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Loans & Collections: Part II

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THE GUARANTOR:

The Gemara in Bava Basra details two important leniencies when obligating an *areiv*, a guarantor.

First, when one is a guarantor at the time a loan is given, no *kinyan* (physical act of transaction) is needed. If an individual gives a guarantee at the time of the loan that he is taking responsibility to ensure it is paid back, that suffices to make him an *areiv*, with no other action necessary.

If one accepts to become an *areiv* after the loan has already been given, then there is a *machlokes* in the Gemara whether a *kinyan* is needed or not. We rule according to the opinion that a *kinyan* is needed in this case.

The second *chiddush* of *arvus* is that although the acceptance of responsibility is presumably an *asmachta*, it is nevertheless binding.

Usually, when a transaction is made with an *asmachta* (a conditional deal), the entire transaction is deemed invalid, as it is not considered a full commitment. In the case of *arvus*, the guarantee to accept responsibility on the loan is an *asmachta*, as the guarantor only accepts to pay on condition that the borrower does not come up with the money. Still and all, in this instance *asmachta* is good enough to enact the deal.

The Gemara explains that even though the acceptance to be an *areiv* is conditional, we assume that the *areiv* fully accepts the responsibility because he receives pleasure from the fact that he is being trusted by the lender. Because he has this pleasure, he fully accepts to commit himself to the obligation to repay the loan if need be.

The Ramban points out that *arvus* cannot be a real *asmachta* because we see that there is an opinion in the Gemara that holds that a *kinyan* is unnecessary even if one becomes an *areiv* after the loan was already given. If *arvus* is a real *asmachta* and it only works because the cosigner commits fully because of the pleasure he receives from being trusted, that would only apply if he became a guarantor at the time of the loan. If he only accepted to cosign on the loan at a later date, this rationale would not apply, as he did not make this commitment when the loan was given, and we would have to say that the *asmachta* cannot create a valid commitment. Thus, he says, we see clearly that *arvus* is not a full *asmachta* and is only a quasi-*asmachta* that is considered sufficient to place the responsibility on the guarantor.

ARVUS AS SHLICHUS:

The Rashbam explains that when the lender gives the money to the borrower, he is the *shliach* (messenger) of the cosigner. By accepting responsibility, the guarantor is, in essence, lending the money himself to the borrower, and the lender is merely acting as his agent to give him the money. The reason the *areiv* is liable to lose if the lender doesn't pay is because he is the real lender, and, therefore, he must reimburse his *shliach* who laid out the money if the borrower fails to come through with the money.

There is a major dispute amongst the Acharonim if this Rashbam is meant to be taken literally and the rules of *shlichus* actually apply to an areiv.

The Ketzos Hachoshen learns that *arvus* does work with actual *shlichus*. He uses this to explain the ruing of the Shach that if the *areiv* doesn't actually tell the lender to give the money with the promise that he will act as a guarantor, but merely says a general statement "whoever lends this person money, won't lose out", he is not considered to have accepted the responsibility of a guarantor. The Ketzos explains that the reason for this is because *arvus* works with *shlichus*, and this statement is not sufficient to appoint the lender as a *shliach* of the *areiv*.

The Shaar Mishpat also learns that *arvus* literally works as a *shlichus*. Accordingly, there are a number of relevant halachos that will apply. For one thing, a *koton* (minor) cannot be a valid *shliach* and one cannot be a *shliach* for a koton; therefore, if either the *areiv* or the lender is a *koton*, the *arvus* is invalid. One also cannot be a *shliach* for a non-Jew and a non-Jew cannot be a *shliach*; therefore, if either the *areiv* or lender is a gentile, the *arvus* is technically invalid. Furthermore, there is a well-known rule of "*ain shliach l'devar aveirah*", if one appoints a *shliach* to do

an *aveirah* on his behalf, the *shlichus* is not valid. Accordingly, he says that if someone tells someone to steal money, with the promise to reimburse him if he suffers any loss while doing so, the *arvus* is not valid.

The Imrei Bina and others disagree, claiming that the Rashbam did not literally mean that *arvus* is a form of *shlichus*. He says that *arvus* does apply to non-Jews and to minors. The Nesivos Hamishpat also disagrees with the Ketzos, proving this from an opinion in the Gemara that a *kinyan* is unnecessary even if one becomes an *areiv* after the time of the loan. If the *arvus* started after the loan was given, it is obvious that the lender was not the *areiv's shliach* to lend the money at an earlier time; therefore, he says that this is proof that *arvus* is not literally a form of shlichus.

The Ketzos is not bothered by the Nesivos's question because we *pasken* like the opinion that a *kinyan* is necessary when one becomes an *areiv* after the time of the loan; however, we would have to say that according to him *arvus* only works as a form of *shlichus* if the areiv committed himself at the time of the loan. If he became an *areiv* later on through a *kinyan*, that would be a different model of *arvus* that is not a kind of *shlichus*.

ARVUS OR MAZIK?

The Mahari Veil discusses a story where Mr. A wants to repay a debt he has to Mr. B with an IOU that he has from a third party, Mr. C, who owes money to him. When Mr. B is reluctant to accept the IOU as payment, Mr. A assures him that he knows Mr. C and he can vouch for his dependability. Unfortunately, Mr. C does end up defaulting on his debt, and the IOU is never honored. By vouching for Mr. C, did Mr. A become his *areiv*, which would mean that he must now repay the debt to Mr. B?

The Mahari Veil ruled that Mr. A did not become an *areiv* with his statement. He does say, however, that he is only not be responsible if he really thought that Mr. C was reliable and could be depended on to pay. If he knew that Mr. C could not be depended on, and he lied to Mr. B, then he is liable to pay the debt.

The Rema cites this *teshuva* of the Mahari Veil as the binding halacha. He explains that although Mr. A did not accept to be a full *areiv* on the loan, he did accept to be an *areiv* to the fact that his statement was the truth. If he is found to be lying, then he is liable to pay for any loss caused by his lie.

While the Rema seems to be saying that Mr. A's responsibility is a form of *arvus*, the Mahari Veil himself seems to give a different reason why Mr. A is liable. He says that Mr. A caused harm to Mr. B with his claim that Mr. C could be relied upon, which deems him a *mazik* (damager), and he is obligated to reimburse Mr. B for the damage he caused him.

There are numerous halachic differences between the obligation of an *areiv* and the obligation of a *mazik*, as the responsibilities of an *areiv* to repay a debt are much more limited than the responsibility of a *mazik* to pay for damages he caused. These variables would be the difference between the explanation of the Rema and the explanation of the Mahari Veil as to why Mr. A is liable.

ARVUS ON A NON-SPECIFIC AMOUNT:

There is a discussion amongst the Poskim regarding someone who says that he will guarantee a loan by telling the lender that he can give money to a borrower and he will accept responsibility, but doesn't specify the amount he will cosign for. The Rambam says that if the amount is not specified, there is no obligation on the *areiv* to pay if the lender reneges because he is not considered to have fully committed. The Shulchan Aruch says that everyone after the Rambam disagree with him and rule that the *areiv* is obligated to repay the debt. He says that the Rambam is a *da'as yachid* on this matter, and the *areiv* cannot rely on his opinion to exempt himself from liability.

Other Poskim disagree and say that there are other Rishonim who agree with the Rambam, which may mean that the *areiv* does have the right to exempt himself from liability.

WHEN THE AREIV WAS NOT RELIED UPON:

The Teshuvas HaRosh speaks about a case where Reuven owns a cow that he is reluctant to slaughter out of fear that it may turn out to be a *treifa*. His friend, Shimon, urges him to shecht the cow, telling him that he will buy the cow from him after it is *shechted* and assuring that he will pay him a certain amount even if it ends up being a *treifa*. When the cow is found to be a *treifa*, Shimon wishes to renege on his commitment to pay.

The Rosh rules that although it is unethical to do so, Shimon does have the right to back out because he never made a *kinyan* with Reuven.

The Bais Yosef asks: While it may be true that Shimon's assurance does not constitute a sale because there was no *kinyan*, why is he not obligated to pay as an *areiv*, since he did accept responsibility to reimburse Reuven even if the cow is a *treifa*?

The Bais Yosef offers two answers to this question. Firstly, he says that in the Rosh's story, Reuven asked Shimon beforehand for a *mashkon*, a collateral. Since he did, it is clear that he didn't fully trust him. As we explained earlier, the reason *arvus* works is because the guarantor obligates himself to pay because of the pleasure he receives from being trusted. In this story, he was not fully trusted, and, therefore, never fully committed himself.

The Drisha disagrees and says that we do not see anywhere that if a lender asks for a *mashkon* that the *arvus* does not work. Since this concept is not found regarding loans, he rejects this answer of the Bais Yosef.

Rav Yaakov Dovid Shmahl, a *Rov* in Antwerp, notes that some

Gemachs ask for head-checks from an *areiv*. He posits that such head-checks would constitute a *mashkon*, which would render the *arvus* invalid according to the Bais Yosef. Although the Drisha disagrees with the Bais Yosef, the *muchzik* on the head-checks is the Gemach, which would mean that they have the right to say that they hold like the Bais Yosef and will cash the checks.

On the other hand, he points out that one could possibly argue that holding a head-check does not make you a *muchzik* on any money. This may be dependent on the society – as in some societies, checks are treated like currency and in others they are not. Furthermore, one could argue on the premise that a check constitutes a *mashkon*. This too, may depend on whether or not a check is considered actual currency or not.

The Bais Yosef's second answer is that *arvus* only works in the form of a guarantee. If the commitment is said as part of a sale, then it does not constitute *arvus*.

TITLE INSURANCE:

When someone purchases a piece of property, it is common to buy title insurance that guarantees reimbursement if for some reason the purchaser is unable to take possession of the property. The Rambam says that such insurance is not binding as *arvus*. The Shulchan Aruch explains that the rules of *arvus* only apply when someone gives something away – such as when someone lends out his money – based on another party's guarantee that he will get his money back. In the case of title insurance, the buyer is not giving anything away; therefore, the title insurance does not have the status of *arvus* and would not be binding unless a *kinyan* is made.

The Minchas Pitim asks a few questions on this Shulchan Aruch. He cites the Rosh's case of the cow, where it did not leave the possession of the owner and it seems that the laws of *arvus* would apply if not for the two reasons offered by the Bais Yosef as proof that *arvus* can apply even in such cases.

A BACKSTABBING CUSTOMER:

There is a *teshuva* in Sefer Zekan Aharon about two partners who owned a sawmill, where large logs of wood were chopped down into lumber. One year, their biggest customer informed them that he would be sending them a lot of work that summer. He said that he would be providing them with a very large amount of raw wood that he would need them to cut up for him.

Since their current facilities would not be large enough for the job, he told them to buy new equipment and enlarge their premises, saying that he would pay for part of the upgrades.

In the end, the customer backed out on the deal and left the partners high and dry after they spent a fortune on the capital upgrades.

The Zekan Aharon ruled that the customer cannot be held liable, neither as a *mazik* or as an *aruv*. For one thing, the deal was done in the form of a purchase, which we previously explained is not subject to the laws of *arvus*. Another reason he offers to exempt the customer from liability is the fact that he never committed to a set amount, which we also explained is not a valid *arvus*.

While he does say that the customer is not technically liable, he does urge him to make some form of restitution to the partners because he did indirectly cause them a substantial monetary loss.

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