal, was secondary to the duty of disclosure to a third party.

90 Segal, "The Right to Privacy as Compared with the Right to Know", 9 *Iyunei Mishpat* (1983), at pp. 175 and 193.

good of the public and the good of the individual in respect of whom the disclosure is requested. Only in cases when ethical considerations indicate that the good of the public justifies the violation of the rights of the individual can the disclosure be justified.[91]

Recently, an interesting case emerged in Israel that is related to this subject. It transpires that at the very outbreak of the war in Lebanon, and in the midst of the planning of battles and the deployment of soldiers, the Chief of Staff called his bank branch and gave an order to sell his entire share portfolio. This information was leaked to the media, which lost no time in publishing it and, as a consequence, incisive criticism was leveled at the Chief of Staff.[92] The bank vehemently denied that it was responsible for the leak and with this the affair came to an end. However, had the Chief of Staff decided to sue the bank in respect of a breach of the obligation of confidentiality, the question of the existence of a public interest in this case would have arisen.

Another example is the affair of the Prime Minister's alleged dollar account. In 1977, at a time when Israeli citizens were prohibited from holding foreign currency, reports surfaced that the Prime Minister of the time, Yitzhak Rabin, and his wife held a dollar account with an American bank from the period of their diplomatic service abroad. Eventually, it transpired that the Prime Minister knew nothing whatsoever about the account, which had been opened only by his wife. Nevertheless, the Prime Minister decided to resign, and an indictment was filed against his wife.[93] The question of bank secrecy did not arise in this case. However, had such an event involved an Israeli bank, it also could have given rise to the question of the existence of a public interest.

A case in which the exception of public interest was raised is that of *The Companies Ordinance* vs. *Trade Bank*.[94] In this case, the bank collapsed as a result of a huge embezzlement. Customers of the bank lost the funds they had deposited with the bank.

The State of Israel decided to intervene, *ex gratia*, and to compensate customers. In addition, immediately prior to the distribution of the compensation to the customers, the Income Tax Commission

91 Ben-Oliel, *Banking Law General Part* (1996), at p. 125.

92 Sharoni, "The Guns Were Firing, Halutz Sold Shares", *Ma'ariv* (15 August 2006).

93 Levine and Len, "Caught Red-Handed", *Globes* (27 September 2006).

94 Bankruptcy File Number 1398/02, in the matter of *The Companies Ordinance* vs. *Trade Bank Ltd.*, available at http://www.psakdin.co.il.

demanded of the special administrators who had been appointed to the bank that they submit to it the list of all the customers of the bank who were due to receive compensation from the state, so that it could check whether the list included tax refusers. The Income Tax Commission relied on the exception to banks maintaining confidentiality of information for reasons of the existence of a public interest. According to the Income Tax Commission, the streamlining of the collection proceedings is a public interest that justifies disclosure and especially in special circumstances such as the case in question, which concerned compensation that was being awarded *ex gratia* by the state, so it would not be appropriate to allow tax refusers to benefit from it.

The Court ruled that a general and sweeping claim with regard to the public interest in the streamlining of the collection proceedings was not sufficient; rather, it was necessary to show special and specific circumstances that would tip the balance of the interests in favor of the tax authorities. The Court agreed, in principle, to recognize the existence of such circumstances in the case in question, where tax refusers could benefit from compensation that was being awarded *ex gratia* by the state.

Despite this fact, the Court also ruled that the requested information should not be submitted. The request of the Income Tax Commission was not a request that pertained to tax refusers. It was a sweeping request of the tax authorities to receive a list of names and details of all the customers of the bank, merely due to the theoretical concern that there might be some tax refusers among them. Such a violation is not proportional, and the damage that it entails exceeds what is deemed reasonable.

In the author's opinion, which has already expressed in another commentary,[95] the exception of a public interest should not be recognized. The cases where a public interest genuinely exists have been established by the legislator within the obligations of disclosure pursuant to law.[96] Indeed, it is appropriate that the recognition of a public

95 Plato-Shinar, "The Bank Safety Deposit Box as Reflected in the Right to Privacy", 1 *Kiryat Hamishpa* (2001), at pp. 279 and 298.

96 Thus, in CC (Tel Aviv) 721/95 *Kazarshvili* vs. *Mercantile Discount Bank*, PM 5756 (2) 402, 412, a public interest was recognized in an *obiter dictum*, in connection with the investigation of a murder and money laundering. In any event, the police obtained an order to seize documents pursuant to the Criminal Procedure Ordinance, so that the recognition of public interest was not even necessary.

interest that justifies the violation of bank secrecy should be done by way of legislation, and not according to the discretion of a bank, which believes that certain circumstances do indeed justify the disclosure of information. In addition, when it concerns such a basic and important right as bank secrecy, the existence of such an obscure exception might be applied in unsuitable cases, thus violating the right unnecessarily.

Protection of the Interest of the Bank

Another exception to bank secrecy is the existence of the bank's own interest in the disclosure of the information. It is unclear what that personal interest precisely is, though it appears that it should be interpreted in a cautious and narrow manner. The bank's interest will only be recognized when a genuine and essential need arises for the bank to ensure the disclosure of the information. Considerations of convenience or economic viability alone are not sufficient.

In at least two cases, it is obvious when the existence of a bank's own personal interest justifies disclosure: when a bank takes legal proceedings against a customer or a guarantor in respect of a debt; and when a bank is forced to defend itself against a claim of a customer or a guarantor.[97] In these cases, the disclosure of information about a counter litigant may be recognized, needless to say, as long as the information is relevant and vital for the purpose of clarifying the process.

A more problematic case is that in which a bank's own interest requires the disclosure of information about a third party. In the author's opinion, disclosure of information about a third party should not be permitted for the bank by virtue of the exception of a "personal interest", but rather, the bank should be required to obtain a court order, in respect of which the rules of privilege as explained above shall apply.

In several cases, banks have attempted to rely on the exception-to-confidentiality obligations for reasons of personal interest. In *Bank Leumi* vs. *Alhadaf*,[98] in the course of handling the affairs of one of its customers, the bank discovered that another one of its customers, who owed money to the bank, was about to receive a considerable

97 In particular, when it concerns a class action; CC (Petach Tikva) 6619/04 *Reizel* vs. *Bank Leumi*, available at http://www.faxdin.co.il.

98 ACA 8873/05 *Bank Leumi* vs. *Alhadef*, available at http://www.court.gov.il.

sum. The bank made haste to obtain an order for the restriction of the use of the funds (a *Mareva* injunction).

The Supreme Court, which was hearing the appeal, disqualified the order on the grounds that the information had been obtained by way of a breach of the duty of confidentiality. It was ruled that the bank may not make any use it wishes of information that reaches it through a customer. The only use of such information that it is permissible for the bank to use is in the course of legal proceedings that are being conducted between the bank and the concerned customer. Interestingly, in this case, the entity that claimed a violation of bank secrecy was not even the customer who had submitted the information, but a third party — the customer in debt. Nevertheless, the Court accepted the claim.

In *She'altiel* vs. *Bank Mizrahi*,[99] the bank was worried by the problematic situation of one of its customers. The bank contacted the customer's employer, to clarify whether she was still working for him. When the bank was asked the reason for its inquiries, it told the employer about the problematic financial situation of its customer.

In this case, too, it was ruled that the bank had breached the obligation of bank secrecy that is imposed on it, and the existence of a personal interest that would justify the disclosure of the information was not recognized. The Court ruled that a valid personal interest would be interpreted in a cautious and narrow manner, and pursuant to the criteria of proportionality as developed in the case law. For this purpose, it is necessary to examine whether there is a direct relationship between the need for the disclosure of the information about the customer and the appropriate objective of the payment of the debt, and the goal of the protection of the bank's interest, which was to get its money back. Consequently, when a bank takes legal proceedings against a customer, or sends warning letters to guarantors, then such a direct relationship does indeed exist. In *She'altiel* vs. *Bank Mizrahi*, however, the required relationship did not exist.

On the other hand, in *Reizel* vs. *Bank Leumi*,[100] a customer filed a class action against the bank. In the course of its defense, the bank submitted details about the activities of the customer in connection with the subject of the claim. The Court ruled that a plaintiff may not benefit from a claim of privilege pertaining to evidence that is relevant to the clarification of the claim, and which is required of the

99 CC (*Acre*) 2483/97 *She'altiel* vs. *Bank Mizrahi*, available at http://www.nevo.co.il.

100 CC (*Petach Tikva*) 6619/04 *Reizel* vs. *Bank Leumi*, available at http://www.nevo.co.il.

defendant for the establishment of its defense, *a fortiori*, when it concerns a class action and the great risk that entails, as far as the defendant is concerned.

The Customer's Consent

The fourth exception to the principle of bank secrecy is by way of the customer's consent to the submission of the information. Needless to say, if a customer gives his consent for this purpose, then the bank is permitted to submit information regarding that customer.

The question that arises is whether the consent should be given expressly, or whether it is sufficient for it to be given implicitly. The Privacy Protection Law also recognizes implied consent.[101] It would appear that this also is the approach with regard to bank secrecy.[102] Thus, there are scholars who believe that a customer who receives credit from the bank is deemed to have granted his implied consent to the submission of information about him to the guarantor, as long as the information pertains to the guarantee agreement.[103] However, Ben-Oliel admits that this approach is not acceptable to everyone.

The author's opinion in this matter is different. In light of the importance of bank secrecy and the desire to reduce the scope of the exceptions thereto, only express consent should be recognized. Furthermore, if the express consent appears in a banking agreement that constitutes a standard contract,[104] then it must be ascertained that it is not deemed to be an unfair term in a standard contract, which may be cancelled by the court.[105] Section 4 of the Standard Contracts Law determines that a term that invalidates or restricts a right that is available to a customer pursuant to law may reasonably be assumed to be unfair. A general and sweeping waiver of confidentiality will, in all likelihood, be deemed to be an unfair term. Having said this, a restriction of the consent to the submission of certain information, to a certain entity (such as a guarantor), or for certain circumstances, could meet the legal criterion.

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101 Privacy Protection Law, Section 3. The same is true of the Agency Law, Section 8, which applies to a bank in its capacity as the agent of the customer.

102 CA 5893/91, *Tefahot Mortgage Bank Ltd.* vs. *Tsabach et al*, PD 48(2) 573, 588.

103 Ben-Oliel, *Banking Law General Part* (1996), at p. 128.

104 As this term is defined in the Standard Contracts Law, Section 1.

105 Pursuant to the Standard Contracts Law, Section 3.

Conclusion

Bank secrecy constitutes one of the most important characteristics of Israeli banking. Despite the fact that there is no law in Israel that imposes the obligation of secrecy on banks, there is no doubt that bank secrecy is a well-established principle in Israeli law, and that banks go to great lengths to honor it and to comply with it.

Having said this, bank secrecy is not an absolute principle. The law recognizes a number of exceptions in which a bank is entitled and, at times, is even obligated, to disclose information about its customers. Hopefully, these exceptions will be applied in a limited manner, so as to boost the intensity of bank secrecy and to provide appropriate protection of the individual's privacy.