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Beth Din of America

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Beth Din of America  
305 Seventh Avenue  
12th Floor  
New York, New York 10001  
[www.bethdin.org](http://www.bethdin.org)



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# The Journal of the Beth Din of America

## *Editors*

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RABBI SHLOMO WEISSMANN

## *Copy Editing*

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# The Beth Din of America

is the most active rabbinical court in North America, providing services to the Jewish community in the following areas:

- ☞ Arbitration of commercial, communal and family disputes through the *din torah* process. The Beth Din handles a wide variety of matters, including cases involving wrongful termination, partnership dissolution, construction litigation, landlord-tenant issues, synagogue governance and matrimonial litigation. Hearings take place in the offices of the Beth Din in New York City. In some situations, *dinei torah* are arranged in remote locations, or through video teleconferencing over the Internet.
- ☞ Arranging Jewish divorces through the *get* process. The Beth Din arranges approximately 300 *gittin* per year, including those coordinated with *batei din* in Israel and other locations, and *gittin* originating and delivered to spouses in remote locations within the continental United States and elsewhere.
- ☞ Resolution of contested *get* and *agunah* cases. The Beth Din is actively involved in the resolution of cases involving recalcitrant spouses who refuse or are reluctant to give or receive a *get*. The Beth Din also administers the Beth Din of America Prenuptial Agreement, which provides a framework for the proper dissolution of a marriage under Jewish law in the event of divorce, and represents the single most promising solution to the *agunah* crisis. For more information about this agreement, visit [www.theprenup.org](http://www.theprenup.org).
- ☞ *Halachic* personal status determinations and *halachic* advisory services. The Beth Din conducts investigations into, and issues determinations relating to, the *halachic* personal status of individuals, including Jewish and single status, as well as *mamzerut*. The Beth Din also assists in preparing and providing *halachic* business forms when necessary. These included *halachic* will forms and *shtar iska* forms (permitting interest-like payments).

The Beth Din of America is based in New York City, and is affiliated with the Rabbinical Council of America.

## Introducing The Journal of the Beth Din of America

We are proud and excited to introduce the publication of The Journal of the Beth Din of America.

Like any Torah journal, this one seeks to provide a forum for the sharing and dissemination of Torah insights, in a manner that is successful *libagdil Torah ulba'adira* (to uplift and glorify the Torah). This journal has a second goal as well: to expose a wider audience to the practices of a contemporary *beit din*, and the intellectual foundations for its work.

One of the primary functions of a *beit din* is to resolve disputes, through mediation or through the *din torah* (binding arbitration) process. *Beit din* should be the primary address for resolving the family, communal and business disputes that arise in our communities for a number of reasons. First, our tradition features a developed and sophisticated body of substantive and procedural law. It is axiomatic that individuals and communities committed to Torah observance should seek to resolve their disputes within a framework that is consistent with the Torah's laws and values. Second, *beit din* adjudication of disputes is often required under Jewish law. In most situations involving conflicts among Jews, *halacha* prohibits the parties from resorting to civil court, and requires that a *beit din* adjudicate the matter. Finally, *beit din* arbitration carries many practical benefits. These include the promise of confidentiality, and cost savings that result from a process that is significantly more efficient than secular court litigation.

The Beth Din of America, in particular, for many years has served as an attractive forum for dispute resolution because of its respect for secular legal institutions and rules, in a manner that is consistent with *halachic* procedures and decision making. Many disputes that contemporary *batei din* are asked to adjudicate involve transactions and interactions that are complex and that take place in the secular business



## WELCOME

environment, and the proper adjudication of these controversies often requires a sophisticated understanding of secular law and general business customs, and how they affect applicable Jewish law. The Beth Din of America is well known for its expertise in these areas, and for its rigorous commitment to procedural fairness in the dispute resolution process, both from a Jewish and secular legal perspective.

Yet despite a well earned reputation for adjudicating cases fairly, efficiently and competently, the public lacks a full understanding and appreciation for much of the work of the Beth Din of America. This is because, like all *batei din*, the Beth Din is committed to confidentiality for the individuals, families and firms that utilize its services. Unlike secular court decisions which are published and accessible, *beit din* arbitration awards are provided only to parties and their legal counsel.

The publication of The Journal of the Beth Din of America is an attempt to change this situation, and educate the public about Jewish law as applied in a *beit din*, with particular attention to the outlook and practices of the Beth Din of America. The journal will primarily feature articles by *dayanim* of the Beth Din of America and other contributors. In each issue, we also hope to publish decisions actually rendered by the Beth Din of America (appropriately anonymized and approved for publication by the parties).

The Talmud derives the requirement for two Jewish litigants to settle their disputes before a *beit din* from the verse, “*v’e’eleh ha-mishpatim asher tasim lifneihem*,” (Exodus 21:1; “and these are the statutes which you shall place before them”). That same verse is utilized by Rashi, in his commentary to the Torah, to instruct us to teach and communicate the Torah’s laws and values clearly. According to Rashi, Moshe was commanded to “place” (“*tasim*”) the Torah before the Jewish people as a “set table” — in a lucid and easily accessible fashion.

It is our hope that this journal, and the study it enables, will serve as a vehicle for the clarification and dissemination of the Torah’s laws relating to the *beit din* process. May the teachings brought to light in this publication bring about a greater awareness and confidence in the institution of the *beit din*, thus restoring the prominence of this important communal institution.

Rabbi Yaacov Feit  
Rabbi Shlomo Weissmann  
New York, New York  
Adar 5772; March 2012

# The Prenuptial Agreement: Recent Developments

*Rabbi Mordechai Willig*

In 1992, in response to growing concern regarding a husband's ability to purposefully withhold a *get* from his wife without *halachic* reason to do so, as well as the modern day *beit din's* lack of authority to ensure that *gittin* were delivered in a timely manner, a prenuptial agreement was developed. Its purpose was to ensure that a husband would deliver a *get* in a timely fashion, while being sensitive to the *halachot* that would render a "forced" *get* null and void. The agreement, known as the Rabbinical Council of America and/or Beth Din of America prenuptial agreement, received approval from significant Torah authorities, and has resulted in the efficient resolution of scores of divorce cases in the years since its introduction. The current form of the agreement is available at [www.theprenup.org](http://www.theprenup.org).

The prenuptial agreement obligates the husband to pay a set sum, currently \$150 a day, which begins when the couple no longer continues domestic residence together and is in effect for the duration of the Jewish marriage. This obligation for food and support (*parnasah*) terminates if the wife refuses to appear before the Beth Din of America when summoned, or if she fails to abide by the decision or recommendation of the Beth Din of America.

From its inception, there was a concern that a wife might demand the daily sum in circumstances not envisioned by the parties or the agreement's formulators. For example, in some cases a couple ceases living in the same residence, but some time passes before either spouse takes any steps to request or schedule a *get*. Where the husband has not declined to give a *get* in a timely manner, it would seem inequitable for the support obligation to silently accrue until one spouse or another decides to request a *get*. This is because the obligation is meant to serve as an incentive for the husband to issue a *get* upon his wife's request in a timely fashion. It was not intended to provide the wife a means to demand additional money beyond any negotiated or *beit din* or court imposed settlement. While the text of the document is appropriately silent on this matter, a supplemental informational page states that the agreement is intended to facilitate the timely and proper resolution of marital disputes, and this is clearly the parties' intention when they sign the agreement.

To allay these concerns the following statement was added to the agreement in May 2008: "Furthermore, Wife-to-Be waives her right to collect any portion of this support obligation attributable to the period preceding the date of her reasonable

attempt to provide written notification to Husband-to-be that she intends to collect the above sum. Said written notification must include Wife-to-Be's notarized signature." This new language eliminates the possibility of a latent accrual of the support obligation. The obligation only begins once the wife has affirmatively put the husband on notice that she intends to collect the sum.

Notwithstanding this addition, the concerns that motivated the adoption of the new language still remain with respect to prenuptial agreements signed prior to May of 2008. In addition, even with the new language, there remains the possibility that some time will pass between the wife's delivery of the requisite notice and the actual delivery of the *get* – either because of legitimate logistical reasons beyond the control of the parties, or because the wife fails to act to schedule the *get* in a timely manner. Ultimately, any award under the prenuptial agreement can only be made by a *beit din* convened to hear testimony and gather evidence regarding the facts and circumstances of the particular case. This article will explore three possible bases that a *beit din* may utilize to exempt a husband from payment of the daily sum in circumstances similar to those we have set forth above.

## INTENT

As mentioned, there are cases when the document's plain language obligates the husband even though it is clear that the intent of the parties and the original formulators of the agreement was not to obligate him. What is the *halacha* in these cases?

*Shulchan Aruch* cites an opinion which states that if one writes a condition in a document, we follow the intention of the condition, rather than the language that is written.<sup>1</sup> The opinion is based on a case that appears in the Talmud (*Kiddushin* 60b) involving a man who marries a woman on the condition that he shows her a measure of land. The Talmud rules that if he shows her land that he owns, she is married, but if he shows her land which is not owned by him, she is not married. The Talmud, citing a *Tosefta*, explains that, "she did not intend to see anything but his land." Although the literal language of the condition, "I will show you a measure of land," makes no mention of ownership, we follow her presumed intention. It is

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<sup>1</sup> *Shulchan Aruch, Choshen Mishpat*, 61:16.

from here that Rabbeinu Yerucham derived and proclaimed what he referred to as a major principle: that we ignore the literal language of an agreement and follow the intention of its parties.<sup>2</sup>

Since the intent of the prenuptial agreement was to serve as an incentive for the husband to deliver a *get* in a timely fashion, the husband cannot be obligated to pay the daily sum in a case where the husband has acted in good faith, even if the plain language of the document may imply otherwise.

## EQUITY

Another important consideration is the governing law provision contained within the prenuptial agreement. The agreement provides for the Beth Din to render its decision “in accordance with... Beth Din ordered settlement in accordance with the principles of Jewish law (*pesbara krova la-din*).” A *beit din* empowered to decide a case based on *pesbara krova la-din* has wide latitude to decide a case based on its equities, and avert an inequitable and unintended consequence that may result from the literal reading of a contractual provision.

Obligating a husband who has acted in good faith to pay the daily sum provided for in the prenuptial agreement would certainly be considered inequitable. As such, the Beth Din may absolve him from such an obligation using the principle of *pesbara krova la-din*.

## WAIVER

The husband’s obligation of \$150 per day is characterized by the document as support, or *parnasah*. The agreement quantifies the *parnasah* obligation, and applies it when domestic residence together is discontinued “for whatever reason.” In the absence of the agreement, the husband’s obligation, which is not quantified, continues after the separation only if he is responsible for the separation.<sup>3</sup> In such a case, the burden of proof would fall upon the wife and would be very difficult for her to demonstrate even if she is factually correct. This is especially true in light of the vagaries of the

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<sup>2</sup> *Beit Yosef, Choshen Mishpat*, 61:16 and *Biur HaGra, Choshen Mishpat*, 61:16.

<sup>3</sup> *Shulchan Aruch, Even Haezer*, 70:12.

present *beit din* system. The agreement, however, applies the obligation “for whatever reason,” thereby eliminating the need to determine responsibility for the separation.<sup>4</sup>

Notwithstanding these significant deviations from the classical concept of *parnasab*, the husband’s obligation under the prenuptial agreement resembles *parnasab*, and is explicitly described in the agreement as functioning “in lieu of my Jewish law obligation of support.” Classical *parnasab* is subject to claims of waiver. For example, *Shulchan Aruch* describes a couple that separated in a case in which the husband is obligated to support her, and concludes that if she did not claim the support when it came due, she has waived (“*machala*”) the earlier support obligation.<sup>5</sup> Since the support obligation contained in the prenuptial agreement is akin to *parnasab*, it is likely subject to waiver as well. In a case where a wife does not demand the daily sum when it becomes due, there may be a presumed waiver or *mehila* of that sum.

These three considerations apply in virtually all Beth Din of America prenuptial arbitration agreements, prior to the updated language, when the husband is willing to give a *get* immediately but is constrained by mutual agreement. This includes attempts at reconciliation, mediation, and legal proceedings. Two additional considerations exist in a limited number of cases based on the wife’s conduct.

### REFUSAL TO RECEIVE THE *GET*

In a case where the husband wishes to issue the *get* and the wife refuses to receive it, for the above reasons (reconciliation, mediation, or legal proceedings) or others, there is an additional reason to assume that the wife waives the daily sum of the prenuptial arbitration agreement for the duration of her refusal to receive the *get*. The Ritva states that even a woman who argued with her husband and left him is assumed to have forgiven a support obligation.<sup>6</sup> As long as they are married, she may harbor hope for reconciliation and for that reason forgive the obligation. Some *batei din* have cited this Ritva as further precedent for waiving a husband’s *parnasab* obligation.<sup>7</sup>

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<sup>4</sup> Nevertheless, the *beit din* is authorized to consider the respective responsibilities of either or both of the parties for the end of the marriage as an additional, but not exclusive, factor in determining the distribution of marital property. This protects the husbands from possible inequity stemming from his unconditional obligation.

<sup>5</sup> *Shulchan Aruch, Even Haezer*, 70:12.

<sup>6</sup> *Chiddushei HaRitva, Ketubot* 96a.

<sup>7</sup> *Piskei Din Rabaniyim* 2, no. 10 (1956), 291-292.

## FINANCIAL CLAIM IN SECULAR COURT

If, prior to petitioning the *beit din* for support pursuant to the terms of the prenuptial agreement, the wife pursued financial claims in secular court, she may not be entitled to petition a *beit din* to address a similar claim. Rama cites an opinion that *beit din* will not accept the case of one who previously pursued a claim in secular court against a fellow Jew and turned to *beit din* after losing that case in secular court.<sup>8</sup>

According to many authorities, the plaintiff forfeits his or her right to pursue the claim in *beit din* from the moment that substantive proceedings have begun in secular court.<sup>9</sup> A wife's claim for support in secular court is fundamentally the same as the support clause of the prenuptial arbitration agreement. As such, if she pursues support in secular court, she may forfeit her right to pursue the support clause of the prenuptial agreement in *beit din*.

The decision of any *beit din* or court on these matters is somewhat unpredictable.<sup>10</sup> Therefore, notwithstanding the arguments set forth above, the recent language added to the Beth Din of America prenuptial agreement is a prudent step to avoid problems in the future

*Rabbi Mordechai Willig is the Segan Av Beit Din of the Beth Din of America. Rabbi Willig is also the Rabbi Dr. Sol Roth Professor of Talmud and Contemporary Halachah, the Rosh Kollel of the Bella and Harry Wexner Kollel Elyon and the Segan Rosh Kollel of the Rabbi Norman Lamm Yadin Yadin Kollel of the Rabbi Isaac Elchanan Theological Seminary at Yeshiva University, and the rabbi of the Young Israel of Riverdale in Riverdale, New York.*

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<sup>8</sup> Rama, *Choshen Mishpat*, 26:1.

<sup>9</sup> R. Joseph Colon (1420-1480), *Shu"t Maharik*, no. 187 and *Beit Yosef Choshen Mishpat*, 26:1 (s.v. *gedola mizu*). For a further discussion see R. Mordechai Willig, "He'arot B'reish Perek Zeh Borer," *Beit Yitzchak* 36 (2004), 24-25

<sup>10</sup> See, for example, *Lang v. Levi*, 16 A.3d 980 (Md. App. 2011) (available at <http://www.courts.state.md.us/opinions/cosa/2011/1425s09.pdf>).

# Jewish Law, Civil Procedure: A Comparative Study

*Rabbi Yona Reiss*

## PART I: THE ARBITRATION AGREEMENT<sup>1</sup>

The *Shulchan Aruch* sets forth the procedures of a *din torah* proceeding under Jewish law.<sup>2</sup> From a secular law perspective, a *din torah* is only binding upon the parties when both parties have agreed to submit to the *beit din* as an arbitration tribunal.<sup>3</sup> Thus, from a secular law perspective, it is necessary for the *beit din* to comply with the rules of arbitration procedure in order for the *beit din* award to be enforceable.<sup>4</sup>

The laws of secular arbitration may vary from state to state within the United States. While many states have adopted the Uniform Arbitration Act as their lodestar,<sup>5</sup> a number of states, such as New York, have retained separate arbitration statutes which contain certain variations from the provisions of the Uniform Arbitration Act.<sup>6</sup> A *beit din* needs to adhere to the procedural demands of *halacha*, while at the same time being mindful of relevant requirements of secular law in order to ensure that its judgments will be enforceable. This article shall set forth a comparison between Jewish law and relevant arbitration law with respect to a number of relevant procedural requirements.

According to the Uniform Arbitration Act, an agreement by parties to submit to arbitration is enforceable as a binding contract between parties, subject to the limitations under relevant contract law with respect to the revocation of contracts in general. Thus, absent a showing of duress, fraud or other grounds for revocation under contract law, the agreement between parties to submit a dispute to the

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<sup>1</sup> Part I of this article is reprinted from R. Yona Reiss, "Jewish Law, Civil Procedure: A Comparative Study," *Inside Beth Din of America* (2000), 1. The article was prepared as the first part of a series exploring the interface between secular arbitration law and the *beit din* process. Part 2 of this article is presented here for the first time, and represents the second installment of the series.

<sup>2</sup> See generally *Shulchan Aruch, Choshen Mishpat*, 1-27 which contain the bulk of laws relating to *beit din* court procedures. For an excellent review of these topics in general, see R. Eliav Shochetman, *Seder ha-Din* (Jerusalem: *Sifrit ha-Mishpat ha-Ivri*, 1988).

<sup>3</sup> See Uniform Arbitration Act, §1 and §16 and New York CPLR §7501-7502.

<sup>4</sup> See Uniform Arbitration Act §§12-13.

<sup>5</sup> The Uniform Arbitration Law was adopted by the National Conference of the Commissioners on Uniform State Laws in 1955 and approved by the House of Delegates of the American Bar Association in 1955 and 1956. See, generally, Thomas A. Oehmke, *Commercial Arbitration* §4. For federal arbitration matters relating to maritime transactions and the like, the United States Arbitration Act (9 USC §§1-15, 201-208, 301-307) is applicable.

<sup>6</sup> See Oehmke at §4.

arbitration of a *beit din* is treated as an enforceable agreement.<sup>7</sup> The New York statute goes further to emphasize that a written agreement to arbitrate is enforceable “without regard to the justiciable character of the controversy” so that a court is duty-bound to enforce an arbitration agreement even if the court is of the opinion that the underlying claim clearly has no legal merit.<sup>8</sup>

In Jewish law as well, the signing of an arbitration agreement is significant. As a general matter, Jewish law requires a Jewish person to submit to the jurisdiction of a *beit din* with respect to the adjudication of all monetary disputes between Jewish parties. However, a particular *beit din* cannot assert exclusive jurisdiction unless it is a *beit din kavua*, meaning a *beit din* that has been established as the only *beit din* for a particular community.<sup>9</sup> In the United States, due to the multifarious nature of the various Jewish communities and leaders throughout the land, no *beit din* has yet assumed the mantle of *beit din kavua* in order to compel all parties to go to that particular *beit din*.<sup>10</sup> Thus, for a particular *beit din* to have jurisdiction over a certain case, both parties usually have to agree to choose that particular *beit din* to hear the matter. In the event that the parties cannot agree about which *beit din* to select, Jewish law provides for a mechanism known as *ZABLA*<sup>11</sup> whereby each party chooses one *dayan* (i.e., arbitrator) and the two chosen *dayanim* appoint a third *dayan* to round out a panel of three arbitrators to hear the matter as an ad hoc *beit din*.<sup>12</sup>

However, what enables *beit din* to function in either case is the explicit submission of the parties to a particular *beit din* or a particular ad hoc *beit din* panel. This submission is typically achieved through a *shtar berurin* which is the Jewish law document traditionally used to denote an arbitration agreement.<sup>13</sup>

Besides the *shtar berurin*, there is another method by which parties may accept

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<sup>7</sup> Uniform Arbitration Act §1.

<sup>8</sup> CPLR §7501.

<sup>9</sup> See Rama, *Choshen Mishpat* 3:1; *Halacha Pesuka*, *Choshen Mishpat*, 13:11-16.

<sup>10</sup> See R. Moses Feinstein (1895-1986), *Iggerot Moshe*, *Choshen Mishpat* I, 3.

<sup>11</sup> “ZABLA” is an acronym for “Ze Borrer Lo Ehad”, or “he chooses one for himself,” referring to this process of selecting judges.

<sup>12</sup> See *Shulchan Aruch*, *Choshen Mishpat*, 13:1.

<sup>13</sup> The Talmud (*Bava Metzia* 20a) employs the term “*shtar berurin*” in the context of a *ZABLA* case where the two sides draw up a document identifying the respective arbitrators chosen by each side. In the context of the present-day *batei din*, the term “*shtar berurin*” (or “*shtar borerus*”) is typically used to refer to any arbitration agreement by parties to submit to a *beit din*.



the jurisdiction of a particular *beit din* panel under Jewish law, and that is through a *kinyan sudar* in front of the *beit din*. A *kinyan sudar* (which literally means “handkerchief acquisition”), in this context, consists of the ceremonial act of a litigant lifting a handkerchief or some other trivial item presented to him as a demonstration of undertaking a serious commitment to submit to the jurisdiction of the *beit din*. However, because secular law only ensures the enforceability of the *beit din* judgment in the case where there has been a written arbitration agreement, it is important for any *beit din* to require that the parties enter into an arbitration agreement even when a *kinyan sudar* will be performed by each party.<sup>14</sup> The question arises under Jewish law whether a written agreement to submit to arbitration without a *kinyan sudar* is sufficient. It has been argued that a written agreement should suffice even without a *kinyan sudar* based on the following arguments: (1) Jewish law recognizes the enforceability of *situmta* – actions or gestures (such as a handshake) which are commonly understood by parties as creating binding obligations in the society in which they live;<sup>15</sup> (2) Jewish law itself recognizes the enforceability of obligations undertaken through written contracts (*shtarot*) signed by the parties themselves.<sup>16</sup> However, reliance on the second argument alone may be insufficient based on the fact that a *shtar* is not capable of creating a binding obligation with respect to certain types of transactions.<sup>17</sup>

The practice of most *batei din* is to have the parties perform a *kinyan sudar* in addition to their signed arbitration agreement. One possible explanation for this prac-

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<sup>14</sup> In fact, this may be a fulfillment of the commandment set forth in *Deuteronomy 16* for Jewish communities to have both “*sboftim*” – judges, and “*sbotrim*” – policemen to enforce the judgments. Taking steps to ensure that the arbitration will be enforced by the secular court system provides the “*sbotrim*” needed for a *beit din* to be able to function. See R. Yoezer Ariel, “*Hatzorech Habelchati Be’Shtar Borerut*,” *Techumin* 14 (1994), 147.

<sup>15</sup> See *Bava Metzia* 74a; *Shulchan Aruch, Choshen Mishpat*, 201:2.

<sup>16</sup> See *Shulchan Aruch, Choshen Mishpat*, 40 and 69.

<sup>17</sup> See, e.g., *Kiddushin* 26a. A possible solution to any such limitation is to insert language in the *shtar* specifying that the parties accept any decision of the *beit din* as a binding obligation, which would constitute a “*hitchayvut*” – irrevocable obligations – under Jewish law. Once a party submits in a manner of “*hitchayvut*”, a *shtar* is able to encompass obligations that would not otherwise have been covered, such as obligations relating to chattel items, or to cash. See R. Ariel, “*Hatzorech Habelchati Be’Shtar Borerut*,” 149–150. There may also be certain Jewish law advantages to having kosher witnesses sign the arbitration agreement in addition to the parties themselves, in order to ensure the collectability of any judgment from encumbered assets. See *Shulchan Aruch, Choshen Mishpat*, 69. Of course, if the *shtar berurin* works through the mechanism of *situmta*, it is sufficient for the *shtar* to contain the customary language used for such contracts in secular society.

tice is that the performance of the *kinyan sudar* is deemed necessary as a matter of Jewish law. However, it appears that, as a general rule, there is a recognition by *halachic* authorities that the arbitration agreement constitutes a valid submission under Jewish law.<sup>18</sup>

Rather, the main purpose of having the parties enter into the *kinyan sudar* in addition to the arbitration agreement may be to preserve traditional Jewish law procedure at the outset of the *beit din* proceeding in order to instill in the parties a sense of religious reverence for the *din torah* process.<sup>19</sup>

## PART 2:

### COMPELLING PARTICIPATION IN A *BEIT DIN* ARBITRATION PROCEEDING I. INTRODUCTION

“You shall appoint Judges and Officers in all of your gates,” (Deuteronomy 16:18; “*shoftim v’sbotrim titen licha*”). The *Midrash* notes, based on this Biblical verse, that a Jewish law judge (operating within the framework of a *beit din*) cannot be effective unless there are “police officers” capable of enforcing his decisions.<sup>20</sup> In contemporary times, the secular courts in the United States serve the police function of the *beit din* by being the enforcement arm of the *beit din*’s decisions. This relationship is enabled through arbitration laws that provide that the decisions of an arbitration tribunal such as a *beit din* have the same force and effect as that of a duly constituted court.<sup>21</sup>

There is, however, one significant difference between the civil court and a *beit din* operating as an arbitration tribunal. While a civil court enjoys automatic jurisdiction over the parties, a *beit din* receives jurisdiction based on the parties’ formal submission to the authority of the *beit din* through a written arbitration agreement.<sup>22</sup> Once such an agreement is signed, the *beit din* is empowered by civil

<sup>18</sup> See Rama, *Choshen Mishpat*, 12:7; Sma, *Choshen Mishpat*, 12:18; *Halacha Pesukah* to *Hilchot Dayanim* 12:298.

<sup>19</sup> Cf. the Rules and Procedures of the Beth Din of America which do not make reference to the need for a *kinyan sudar* at *din torah* sessions, but rather leave this matter to the discretion of the *dayan* or *dayanim* who are appointed to sit on a given case.

<sup>20</sup> *Midrash Tanchuma, Parsbat Shoftim*, 3, s.v. “*shoftim v’sbotrim*.”

<sup>21</sup> See, e.g., *Kingsbridge Center of Israel v. Turk*, 469 NYS2d 732 (1983).

<sup>22</sup> See New York CPLR §7501

law authorities (serving as the “police officers”) to summon the parties for a proceeding and to issue an enforceable decision.<sup>23</sup>

Above, we discussed the need for the arbitration agreement under both Jewish law and civil law. Now, we shall explore the circumstances pursuant to which a party can be compelled to submit to a *beit din* arbitration proceeding, both in Jewish law and in civil law.

It is important to note that, regardless of whether or not a specific *beit din* has the ability to compel parties to appear before it, Jewish law requires that parties not bring their litigation before a civil court.<sup>24</sup> Even if both parties are willing to waive this requirement and litigate before a civil court, the *halacha* compels them to submit their dispute before a duly constituted *beit din* or other tribunal recognized as a legitimate option according to Jewish law.<sup>25</sup>

## II. THE POWER OF A *BEIT DIN* TO COMPEL A PARTY’S SUBMISSION

Under Jewish law, a specific *beit din* can compel a party to submit to its jurisdiction if it is the *beit din kavua* – the established rabbinical court of jurisdiction in a particular locale.<sup>26</sup> In order for a *beit din* to achieve this status, it has to be accepted by the local population as its official *beit din*.<sup>27</sup> Nowadays, in highly populated communities where there are multiple rabbinical courts, there is no single *beit din* that has the status of a *beit din kavua*.<sup>28</sup>

In the absence of a *beit din kavua*, a *beit din* would need both parties to submit to its jurisdiction in order to compel their appearance. The traditional mode of

<sup>23</sup> In an unusual case, a Connecticut court (*Koenig v. Middlebury Land Associates*, 2008 Conn. Super. LEXIS 1816 (2008)) ruled that an agreement to arbitrate before a *beit din* did not automatically remove jurisdiction from the civil courts unless it included language that the arbitration was a “condition precedent to litigation.” However, this ruling does not appear to be consistent with the Uniform Arbitration Act adopted in most states nor with New York arbitration law. See *Ercoli v. Empire Professional Soccer, LLC* 833 NYS2d 818 (2007) (in which a New York court considered and rejected the argument that the “condition precedent” language in the parties’ arbitration agreement actually implied that the dispute could still be litigated in civil court, describing the parties’ unusual usage of this language as a “vestige from usage under the common law”).

<sup>24</sup> See Rashi, Exodus 21:1, s.v. “*lifneihem*.” See also R. Yaacov Feit, “The Prohibition Against Going to Secular Courts,” *The Journal of the Beth Din of America* 1 (2012): 30.

<sup>25</sup> See Commentary of the *Ramban*, Exodus 21:1.

<sup>26</sup> See Rama, *Choshen Mishpat*, 3:1.

<sup>27</sup> R. Avrohom Yeshaya Karelitz (1878-1953), *Chazon Ish, Sanhedrin* 15:7.

<sup>28</sup> See *Iggerot Moshe, Choshen Mishpat* II, 3.

evidencing such submission to an ad hoc *beit din* panel is through a *shtar berurin*, a document of submission similar to a civil arbitration agreement.<sup>29</sup> Once a *beit din* has been given jurisdiction through a *shtar berurin*, it can require parties to appear before the *beit din*.

However, even when there is no *shtar berurin*, a respondent has an obligation to submit to a *beit din* in the event that there is a dispute and the other party has approached a legitimately constituted *beit din* to issue a summons. The fact that a *beit din* is not a *beit din kavua* only means that the respondent is not required to submit to the *beit din* that issues the summons (sometimes referred to as the “*beit din hamazmin*”).<sup>30</sup> If the respondent does not wish to submit to the *beit din hamazmin*, the respondent is required under Jewish law to name an alternative *beit din* or to agree to submit to an ad hoc “ZABLA” panel pursuant to which each party would choose one judge and the two judges would select a third judge to complete the *beit din* panel. In the event that the respondent refuses to submit to any such duly constituted *beit din*, the *beit din hamazmin* can issue a contempt order (“*siruv*”) declaring the respondent to be in contempt and authorizing the petitioner to bring the case to secular court.<sup>31</sup>

A respondent may argue to the *beit din hamazmin* that the case falls outside of *beit din* jurisdiction. For example, the respondent may argue that the petitioner previously chose to adjudicate the case in civil court,<sup>32</sup> that the case had been previously settled,<sup>33</sup> or that the case is a criminal matter that falls outside of the *beit din*’s civil jurisdiction.<sup>34</sup> While any of these defenses may be deemed legitimate as a matter of Jewish law, it is ultimately the province of the *beit din hamazmin* to determine whether a sufficient showing has been made by the respondent that the case falls beyond *beit din* jurisdiction.<sup>35</sup> In the event that the *beit din* is not satisfied that the case had been adequately made, it may still issue a *siruv*.

<sup>29</sup> *Mishna, Moed Kattan* 3:3, commentary of R. Ovadia Bartenura *ad loc.*

<sup>30</sup> See R. Shimon ben Tzemach Duran (1361-1444), *Shu”t Tashbetz* I, no. 161.

<sup>31</sup> See R. Avrohom Derbandiker, *Seder Hadin* (2009), 1:32.

<sup>32</sup> See *Rama, Choshen Mishpat*, 26:1 (petitioner who brought and lost case in civil court cannot compel respondent to re-litigate in *beit din*).

<sup>33</sup> See *Shach, Choshen Mishpat*, 12:12 (settlement between parties is considered binding).

<sup>34</sup> See R. Avraham Dov Kahane Shapiro (1870-1943), *Teshuvot D’var Avrohom*, no. 1:1 (3) (criminal prosecution is within province of governmental authority).

<sup>35</sup> See *Rama, Choshen Mishpat*, 11:1.

Nowadays the standard practice of *batei din* is to decide cases on the basis of “*pesbara k’rova l’din*” – taking into account not only the strict law (“*din*”) but also equitable considerations (“*pesbara*”; sometimes defined as “compromise”).<sup>36</sup> There is an interesting question as to whether a *beit din* can insist that a respondent submit to both *din* and *pesbara* in the event that the respondent agrees to submit to *beit din* jurisdiction but only if the *beit din* decides the case according to *din*, the strict interpretation of the law. In one such case, a Brooklyn *beit din* issued a *siruv* against the respondent because of the respondent’s failure to submit to the *psbara* standard customarily employed by the *beit din*. The respondent in turn brought a suit for libel, alleging that the *siruv* failed to reflect his willingness to submit to a *din* proceeding. The New York court ruled that the *beit din*’s determination of recalcitrance was ecclesiastical in nature and therefore not subject to court review.<sup>37</sup>

The civil court’s conclusion that the *beit din* determination was essentially an ecclesiastical determination is consistent with the diversity of opinions among Jewish law authorities regarding this issue. According to some Jewish law authorities, a litigant indeed has the right to insist upon *din*, while others maintain that a litigant can be compelled to submit to an adjudication based on *psbara* considerations as well.<sup>38</sup> Finally, it could be argued that a submission to *din* actually subsumes *psbara*.<sup>39</sup>

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<sup>36</sup> See R. Malkiel Tzvi Tannenbaum (1847-1910), *Sbu”t Divrei Malkiel*, no. 2:133. The author explains that if the “*din*” would require the respondent to pay \$100 to the petitioner, a settlement of not less than \$51 (i.e., more than half the “*din*” amount) might be awarded based on *psbara krova l’din* if this would lead to a more equitable and peaceful settlement, while under pure *psbara* it is possible that based on equitable considerations, such as the good intentions of a respondent laborer who accidentally broke some barrels of the petitioner while trying to transport them from place to place, the petitioner may be forced to forego payment altogether and even pay the respondent for his efforts. See *Bava Metzia* 83a. By contrast, according to R. Yaakov Reisher (1661-1733), *Sbvut Yaakov*, no. 2:145, a *pesbara krova l’din* determination would as a general rule not vary more than 1/3 from the amount required to be paid based on strict *din* considerations.

<sup>37</sup> *Neiman Ginsburg v Goldburd*, 684 NYS2d 405, at 407 (1998).

<sup>38</sup> See the conflicting opinions of Rabbi E. Shapiro and Rabbi M.Y. Miletzky in the case reported in *Piskei Din Rabbanim* 11, 259 (1979). Among the relevant texts cited in this discussion are: the Talmudic dictum in *Sanhedrin* 6b that it is a *mitzvah* “*livtzoa*” (to settle disputes through *psbara*); the dispute recorded in the *Rama*, *Choshen Mishpat*, 12:2 regarding whether or not a *beit din* has the ability to compel parties to act “beyond the letter of the law;” and the story from the Jerusalem Talmud (*Sanhedrin* 1:1) that records how the great sage R. Yosi ben Chalafta told litigants that he did not feel equipped to judge them according to strict *din* Torah.

<sup>39</sup> See *Shulchan Aruch*, *Choshen Mishpat*, 12:5 (codifying the notion that judges adjudicating a case according to *din* occasionally need to resort to *pesbara* if a decision cannot otherwise be properly rendered) and 12:20 (recording as normative law that judges should refrain from deciding cases according to strict *din*).

In the event that a party agrees to submit to the jurisdiction of the *beit din* but refuses to sign an arbitration agreement, it is generally held that this effectively constitutes refusal to submit to the authority of the *beit din* since the *beit din* will not be able to issue a decision capable of the fullest degree of enforcement.<sup>40</sup> Nonetheless, a *beit din* may insist that a party submit to the *beit din* with respect to a matter that would not be subject to court enforcement.<sup>41</sup> This is because the lack of an enforcement mechanism does not inherently exempt a party from the *beit din* process, although in certain cases it may prompt the *beit din* to authorize that the case be referred to the civil court system functioning as an “agent” of the *beit din*.<sup>42</sup>

If there is an “industry custom” where all disputes are resolved by an arbitration board of that industry which is not technically an arm of the secular court but rather an informal arbitration tribunal, a party to a dispute may insist that a dispute be submitted before that panel even though it is not a *beit din* tribunal.<sup>43</sup> Similarly, if parties on their own agree to submit a dispute to an arbitration tribunal outside of the province of *beit din* but also outside the province of a secular court bound by secular law (*i.e.*, the arbitrators are empowered to make decisions based on general principles of equity rather than secular law), there would no Jewish law violation inherent in such submission.<sup>44</sup>

### III. CIVIL COURT ENFORCEMENT OF *BEIT DIN* JURISDICTION

As previously discussed, once parties sign a binding arbitration agreement before a particular *beit din* entity, the parties are bound as a matter of secular law to submit to that *beit din*. The enforcement of this obligation can be achieved in two different ways: (1) the *beit din* can schedule a proceeding based on the parties’ commitment pursuant to the arbitration agreement, and issue a default judgment in the event that one party does not appear, which will be capable of enforcement in court; or (2) the moving party can petition the court to compel arbitration and thus require the

<sup>40</sup> See, *e.g.*, R. Derbamdiker, *Seder Hadin*, 1:45.

<sup>41</sup> For example, as a matter of Jewish law, parties are presumed to be required to submit child custody disputes to *beit din* rather than civil court, even in jurisdictions where the *beit din*’s decision would not be enforceable as a matter of civil law. See below, text accompanying notes 52-53.

<sup>42</sup> See R. S. Sha’anán, “*Hafniyat Tovea Le’Beit Mishpat*,” *Techumin* 12 (1992), 251 at 252 and R. Moshe Sofer (1762-1839), *Shu”t Chatam Sofer, Choshen Mishpat*, no. 3.

<sup>43</sup> R. Akiva Eiger (1761-1837), Glosses to *Shulchan Aruch, Choshen Mishpat*, 3:1.

<sup>44</sup> See *Aruch HaShulchan, Choshen Mishpat*, 22:8

other party to appear before the *beit din*.<sup>45</sup> In order to ensure that the enforcement of the arbitration agreement can be exercised by the *beit din* directly, it is prudent for the *beit din* to articulate in the arbitration agreement, or in its written rules that are incorporated into such agreement by reference, that it has the right to exercise the option of issuing a default judgment in the event that one party refuses to appear after signing the arbitration agreement to submit to the *beit din*.<sup>46</sup>

It is not obvious from the perspective of Jewish law that the second option (of petitioning the court to compel arbitration) is actually permissible. According to Rabbi Moshe Isserles (the Rama), it is forbidden for one party to utilize the secular court system for the purpose of compelling the other party to appear before *beit din*.<sup>47</sup> This prohibition is premised upon the general proscription against *mesirah* – handing in a Jewish offender to secular authorities.<sup>48</sup> However, Rabbi Yechiel Michel Epstein (the author of the *Aruch HaShulchan*), noted that the interdiction against *mesirah* was primarily applicable to sovereign states that discriminated against Jewish parties and exploited any type of violation as a pretense to impose excessive fines and punishments.<sup>49</sup> By contrast, in a fair and just government (such as the United States), this prohibition would presumably not be applicable.<sup>50</sup> Even according to the Rama, a motion to compel arbitration would be perfectly permissible if explicitly authorized by the *beit din*.<sup>51</sup>

In certain cases, a civil court may refuse to compel arbitration if the subject matter is subject to a “public policy” exception to arbitration. There are two forms of public policy limitations on *beit din* arbitration. One form of public policy limitation is to preclude an arbitration tribunal, such as a *beit din*, from being empowered to adjudicate certain types of disputes. For example, in New York, there are numerous appellate court decisions that indicate that child custody cases are not subject to arbitration.<sup>52</sup> Therefore,

<sup>45</sup> New York CPLR §7503(a), Uniform Arbitration Act §7.

<sup>46</sup> See Rules and Procedures of the Beth Din of America, Sections 2(j) and 17, accessed January 27, 2012, [http://bethdin.org/docs/PDF2-Rules\\_and\\_Procedures.pdf](http://bethdin.org/docs/PDF2-Rules_and_Procedures.pdf).

<sup>47</sup> *Rama, Choshen Mishpat*, 26:1.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Aruch HaShulchan, Choshen Mishpat*, 388:7.

<sup>50</sup> See R. Eliezer Y. Waldenberg (1915-2006), *Teshuvot Tzitz Eliezer*, no. 19:52.

<sup>51</sup> See R. Yehoshua Falk (1555-1614), *Sefer Meirat Eynaim, Choshen Mishpat*, 26:5.

<sup>52</sup> See, e.g., *Hirsch v. Hirsch* 774 NYS2d 48 (2004). *Glauber v. Glauber* 600 NYS2d 740 (1993).

even in cases where the parties have signed an arbitration agreement to submit a child custody dispute before a *beit din*, arbitration will not be compelled by the civil court. Nonetheless, it is common for New York parties who submit to arbitration before the Beth Din of America in child custody cases to appear voluntarily before the *beit din* and then incorporate the decision of the *beit din* into a signed divorce agreement, which is capable of enforcement.<sup>53</sup>

The other type of public policy limitation is that with respect to certain types of cases, the arbitration tribunal may adjudicate the case under civil law but is obligated to demonstrate that it followed a certain type of standard in reaching its conclusion. In New York, child support determinations fall into this category.<sup>54</sup> Thus, a *beit din* deciding a child support dispute must demonstrate that it took into account the Child Support Standards Act in rendering its decision in order to ensure its enforceability. In New Jersey, child custody determinations also fall into this latter category, with a *beit din* empowered to render decisions provided that it demonstrates that it decided the case in accordance with the “best interests of the child” standard.<sup>55</sup>

The fact that a matter has been submitted to arbitration before a *beit din* also enables the *beit din* to issue enforceable decisions regarding ecclesiastical matters that would otherwise be beyond a civil court’s purview. For example, certain courts have concluded that issuing an order requiring a husband to execute a *get* (bill of Jewish divorce) is a religious matter beyond the purview of the court system.<sup>56</sup> Nonetheless, an arbitration agreement signed by the parties requiring them to submit to a *beit din* panel and abide by its decision with respect to the issue of granting a *get* remains an enforceable agreement as a matter of arbitration law.<sup>57</sup>

In the same fashion that a *beit din* may refer a case outside of its purview to civil court jurisdiction, a civil court may determine that an ecclesiastical matter in dispute should be referred to a *beit din*.<sup>58</sup> An interesting question arises when a civil court actually does refer such a matter to a *beit din*. Does the *beit din* that was designated by

<sup>53</sup> See New York Domestic Relations Law, §236(B)(3).

<sup>54</sup> See *Rakosynski v. Rakosynski*, 663 NYS2d 957 (1997).

<sup>55</sup> *Fawzy v. Fawzy*, 199 NJ 456 (2009), *Johnson v. Johnson* 204 NJ 529 (2010).

<sup>56</sup> See *Aflalo v. Aflalo*, 295 N.J. Super. 527 (1996).

<sup>57</sup> See *Avitzur v. Avitzur*, 459 NYS2d 572 (1983); cf. *Aflalo*, supra note 56 at 541.

<sup>58</sup> This is unlikely to occur in New York, where it has been held that a court may not convene a rabbinical tribunal. See *Pal v. Pal*, 356 NYS2d 673 (1974).



the civil court have jurisdiction from the standpoint of Jewish law? This question was discussed by Rabbi Shlomo Zalman Auerbach in the context of a case where a *get* (Jewish divorce) dispute was referred by a British civil court to *beit din* for adjudication despite the fact that there had been no signed arbitration agreement by the parties to appear before a *beit din*. Rabbi Auerbach ruled that in such a case, since the matter was unlikely to be resolved properly before any alternative *beit din* tribunal chosen by the husband, and the fate of a potential *agunah* (woman chained to marriage) was at stake, the civil court designation of a *beit din*, based on the woman's specific selection of the *beit din* of her choice, should be viewed as binding as a matter of Jewish law.<sup>59</sup>

The issue of civil court designation of a *beit din* could have other ramifications as well. For example, in secular law, if an ad hoc arbitration panel similar to a *halachic ZABLA* panel is formed, and the two arbitrators selected by the two respective parties fail to agree upon a third arbitrator,<sup>60</sup> a civil court may designate the identity of the third arbitrator. However, from the standpoint of Jewish law, there are certain rules and regulations regarding the selection process of both the initial two arbitrators and the third arbitrator that may diverge from the civil law process of selection.<sup>61</sup> In the next installment in this series, we will explore at greater length the intersection between the Jewish law process and civil law process in the formation of such an ad hoc *ZABLA* panel.

#### IV. CONCLUSION

The *beit din* in the modern era functions both as a Jewish law court for Jewish law purposes and as an arbitration tribunal for secular law purposes. Both of these functions are a fulfillment of the Biblical mandate to establish “judges and officers.”

From a Jewish law perspective, parties to a dispute are obligated to appear before a *beit din* (or a *beit din* approved arbitration tribunal) rather than a civil court. Nonetheless, from both a Jewish law and secular law perspective, a specific *beit din* cannot as a general rule compel the parties' appearance before it absent a signed arbitration agreement between the parties. When such an agreement has been executed,

<sup>59</sup> R. Shlomo Zalman Auerbach (1910-1995), *Minchat Shlomo*, 3:103(24).

<sup>60</sup> See, e.g., New York CPLR §7504, Uniform Arbitration Act §II.

<sup>61</sup> See *Sanbedrin* 23a.

the civil courts will usually compel the parties to submit to the jurisdiction of the *beit din* and to abide by its decision, although there may be certain cases that will fall subject to “public policy” exceptions limiting the *beit din*’s jurisdiction in certain ways. Even in cases where a *beit din* does not have secular law jurisdiction to compel appearance before the *beit din*, it may issue an ecclesiastical determination that a party is not in compliance with its Jewish law obligation to submit to a *beit din*, and that the other party is free to pursue remedies in civil court.<sup>62</sup> In certain instances, a *beit din* may even assume jurisdiction of a case based on civil court designation of that *beit din* to hear the case.

Ultimately, the *beit din* model successfully functions through a symbiotic relationship between the *beit din* and the civil courts. This relationship is based upon a shared respect for arbitration law procedures and appreciation for the freedom of parties to adjudicate their disputes in accordance with their religious beliefs.

*Rabbi Yona Reiss, a graduate of Yale Law School, is the Max and Marion Grill Dean of the Rabbi Isaac Elchanan Theological Seminary at Yeshiva University. He also serves as Chaver Beth Din at the Beth Din of America.*

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<sup>62</sup> See *Rosh, Bava Kamma* 92b, s.v. *mina bach milta*.

# The Prohibition Against Going to Secular Courts

By Rabbi Yaakov Feit

The Torah states (Exodus 21:1), “*V’eileh ba-mishpatim asher tasim lifneihem*,” “And these are the statutes which you shall place before them.” The Talmud (*Gittin* 88b), sensitive to the word “*lifneihem*,” deduces “*lifneihem- velo lifnei akum*,” “Before them- but not before gentiles.” As such, the Talmud understands that there is a prohibition against bringing disputes to be adjudicated before gentile courts.<sup>1</sup> The rationale for such a prohibition is explained by Rashi who writes that one who goes to secular courts “profanes the name of God and gives honor to the name of idols.”<sup>2</sup> Rambam writes that one who does so is considered as if he has “blasphemed and raised a hand against the Torah of Moses.”<sup>3</sup> The unanimous conclusion among *halachic* authorities is that the prohibition extends to even those gentiles who are not technically idol worshippers.<sup>4</sup> Acceptance of a foreign court system, even if secular in nature, is considered a rejection of Torah law.

The *Shulchan Aruch* emphasizes the seriousness of this prohibition by describing one who violates it in unusually harsh terms. One who goes to secular court is consid-

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<sup>1</sup> See R. Shimon ben Tzemach Duran (1361-1444), *Shu”t Tashbetz* II, no. 290 who understands this prohibition to be biblical in nature. This is also the implication of R. David ibn Zimra (1479-1573), *Teshuvot Radvaz*, I, no. 172; *Chiddushei ba-Ran*, *Sanhedrin* 2b; *Chiddushei ba-Ramban*, *Sanhedrin* 23a; R. Chaim Benbenishti (1603-1673), *Teshuvot Ba’i Chayei*, *Choshen Mishpat* no. 158; R. Chaim Yosef David Azoulay (1724-1806), *Birkei Yosef*, *Choshen Mishpat* 26:3 and *Kli Chemdab*, beginning of *Parshat Mishpatim*. However, see R. Baruch Klai, *Sefer Mekor Baruch*, no. 32 who concludes, based on the omission of this prohibition by Rambam and Rasag from their list of mitzvot, that this prohibition is in fact rabbinic in nature. See R. Yerucham Fischel Perlow (1846-1934), Commentary on *Sefer Hamitzvot* of R. Saadia Gaon, II: 319, who attempts to explain the omission.

<sup>2</sup> See commentary of Rashi to Exodus 21:1.

<sup>3</sup> Rambam, *Mishneh Torah*, *Hilchot Sanhedrin* 26:7.

<sup>4</sup> See *Shu”t Tashbetz* II, no. 290 and R. Shimon Duran (1361-1444), *Yachin U’Boaz* II, no. 9, who states this explicitly, as well as the Rif, quoted in *Beit Yosef*, *Choshen Mishpat* 26:3, who refers specifically to adjudicating before Muslims. This is accepted by all halachic authorities. See *Knesset Ha-Gedolah*, *Choshen Mishpat*, 26:1; R. Shmuel Vozner (1913-), *Teshuvot Shevet Halevi* X, no. 263 sec.1; R. Yitzchak Yaakov Weiss (1902-1989), *Teshuvot Minchat Yitzchak* IV, no. 52 sec.1; R. Ezra Batzri, *Dinei Mamot V* (Jerusalem 1990), no. 5; R. Shmuel Leib Landesman, “*Teshuva bi-Inyan Arkaot*,” *Yeshurun* XI (2002), 708.

See, however, R. Meir Dan Plotzki (1867-1928), *Kli Chemdab*, beginning of *Mishpatim*, who at the end of his comments on the prohibition writes in brackets that his discussion is only theoretical since it is only relevant in areas that practice real idol worship. In light of the overwhelming majority who disagree, as well as the use of brackets, a persuasive argument can be made that *Kli Chemdab*’s comments were inserted for governmental censors who were prevalent at the time, and do not reflect his viewpoint.

ered “an evildoer, as if he has blasphemed, and as if he has raised a hand against the Torah of Moses.” The *Shulchan Aruch* also states that the prohibition applies even in a situation where the secular court would rule according to Jewish law and in a case where both litigants agree to go to secular courts.<sup>5</sup>

As a result of this unequivocal prohibition, one who wishes to adjudicate a private legal dispute with a Jewish adversary generally must do so in the confines of a *beit din*. What follows is an examination of some of the exceptions to and ramifications of this rule.

## A. EXCEPTIONS TO THE RULE

### I. A DEFENDANT WHO REFUSES TO APPEAR BEFORE A *BEIT DIN*

In a situation where one’s adversary refuses to appear before a legitimate *beit din*, *Shulchan Aruch* permits one to resort to the secular courts after receiving permission from a *beit din*.<sup>6</sup> Typically, a plaintiff opens a file in a *beit din*, which then issues a *hazmanah* (summons) to the defendant. If a proper response is not received,<sup>7</sup> that *beit din hamazmin* (summoning *beit din*) would send additional *hazmanot* and, if the defendant has failed to properly respond to the *beit din*, a *heter arkaot* (permission to litigate in secular court). If appropriate, the *beit din* may also issue a *seruv* (document of contempt) against a recalcitrant defendant.

*Sma* writes that the custom of *batei din* is to only give permission after the adversary has refused to respond to three summonses by *beit din*.<sup>8</sup> Nevertheless, some *batei din* may give permission earlier if it is clear that the adversary will not appear in a *beit din*.<sup>9</sup>

<sup>5</sup> *Shulchan Aruch, Choshen Mishpat*, 26:1.

<sup>6</sup> See *Shulchan Aruch, Choshen Mishpat* 26:2. The theory underlying this exception to the prohibition of litigating in secular courts appears to be a recognition among authorities that where compliance with the prohibition would necessarily result in the forfeiture of funds to which the litigant has a legitimate claim, the prohibition should be set aside. *Kli Chemdah, Mishpatim*, questions why one should be permitted to violate a biblical prohibition in order to “save his money”. R. Moses Sofer (1762-1839), *Teshuvot Chatam Sofer, Choshen Mishpat*, no. 3 and *Biur ha-Gra, Choshen Mishpat* 26:2, as explained by *Be’er Eliyahu*, imply that one is permitted to do so since the secular court merely acts as an agent of *beit din*. *Kli Chemdah* rejects this approach and suggests that the prohibition only applies in a case where one has the option of appearing before *beit din*. In a case where one has attempted to go to *beit din* but the adversary refuses, appearing before secular court does not imply a rejection of Torah law and as such there is no prohibition.

<sup>7</sup> See section 2 of the Rules and Procedures of the Beth Din of America for an example of acceptable responses to a *beit din*. (“Rules and Procedures of the Beth Din of America,” Beth Din of America, Accessed January 27, 2012, [http://bethdin.org/docs/PDF2-Rules\\_and\\_Procedures.pdf](http://bethdin.org/docs/PDF2-Rules_and_Procedures.pdf))

<sup>8</sup> *Sma, Choshen Mishpat* 26:8. Also see *Pitchei Teshuvah, Choshen Mishpat* 11:1 and *Netivot ha-Mishpat, Chiddushim*, 11:4 who refer to the custom of issuing three summonses.

<sup>9</sup> See R. Yitzchak Yaakov Weiss (1901-1989), *Shu”t Minchat Yitzchak* IX, no. 155.

The Beth Din of America generally sends three summonses before granting permission to litigate before the secular courts. However, the Rules and Procedures of the Beth Din of America provide that it is within the discretion of the *Av Beit din* to grant permission to go to secular court if no response is forthcoming after proper notification and the passage of thirty days.<sup>10</sup>

## 2. ONE WHO IS SUMMONED TO SECULAR COURT

Defendants inappropriately summoned to secular court by a fellow Jew may defend themselves in secular court without violating any prohibition. There is some disagreement as to whether defendants are required to receive express permission from *beit din* to defend themselves in the action, and whether they are required to take steps to indicate their willingness to move the case to a *beit din*.<sup>11</sup>

## 3. NON-JEWS

Tashbetz<sup>12</sup> assumes that, technically speaking, the prohibition against litigating in secular court would apply even in the context of a non-Jewish adversary. However, one may assume that a non-Jew will not willingly appear before a *beit din*, and accordingly one may bring the non-Jew before a secular court without permission from *beit din*.<sup>13</sup>

<sup>10</sup> Rules and Procedures of the Beth Din of America, Section 2(i), (accessed January 27, 2012, [http://bethdin.org/docs/PDF2-Rules\\_and\\_Procedures.pdf](http://bethdin.org/docs/PDF2-Rules_and_Procedures.pdf))

<sup>11</sup> Although *Tumim, Chosben Mishpat*, 26:1 writes that even in such a situation the prohibition remains, this does not seem to be the accepted opinion. R. Meir Auerbach (1815–1878), *Imrei Binah, Chosben Mishpat*, no. 27 refers to those who require that the defendant protest that the case should be brought to *beit din* but argues that not even that is required. Similarly, R. Yechezkel Katzenelenbogen (1667–1749), *Knesset Yechezkel*, no. 97, also quoted in Imrei Binah and R. Shalom Mordechai Schwadron (1835–1911), *Shu"t Mabarsbam* I, no. 89, write that no protest is necessary and no permission from *beit din* is required. This appears to be the opinion of R. Ovadya Yosef (1920–), *Yecheveh Daat* IV, no. 65 who permits a defense attorney to defend a Jew who is wrongfully brought to secular court but makes no mention of a requirement to protest or receive permission from *beit din*. However, *Kesef ha-Kodshim, Chosben Mishpat*, 26:1 writes that although one who went to secular court to defend against an injunction does not “bear much guilt” it is appropriate to first receive permission from *beit din* to do so. R. Moshe Shternbuch (1926–), *Teshuvot ve-Hanbagot* III, no. 453 writes that it is appropriate for defendants to voice their preference to appear before *beit din*. He implies that one who is brought to secular court by a religious Jew is certainly required to demand that the case be moved to *beit din*. Note that even if there is no prohibition for a defendant to participate in secular court proceedings without protest, such participation may prevent the defendant from later insisting on *beit din* adjudication. See Section C.1 for a discussion of this matter.

<sup>12</sup> *Shu"t Tashbetz* II, no. 290 and *Shu"t Tashbetz* IV (*Chut Hameshulasb*), no. 3:6, also quoted in R. Chaim Aryeh Kahane (unknown – 1917), *Divrei Geonim*, no. 52:15. *Medrash Tanchuma, Parasbat Shoftim* I also explicitly writes that it is forbidden to take a non-Jew to secular court.

#### 4. NON-OBSERVANT JEWS

*Kesef ha-Kodshim* rules that when it is extremely likely that an adversary will refuse to appear before *beit din*, one may go directly to secular court without prior permission from *beit din*.<sup>14</sup> The argument can be made that a non-observant Jew may be immediately summoned to secular court without permission from *beit din*, since it can be assumed that he or she would not attend a *din torah* (*beit din* proceeding). Nevertheless, some *batei din* have the practice of issuing one summons (as opposed to three) before granting permission to go to secular court in such a situation.<sup>15</sup> The Beth Din of America does not differentiate between observant and non-observant Jews and will issue three summonses in all cases unless the party summoned makes it clear that they will not appear before the Beth Din.

#### 5. INSURANCE COMPANIES

Generally, where a defendant maintains insurance coverage for the particular claim being pursued by a plaintiff, it is the position of the Beth Din of America that the insurance company is viewed as a necessary party in interest. Accordingly, if the insurance company is not prepared to submit to arbitration before a *beit din*, the plaintiff may pursue his or her claim in secular court.<sup>16</sup> This is because the insurance company

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<sup>13</sup> *Orach Mishpat, Choshen Mishpat* 26:1: 178 writes that it is a *mitzvah* to try to bring the non-Jew to *beit din* but upon refusal he may bring him to secular court. Based on ruling of Tashbetz, in the unusual case where a non-Jew would be willing to appear before *beit din*, one would theoretically be required to litigate the case in *beit din*. See *Kovetz Haposkim, Choshen Mishpat* 26: 178 who cites *Teshuvot Emet Me'erefs* who writes that, nevertheless, one who takes a non-Jew to secular court, rather than *beit din*, would not be treated as a *mesarev* or one who refuses to recognize the authority of *beit din*. R. Michael Broyde has stated that Jews may avail themselves of the secular courts even in cases of gentile adversaries prepared to appear before a *beit din*, since the use of secular courts in such an instance would not constitute a form of rebellion or denial of the authority of the Torah.

<sup>14</sup> *Kesef ha-Kodshim, Choshen Mishpat*, 26:2.

<sup>15</sup> *Minchat Yitzchak* IX, no. 155, 2 writes that his practice is to send one summons. However, if the *beit din* determines, based on the totality of the circumstances, that the individual is noncompliant, permission may be granted to go to secular court immediately. See *Teshuvot ve-Hanbagot* III, no. 441 who reaches a similar conclusion. However, *Teshuvot ve-Hanbagot* III, no. 445, concludes that it is not necessary to burden a claimant with the requirement to send even one summons, although it would be appropriate to note in the secular court pleadings that that *beit din* is the preferred forum. R. Chaim Jachter, *Gray Matter Vol. II* (Teaneck, NJ: 2006), 166 quotes R. Mordechai Willig as requiring permission from *beit din* before bringing a non-observant Jew to secular court. R. J.D. Bleich, *Contemporary Halakhic Problems V* (Southfield, MI: Targum/Feldheim, 2005), 37 writes that in a day and age where "alternative dispute resolution is encouraged and in which many non-observant Jews are open to the heritage of Judaism," an offer to appear before a *beit din* is appropriate.

<sup>16</sup> In most cases, insurance companies are not owned by Jews. See section A: 3 of this article which established that one may initiate an action against a gentile defendant in court even without obtaining prior permission from *beit din* to do so.

acts as a surety (i.e. a guarantor with primary liability). Just as a creditor may pursue either the debtor or surety, a plaintiff may pursue the insurance company in whatever forum necessary.<sup>17</sup>

Where insurance coverage is common and expected, such as in cases of professional malpractice, personal injury and automobile and property casualty, a defendant has the right to insist that a plaintiff bring his or her claim directly against the insurance company, even if the plaintiff wishes to seek damages from the defendant, personally, in *beit din*. This is based on the assumption that both parties entered into their course of dealing with an implicit assumption that any liability would be covered by insurance, and that any recovery could be obtained only from the insurer.<sup>18</sup>

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<sup>17</sup> R. Bleich, *Contemporary Halakic Problems V*, 34 adds that, “since it is readily perceived that the cause of action is really against a non-Jewish insurance company that will not appear before a *beit din*, it would appear that judicial proceedings in such circumstances do not constitute either a renunciation of the Law of Moses or voluntary aggrandizement of a non *halachik* legal system and hence such suits are not forbidden.” Also see R. Michael Broyde, *The Pursuit of Justice and Jewish Law* (New York: Ktav Publication House, 1996), 47. See R. Yitzchak Zilberstein, “*Teviah bi-Arkaot al Mechdal Shel Rofeh*,” *Yeshurun* XI (2002), 695-697 who also permits going to secular court in such a situation. See, however, R. Avraham Chaim Sherman, “*Teviat Nezikin Kineged Mevutach Tzad Gimel*,” *Sbaarei Tzedek* VII (2007): 45-57 who views the insured as the primary litigant and as such requires appearance before *beit din*, which then may permit the litigants to proceed in secular court. See *Teshuvot ve-Hanbagot* III, no. 444 who discusses the case of a Jewish insurance company and requires permission from *beit din* before bringing them to secular court. Also see R. Yaakov Yishaya Blau, *Pitchei Choshen – Hülchot Yerusha* (Jerusalem: *Beit Horaah Tevunot Aryeh*, 1996), 1:65.

<sup>18</sup> Where insurance is not commonly held, other factors may be relevant in determining whether a plaintiff may insist on pursuing the defendant, personally, in *beit din*, even in the face of a claim by the defendant that he or she is insured and will not be indemnified for any losses in *beit din*.

<sup>19</sup> This is the implication of R. Moshe Feinstein (1895-1986), *Iggerot Moshe, Choshen Mishpat* II, no. 11, who writes that one may not refuse to appear before *beit din* on the grounds that their adversary already filed for an injunction in secular court. This is the opinion of Ramah Mi'Panu 51 quoted by *Knesset Hagedolah* 73 (*Beit Yosef* 47) and R. Batzri, *Dinei Mamonot* I, no. 5:11. He writes that in a case of imminent monetary loss one is permitted to file for a preliminary injunction to freeze assets so that the case may be taken to *beit din*. R. Shternbuch, in *Teshuvot ve-Hanbagot* III, no. 440, adds that no permission is required to do so but that contemporaneously with emergency court filings litigants must make it clear that they intend to bring the case before *beit din*. In *Teshuvot ve-Hanbagot* III, no. 445, he writes that it is the prevailing custom to be lenient in not requiring permission. In *Teshuvot ve-Hanbagot* V, no. 362:2 he adds that if it is possible to get permission from a *beit din* one should do so and that if that is not possible it is appropriate to ask permission from the rabbi of the area. See, however, *Teshuvot Shevet HaLevi* X, no. 263:4 who assumes that an injunction is an action of a *beit din*. As such he does not permit one to file for an injunction in secular court before a *beit din* proceeding since no presumption of guilt has been established. This analysis would seem to be limited to Israel, where a *beit din* has the authority to issue an injunction.

## 6. CASES INVOLVING THE THREAT OF IMMINENT LOSS

Most *halachic* authorities maintain that in a case of imminent loss when there is no time to go to *beit din* first, one is permitted to file for a preliminary injunction or temporary restraining order in secular court, even without permission from a *beit din* to do so.<sup>19</sup> The rationale for such a position seems to be that the prohibition of going to secular courts entails going to such a court for “judgment.” Since an injunction to prevent imminent loss is not dispositive of the underlying claims, obtaining such an injunction does not violate the prohibition.<sup>20</sup> The position of the Beth Din of America is that it is *halachically* permissible for parties to resort to civil courts, when necessary, for injunctions restraining the other party from taking action in a matter until a *beit din* can properly adjudicate the underlying dispute.

Similarly, where a party faces an approaching deadline, pursuant to a statute of limitations, to initiate an action in court, the party may file a petition or seek to toll the statute of limitations in secular court in order to preserve his or her right to seek remedies. Also, a landlord wishing to evict a tenant for non-payment of rent who stands to lose rent from re-letting the premises if he or she is unable to first begin eviction proceedings until after a *hazmana* process has played out, may initiate an action in landlord-tenant court simultaneously with initiating the *hazmana* process in *beit din*. Since the plaintiff is merely reserving the right to seek remedies in court if he or she is unable to do so in *beit din* and he or she will not begin substantial judicial involvement prior to completion of the *hazmana* process, such an action does not represent a violation of the prohibition against litigating in secular court. In both these cases, the plaintiff should simultaneously begin the *hazmana* process or make his or her preference to litigate in *beit din* clear to the defendant in the court pleadings or otherwise, and be prepared to adjudicate the substantive dispute in *beit din* in the event the defendant indicates a willingness to do so.<sup>21</sup>

<sup>20</sup> See *Teshuvot Chatam Sofer, Choshen Mishpat*, no. 3 who permits registering the statement of a witness in secular court for use in *beit din* at a later date. Since the secular court is not asked to judge, no prohibition is violated. *Kesef ha-Kodshim, Choshen Mishpat*, 26:2 writes that the Torah only forbade “*mishpatim*” or judgments but not actions in secular court that do not require judgment.

<sup>21</sup> There is an additional reason for permitting such actions. Certain judicial actions cannot be performed by a *beit din*. For example, obtaining a name change or adopting a child are governmental functions that can only be accomplished by a secular court judge, and one does not violate the prohibition against litigating in secular court by bringing such an action to secular court (see R. Bleich, *Contemporary Halachic Problems* V, 26). Other actions require action by a secular court judge, but also involve the adjudication of substantive disputes among litigants. Where the dispute can be separated from the court action in a manner that allows for *beit din* adjudication, Jewish law



## 7. DISCOVERY

A party who files a complaint in secular court solely to initiate discovery may technically not be in violation of the prohibition of adjudicating before a secular court, to the extent the filing is followed by discovery that proceeds among the parties without judicial involvement.<sup>22</sup> Litigation in secular court to enforce discovery rights may constitute a violation of the prohibition.<sup>23</sup> In any event, a plaintiff who files an action in secular court, even if only for the purpose of beginning the discovery process, may lose his or her right to later insist on *beit din* adjudication of that claim.<sup>24</sup>

## 8. UNDISPUTED CLAIMS

A plaintiff with an undisputed claim, such as where the defendant has signed a confession of judgment for the full amount being claimed by the plaintiff, may resort to secular court without attempting to litigate the matter in a *beit din*. Since the courts are not being asked to adjudicate competing claims, such an action could be charac-

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would require such separation. For example, a civil divorce can only be obtained in court, but the parties may also be disputing issues such as the allocation of their assets, spousal and child support, and custody and visitation. It is permissible to file a court action for civil divorce, so long as the plaintiff makes his or her preference to litigate in *beit din* clear to the defendant, either in the court pleadings or by simultaneously initiating the *hazmana* process. Similarly, a landlord may file a complaint in secular court for possession of leased premises in landlord-tenant court, so long as it is clear that such action is merely a predicate for the enforcement of a *beit din* decision on the merits of the case.

<sup>22</sup> See Roger S. Haydock and David F. Herr, *Discovery Practice* (Austin: Aspen Publishers, 2009), §31.01 (“Discovery is designed to take place primarily with satisfaction and without court involvement. Interrogatories, depositions, document production, and requests for admissions are all normally used without a judge ordering or barring them.”)

<sup>23</sup> See R. Bentzion Yaakov Vozner, “*Halicha li-Arkaot*,” *Divrei Mishpat* III (1997): 195-197, who discusses the case of an individual who plans on adjudicating before *beit din* but goes to secular court for the purpose of putting pressure on his adversary. R. Vozner points out that *Shulchan Aruch, Choshen Mishpat*, 26:1 begins by writing, “It is forbidden to adjudicate” in secular court but ends by writing that anyone who “comes to adjudicate before them” has violated the prohibition. He argues that the additional words here as well as in other primary sources indicate that appearance before secular court alone, when a request to adjudicate has been made, is a violation of the prohibition since it honors another system of law and represents a rejection of Torah law. Similarly, see R. Asher Weiss, *Minchat Asher Devarim* (Jerusalem, 2007), 3:1 who prohibits appearing in secular court even when one’s intention is merely to convince an adversary to agree to a compromise. Also see R. Yehoshua Yehuda Leib Diskin (1817-1898), *Shu”t Mabaril Diskin*, in the collection of rulings based on his manuscripts in the back of his responsa, no. 20 which says that one who issues a “*pazavu*” (seemingly a summons) is not deemed to have gone to secular court since only words were spoken and no court action was taken. One may infer from here that any action taken in court beyond a summons, such as actual appearance, would be tantamount to violation of the prohibition. It follows that appearance in secular court solely for enforcement of discovery would be prohibited as well.

<sup>24</sup> See Section C.1.

terized merely as a collection action with no resulting violation of the prohibition of litigating in secular court.<sup>25</sup>

Even absent a confession of judgment, in the case of a claim upon which no defense or counterclaim can reasonably be anticipated, the prohibition of litigating in secular court may not technically bar a plaintiff from initiating an action in secular court, although it may still be appropriate to first attempt to adjudicate the claim in a *beit din*.<sup>26</sup> Examples of such claims are nonpayment of tuition obligations, or of an unconditional promissory note, mortgage or guaranty,<sup>27</sup> if the parties have no other business dealings with each other that could result in the assertion of a counterclaim that may offset the obligation.

## 9. CONFIRMATION AND ENFORCEMENT OF AN AWARD OF *BEIT DIN*

Based on the same logic, one who wishes to have a judgment from *beit din* confirmed or enforced in secular court is permitted to do so. Here too, the claimant is petition-

<sup>25</sup> *Shu"t Mabarsbam* I, no. 89 quotes the position of the *Av Beit din* of Butchatch who permits going to secular court in the case of a defendant who admits his debt. He argues that with the admission of liability, the case is viewed as if a decision was already rendered, and enforcement in secular court is akin to enforcing a decision of *beit din*, which does not violate the prohibition of appearing before secular courts (see note 28). Requesting permission prior to going to court to enforce such an obligation is merely a "*middat chassidut*." See *Shu"t Mabarsbam* II, no. 252 and *Shu"t Mabarsbam* III, no. 195 where he reiterates this position. Similarly, *Teshuvot Shevet Halevi* II, no. 263:3 permits use of secular courts to collect a "*chov barur*" or clear debt provided basic *halachic* laws of debt collection (such as certain debtor protection laws enumerated in *Shulchan Aruch, Choshen Mishpat*, 97:23) are not violated. See R. Yaakov Kamenetsky (1891-1986), *Emmet le-Yaakov, Choshen Mishpat*, 26 who suggests that secular courts may be utilized when one is merely coming to take what is clearly his and requires no decision from *beit din*. R. Bleich, *Contemporary Halachic Problems* V, 26 permits probate of an uncontested will in secular court on the same grounds. R. Mordechai Eliyahu, "*Mabat Torani Al Chukei ha-Medina vi-Hatkanat Takanot bi-Yameinu*," *Techumin* III (1982), 244 similarly permits appearance before a secular court to collect a clear debt. See R. Weiss, *Minchat Asher Devarim*, 3:4 who writes that a bounced check would not qualify as a *chov barur* since the debtor may have any of several possible defenses (i.e. he could claim that the debt was already paid, the sale was voided, etc.) As such, the creditor would be required to go to *beit din*. Presumably this would be the case regarding similar unambiguous documents.

<sup>26</sup> Practically speaking, what might be viewed by a claimant as a *chov barur* may be met by defenses and counterclaims asserted by the defendant. Once such defenses and counterclaims are asserted the claimant would be required to continue the action in *beit din*. Even if no actual defenses or counterclaims are asserted, in a case where the debtor claims that he cannot afford to pay and/or requests an extension, it would be appropriate to go to *beit din* first, even if not absolutely required. In any event, a plaintiff who files an action in civil court, even if he or she does so on the basis of an expectation that the claim would not be substantively contested, may lose the right to later insist on *beit din* adjudication of that claim (see Section C.1.).

<sup>27</sup> This assumes that no interest is being charged, or that there is a valid *heter iska* in place. Where the claim involves interest charges, *beit din* involvement may be necessary.

ing the secular court to enforce a decision of *beit din* that was already rendered, rather than adjudicate a dispute between parties.<sup>28</sup>

## 10. CRIMINAL LAW

As a technical matter, criminal litigation does not violate the prohibition of litigating in secular court since it involves criminal charges brought by the government against an individual rather than a civil dispute resolution between two individuals. One should consult a competent *halachic* authority to determine whether reports of criminal activity to the secular authorities involve a separate prohibition of *mesirah*. In any event, it is important to note that in any instance of imminent danger to human health or safety, criminal activity must be reported to the police.

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<sup>28</sup> *Urim vi-Tumin, Choshen Mishpat*, 26:5 quotes *Kenesset ha-Gedolah* in the name of Maharshach who permits enforcing a decision of *beit din* in secular court without express permission of *beit din*. *Urim* questions why this is permitted, since he equates seeking redress in the secular courts with “taking the law into one’s own hands,” which is only permitted against an adversary who is an “*alam*”, a strong and non-compliant individual. Even if *Urim*’s question makes it clear that he prohibits enforcing a *beit din* award absent non-compliance, the implication is that he would permit it where there is actual non-compliance. *Kesef ha-Kodshim* 26:2 implies that a defendant’s status as non-compliant can certainly be presumed based on an *umdenab* (i.e. a likelihood of non-compliance based on prior actions). *Imrei Binah, Choshen Mishpat*, no. 27, answers the *Urim*’s question by pointing out that no prohibition is violated where the secular authorities are not rendering a decision but are merely carrying out the decision of *beit din*. He quotes Maharikash who nevertheless requires receiving permission from *beit din* to do so, but writes that such an argument is not compelling. R. Vozner, “*Halicha li-Arkaot*,” 197-200, answers *Urim*’s question by pointing out that in the case of someone who refuses to carry out the decision of *beit din*, “there is no greater *alam* than this.” *Teshuvot Maharsham* IV, no. 105 quotes and concurs with the opinion of Maharshach that one may enforce a *beit din* decision without permission from *beit din*. R. Shlomo Kluger (1785-1869), *Teshuvot ha-Elef Lecha Shlomo, Choshen Mishpat*, no. 3 comes to a similar conclusion as Maharshach. *Teshuvot Shevet Halevi* X, no. 263:2 writes that one is permitted to enforce a decision of *beit din* when the other party refuses to comply but notes that in a case where his non-compliance is sanctioned by *beit din* because *beit din* has agreed to revisit its decision, one would certainly need permission from the *beit din* before bringing the decision to secular court for enforcement.

However, see *Teshuvot Ve-Hanbagot* III, no. 439 who writes that it is not customary to follow the opinion of Maharshach.

It would seem that confirming a *beit din* decision in secular court should be equated with enforcement of a *beit din* decision. However, see R. Chaim Kohn, “*Akipat Kiyum Psak Pasbranim Al Yedei Arkaot*,” *Divrei Mishpat* III (1997): 188-189 who questions the permissibility of confirming a *beit din* decision since making a motion to confirm an arbitration decision allows the other party to contest the award and thereby retains an element of “judgment.” Accordingly confirmation would require permission from *beit din* as would any other judgment in secular court. R. Kohn concludes, however, that confirming a *beit din* decision in secular court would be permissible since first going to *beit din* and only then seeking recourse in secular court indicates that the party is not attempting to “raise a hand against the Torah of Moshe”. R. Bleich, *Contemporary Halachic Problems* V, 28 writes that confirmation of a *beit din* decision does not require prior permission since the confirmation process results only in the reservation of the option to enforce the decision should it become necessary. He

## II. CASES WHERE *BEIT DIN* JUDGMENTS WOULD BE UNENFORCEABLE UNDER SECULAR LAW

There is no obligation to use a *beit din* to adjudicate public law matters<sup>29</sup> such as allegations of zoning violations, OSHA violations, bankruptcy law<sup>30</sup> or other areas of public law. In a case where two Jewish individuals have a private dispute that may implicate public law issues, a *beit din* should adjudicate the matter if secular law allows for arbitration of the matter.

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notes the opinion of some *halachic* authorities who require permission before enforcing a *beit din* decision. For a further discussion on confirming judgments of *beit din*, see R. Yaacov Feit and Dr. Michael A. Helfand, "Confirming Piskei Din in Secular Court," *Journal of Halacha and Contemporary Society* (Spring 2011): 5- 27.

Section 33 (c) of the Rules and Procedures of the Beth Din of America as well as the standard form of binding arbitration agreement that the parties sign prior to *din torah* proceedings at the Beth Din of America, expressly provide for the enforcement of the decision in secular court. Accordingly, even if permission of a *beit din* to enforce a *beit din* award is required, such permission is presumed upon the issuance of any decision (following the final disposition of any requests for modification under section 31 of the Rules and Procedures) by the Beth Din of America.

<sup>29</sup> This is true for several reasons. In the United States, most public law matters cannot be adjudicated through arbitration. As such any decision rendered by *beit din* would be unenforceable. See *Medrash Tanchuma, Parashat Shoftim*, which states, "When there is no police officer, there is no judge," implying that when *beit din* has no power to enforce its judgments appearance before *beit din* is not mandated. See R. Chaim Ibn Atar (1696-1743), *Ohr Hachayim – Devarim*, 16:18 who writes that there is no requirement to appoint judges when there is no one to enforce their law. See *Teshuvot Maharsham I*, no. 89, who writes regarding enforcement of an admission of guilt that since in our day *beit din* does not have the power to enforce its rulings, receiving permission from *beit din* to go to secular court is merely a "*middat chassidut*" but not required strictly speaking. The implication of his statement is that when *beit din* has no power to enforce its decisions, no prohibition exists since it is clear that appearance in secular court does not imply a rejection of Torah law. Also see *Teshuvot Shevet Halevi X*, no.263:2 who addresses the case of one who wishes to contest a decision of a zoning board. He argues that since the government will not recognize the decision of *beit din* and as such the decision will be unenforceable, it is obvious that no prohibition of going to secular courts applies. These *halachic* authorities assume that a prohibition against going to secular court only applies when the matter can be solved in *beit din*. Bringing a matter unenforceable by *beit din* to secular court does not in any way "raise a hand against the Torah of Moses." However, see R. Landesman, "*Teshuva bi-Inyan Arkaot*," 704-707 who argues that one may not appear before secular court without permission from *beit din* even in a case where *beit din* does not have the ability to enforce their judgment. He argues that *Medrash Tanchuma's* statement cited above is meant to be taken as advice and not as a *halachic* ruling.

In addition, public law matters usually entail determining the rights of parties such as gentiles, public officials, and the community at large. See Section A.3. which discusses *beit din* adjudication of matters involving non-Jews.

Furthermore, *halacha* recognizes the rights of gentiles and society to regulate their own framework and they need not go to *beit din*. As such, one may litigate against a government agency even if its agents are coincidentally Jewish. See R. Broyde, *The Pursuit of Justice and Jewish Law*, Chapter 8, for a further discussion of public law.

<sup>30</sup> See R. Steven Resnicoff, "Bankruptcy- A Viable Halachic Option?," *The Journal of Halacha and Contemporary Society* (Fall 1992): 52-54, who offers several reasons why filing for bankruptcy does not

Generally speaking, the decisions of arbitration panels in the United States regarding child custody and visitation matters are not automatically enforceable in court, although in some jurisdictions *beit din* determinations regarding these matters may be presumptively enforceable.<sup>31</sup> It is the view of the Beth Din of America that custody disputes should be decided in *beit din*.<sup>32</sup>

## B. THE SCOPE OF THE PROHIBITION OF LITIGATING BEFORE NON-JEWISH COURTS

### I. SECULAR LAW BEFORE A JEWISH JUDGE

The prohibition of adjudicating a dispute before a secular court applies even if the

violate the prohibition of going to secular court. First, bankruptcy is an “*in rem*” proceeding. It is not an action directed toward a particular individual and there is no adjudication between parties. Rather, the debtor merely appears before court to seek relief. In a situation where filing for bankruptcy leads to adjudication between individuals in bankruptcy court, appearance in such a court would still be permitted since bankruptcy law would usually prohibit collection actions in *beit din*. R. Resnicoff questions the permissibility of such an appearance in a case where bankruptcy court would make an exception to this rule. Still, he suggests that if most of the creditors are non-Jews the debtor would not violate the prohibition of going to secular court for taking such actions. Since the debtor is entitled to relief against non-Jewish creditors and filing for bankruptcy and following the court’s procedures is the only way to do so, such actions would not be tantamount to “raising a hand against the Torah of Moses.” This paragraph has only addressed the permissibility of bankruptcy vis-à-vis the prohibition of going to secular court. A more complete discussion of whether it is permissible to file for bankruptcy is beyond the scope of this article and is addressed at length in R. Resnicoff’s article.

The Beth Din of America will generally hear a post-bankruptcy claim that addresses a debt that existed pre-bankruptcy upon the consent of both parties. The Beth Din would generally not issue a *seruv* in such a case since it would be in contravention of *dina demalchuta dina*, the “law of the land is law.”

<sup>31</sup> For a collection of cases in various states dealing with this issue, see Elizabeth A. Jenkins, “Validity and Construction of Provisions for Arbitration of Disputes as to Alimony or Support Payments or Child Visitation or Custody Matters,” 38 A.L.R.5th 69 (1996). See also Fawzy v. Fawzy, 199 N.J. 456 (2009), in which the court ruled that arbitration decisions regarding child custody and visitation matters are presumptively enforceable pursuant to the applicable arbitration statute. As a practical matter, courts will often defer to the child custody and visitation decision of an arbitration body such as a *beit din* if it is clear to the court that the arbitrators adhered to fundamental notions of due process, considered the relevant factors and acted in the best interests of the child.

<sup>32</sup> See R. Bleich, *Contemporary Halakbic Problems* V, 33 who takes this position as well.

<sup>33</sup> For a discussion regarding adjudication before the secular courts in the State of Israel see R. Avrohom Yeshaya Karelitz (1878-1953), *Chazon Ish, Sanbedrin* 15:4; R. Yitzchak HaLevi Herzog, “*Gedarim bi-Din ha-Malchut, Hatorah Vehamedinah* VII-VIII (1956): 9-12; *Yecheveh Daat* IV, no. 65; R. Eliezer Waldenberg (1915-2006), *Teshuvot Tzitz Eliezer* XII, no. 82; *Teshuvot Shevet HaLevi* X, no. 263; *Teshuvot Ve-Hanbagot* III, no. 441; and R. Binyamin Zilber (1917-2008), *Teshuvot Az Nidberu* III, no. 74. Also see, *Kovetz Haposkim, Choshen Mishpat*, 26: 206. For further explanation see R. Bleich, *Contemporary Halakbic Problems* V, 16-21.

<sup>34</sup> At first glance this ruling appears to contradict the opinion of *Chazon Ish* and others cited above as well as R. Shlomo ben Aderet (1235-1310), *Teshuvot ha-Rashba* VI, no. 254, cited in *Beit Yosef*,

judge is Jewish. The acceptance of a foreign system of law in replacement of Torah Law is considered a repudiation of the Torah and viewed as “raising a hand against the Torah of Moses.”<sup>33</sup>

## 2. CHOICE OF LAW

A choice of law clause, where two parties agreed to be judged in *beit din* but according to the laws of a specific secular set of rules or authority, is permitted by many *halachic* authorities. The Beth Din of America generally respects choice of law clauses and will apply secular law in determining the outcome of a dispute where parties have agreed to be governed by that body of law.<sup>34</sup>

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*Choshen Mishpat*, 26. Rashba discusses a case where a person claimed that the accepted custom in his area was to follow secular law regarding inheritance despite its clash with Jewish inheritance law, and as such argued that it was as if the parties had agreed to be bound by it. Rashba argues that to do so because it is the law of the gentiles is prohibited since he is mimicking the gentiles and this was specifically forbidden by the prohibition against going to secular courts. He writes that even though both parties agree and even though it is a monetary agreement, the Torah does not permit giving value to a gentile system of law. See R. Tzvi Gartner, “*Sheila bi-Inyan Arkaot*,” *Yeshurun* XI (2002): 699-701 who accordingly argues that such clauses are prohibited. See R. Bleich, *Contemporary Halakhic Problems* V, 21-22, and R. J. David Bleich, *Be-Netivot ha-Halachah* II (New York: Michael Sharf Publication Trust of the Yeshiva University Press, 1998): 169-170 who takes a similar position.

However, see R. Zalman Nechemya Goldberg, “*Teshuva vi-Hatzaah bi-Inyan*,” *Yeshurun* XI (2002): 702-703, who takes issue with R. Gartner and argues that the Rashba’s principle applies when the accepted conditions contradict Torah law, as in the case of inheritance, as opposed to when one assumes added obligations that are not in violation of any Torah principle. See R. Tzvi Spitz (20th century), *Sefer Minchat Tzvi - Shechenim*, no. 16:10 who argues that a choice of law clause is permissible when specific laws are mentioned and no reference of a foreign system of law is made. See R. Gartner who takes issue with this opinion. See R. Yonah Reiss, “*Matneh Al Mah Shekatuv ba Torah*,” *Shaarei Tzedek* IV (2003), 288-296 who offers another distinction. The Rashba objected to blind acceptance of another system of law because such acceptance implies that the system is viewed as superior to Torah law. However, acceptance of a certain system of law because it reflects customary business practices of the location does not reject Torah law and is like any other monetary condition which is binding according to halacha. As such, the practice of the Beth Din of America is to allow choice of law clauses which accept a system of law as it is the day of the agreement because it is like any other binding monetary agreement. However, acceptance of a system of law even if the law may change in the future reflects blind adherence to secular law and represents a rejection of the Torah (unless such changes are a reflection of change in customary practice).

R. Bleich, *Contemporary Halakhic Problems* V, 30, does maintain that common trade practices or *minbag ha-socherim* can become implied conditions of a specific contract. It seems that he would differentiate between acceptance of specific practices as opposed to acceptance of an entire system of law. One could argue that a choice of law clause, since limited to a specific situation or contract, is similar to *minbag ha-socherim* and different than acceptance of an entire system of law.

See the Rules and Procedures of the Beth Din of America, subsections 3(d) and (e), which state:

In situations where the parties to a dispute explicitly adopt a “choice of law” clause, either in the initial contract or in the arbitration agreement, the Beth Din will accept such a choice of law clause as providing the rules of decision governing the decision of the panel to the fullest extent

### 3. ARBITRATION

Many poskim assume that one is permitted to present a case for binding arbitration to an arbitrator who is a non-Jew. Since arbitrators are not bound by a specific set of laws,<sup>35</sup> adjudication before them is not considered a rejection of Torah law and as such is not a violation of the prohibition.<sup>36</sup> Still, arbitration conducted under the auspices of a gentile judicial body is prohibited since it acknowledges the authority of a foreign judicial system.<sup>37</sup>

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permitted by Jewish Law. In situations where the parties to a dispute explicitly or implicitly accept the common commercial practices of any particular trade, profession, or community – whether it be by explicit incorporation of such standards into the initial contract or arbitration agreement or through the implicit adoption of such common commercial practices in this transaction – the Beth Din will accept such common commercial practices as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish Law.

<sup>35</sup> See *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 308 (1984) (“[A]n arbitrator is not bound by principles of substantive law or by rules of evidence. He may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement . . . .”) Also see Rule 43 of the commercial rules of the American Arbitration Association (<http://www.adr.org/sp.asp?id=22440>, accessed February 7, 2012) which states, “(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties...” Similarly, Rule 24(c) of the JAMS Comprehensive Arbitration Rules & Procedures (<http://www.jamsadr.com/rules-comprehensive-arbitration>, accessed February 7, 2012) states, “[I]n determining the merits of the dispute the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that the Arbitrator deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties’ agreement, including but not limited to specific performance of a contract or any other equitable or legal remedy.”

<sup>36</sup> *Shulchan Aruch, Choshen Mishpat*, 22:2 states that even if one accepts a non-Jew as a judge, the acceptance is not binding and it is forbidden to appear before that judge. Rama comments, however, that if one was already judged in such a situation the judgment is binding. Shach 22:16 takes issue with Rama and suggests that there is a difference between acceptance of non-Jewish law which is forbidden and acceptance of a specific non-Jewish judge which is permitted. *Netivot ha-Mishpat, Chiddushim* 22:14 rejects Shach’s opinion and writes that even acceptance of a specific gentile judge is prohibited. *Aruch Hashulchan, Choshen Mishpat*, 22:8 explains that Shach permitted acceptance of a specific gentile judge who will judge according to his own logic as opposed to a judge who is bound by a secular body of law. *Aruch Hashulchan* seems to understand that the nature of the prohibition is one of rejecting Torah law by replacing it with a foreign system of law. Acceptance of a gentile judge to rule according to his own judgment is not acceptance of another system of law. *Aruch Hashulchan* rules according to Shach and against *Netivot ha-Mishpat*. In effect, *Aruch Hashulchan* and Shach permit arbitration since an arbitrator is not bound by a body of law. However, *Halacha Pesukab, Choshen Mishpat*, 22:13 views the question of arbitration as a disagreement between Shach and *Netivot ha-Mishpat* and rules according to *Netivot ha-Mishpat* who forbids arbitration before a non-Jew. See, however, R. Bleich, *Contemporary Halakic Problems* V, 21-23 (and R. Bleich, *Be-Netivot ha-Halachab* II, 171), who understands that *Netivot ha-Mishpat* never argued with Shach about a case of arbitration. Rather, *Netivot ha-Mishpat* understood that Shach permitted acceptance of a single non-Jewish judge even if bound by secular law and as such rejected Shach’s view. However, even

## C. RAMIFICATIONS OF VIOLATION OF THE PROHIBITION

### I. APPEARANCE IN *BEIT DIN* AFTER SECULAR COURT

Rama rules that one who brings a case to secular court and does not prevail may not later insist on *beit din* adjudication.<sup>38</sup> Some authorities have expanded Rama's ruling to include instances in which secular court activities have taken place, but no final judicial decision has been rendered.<sup>39</sup> This means that in some cases a *beit din* may

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*Netivot ha-Mishpat* would agree that acceptance of an arbitrator who is not bound by secular law would be permitted.

Many *poskim* seem to take the view of Shach as understood by *Aruch Hasbulchan*. *Teshuvot Tzitz Eliezer* XI, no. 93 permits settlement of cooperative housing disputes by an official appointed by the government since the official is not bound by a set of laws and judges based on the official's view of fairness and equity. R. Waldenberg's ruling carries added significance, since, in effect, he even permits arbitration that is mandated by law.

See *Piskei Din Rabanaim shel Batei Din Ha-Eizorim Be-Yisrael* XIII: 330-334 (Ashdod 1982) who permit adjudication by the Israeli Union of Engineers and Architects. They base their opinion on R. Karelitz, *Chazon Ish – Sanbedrin*, 15:4 who also differentiates between judges bound by a secular set of laws and judges who decide based on logic and fairness. See a similar conclusion in *Piskei Din Rabanaim* VII: 231 reached by the High Rabbinic Court of Jerusalem headed by R. Yitzchak Nissim, R. Yosef Shalom Elyashiv, and R. Eliezer Goldschmidt. See R. Avraham Chaim Sherman, "Maamad *Beit din* Shel Tenuah Al Pi Halacha," *Techumin* XIV (1994): 159-164 who similarly permits arbitration before a political union as well as settlement of a dispute by an expert in a certain area since the expert is judging based on expertise and not based on a specific set of laws. See *Kovetz ha-Poskim, Choshen Mishpat*, 26: 207 who quotes *Teshuvot Pri Elyahu* III, no. 84 and *Teshuvot Kisei Shlomo*, no. 1 who permit "courts of merchants" on the same grounds. See R. Brody, *The Pursuit of Justice and Jewish Law*, 127 who follows the view of *Aruch Hasbulchan*.

R. Sherman adds based on a careful reading of Mei'ri, *Beit ha-Bechirah, Sanbedrin* 23a, that arbitrators are allowed to rule according to secular law if they deem it fair and equitable, as long as they are not bound by secular law. R. Yonah Reiss adds that it may even be permissible for two parties to appear before an arbitrator and stipulate that the arbitrator should judge based on secular law. If one assumes that one may make such a stipulation in front of *beit din* (see note 34), one can similarly argue that it would be permissible to do so before an arbitrator as well.

An interesting case that may arise with regard to arbitration is that of an adversary who refuses to appear before *beit din* but would be willing to go to a non-Jewish arbitrator. Is one required to follow suit since arbitration by a non-Jew is also permitted or may one consider such an individual non-compliant and proceed to secular court? R. Brody, *The Pursuit of Justice and Jewish Law*, 128 argues that one is not required to go to arbitration since even according to Jewish law one is not required to accept a hearing of "*peshara*" or compromise. Rather, the litigant can appear before secular court after receiving permission from *beit din*. R. Bleich, *Contemporary Halakbic Problems V*, 37 writes that accepting arbitration in such a situation would be "praiseworthy but is not mandatory if the plaintiff believes that a court is more likely to grant an award in, or closer to, the amount he is entitled to recover according to Jewish Law."

<sup>37</sup> See R. Bleich, *Contemporary Halakbic Problems V*, 22-23 and *Teshuvot Az Nidberu* III, no. 74. Perhaps this is explicit in *Shulchan Aruch, Choshen Mishpat*, 26:1 who writes that it is forbidden to adjudicate "in front of non-Jewish judges and in their courts." The addition of the words "and in their courts" may indicate that adjudicating in their courts even when not in front of their "judges" is forbidden as well. Appearance before arbitrators in such a setting would not be considered appearance before their "judges" but would be considered appearance "in their courts."



decline to issue a summons to appear in *beit din* on behalf of a party that has already participated to some degree in secular court litigation. In some cases, the *beit din* may issue a summons, but will not issue a *seruv* if the recipient of the summons fails, ultimately, to appear before *beit din*.

Where a party to ongoing litigation in secular court requests that the Beth Din of America invite the other party to move the case to *beit din*, the Beth Din will generally do so. However, if the other party declines to submit the matter to *beit din*, the Beth

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<sup>38</sup> *Shulchan Aruch, Choshen Mishpat*, 26:1

<sup>39</sup> There are at least two explanations to Rama's ruling. Some explain that appearance before a secular court is tantamount to acceptance of its decision and ipso facto the decision is binding. Others explain that Rama's ruling represents a penalty (*kenas*) imposed by *halacha* against Jews who utilize the secular courts. *Netivot ha-Mishpat, Beurim*, 26:2 quotes both explanations as offered by the *Tumim*. See R. Pinchas Horowitz (1731-1805), *Chiddushei Hafla'ah, Choshen Mishpat*, 26:1 who adopts the first explanation. *Netivot ha-Mishpat* writes that a difference between the two reasons would arise in a case where the judge in secular court was bribed. In such a case the ruling might not be binding under Jewish law but a penalty would still be in order. *Netivot ha-Mishpat* concludes that since no *halachic* authorities raise this distinction, the penalty theory must be the more accurate explanation. See *Biur ha-Gra, Choshen Mishpat*, 26:4 who also adopts this explanation.

If one accepts the penalty theory, a penalty may be appropriate even if a ruling has not yet been issued in secular court. Whereas acceptance of a ruling of a non-Jewish judge is only binding once a decision is made (see Rama, *Choshen Mishpat*, 22:2) penalization for appearing before a secular court may be appropriate once the prohibition of appearing before a secular court has been violated. This suggestion is made by R. Meir Arik (1855-1926), *Teshuvot Imrei Yosher*, no. 36 and R. Aryeh Leib Grosnas (1912-1996), *Teshuvot Lev Aryeh*, no. 51. However, both reject this distinction. *Lev Aryeh* points out that if this distinction is correct, it should have been mentioned by *Netivot ha-Mishpat* who instead quotes the much less likely scenario of bribery. *Imrei Yosher* and R. Shlomo Yehuda Tabak (1832-1907), *Erech Shai, Choshen Mishpat*, 26, argue that penalization of an individual before the conclusion of a civil court proceeding would "lock the doors before those who wish to repent." *Imrei Yosher* as well as *Teshuvot Ve-Hanbagot* III, no. 441 also add that not allowing someone to return to *beit din* if he is already in the middle of a civil court proceeding would cause him to violate the prohibition of appearing before secular courts every second that he is there. R. Shternbuch (*Teshuvot Ve-Hanbagot*) also points out that the phraseology of Rama implies that he refers specifically to an attempt to resort to *beit din* after an unfavorable opinion has already been rendered in secular court. One could respond that Rama was merely referring to the most common case, since most will only take the case to *beit din* after actually losing in court. Those who reject this distinction would argue that penalization of the individual is only appropriate when he violated the prohibition to such a degree that he allowed it to come to a final decision.

See R. Chaim Halberstam (1793-1876), *Divrei Chaim, Choshen Mishpat* II, no. 1, who discusses a case where a plaintiff left a secular court before the final decision and returned to *beit din*. He rules that the defendant must return to *beit din* as long as he is reimbursed for any expenses he was forced to pay in order to defend himself in secular court. See R. Aharon Volkin (1865-1942), *Teshuvot Zekan Abaron, Choshen Mishpat* II, no. 125 who rules that one can compel his adversary to return to *beit din*, even after a decision is rendered in secular court, as long as the reward was not yet collected. Also see R. Batzri, *Dinei Mamot* I, no. 5:4 who rules that *beit din* should accept a case previously brought to secular court as long as no decision is rendered in secular court. He argues that since Rama's ruling is not accepted by everyone, and Rama's reasoning may not be due to the reason of penalization, and Rama's phraseology implies that penalization is appropriate only after a decision is rendered, *beit din*

Din will generally not issue a *seruv* if (i) the plaintiff in civil court is the party requesting *beit din* adjudication and he or she did not obtain prior permission to adjudicate the matter in secular court or (ii) the defendant in civil court is the party requesting *beit din* adjudication and the civil court action has already reached a stage of “substantial judicial involvement,”<sup>40</sup> as determined by the Beth Din based on a review of submissions by the parties.<sup>41</sup> As a practical matter, this means that a party risks losing the ability to compel an adversary to appear before *beit din* as a result of initiation of or participation in secular court proceedings. It is therefore advisable that any action in secular court, other than for emergency injunctive relief, only be taken after first attempting *beit din* adjudication.

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should accept a case that was not completed in secular court. However, Maharil Diskin, in the collection of rulings based on his manuscripts in the back of his responsa, no. 20 writes that one who issues a “*pazavru*” (seemingly a summons) is not deemed to have gone to secular court since only words were spoken and no court action was taken. One may infer from here that any action taken in court beyond a summons, such as actual appearance, would be tantamount to violation of the prohibition and subject to penalization. See R. Avraham Dov Berkowitz, “*Teviah bi-Beit din Liachar Teviah bi-Arkaot*,” *Techumin* XV (1995): 228-244 and R. Mordechai Willig, “*He’arot Bireish Perek Zeh Borer*,” *Beit Yitzchak* 36 (2004), 24-25 who conclude that penalization of one who went to secular court is in order even before a decision was rendered. See *Teshuvot Ve-Hanbagot* III, no. 443 who writes that some *batei din*, including the *beit din* of the Eidah Hacharedis of Jerusalem, have the practice of not hearing any case previously brought to secular court. Even though strictly speaking the ruling of Rama may not apply, such a practice is customary to properly enforce compliance with the prohibition of going to secular court.

The foregoing analysis pertains to the ability of a litigant to insist on *beit din* adjudication following resort to the secular courts, and to the appropriateness of the imposition of a *seruv* against a litigant who declines to submit to *beit din* after secular court proceedings have already begun. In contrast, *Teshuvot Lev Aryeh* 52 writes that in a case where both the plaintiff and the defendant wish to return to *beit din*, everyone would agree that *beit din* would not be required to penalize the plaintiff for bringing the case to secular court and the case should be heard by *beit din*. However, see R. Berkowitz, “*Teviah bi-Beit din Liachar Teviah bi-Arkaot*,” 228-244, who suggests that if the reason for Rama’s ruling is penalization, *beit din* should be required to penalize the plaintiff by not hearing the case even in a situation where the defendant is willing to go to *beit din*. He points out that this would depend on whether the nature of the penalty is for the purpose of protecting the honor of *beit din* or for the purpose of protecting the defendant.

<sup>40</sup> *Shu”t Maharsham* I, no. 89 writes that even though a defendant who is summoned to secular court inappropriately is allowed to defend himself or herself without permission from *beit din*, in a case where the defendant makes certain investments and demands an oath from the plaintiff, the defendant thereby demonstrates an intention to bring the case before secular court and an acceptance of the jurisdiction of the secular court. See R. Shlomo Zalman Braun, *She’arim Metzuyanim be-Halacha - Kitzur Shulchan Aruch*, no. 181 who quotes Maharsham as ruling this way in any case where a defendant appears before secular court without requesting that the case be brought to *beit din*, regardless of the degree of involvement of the defendant in court. It follows, that a defendant who participates to some degree in secular court proceedings is subject to Rama’s ruling to the same degree as the plaintiff who initiated secular court proceedings.

It should be noted that Maharsham’s logic seems to be based on the assumption that the ruling of Rama under discussion is based on the reasoning that appearance in court implies acceptance of

## 2. AWARD NOT IN ACCORDANCE WITH JEWISH LAW

Someone who appears before secular court when not permitted to do so according to Jewish law and is granted an award that is more than he or she would be entitled to according to Jewish law may not accept such an award and is guilty of theft if he or she does so.<sup>42</sup>

The centrality of the prohibition against litigating in secular courts cannot be overstated. The comparison of one who violates the prohibition to “one who worships idols” and one who “raises a hand against the Torah of Moses” highlights the fact that with adherence to this commandment we are recognizing the Torah’s legal system and none other as the guiding principle in our lives. On the flipside, violation of the

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the secular court decision. As such, Maharsham’s ruling should only apply if we accept that reason and should only apply if the secular court proceeding reached the point of a final decision. *Netivot ha-Mishpat* and *Biurei ha-Gra*, who preferred the other explanation of Rama’s ruling set forth above, would not necessarily apply Rama’s ruling to a defendant. However, see *Teshuvot ve-Hanbagot* III, no. 443 who writes that while someone who is summoned by a non-observant Jew to secular court cannot be held accountable for not attempting to bring the case to *beit din* since he may have justly assumed his attempt would be futile, someone summoned by an observant Jew who does not protest may be subject to penalization as well since he should have tried to bring the case to *beit din*. Also see *Teshuvot ve-Hanbagot* III, no. 441 sec.3. See *Imrei Binah, Choshen Mishpat*, no. 27, who cites those who ruled that a defendant who did not voice his opposition to being brought before a secular court loses his right in *beit din* to demand repayment for legal expenses spent in secular court. *Imrei Binah* himself rejects such a view.

<sup>41</sup> In cases involving a party requesting a *get* (Jewish divorce) the Beth Din may determine that a *seruv* is appropriate notwithstanding prior secular court proceedings, since the issue of the *get* is only justiciable in *beit din*.

<sup>42</sup> *Shu”t Tashbetz* II, no. 290 writes that where a secular court issues an award in excess of what a *beit din* would award, a litigant who collects on such an award violates the prohibition of theft (in addition to any violation of the prohibition of litigating in secular court, to the extent the prohibition applies in the given case). Such an individual would be labeled a “thief” and disqualified from serving as a witness, and title to any property collected on such a judgment would not vest under Jewish law. He writes that “this point is so obvious that it does not need to be written.” *Chiddushei R. Akiva Eiger, Choshen Mishpat* 26:1 quotes Tashbetz and *Chidushei Haflaah, Choshen Mishpat*, 26:2 makes a similar point. Also see R. Batzri, *Dinei Mamonot* I, no. 5:6.

Many authorities assume that this is the case even if one or both of the litigants had received prior permission from *beit din* to go to secular court. It is for this reason that *Netivot ha-Mishpat* 26:3 does not allow a *beit din* to give permission to a plaintiff to go to secular court unless the plaintiff has demonstrated to the *beit din* that the case is compelling (lest such permission result in an improper award by the secular court to the plaintiff). Although normative *halacha* does not follow this practice, the concern nevertheless remains. See R. Avrohom Borenstein (1838-1910), *Teshuvot Avnei Nezer, Yoreh Deah*, no. 133:2 who writes that an adversary’s refusal to follow the laws of the Torah does not make it permissible to steal from the adversary. *Teshuvot ve-Hanbagot* III, no. 445 warns that one should consult a halachic authority before going to secular court. However, he adds that one who knows they are owed a certain sum but lacks the witnesses to receive the award according to Jewish law, is not in violation of theft if the amount is received through an award from secular court. See *Teshuvot ve-Hanbagot*

prohibition serves as a rejection of the Torah itself. It is the hope of this author that a greater understanding of the issues at hand and a clearer perspective on the rules and exceptions will aid the reader in properly observing this vital commandment, ultimately leading to the fulfillment of our daily prayer for “restoration of our judges as in earlier times, and our counselors as it was at first.”

*Rabbi Yaacov Feit is a member of the Norman Lamm Yadin Yadin Kollel of the Rabbi Isaac Elchanan Theological Seminary at Yeshiva University. He also serves as the inaugural intern of the joint program of the Rabbi Norman Lamm Yadin Yadin Kollel and the Beth Din of America. Rabbi Feit is also a rebbe at the Joseph Kushner Hebrew Academy in Livingston, New Jersey.*

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III, no. 444 where he permits accepting an insurance award for injury that is not in accordance with Jewish law, since the parties bound themselves to such a monetary agreement. R. Yosef Shalom Elyashiv is quoted by R. Mordechai Ralbag, “*Hitdayanut bi-Arkaot bi-Heter Beit din*,” *Techumin* XXV (2005): 250-251, as saying that one must speak to a *balabchic* authority before accepting an award and suggests that *beit din* mention this point when granting permission to go to secular court. R. Weiss, *Mimchat Asher Devarim*, 3:4 also writes that one must go to a *beit din* after going to secular court in order to ensure that the reward is appropriate according to Torah law. Also see R. Landesman, “*Teshuva bi-Inyan Arkaot*,” 706, who also assumes that permission granted by *beit din* to appear before secular court is on condition that one will not collect more than the amount deserved according to Torah law. Also see, R. Bleich, *Contemporary Halakhic Problems* V, 26-27, 35 who makes this point as well.

See, however, R. Willig, “*He’arot Bireish Perek Zeh Borer*,” 23 who suggests based on a view of *Or Zarua* that the prohibition of theft only applies when one is not allowed to be in secular court. When one has permission to appear before secular court the prohibition is lifted and the principle of “*dina demalchuta dina*” applies. Also see *Teshuvot ve-Hanhagot* III, no. 441, who deals with the question of why one may go to secular court when an adversary refuses to go to *beit din*, despite the fact that appearance in secular court is biblically prohibited. He suggests that *beit din*’s approval of appearance in secular court is really a way for *beit din* to punish a non-compliant individual by subjecting that individual to whatever the secular court decides. The implication of such an argument is that it would be permitted in such a case to accept an award granted by secular court even though it is in excess of the award that would be granted by Torah law. R. Kohn, “*Akipat Kiyum Psak Pasbranim Al Yedei Arkaot*,” 191, uses a similar argument to explain the practice to not follow the view of the *Netivot ha-Mishpat* cited above. Since permission to go to secular court is viewed as a way for *beit din* to punish a non-compliant individual, it is irrelevant if the individual is guilty or not since that individual is responsible for the loss he or she will incur. The implication again, is that in such a situation one may accept an award greater than the amount that would have been awarded in *beit din*. This would not be viewed as theft but as a punishment that the non-compliant individual brought upon himself or herself.

# Understanding Rights in Context: Freedom of Contract or Freedom from Contract? A Comparison of the Various Jewish and American Traditions

*Rabbi Michael J. Broyde and Steven S. Weiner*<sup>1</sup>

## INTRODUCTION

More than twenty years ago, the late professor Robert Cover of Yale University Law School noted a crucial difference between the rights-based approach of common law countries and the duties-based approach of Jewish law. He remarked:

Social movements in the United States organize around rights. When there is some urgently felt need to change the law or keep it in one way or another, a “Rights” movement is started. Civil Rights, the right to life, welfare rights, etc. The premium that is to be put upon an entitlement is so coded. When we “take rights seriously” we understand them to be trumps in the legal game. In Jewish law, an entitlement without an obligation is a sad, almost pathetic thing.<sup>2</sup>

One can extrapolate something even more general from this, as part of the contrast between the Judaic mindset of obligation and duty and the common law mindset of rights and needs.

Ironically, in the realm of contractual freedom – the ability of parties to undertake binding obligations through an exchange of promises – it is classical Jewish tradition that is reluctant to recognize and enforce such obligations. Modern western societies show no hesitation in enforcing contractual promises as binding obligations; indeed, our contemporary systems of commerce are predicated on the

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<sup>1</sup> This paper was written for presentation at a DePaul University conference entitled “Founding a Nation, Constituting a People: American and Judaic Perspectives” in Chicago, Illinois on May 13, 2010, which was organized under the auspices of the DePaul University College of Law Center for Jewish Law and Judaic Studies. This conference and this paper were graciously provided with financial support by the Jack Miller Center.

<sup>2</sup> Robert M. Cover, “Obligation: A Jewish Jurisprudence of the Social Order,” *Journal of Law and Religion* 5 (1987): 67 (footnotes omitted).

strong enforcement of contractual commitments. In contrast, as we shall see, classical Jewish law protects freedom of choice over contractual interests. Perhaps, we argue, this is because Judaism sees moral obligation and duty as firmly rooted in the possession of free will and the ability to choose. Therefore, Jewish law is uncomfortable with allowing individuals to effectively contract away their future choices like a financial asset. In a sense, strong contractual obligations would weaken the foundation for strong moral obligations. From a classical Jewish moral standpoint, “freedom of contract” is less important than “freedom from contract.”

## II. CONTRACT LAW AND JEWISH LAW SALE OF GOODS AND CONTRACT LAW

The presumption that honorable people keep their word and do not lie is a fundamental one found in nearly all societies, and it has clear roots in the biblical mandate that directs a person to “distance oneself from falsehood” (Exodus 23:7).<sup>3</sup> Nevertheless, Jewish law (*halacha*) has always had a great reluctance to enforce, as a matter of civil law, mere promises and agreements to perform an action or engage in a future transaction. This classical Talmudic view was codified by Maimonides (Rambam, Egypt, 1135-1204) as follows:

Merchandise cannot be acquired by mere words. Even if a seller says to a buyer, ‘I will sell you my house’, the two agree on a price, the buyer says ‘I will buy’ and the seller says ‘I will sell’, and they declare this future transaction before witnesses still it is void and as if they had never spoken. However, if title to the merchandise is transferred [by appropriate legal device], then even in the absence of witnesses, both parties are bound.<sup>4</sup>

Per Maimonides, we thus see not only that title cannot generally be conveyed by mere words, but also that an agreement to conduct a future transaction – even a clear, firm, and well-evidenced agreement – does not create an enforceable obligation to follow through and perform.

Similarly, the Talmud speaks frequently of the inability to effect a binding sale of

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<sup>3</sup> For more on this, see the recent work by R. Yaakov Fish, *Titen Emet LeYaakov* (Jerusalem: 2003).

<sup>4</sup> Rambam, *Mishneh Torah, Hilbot Mechirah*, 1:1 2.

goods that are not yet in the seller's possession.<sup>5</sup> In the Talmud, the legal effect of selling what one did not yet own or what was not yet in existence, like next year's crops, was the subject of a famous dispute. The origin of this dispute is found in the disagreement between the early Rabbis and Rabbi Meir (Israel, c. 100 CE), over the case of a man who attempts to wed a woman when marriage is not yet possible for them (*Kiddushin* 63a):

Suppose a man says to a woman, 'be wedded to me after I convert' or 'after you convert'... or 'after your husband dies'... she is not wedded. R. Meir rules: she is wedded.

The Talmud interprets this argument as founded on the basic issue of whether a person has the power to make a deal involving property not yet in existence or not yet in his possession. The Talmud applies the argument to a variety of cases including the sale of: a field not yet acquired by the seller (*Bava Metziah* 16b), a tree's fruit that has not yet grown (*Bava Metziah* 33b), "what my trap shall ensnare" and "what I shall inherit" (*Bava Metziah* 16a, 33b). In each of these cases, the Rabbis hold that neither the buyer nor the seller is bound to follow through with performance, nor would the breaching party be subject to any liability. This opinion was universally accepted as law by all major post-talmudic authorities including Rambam,<sup>6</sup> R. Jacob b. Asher (*Tur*, Spain, 1269-1343) and R. Joseph Caro (*Shulchan Arukh*, Israel, 1488-1575)<sup>7</sup> Because in classical Jewish law a binding sale can only be effected by actually conveying title to the property – and not merely by agreeing to perform a sale in the future – it makes sense that the law will not enforce a sale of assets not

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<sup>5</sup> This article repeatedly discusses the validity of a contractual agreement (according to Jewish versus common law) when the goods being contracted over are not currently in the seller's possession. The reason the case discussed throughout this article is formulated as such, is because the contract cases presented in the Talmud were cases in which the goods being contracted over were not yet owned by either party (as will be seen in the Talmudic examples that follow in the text). However to be halachically accurate, we must note that normative Jewish law absolves sellers from binding promises for the sale of future goods even more broadly than this discourse implies. Even in cases where the seller is already in possession of the goods that he wishes to contract over, Jewish law has no mechanism for the enforcement of his verbal promise to do so. A perfect proof of this is found in the Rambam just presented, where although the seller clearly owns the deed to the house, which he refers to as "my house," his agreement to sell cannot create a binding obligation to perform a sale. Until and unless title to the property is actually and formally conveyed, no enforceable obligation arises and the seller can back out.

<sup>6</sup> Rambam, *Mishneh Torah, Hilchot Mechirah*, 22: 1-5.

<sup>7</sup> *Tur* and *Shulchan Arukh, Choshen Mishpat*, 209 and 211.

<sup>8</sup> Quite possibly, R. Meir concurs that mere promissory obligations cannot be enforced, but contends that the seller can formally convey title now as to his future interest in property yet to be acquired – taking full effect automatically upon the seller's acquisition of that property.

yet owned by the seller, since (in the Rabbis' majority view) a seller cannot convey title to property he does not yet own.<sup>8</sup>

For certain, the Talmud contains several exceptions to the Rabbis' position, but even these exceptions reinforce the basic rule. The Talmud comments on the situation in which a seller does not own the promised property at the time of sale, but immediately afterwards does come to acquire it. The Talmud accepts the opinion expressed by R. Abba Arika (Babylon, 3rd century) that the aggrieved buyer is awarded ownership, because the seller is presumed to have purchased the property as agent for the buyer in order to clear his own name (*Bava Metziah* 15a).<sup>9</sup>

Additionally, the Talmud creates an exception by special enactment in the case of "what my trap shall ensnare," as a form of charity for a poor person to raise money for his daily needs by selling his catch for that very day before it is actually caught. Both of these are denoted as exceptions, and they reinforce the notion that the rule is to the contrary: There was no straightforward halachic way for a businessman to routinely sell that which he does not yet own. The most one can say is that as a form of charity, the desperately poor may engage in such sales.

Only the actual conveyance of title by the seller through formal *kinyan* (acquisition) can close the deal according to classical Talmudic law. With the possible exception of R. Meir's minority opinion, the Talmud does not recognize a binding agreement to make a sale absent the actual transferring of the title. By contrast, contract law in the common law system shows absolutely no reluctance to enforce contracts for the future sale of goods which the seller does not yet possess at contract time. If either party to a binding sale agreement fails to perform, the Uniform Commercial Code (UCC) compels the breaching party to pay full expectancy damages – i.e., enough money to make the damaged party as well off as if the contract had been followed through as agreed. Whether or not the seller owned such goods at the time the agreement was concluded could not possibly be more irrelevant to sale-of-goods doctrine within common law.

Under common law, the enforceability of contracts for the sale of goods which the seller does not yet possess is taken for granted. Such contracts are extremely common forms of commercial transaction. (For example, trading in the futures market or commodities market is predicated on the premise that agreements to

<sup>9</sup> Of course, this remedy is essentially left up to the seller to act on and thus does not have a great deal of teeth. Furthermore, it is not widely accepted as fully binding by post-Talmudic authorities (for example, Rambam, *Hilchot Gezeilab vi-Aveidab* 9:9) applies it only to a seller who acted deceptively.)



sell and buy specified goods at future times are valid, even if those goods are not yet owned by the seller or they do not even yet exist.) Modern commerce could hardly imagine a system where purchase orders for goods not yet in inventory or not yet manufactured are not binding. The UCC provides explicit and unequivocal legal support for expectancy damages in the event of default on sale-of-goods contracts, regardless of whether any goods were actually possessed by the seller.<sup>10</sup>

Why Jewish law, in contrast to the common law, shrank from enforcing binding promises to sell (whether such a sale entailed goods not yet owned, or goods currently in the seller's possession) is best understood in light of the broader rabbinic disdain for enforcing personal undertakings to perform specific acts as a matter of civil law. Compelling performance of specific acts by an individual as a matter of civil obligation to another party smacked of bondage – which the rabbis abhorred.<sup>11</sup>

Thus, while the common law accepted and embraced the penalties of debtor's prison and debtor bondage (i.e. selling a debtor who cannot otherwise pay off his debts into slavery or indentured labor) – until relatively recent times<sup>12</sup> – in Jewish law such deep restrictions on personal freedom as a consequence of financial obligations were strictly limited to situations where the obligation came about through some criminal wrong, such as theft, if the resulting debt could not be paid by the guilty perpetrator.<sup>13</sup> All other debts gave rise merely to an obligation enforceable against the debtor's property, not his person – i.e., there was no threat of peonage under Jewish law if a conventional debt was not paid. This means that if the defaulting party has no way of making restitution (i.e., he is too poor, even if by choice), he is functionally absolved from his obligation. When it comes to these obligations, the debtor need not indenture himself in order to reimburse his creditor even if no other means are in his possession.

We believe this sheds light on why the Talmudic rabbis shrank from enforcing

<sup>10</sup> See UCC sections 2-706 through 2-709, and 2-711 through 2-713.

<sup>11</sup> See further discussion below in Section B (Sale of Labor and Contract Law).

<sup>12</sup> In the United States, imprisonment for unpaid debts was abolished around 1833 at the Federal level and in most states; in Europe this only occurred beginning in the 1860's. Interestingly, two signatories to the Declaration of Independence, James Wilson & Robert Morris, were both later incarcerated for unpaid debts. See "Debtor's prison," accessed February 6, 2012, [http://en.wikipedia.org/wiki/Debtors'\\_prison](http://en.wikipedia.org/wiki/Debtors'_prison).

<sup>13</sup> See Exodus 22:2 which mentions involuntary sale as a Hebrew slave specifically as a remedy for theft. See also Rambam, *Hilchot Avadim*, 1:1 ("there is no one other than a thief who is sold as a slave by a rabbinical court").

binding promises. The rabbis were exceedingly averse to the notion of potentially imposing restrictions on personal action as a matter of civil obligation on anyone, even a defaulting party, and therefore shirked the notion of allowing parties to enter into binding contractual promises to perform particular acts. Bilateral executory contracts – the ordinary form of contemporary purchase and sale agreements – are invalid as a matter of classical Jewish law.<sup>14</sup>

Although the Talmudic approach differs from the modern common law approach, it certainly has precedent. In fact, it very much resembles pre-modern common law. As one classical textbook notes:

Consider, for example, an agreement made in the year 1450 C.E. and involving an exchange of oral promises – 150 bushels of wheat for £10. On the original exchange of promises, no obligation in debt arose; that action would lie only if the wheat were actually delivered, or at least a ‘property’ in the wheat were transferred. Even after 1500 C.E., when special assumpsit began to expand as a remedy on promises, the great bulk of special assumpsit cases described in the reports involved plaintiffs who had already performed.<sup>15</sup>

As in early common law, the one contractual obligation apparently recognized by the Talmud was debt. Conveying title in goods to a buyer created a debt for the agreed purchase price in favor of the seller. The creditor, according to Talmudic law, was entitled to satisfy his debt by collecting money (or else other property of the debtor’s choosing) in the debtor’s possession, even if acquired after the debt arose. Moreover, the debt created a lien for the creditor on real property of the debtor, so that the creditor could recover his debt from property conveyed by the debtor to third parties after the debt arose (*Bava Batra* 175a). After some debate, it was decided that this lien, too, applied even to real property acquired after the debt arose, what modern UCC considers a floating lien (*Bava Batra* 157b).<sup>16</sup> It bears

<sup>14</sup> See quotation from Rambam, *Mishneh Torah*, cited in footnote 6.

<sup>15</sup> Dawson, Harvey, & Henderson, *Cases and Comment on Contracts* (The Foundation Press, Inc., 1987), 273.

<sup>16</sup> In the name of Rav Ashi (Babylonia, 352–427). Many commentators (see R. Samuel b. Meir, Rashbam, France, c. 1080/85–c.1174) have understood the floating lien rule as something of an aberration in the conceptual framework of the Talmud, and considered it a special rabbinic enactment to facilitate the extension of credit. In any event, though, the rules about after acquired property make it clear that there existed some level of an obligation to pay money, even unto the level of a floating lien.

emphasis that there was generally no enforceable obligation for a debtor to convey any particular property or perform any services – and there was certainly no legal risk for the debtor of being sentenced to indentured labor or debtor’s prison. The only risk was that the debtor’s property could potentially be seized to pay the debt.

### THE SALE OF LABOR AND CONTRACT LAW

In labor contract cases, as in sale of goods cases, we have a sweeping Talmudic re-nouncement of promissory enforcement: “If an employer and laborer agree to a labor contract and then one of them backs out, the aggrieved party has no legal claim for damages.”<sup>17</sup> Of course, as we saw in sale of goods cases,<sup>17</sup> this does not mean that there is no protection of contractual interests. Analogous to what we have seen in sale of goods cases, a labor agreement from the Talmudic perspective is rather like a unilateral contract in common law. Once an employee fully performs his contracted work, the employer is in debt for the full contracted wages.<sup>18</sup> Thus, the promises alone create no obligations per se, but performance by one particular party (the laborer, the promisee) will obligate the other (the employer, the promisor).

In Talmudic law, restitutionary interests on both sides are also protected. An employer can get his money back, and the employee who has partially performed is entitled to partial compensation. Recovery for work performed is analogous to quantum meruit in common law. The question of exactly how to value partial performance is a complex one in common law.<sup>19</sup> Talmudic authorities engage in a fairly sophisticated debate on this issue, and generally give the party not in default the choice between pro rata contract price and “contract price less cost of completion” as possible standards for recovery.<sup>20</sup> Note that Talmudic quantum meruit is available even for the defaulting employee (although the employer “has the upper hand” in choosing a standard), thus long anticipating the comparable common law development chronicled in *Britton v. Turner*.<sup>21</sup>

Interestingly, the Talmud is emphatic that a laborer paid by the hour (or by any unit of time, as opposed to a job contractor), is entitled to recover pro rata contract

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<sup>17</sup> Rambam, *Mishneh Torah, Hilchot Sechirut*, 9:4.

<sup>18</sup> Rambam, *Mishneh Torah, Hilchot Sechirut*, 11:1.

<sup>19</sup> See, for example, *United States v. Algernon Blair, Inc.*, 479 F.2d 638 (1973).

<sup>20</sup> Tosafot, *Bava Metzia* 76a. See also *Rama, Choshen Mishpat*, 333:3.

<sup>21</sup> *Britton v. Turner*, 6 N.H. 481 (1834).

price for partial performance, even where the laborer defaults (except where the work is time critical – then, “contract price less cost of completion” may be used). In setting forth this particular rule, the Talmud cites the biblical verse, “The [children of Israel] are My slaves” (Leviticus 25:42), and homiletically comments: “My slaves, and not the slaves of men” (*Bava Metzia* 10a). As much as any statement, this is a statement of core values and not just of contract law.

Indeed, in contrast to the Talmud’s treatment of sale of goods cases, Talmudic protection of labor contracts goes somewhat beyond debt and restitution. Recall that labor contracts are comparable to unilateral contracts under Talmudic law. Common law has developed a number of grounds for preventing the promisor in a unilateral contract from withdrawing the offer, even where there has not yet been full performance by the promisee. These grounds include partial performance,<sup>22</sup> reliance,<sup>23</sup> and “firm offers” supported by formality or extra consideration.<sup>24</sup> The Talmud and its commentaries recognize a number of similar grounds for relief for the laborer when the employer calls things off before complete performance. In the following section, we shall examine these grounds, as well as some other bases for recovery in a labor agreement, in some detail.

**RELIANCE INTEREST-EMPLOYEE.** The employer must pay for any wages which have been lost as a result of his making and then breaking the work agreement. These are reliance damages: The laborer is compensated for wages he could have made by accepting a different job, an opportunity which is now no longer available to him because of his reliance on the employer’s offer. This reliance recovery is neither explicitly mentioned in the original Talmudic texts dealing with laborers nor in Maimonides, but it is introduced as well-grounded in Talmudic tort principles by early Talmudic commentaries<sup>25</sup> and is clearly spelled out in the *Shulchan Aruch*:

If the workers could have found alternate work yesterday when this employer agreed to hire them, and now they cannot find any work, then ... the employer

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<sup>22</sup> *Restatement of Contracts*, Second. Sec. 45.

<sup>23</sup> *Drennan v. Star Paving Co.*, 51 Cal. 2d 409 (1958).

<sup>24</sup> *Mier v. Hadden*, 148 Mich. 488 (1907).

<sup>25</sup> R. Shlomo Aderet (1235-1310), *Chidushei ba-Rashba, Bava Metzia* 76b.

must pay them full wages discounted by the value of leisure. If they can now find work at reduced wages, the employer need pay them only the difference.<sup>26</sup>

It is important to notice that while reliance can be the basis for enforcing promissory expectancy in common law, the Talmudic authorities view reliance as a pure tort action. Accordingly, the Talmudic authorities would only grant damages equal to the actual reliance loss – not the lost expectancy. Thus, if the alternative job available to a worker at contract time was for a lower rate than the contract, then the defaulting employer would be liable to pay only for the lost opportunity – i.e., the lower rate. In a similar case, common law would hold the employer to his promise and award full contract rate damages.

**RELIANCE INTEREST - EMPLOYER.** Defaulting employees may cause reliance damages to an employer if, for example, the market price of labor has risen since the original time of agreement. The Talmud is rather explicit on the point that the employer is not generally entitled to recover such damages from the employee. If the employee claims restitution for partial performance, then the employer can essentially cover his reliance by using the contract price less the cost of completion standard to calculate the employee's recovery (*Bava Metzia* 76b). However, if the cost of completion exceeds the contract price, or if the employee has no restitutionary claim, then the employer's reliance is not generally protected. The Talmud does make an exception for cases where the contracted work is time critical – e.g., the removal of soaking flax (which, if not done on time, means ruined flax) or musical performance for a wedding. What the Talmud grants even in those cases, however, appears to be only a choice of limited remedies: The employer may either promise his defaulting workers extra money to get them to finish (if they are ignorant enough of the law to fall for that!) and then pay only the original contract price,<sup>27</sup> or else he may hire other workers and recover his reliance (the actual cost of completion less the contract price) out of any property that the employees have deposited with him.

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<sup>26</sup> *Shulchan Aruch, Choshen Mishpat*, 333:5.

<sup>27</sup> This particular remedy is reminiscent of the outcome in common law duress cases like *Alaska Packers' Association v. Domenico*, 117 F. 99 (1902).

**GENERAL RELIEF FOR RELIANCE DAMAGES BY THE EMPLOYER DOES NOT SEEM POSSIBLE UNDER TALMUDIC LAW.** A number of Talmudic authorities<sup>28</sup> argue that tort doctrine allows recovery of consequential damages in the case of workers who default on soaking flax, where the employer's property has been knowingly jeopardized by the workers. These authorities claim that the limited Talmudic remedies listed earlier apply as limitations only for non-performance of the act, but in the flax case, where property of the employer is literally at stake, tort doctrine is applicable, thereby protecting the employer. Where property is not at stake, and the employer did not previously exact a security deposit from his employees, the Talmudic response to the employer who must now hire new workers at a higher market rate would evidently be: If you don't like the rate, don't have the work done. In summary, the reliance interests of the employer receive some (but only a limited measure of) protection under Talmudic law.

**PARTIAL PERFORMANCE.** If the employer rescinds after the employee has begun work or even substantial work preparation (e.g., arrived at the work site), the employee is entitled to damages for his lost wages. Here, however, an expectancy measure is used. Regardless of whether the employee had any other opportunities at contract time, he is entitled to his contract salary, discounted by any salary he can now earn at other jobs (or in the alternative, discounted by an amount equal to the value of leisure instead of working). This rule appears explicitly in the Talmud itself, and is enunciated clearly in *Shulchan Aruch*.<sup>29</sup>

This last rule is rather puzzling: Uncharacteristically, the Talmud enforces a partially executory bargain and awards expectancy damages. The rationale generally given by Talmudic commentaries for this anomalous rule runs more or less as follows. When an employee arrives or begins performance, he is tendering his half of the bargain. Once the employer accepts this tender, the debt on his part for the contract price is created (conditioned on complete performance by the employee). If, after accepting this initial tender, the employer then rejects performance, he is simply throwing away that which he has already accepted, and it is his loss – his debt for the contracted wages is enforceable. One might also theorize that the rule simply reflects the truth that in reality, an employer who backs out after his

<sup>28</sup> R. Yisroel Isserlin (1390-1460), *Terumat ha-Desben*, cited in Rama, *Choshen Mishpat*, 333:6.

<sup>29</sup> *Shulchan Aruch*, *Choshen Mishpat*, 333:2.

employee has begun has quite probably caused his employee reliance damages.

Of course, proving those damages is not always easy. If an employee's job search ended after meeting the employer, the employee may well have no idea and be unable to prove whether other opportunities had been available at contract time.<sup>30</sup> The partial performance rule might be viewed as simply a presumption at law that the aggrieved employee relied on the promise of wages to forego other job opportunities. The language of some Talmudic commentators<sup>31</sup> is consistent with this explanation. Recovery of promised wages after partial performance would then, in principle, be a tort-based reliance recovery, similar to the reliance recovery discussed earlier.

### PARTNERSHIP AGREEMENTS

In the same vein as we have seen with respect to contracts for the sale of goods and for labor services, Maimonides<sup>32</sup> rules that partnership agreements involving future services are generally not binding, unless the partnership is focused on tangible, existing items of property for which title can be currently assigned:

[1] When partners wish to create a partnership ... as a general rule, through the same various methods by which a purchaser acquires title, the partners may acquire joint title to the shared money/property that is the subject of the partnership.

[2] However, professionals who wish to form a partnership regarding their professional services – even if they perform *kinyan*, a formal act of acquisition [by which title to tangible goods is acquired], they are not deemed partners [i.e. they are not bound as such]. Thus: if two tailors or weavers agree to split equally the proceeds of their respective businesses, this does not create a [binding] partnership, *because a person cannot sell that which does not yet exist*.

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<sup>30</sup> However in such a case, we assume that other opportunities were available, for the same rate of compensation as the job he was offered, and he is therefore reimbursed according to the expectancy measure, as stated above.

<sup>31</sup> Tosafot, *Bava Metzia* 76b.

<sup>32</sup> Rambam, *Mishneh Torah*, *Hilbot Sbluchin vi-Sbutfin*, 4:1-2

<sup>33</sup> *Shulchan Aruch*, *Chosben Mishpat*, 176:1-3.

The *Shulchan Aruch* rules similarly.<sup>33</sup> Admittedly, the Rama (a later gloss on the *Shulchan Aruch*) cites authorities who do endorse mechanisms for creating binding partnerships to engage in business that is not yet subject to a formal conveyance, at least in some circumstances. We explore more closely the evolution of halacha with respect to the binding nature of contracts in our next section.

### III. MODERN HALACHIC PERSPECTIVE: CONTRACT LAW REVISITED

As we mentioned earlier, the major halachic authorities—including the *Tur* and *Shulchan Aruch*—endorsed the position of the rabbis about not selling that which one does not yet own, thus more or less eviscerating the basis of what would eventually become modern contract law. However, beginning around the thirteenth century, many Jewish law authorities found it possible to also accept the ruling that a person could indeed obligate himself to sell property he would later acquire, by re-conceptualizing sales according to the “debt” paradigm.

That surprising substitution is nowhere to be found in the Rambam; it makes its first appearance in a relatively obscure, virtually out-of-print medieval work by R. Samuel ben Isaac ha-Sardi of Spain entitled *Sefer ha-Terumot*:

And in a case in which he obligates himself with something which is not found at his place, and is not in his possession, he is obligated. And even though it was taught in a *baraita* that if one says ‘What I am to inherit from my father is sold to you,’ or ‘What my net shall bring up is sold to you,’ [it is as if] he has said nothing, so we see that anything that is not yet in existence, or else is in existence but is not in his possession, in all of these cases he does not acquire it, these words are in a case of [when he uses the language of] sales or gifts. But if he uses the terminology of debt [obligation], he is able to obligate himself as much as he wants, even with something that is not in existence, and even with something that is not in his hand. Like we find in the case of one who creates a lien for his debt on that which he will acquire, like we have established that [in a case in which he says] ‘That which I will acquire,’ that such a thing does come under an obligation for his debt.<sup>34</sup>

<sup>34</sup> R. Shmuel ha-Sardi (1190–1256), *Sefer ha-Terumot*, no. 64, 2.



The rule is then incompletely echoed by the *Tur* and *Shulchan Aruch*<sup>35</sup> but is gradually embraced by later authorities, with little or no opposition in more recent writings. R. Yechiel Michel Epstein, an early twentieth century codifier, follows in step with these rulings, and notes: “and so, any person can give or sell property not yet in existence or in his possession, in this way.”<sup>36</sup>

How was this surprising turnaround *halachically* accomplished? The key lay in revisiting the laws of debt, rather than contract. One important idea was the ruling by a majority of scholars that a debt created by agreement did not have to be expressed in fixed monetary terms; one could also become indebted to supply another person with food, for a fixed or indefinite term.<sup>37</sup> Rashba adds a responsum that one could likewise indebt himself to pay his earnings over a future period to a creditor. From this rule – arguably talmudic in origin (according to its proponents) but not exploited within the Talmud<sup>38</sup> – it was but a small leap for the *Tur* and the *Shulchan Aruch* to conclude that the indebtedness could be for some measure of wheat or other property.<sup>39</sup> Since the technique involves not sale but debt, and the goods are formally being used only as a standard to measure the amount of indebtedness, the debtor must supply either the property specified or its value in satisfaction of the debt – regardless of whether the property in question was ever owned by him. Thus, through mechanics of debt, Jewish law achieved full compatibility with the expectancy model of the UCC.<sup>40</sup>

## VESTIGES OF ORIGINAL PERSPECTIVE AND A CONTRAST WITH FREEDOM OF CONTRACT

It would appear that Jewish law has evolved to an equivalent place as the UCC

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<sup>35</sup> See *Tur, Choshen Mishpat* 60 and 71 who quotes a similar view of the *Sefer ha-Terumot* for this aspect of the rule of obligation and debt forgiveness. Indeed, *Beit Yosef* quotes various aspects of this rule of the *Sefer ha-Terumot* many times in *Tur, Beit Yosef, Choshen Mishpat*, 60 and 71-73. See also *Shulchan Aruch, Choshen Mishpat*, 60:6 where the rule of the *Sefer ha-Terumot* is quoted, albeit without any explanation of how significant an exception to the rule this is.

<sup>36</sup> *Aruch ha-Shulchan, Choshen Mishpat*, 60:11

<sup>37</sup> This rule is disputed by Maimonides, *Mishneh Torah, Hilchot Mechira*, 11:16 - but Raaved (R. Abraham ben David, France, 1125-1198), Ramban (Spain, 1194-1270), and a majority of other scholars stood firm.

<sup>38</sup> For example, if the rule against binding sale of future earnings can be this easily circumvented merely by “indebting” oneself in the ultimate amount of the earnings, then why the need for a special Talmudic exception enabling the poor to sell their daily earnings in advance? See above, section II., at p. 51.

<sup>39</sup> *Tur, Choshen Mishpat*, 60 and *Shulchan Aruch, Choshen Mishpat*, 60:6.

with regard to contract law, at least from a functional point of view. However, it is significant that while English common law developed contract by turning away from monetary debt and towards notions of personal duty to perform, Jewish law instead revisited and broadened its conceptions of debt while remaining uncomfortable with the notion of one person or entity being empowered under civil law to compel another individual to perform a particular service or conduct a future transaction. The models we have seen above show that even those relatively recent halachic thinkers who eventually accepted a practical mechanism for contractual enforcement did not conceptualize a contractor's obligation as a binding promise which must be obeyed – unlike authorities of common law. Instead, halachists see contractual promise as a creative way to measure or define monetary debt, but which need not be thought of as ever creating any actual personal obligation to convey a specific piece of future property or to perform any other particular action. Talmudists thus speak of the obligation as a debt which must be paid off, or else as an automatic lien (i.e. a form of property ownership); either way, there is no sense of an enforceable “promise” to perform future actions or services. Fulfilling the contract is not “performance” but merely a way of paying off the debt or satisfying the lien, as is the payment of expectancy in cash.

What is the importance of this conceptual shift? Why indeed must promissory enforcement enter through the back door of debt in Jewish law, and not enter through the front door of “promise keeping”? This is certainly not because the Talmud underestimates the importance of keeping promises. The Sages held nothing back in condemning he who fails to stand by his word.

Rather, the reluctance of Talmudic authorities to endorse the enforcement of contractual promises to perform as such may well embody a strong statement of public

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<sup>40</sup> Another debt-related rationale that can be used to explain the transformation, referred to by the *Sefer ha-Terumot*, is the rule mentioned previously about the floating lien that attaches to after acquired property. This rationale is somewhat more puzzling. If the point is to prove that the Talmud recognized personal—as opposed to property-based—obligations, it is hard to see how the lien rule illustrates this any better than the basic rule that the creditor can collect from any property held by the debtor himself, whenever acquired. (A similar question may be asked about those commentators who regard the floating lien as a special rabbinic edict, but who were not similarly troubled by the personal obligation of the debtor to satisfy the debt.) Evidently, the lien rule is not being noted to prove the personal nature of the obligation to repay a debt. We would instead explain it as follows: The floating lien is cited as an illustration of a property right—namely, the lien—which is born of a transaction (creation of the debt) occurring before the property is owned by the conveyor of the right. The precise analogy is: Just as debt can help create lien rights on property not yet owned by the debtor (perhaps by special rabbinic edict), so too can debt help create full title to property not yet owned by the debtor.

policy: a commitment to protect freedom of choice. Ironically, “freedom of contract” is routinely spoken of in Western literature as one of the basic societal freedoms that law must protect. Charles Fried, in *Contract as Promise*, writes the basic doctrine as such:

Security of the person, stability of property, and the obligation of contract were for David Hume the bases of a civilized society.<sup>41</sup>

Fried goes on to elucidate the notion of contract as a fundamental civil right as follows:

Thus the law of torts and the law of property recognize our rights as individuals in our persons, in our labor, and in some definite portion of the external world, while the law of contracts facilitates our disposing of these rights on terms that seem best to us.<sup>42</sup>

Thus, the modern Western idea is that enforcing promises gives individuals freedom in the sense of more opportunities for autonomous commerce and economic growth – including the opportunity to be stripped of our future rights, based on our consensual agreement in advance to be so stripped.

By contrast, the Talmud seems to place greater value on the freedom to break – not make – contracts. “The children of Israel are My slaves’ - they are not the slaves of men,” is the Talmudic reading of Leviticus 25:42. The Talmud (*Bava Metzia* 10a) emphasizes this teaching in explaining why even a defaulting laborer is entitled to pro rata wages for the time that he did work. Later Talmudic commentaries proposed establishing maximum durations for labor contracts,<sup>43</sup> in the spirit of “they are not the slaves of men.” The Talmudic perspective evidently views promissory enforcement as an institution of bonding and binding – not of freedom. Promissory enforcement gives a person the “freedom” to barter away their future free choice. A promise may be made in the light of current needs and expectations, and subsequently, at the time of enforcement, the promisor’s freedom of choice is gone – the promisee controls both parties. According to the Talmud, a person can sell their property, but cannot sell their own free choice. Not keeping one’s word is unethical and damages the promisor’s credibility; yet, letting the promisee collect damages treats the promise of performance like the promisee’s

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<sup>41</sup> Charles Fried, *Contract as Promise*. (Cambridge: Harvard University Press, 1981), 1.

<sup>42</sup> *Ibid.*, 2.

<sup>43</sup> *Tosafot, Bava Metzia* 10a.

property. If a person borrows money/property or damages someone else's property interests, this person must repay that value, as a monetary debt; but he or she cannot surrender ownership of his own free choice to another mortal. There is a clear aversion to obligating people in this way.<sup>44</sup> To accord legal status to an executory bilateral contract is to allow the bartering of individual free choice in the marketplace; to the Talmud, contract enforcement means bondage, not freedom.

Indeed, in the area of labor law – where the debt theory approach of the *Sefer ha-Terumot* is simply not elastic enough to allow debt to create binding labor contracts – this aspect of Jewish law surges to the forefront in terms of practical Jewish law: Freedom to contract is substantially restricted in the area of labor law. For example, a standard hornbook of Jewish law states that the normative rule is:

It is prohibited for a person to hire himself out as a worker in another's employ contractually for more than three years.<sup>45</sup>

Substantial restrictions on labor contracts remain in place in Jewish law.

Distaste for the sale of free choice is manifested in certain elements of modern common law as well, albeit in a much more limited way and in a more limited circumstance. Specific performance is regarded as an unusual remedy only to be given sparingly.<sup>46</sup> Especially when personal service is involved and the specter of forced labor looms most threateningly in the background, common law courts are loath to decree specific performance. In *Fitzpatrick v. Michael*, for example, it is concluded that decreeing the specific performance of personal services “would result in a species of peonage on the part of the servant... which would be intolerable.”<sup>47</sup>

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<sup>44</sup> In light of all that has just been said about the Talmud's aversion to imposing personal obligations in financial matters on individuals, Jewish laws' broad acceptance of oaths to regulate future conduct may at first blush seem contradictory (see *Shulchan Aruch, Yoreh Deah, 37*). However, while it is true that oaths governing future conduct do create personal moral obligations, such obligations run from the individual directly to the Almighty, and no personal obligation or indenture is thereby created to another person. Therefore, the Talmudic rabbis were not uncomfortable with the institution of oaths, including in financial and business matters. Insofar as no civil obligation (*bein adam le-chavero*) is created by a promise to God, the Talmudic rabbis were not concerned by it. The only sort of binding undertaking to be guarded against was the sort that could be seen as, or result in, the indenturing of one human being to another.

<sup>45</sup> R. Yaakov Yishaya Blau, *Pitchei Choshen Hilchot Sechirut* (Jerusalem: *Macchon li-Hoyraab*, 1985), 140.

<sup>46</sup> *Curtice Brothers Co. v. Catts*, 72 N.J.Eq. 831 (1907).

<sup>47</sup> *Fitzpatrick v. Michael*, 177 Md. 248 (1939).

The classic Talmudic reluctance to grant expectancy damages for wholly executory bargains represents a similar, but much broader concern for the protection of individual freedom, which extends even to monetary remedies.

Moreover, it is interesting to note that several recent trends in contract law promote the value of freedom to break, as opposed to freedom to make, contracts. One is the Lochner-era of law, where the U.S. Supreme Court relied on “freedom of contract” to justify turning a blind eye to commercial exploitation of the poor and weak. Grant Gilmore’s *The Death of Contract* chronicles the modern muddying of purist contract doctrine through the replacement of consideration doctrine with fairness-based doctrine, and through the liberalization of excuses for non-performance. Similarly, courts have shown a growing readiness to police bargains and reform or invalidate contracts, applying doctrines like duress, inadequacy of consideration, and unconscionability.<sup>48</sup> A common argument<sup>49</sup> is that many contract situations in our world involve parties with unequal bargaining power. This inequality undercuts the validity of the contracts so formed, both because the weaker party’s consent is tainted by duress, and because it may be unconscionable for a court of justice to enforce an agreement that brutally takes advantage of a weaker party.

“We are told that Contract, like God, is dead. And so it is.” So goes Grant Gilmore’s famous opening line in *The Death of Contract*.<sup>50</sup> Ironically, we have seen that in more ways than one; it might actually be the religious perspective of the Talmud that accounts for the weakness and leniency of Talmudic contract doctrine. We might say that, for the Talmud, Contract is dead because God lives.

## CONCLUSION

Original Talmudic contract law and current Jewish law vocabulary may reflect a similar concern for the powerless. This is not to suggest that modern contract law is moving toward a framework that abandons promissory enforcement in practice. As we have seen earlier, Jewish law has, as a practical matter, evolved to the point where it can support a modern, industrial economy that thrives on advance purchase orders and “just-in-time” inventory management. Notwithstanding, the Talmudic message that “they are not the slaves of men” has important meaning for

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<sup>48</sup> *Henningsen v. Bloomfield Motors, Inc.*, 350 F.2d 445 (1965).

<sup>49</sup> Dawson, “Economic Duress - An Essay in Perspective,” *Michigan Law Review* 45 (1947), 253.

<sup>50</sup> Grant Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974).

our society as well. Admirably, our legal system has lately chosen to show some empathy for individuals whose economic weakness is unconscionably exploited, and who wind up cheaply selling their own freedom in the marketplace.

Of course, in the practical world of *beit din* adjudication it is worth repeating that which we noted above in the end of Part III: normative Jewish law is now virtually fully compatible with the expectancy model of the UCC. Between the mechanics of “debt” and the expansive application of “the law of the land is the law”<sup>51</sup> common to rabbinical courts in the United States, contracts are routinely enforced in rabbinical courts, even if the exact mechanism for such enforcement is different in Jewish law than in the classical common law approach.

*Rabbi Michael Broyde is Professor of Law at Emory University School of Law, was the founding rabbi of the Young Israel of Toco Hills in Atlanta and is Chaver Beth Din at the Beth Din of America.*

*Steven Weiner is Deputy General Counsel for Intellectual Property and Chief Patent Officer for SRI International. He is a retired partner of Davis Polk & Wardwell, and lead the firm's Corporate Intellectual Property practice.*

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<sup>51</sup> Three theories of “the law of the land is the law” predominate the halachic discourse:

1. R. Yosef Karo (*Shulchan Aruch, Choshen Mishpat*, 369:6-11) rules that secular law is *halachically* binding only to the extent that it directly affects the government’s financial interests. Thus, secular laws imposing taxes or tolls would be valid under Jewish law, but laws for the general health and safety of society would not.
2. Rama (*Choshen Mishpat*, 369:11) agrees that secular laws directly affecting the government’s financial interests are binding, but adds that secular laws which are enacted for the benefit of the people of the community as a whole are also, as a general matter, effective under Jewish law. In this model, all health and safety regulations would also be binding.
3. R. Shabbetai b. Meir ha-Kohen (Shach) (Comment no. 39 to *Shulchan Aruch, Choshen Mishpat*, 73:14), disagrees with Rama in one respect. He believes that even if secular laws are enacted for the benefit of the community, they are not valid under Jewish law if they are specifically contrary to indigenous halachic precepts. Thus, general health and safety rules would be binding, but – for example – Jewish law has a rule that rooftop railings must be about a meter high. As such, a secular law setting a lower height as the standard would not be accepted as *halachically* valid.

Although there was substantial debate among *halachic* authorities as to which approach to follow, it seems that most modern authorities agree that, at least outside of the State of Israel, Rama’s view should be applied, and such is the view of all four of the deans of *halacha* in America in the previous generation: Rabbis Moses Feinstein, Joseph Elijah Henkin, Joseph Baer Soloveitchik, and Joel Teitelbaum; see R. Moshe Feinstein (1895-1986), *Iggerot Moshe, Choshen Mishpat* II, no. 62; R. Yosef Eliyahu Henkin (1881-1973), *Teshuvot Ibra* II, no. 176; R. Hershel Schachter, *Nefesh ha-Rav* (Jerusalem: *Reisbit Yerushalayim*, 1994), 267-69 (citing the view of Rabbi Soloveitchik); and R. Yoel Teitelbaum (1887-1979), *Divrei Yoel* I, no. 147. In this view, almost all applications of secular law are valid under Jewish law as well.

# Recovering the Costs of Litigation in *Beit Din*

By Rabbi Shlomo Weissmann

One of the benefits of resolving conflicts in mediation and arbitration forums such as *beit din*, rather than in court, is the cost savings that result from the relative efficiency of alternative dispute resolution processes.<sup>1</sup> Still, in any forum, parties must incur attorneys' fees and other costs, and the litigation process can be expensive. Parties who prevail in litigation often seek to have the other side reimburse them for their litigation costs. In any given *din torah*, the *dayanim* (arbitrators) are charged with the responsibility of assessing the facts and circumstances of the case to determine whether the award of the *beit din* should include a reapportionment of costs of litigation.<sup>2</sup> This article will examine the right to recover legal fees from the perspective of Jewish law, particularly in the context of *beit din* litigation.

The general rule governing the right to recover legal fees is derived from a Talmudic discussion (*Sanbedrin* 31b) regarding the relative rights of a plaintiff and defendant to choose the location of the *beit din* in which to resolve their dispute. In the midst of that discussion, the Talmud quotes an objection raised by Rabbi Elazar: plaintiffs, particularly lenders seeking to collect debts owed to them, should not be forced to bear the increased costs of litigating in a faraway *beit din* to recover funds that may rightfully be theirs. Rabbi Elazar's statement is presumably based on the assumption that a plaintiff, even if he or she prevails on the merits of the case, will not be awarded compensation for the costs of litigation – be they attorneys' fees, court costs or travel costs. On this basis, a number of *Rishonim* conclude that

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<sup>1</sup> See "Dispute-Wise Business Management: Improving Economic and Non-Economic Outcomes in Managing Business Conflicts," American Arbitration Association, accessed January 27, 2012, [www.adr.org/si.asp?id=4124](http://www.adr.org/si.asp?id=4124) (a 2006 research study sponsored by the American Arbitration Association).

<sup>2</sup> Prior to the commencement of a *din torah*, the parties enter into a binding arbitration agreement which provides for the *psak* (decision) of the *beit din* to be legally enforceable once it is issued. As a matter of arbitration law, arbitrators typically possess the authority to issue awards that include the reapportionment of legal fees. See *In re Northwestern Natl. Ins. Co.*, 2000 WL 702996, \*1 (S.D.N.Y. May 30, 2000) and Richard C. Mason and Catherine E. Hamilton, "An Arbitration Panel's Authority to Award Attorney's Fees, Interest and Punitive Damages," *Rutgers Conflict Resolution Law Journal* 6 (Spring 2009):2. This is especially the case where the parties have agreed to grant such authority to the arbitration panel. For example, parties appearing before the Beth Din of America agree that those proceedings take place pursuant to the Rules and Procedures of the Beth Din of America. Sections 34(b) and 35(a) and (b) of the Rules and Procedures grant discretion to *dayanim* to apportion costs of litigation in the arbitration award issued by the *beit din* ("Rules and Procedures of the Beth Din of America," Beth Din of America, accessed January 27, 2012, [http://bethdin.org/docs/PDF2\\_Rules\\_and\\_Procedures.pdf](http://bethdin.org/docs/PDF2_Rules_and_Procedures.pdf)).

litigants generally must each bear the costs they incur in prosecuting or defending claims in *beit din*.<sup>3</sup> This rule is codified by the *Shulchan Aruch*.<sup>4</sup>

The presumption in Jewish law that a prevailing party is not entitled to recover the costs of litigation is subject to a number of possible exceptions which will be explored in this article.<sup>5</sup> These can be divided into five broad categories. The first involves cases where a plaintiff's improper behavior causes his or her adversary to incur costs that would not otherwise have been incurred.<sup>6</sup> The second involves cases where a plaintiff seeks to recover lost costs that are the result of the defendant's improper defensive actions. The third category of exceptions involves cases where the parties have implicitly or explicitly agreed to reallocate expenses in a manner other than the default rule. The fourth category involves cases dealing with awards of *mezonot* (spousal support). The fifth category involves recent attempts to actively change the default rule regarding the allocation of costs of litigation.

<sup>3</sup> See *Tosafot*, Sanhedrin 31b, s.v. *vivotzi*, and R. Yosef Karo, *Beit Yosef, Choshen Mishpat* 14:5, citing Rosh, *Sanbedrin* 31b, Siman 40 and Mordechai, *Sanbedrin*, no. 707.

<sup>4</sup> *Shulchan Aruch, Choshen Mishpat* 14:5. See also *Shulchan Aruch, Choshen Mishpat* 9:5, which rules that fees paid to *dayanim* for adjudicating a case must be split evenly among the litigants. *Shulchan Aruch* and many of the earlier and later sources on this topic refer generally to *botzaot* (costs) of litigation. Earlier sources refer to the costs of hiring a scribe to prepare various *beit din* documents. In contemporary times, attorneys' fees represent the vast majority of the costs incurred in litigation. Most of the written *teshuvot, psakim* and articles on this topic group all litigation expenses together, and treat liability for attorneys' fees as akin to all other costs of litigation. Consistent with that, this article does not distinguish between various types of litigation costs. See, however, R. Eliav Shochetman, "*Hachiyuv Bibotzaot Mishpat Bipsikat Batei Hadin Harabaniyim*," *Dinei Yisrael* 10-II (1984): note 54, who notes that *batei din* have sometimes distinguished between court fees and attorneys' fees in their decisions regarding the reallocation of costs among litigants.

<sup>5</sup> As discussed above in note 4, *Shulchan Aruch, Choshen Mishpat* 9:5 rules that fees paid to *dayanim* for adjudicating a case must be split evenly among the litigants. This is based on a concern, rooted in the Talmud (*Ketubot* 105a), that any uneven payment of such fees to a *dayan* would constitute *shochad* (bribery). To the extent a *beit din* wishes to order one side or another to disproportionately pay arbitration fees directly to a *dayan*, the issue of *shochad* would need to be addressed. In reality, however, *beit din* decisions in which the *dayanim* award a reallocation of arbitration expenses typically call for the reimbursement by one party of the other's out of pocket arbitration expenses that have already been paid to the *beit din*. In addition, see R. Moses Feinstein (1895-1986), *Iggerot Moshe, Choshen Mishpat* II, No. 26, who discusses, and ultimately permits, the disproportionate payment of fees directly to a *dayan* by a non-prevailing litigant pursuant to an agreement between the parties, notwithstanding the concern of *shochad*.

<sup>6</sup> Many of the sources that address the issue of liability for litigation costs distinguish between parties in the position of *malveh* (lender) and *loveh* (borrower). In reality, *batei din* are called upon to adjudicate all manners of disputes, not only those arising between lenders and borrowers. The distinction drawn between a *malveh* and *loveh* in this context refer more broadly to the distinction between a claimant/plaintiff and defendant. Of course, any particular dispute between two parties may feature a number of interrelated claims, defenses, counterclaims and setoffs, and more than one party may properly be characterized as a plaintiff or defendant depending on the particular aspect of the case under consideration.



## I. IMPROPER ACTIONS OF A PLAINTIFF USE OF SECULAR COURTS

A plaintiff who prosecutes a monetary claim before the secular courts most often violates the Torah's prohibition against litigating before gentile courts.<sup>7</sup> Jewish law thus views a plaintiff in secular court as engaging in a prohibited form of extra-judicial self-help. The Rama quotes two opposing positions regarding whether a defendant improperly brought to secular court may seek monetary compensation from the plaintiff where the plaintiff's prohibited action results in the defendant incurring expenses he would not have otherwise had to pay.<sup>8</sup> These two views emanate from opposing views among the *Rishonim* regarding whether a plaintiff intending only to reclaim what is rightfully his or hers (*libotzi et shelo*), but not to otherwise harm his or her adversary, is liable in tort for such action. Maharam Lublin rules in accordance with those authorities who do not find the plaintiff liable in tort to the defendant.<sup>9</sup> The Shach, however, cites and rules in accordance with a number of authorities who assign liability to the plaintiff.<sup>10</sup>

Even if such recovery is typically allowed, a defendant may sometimes be found to have acceded to secular court adjudication, and thus waived his or her rights to such recovery, if he or she simply participates in the process without actively seeking to have the matter removed to a *beit din*. In one case involving a plaintiff who improperly resorted to secular court, Rabbi Shmuel Yitzchak Shur did not allow the defendant to recover expenses he incurred after the very earliest stages of the litigation, reasoning that the defendant's failure to initiate a *hazmana* (*beit din* summons) process against the plaintiff at that stage estopped him from asserting a claim for expenses thereafter.<sup>11</sup> Similarly, Rabbi Shlomo Yehuda Tabak dismissed a defendant's claims for reimbursement of costs associated with defending an ac-

<sup>7</sup> See R. Yaacov Feit, "The Prohibition Against Going to Secular Courts," *The Journal of the Beth Din of America* 1 (2012): 30.

<sup>8</sup> Rama, *Chosben Mishpat* 388:5.

<sup>9</sup> R. Meir MiLublin (1558-1616), *Sbu"t Maharam Lublin*, no. 26. The Rishonim generally label one who improperly seeks secular court relief as a *moser* (informant), and *Shulchan Aruch*, *Chosben Mishpat* 388:2, rules that a *moser* is categorically liable in tort. Nevertheless, Maharam Lublin, citing the Mordechai, limits this liability to one who intentionally causes financial loss to his or her adversary ("*mitkavein libazik et chaveiro*").

<sup>10</sup> Shach, *Chosben Mishpat* 388:26, citing the view of Maharam Lublin, as well as authorities, including *Darcei Moshe*, who assess liability.

<sup>11</sup> R. Shmuel Yitzchak Shur (1839-1902), *Sbu"t Minchat Shai* II, no. 60.

tion in secular court, on the theory that the defendant's participation in that action constituted a waiver of any such claims.<sup>12</sup>

Clearly, in a case where the plaintiff is entitled under Jewish law to utilize the secular courts, the defendant may not seek recovery of attorneys fees incurred in defending such a claim.<sup>13</sup> Examples of such cases are collection actions for uncontested obligations or collection actions pursuant to a *beit din* award.<sup>14</sup>

### FRIVOLOUS CLAIMS

In the case of a frivolous claim, a plaintiff may be liable to reimburse a defendant for litigation costs even if the plaintiff sought to adjudicate the case in *beit din*, rather than in secular court. *Yeshuot Yisroel* rules that a plaintiff who knowingly pursues a meritless claim against a defendant is liable to reimburse the defendant for costs expended by the defendant in defending the claim.<sup>15</sup> This ruling is significant, and provides *dayanim* with an important tool to deter frivolous claims in *beit din*. *Yeshuot Yisroel* derives this rule from Rama's statement that a litigant is entitled to reimbursement for costs incurred in appearing before a *beit din* in another location, when the litigant relied on the other party's assurance that he or she would appear before that *beit din* and then failed to appear.<sup>16</sup> *Yeshuot Yisroel* argues that this ruling of the Rama reflects the view that any intentional act that causes damage, even indirect damage, results in a reimbursement obligation on the part of the tortfeasor.<sup>17</sup>

<sup>12</sup> R. Shlomo Yehuda Tabank (1832 – 1907), *Shu"t Teshurat Shai, Mahadura Tinyana*, no. 164.

<sup>13</sup> R. Aryeh Leib Tzintz (1768 – 1833), *Shu"t Maharal MiPlatzk, Choshen Mishpat*, no. 30.

<sup>14</sup> See R. Feit, "The Prohibition Against Going to Secular Courts," 36.

<sup>15</sup> R. Yisroel Yehoshua Trunk (1821-1893), *Yeshuot Yisroel, Ein Mishpat*, 14:4.

<sup>16</sup> Rama, *Choshen Mishpat*, 14:5. The Rama's position is based on the view of Maharam MiRutenberg, quoted by Mordechai. On this basis, a *beit din* might order a litigant to reimburse his or her adversary for fees unnecessarily expended due to, for example, the litigant's failure to appear for a scheduled hearing. See *Piskei Din Rabaniyim* 6 (Haifa 1966), 83.

<sup>17</sup> *Yeshuot Yisroel*, 14:4. Jewish law obligates a tortfeasor to reimburse for damages resulting from his or her direct actions. According to most *Rishonim*, a tortfeasor is morally (*latzeit yedei sbamayim*) but not legally obligated to reimburse for damages indirectly resulting from his or her actions (*grama*), unless they fall under the category of *garmi*. This is the position of the Rosh and Tosafot, cited as normative by the Rama (*Choshen Mishpat* 386:3). The Talmud presents a number of cases that are considered *garmi*, and the *Rishonim* debate what qualifies a case as *grama* or *garmi*. Among other factors suggested are whether the damage was proximate in time to the action and whether it was a predictable consequence of the action. Although the opinion of the Rama in 386:3 is understood by many to be

## 2. IMPROPER ACTIONS OF A DEFENDANT FRIVOLOUS DEFENSES

*Yeshuot Yisroel* identifies an important limitation to his aforementioned ruling. While a plaintiff may be forced to bear the costs incurred by a defendant in defending against the plaintiff's frivolous claim, the same does not hold true for a defendant who purposefully asserts frivolous defenses in the face of a valid claim. According to *Yeshuot Yisroel*, such action constitutes an indirect tort (*grama*), and would not result in liability on the part of the defendant.<sup>18</sup> Based on this analysis, a Haifa *beit din* ruled that a defendant who asserted frivolous defenses was not obligated to reimburse the plaintiff for the plaintiff's litigation costs.<sup>19</sup>

Although not articulated in this manner by *Yeshuot Yisroel*, the distinction he draws between frivolous claims, on the one hand, and defenses, on the other hand, is logical given the differing postures of parties to a lawsuit. A plaintiff who fabricates and advances a meritless claim can be said to be engaging in an act of naked aggression, the costs for which he should clearly be liable. On the other hand, Jewish law grants a little more leeway to parties in a defensive position. Their behavior is passive in that they seek to maintain the status quo, even if, in the process, they proffer defenses that stretch the limits of credibility.

## RECALCITRANCE IN APPEARING BEFORE A *BEIT DIN*

A defendant can often thwart a claimant's efforts to recover funds owed to him or her by simply refusing to appear before a *beit din*. In a society that lacks a compulsory *beit din* system, a *din torah* can only effectively take place if both sides enter into a *shtar berurin* (arbitration agreement) in which they agree to be bound legally by the decision of the *beit din*. Where a defendant refuses to do so, a *beit din* may issue a *seruv* (document of contempt) and/or a *heter arkaot* (permission to litigate in secular court). In some cases, a defendant who was initially reluctant to participate in a *din torah* may yield and agree to submit to *beit din* adjudication,

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based on a contractual theory similar to promissory estoppel (see R. Yair Chaim Bachrach (1638-1701), *Shu"t Chavot Yair*, no. 168 and R. Yechezkel Landau (1713-1793), *Shu"t Noda BiYehuda, Mabadura Tinyana, Even Haezer*, no. 90), *Yeshuot Yisroel* understands the ruling of the Rama in *Choshen Mishpat* 14:5 to be based on the position that an intentionally inflicted tort constitutes *garmi* rather than *grama*.

<sup>18</sup> *Yeshuot Yisroel*, 14:4. See above at note 17 for a discussion regarding *grama*.

<sup>19</sup> *Piskei Din Rabaniyim* 6, 83.

and the plaintiff may seek to recover the costs of compelling that submission, such as costs of publicizing the *seruv*. The *Shulchan Aruch* rules that the plaintiff is entitled to recover such costs.<sup>20</sup>

However, the ability of a plaintiff to recover such costs may depend on the legitimacy of his or her underlying claims. The Sma, quoting the Rivash, maintains that a plaintiff may recoup funds lost due to the defendant's recalcitrance only if the *beit din* ultimately determines that the plaintiff's underlying claims were compelling and worthy of a monetary award.<sup>21</sup> Rabbi Refael Ziskind disagrees with the Sma, and maintains that the defendant must reimburse the plaintiff for the harm caused by his or her recalcitrance, regardless of the merits of the plaintiff's underlying claim.<sup>22</sup> *Netivot Hamishpat*, quoting *Tumim*, takes a middle approach, and allows recovery by the plaintiff only if the *beit din* assesses that the plaintiff believed in good faith of the legitimacy of his or her claims, regardless of their actual merit.<sup>23</sup> *Aruch Hashulchan* adopts the approach of *Netivot Hamishpat* and *Tumim*.<sup>24</sup>

Where the defendant is unwilling to appear before a *beit din*, the claimant is often left with the alternative of pursuing his or her claim in secular court. To what extent the plaintiff may recover costs of litigation thereafter is the subject of a dispute between the Rashba, on the one hand, and a host of *Rishonim* including the Rosh and Rivash, on the other hand. According to the Rashba, the litigation costs incurred by the plaintiff by virtue of the defendant's recalcitrance falls under the category of *grama*, or indirect damages for which there is no judicial remedy.<sup>25</sup> The Rosh, Rivash and others, however, maintain that the defendant is obligated to reimburse

<sup>20</sup> *Shulchan Aruch, Choshen Mishpat* 14:5, based on a wide range of *Rishonim*, including Rosh, Rashba, Maharik, Rabbeinu Yerucham and others. The Rashba's position here stands in contrast to his position (below, note 25 and accompanying text) that costs of litigation in secular court following a litigant's recalcitrance to appear before a *beit din* are characterized as *grama* and therefore not recoverable. Many authorities account for this discrepancy by suggesting, based on the language of the Rashba, that costs of compelling *beit din* adjudication (as opposed to costs incurred in litigating in secular court) are recoverable notwithstanding their categorization as *grama*, pursuant to a specific rabbinically imposed penalty (*knas*). See, for example, R. Zvi Ushinski, *Orchot Mishpat* (Jerusalem: Mosad Harav Kook, 2003), 295 and *Iggerot Moshe, Choshen Mishpat* II, no. 26.

<sup>21</sup> R. Joshua Falk (1555-1614), *Sma, Choshen Mishpat* 14:28, citing R. Isaac ben Sheshet Perfet (1326-1408), *Teshuvot HaRivash*, no. 475.

<sup>22</sup> R. Refael Ziskind (1722-1803), *Shu"t Vishav Hakoben*, no. 99.

<sup>23</sup> *Netivot Hamishpat (Biurim)*, 14:4.

<sup>24</sup> *Aruch Hashulchan, Choshen Mishpat*, 14:10.

<sup>25</sup> R. Shlomo Ibn Aderet (1235-1310), *Teshuvot HaRashba*, no. 940.

the plaintiff for all further costs of litigating, once the defendant has been labeled a *mesarev* (unwilling to appear before a *beit din*).<sup>26</sup> *Shulchan Aruch* rules that there is no liability, while Rama sides with the view of the Rosh and others that the defendant is obligated to reimburse the plaintiff for the costs of pursuing an action in secular court.<sup>27</sup>

### 3. IMPLICIT OR EXPLICIT AGREEMENT OF THE PARTIES

Contracts between parties often contain a “prevailing party clause” that provides for the losing party in any lawsuit arising under the contract to bear the costs of litigation between the parties, including attorneys’ fees. Since Jewish law generally recognizes the ability of parties to transact business according to agreed upon terms and conditions, such a clause should be enforceable as a matter of Jewish law.<sup>28</sup> The Sma singles out a contract between parties to reallocate litigation expenses, in particular, as enforceable.<sup>29</sup> Rabbi Moshe Feinstein notes, however, that

<sup>26</sup> R. Asher (1250–1327), *Teshuvot HaRosh*, no. 73,3 and *Teshuvot HaRivash*, no. 475. This dispute between the Rashba and Rosh and Rivash may be based on a more fundamental dispute found in *Tosafot, Baba Batra* 22b, s.v. *zot*, regarding the definitions of *grama* and *garmi* (discussed above in note 17). The Vilna Gaon (*Biur HaGra, Choshen Mishpat*, 14:30) suggests that the Rashba sides with the Ri, who defines *garmi* as damage resulting proximately in time following action personally committed by the tortfeasor. The Rosh and Rivash, according to the Vilna Gaon, hold like the Ritzba, who understands *garmi* to be a rabbinically imposed penalty applied to disincentivize tortuous actions, and which applies to situations which are common and where the damage is foreseeable (*bezek hamatzui viragil lavob*). Litigation costs in secular court that result from an adversary’s recalcitrance in coming to *beit din* fall into the latter, but not the former, category. In addition to the explanation of the Vilna Gaon, the exact holdings of the Rosh and Rashba are subject to a number of interpretations. See, for example, *Iggerot Moshe, Choshen Mishpat* II, 26.

<sup>27</sup> *Shulchan Aruch, Choshen Mishpat*, 14:5. The Rama specifies that recovery of costs incurred in a secular court action is only possible if the plaintiff obtained express permission from a *beit din* to pursue his or her claims in secular court. However, see Feit, “The Prohibition Against Going to Secular Courts,” that permission may not always be required. See R. Moshe Yosef Mordechai Meyuchas (1738–1806), *Sefer Birkot Mayim, Choshen Mishpat*, no. 7, which rules that in the case of a collection action in secular court on a written promissory note where the borrower has not asserted any defenses, the lender’s litigation costs in secular court are recoverable even without express permission from a *beit din* to resort to secular court, even according to the Rama. See also R. Yaakov Yishaya Blau, *Pitchei Choshen Hilchot Nezikin* (Jerusalem: *Maachon Liboyraab*, 1988), 109, note 69. However, see *Iggerot Moshe, Choshen Mishpat* II, no. 26, suggesting that according to the Rama recovery may not be possible in any case absent explicit permission to bring the claim in secular court. Also, it is not clear whether the dispute among the Sma and *Tumim* (see above at notes 21–23 and accompanying text), and the merits of the underlying claims of the plaintiff, are also relevant to the reimbursement of fees incurred in secular court.

<sup>28</sup> See *Baba Metzia* 94a, *Shulchan Aruch, Even Haezer*; 38:5 and *Shulchan Aruch, Choshen Mishpat*, 291:17 and 305:4.

such a contract is only valid if it is entered into early in the business relationship; such a clause entered into after a conflict between the parties has already arisen suffers from problems of *asmachta* and may be unenforceable.<sup>30</sup>

In addition, contracts often contain governing law provisions that provide for any disputes arising under the contract to be decided in accordance with the laws of a specified jurisdiction. Such provisions are generally enforceable under Jewish law.<sup>31</sup> In some cases, a *beit din* might conclude that even absent an express choice of law provision, the course of dealing of the parties makes it likely that they implicitly adopted such a provision as a term of their business dealings.<sup>32</sup> Although in the United States each party to a lawsuit typically bears its own costs of litigation, regardless of which party prevails, there are many statutory exceptions to this rule.<sup>33</sup> In addition, many legal scholars and advocates of tort reform have called for costs of litigation to be borne by the non-prevailing party, and recent legislative activity in some states have trended in that direction.<sup>34</sup> In addition, in many countries other than the United States the losing party is required to pay the costs of litigation.<sup>35</sup> In a case where the *beit din* concluded that the parties agreed to be governed by the

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<sup>29</sup> *Sma, Choshen Mishpat*, 61:12. See also R. Yitzchok Yaakov Weiss (1901-1989), *Shu"t Minchat Yitzchak* V, no. 118.

<sup>30</sup> *Iggerot Moshe, Choshen Mishpat* II, no 26. *Asmachta* refers to a presumption that one or more of the parties did not possess the requisite intent to bind themselves to an agreement because of the overly speculative nature of the agreement. According to Rabbi Feinstein, a party's agreement to pay litigation costs for an existing conflict may not reflect an actual intent to do so, but may instead be the product of the party's misplaced confidence that they will prevail.

<sup>31</sup> See R. Yona Reiss, "*Matneh Al Mab Shekatuv Batorab*," *Shaarei Tzedek* 4 (2003), 288. See, also, Section 3(d) of the Rules and Procedures of the Beth Din of America.

<sup>32</sup> See *Iggerot Moshe, Choshen Mishpat* I, no. 72. See also Section 3(e) of the Rules and Procedures of the Beth Din of America.

<sup>33</sup> See *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U. S. 598 (2001) ("In the United States, parties are ordinarily required to bear their own attorney's fees— the prevailing party is not entitled to collect from the loser. Under this 'American Rule,' we follow a general practice of not awarding fees to a prevailing party absent explicit statutory authority. Congress, however, has authorized the award of attorney's fees to the 'prevailing party' in numerous statutes...")

<sup>34</sup> For a good overview of the history of the American Rule, critiques of the rule, and attempts at reform, see Christopher R. McLennan, "The Price of Justice: Allocating Attorneys' Fees in Civil Litigation", *Florida Coastal Law Review* 12 (Winter 2011): 357.

<sup>35</sup> See W. Kent Davis, "The International View of Attorney Fees in Civil Suits: Why is the United States the 'Odd Man Out' in How it Pays its Lawyers," *Arizona Journal of International and Comparative Law* 16 (1999): 361.

laws of such a jurisdiction, the prevailing party would be entitled to recover legal fees expended in the course of the litigation.

#### 4. SPOUSAL SUPPORT CASES

Cases involving *mezonot* (spousal support) present an exception to the rule against a prevailing party recovering litigation costs, at least according to a 1981 appellate decision of the *beit din* of the Rabbanut in Israel authored by Rabbi Avraham Shapira, a former chief rabbi of Israel.<sup>36</sup> The case involved a man who had been ordered by the *beit din* to provide monetary support for his wife. He appealed the decision, and the appellate *beit din* found no basis for his appeal. Writing for the majority of *dayanim* (judges), Rabbi Shapira opined that the husband was obligated to reimburse the wife for the money she expended on an attorney. This was because, generally, spousal support awarded by a *beit din* represents the *beit din*'s assessment of the basic needs of the spouse based on an appropriate standard of living. Implicit in any *mezonot* award is the assumption that the spouse will net the amount awarded. Where the spouse receiving the support must incur costs to collect the support, that spouse is entitled to collect a gross amount that includes the costs of collection.

#### 5. NEW APPROACHES

In an article published in 1981, Professor Eliav Shochetman notes that many people choose to litigate their disputes in the secular courts rather than in *beit din* due to the fact that Israeli law allows for the recovery of legal expenses by a prevailing party, in contrast to the rule under Jewish law.<sup>37</sup> Professor Shochetman proceeds to advance a number of possible solutions to this problem. Among them, he quotes a suggestion advanced by Rabbi Mordechai Eliyahu, former Chief Rabbi of Israel, in a *beit din* decision issued in 1974 calling for the institution of a formal rabbinic enactment that would obligate the losing party to reimburse the litigation costs of the prevailing party.<sup>38</sup> As precedent for such an enactment, Professor Shochetman cites a similar communal decree issued in Lithuania in 1633 that empowered *daya-*

<sup>36</sup> *Piskei Din shel Batei ha-Din ha-Rabbaniyim be-Yisrael* 12 (Jerusalem 1981), 186.

<sup>37</sup> R. Shochetman, "Hachiyuv Bibotzaot Mishpat Bipsikat Batei Hadin Harabaniyim," 263.

<sup>38</sup> *Ibid.*, 281.

*nim* to award fees in favor of prevailing parties to *dinei torah*.<sup>39</sup> Professor Shochetman notes that there are considerable barriers to the enactment of formal rabbinic enactments in contemporary times. For example, in response to a proposed enactment to raise the age at which the obligation to pay child support terminates, Rabbi Ovadia Yosef wrote that an enactment can be binding under Jewish law only if it enjoys a broad consensus of the entire rabbinic establishment.<sup>40</sup>

In lieu of such an enactment, Professor Shochetman suggests the possibility that *dayanim* may award attorneys' fees based on the general authority vested in *batei din* to impose extra-judicial remedies ("*makim vi'onsbin sbelo min badin*") to curtail behavior that violates public policy ("*limigdar milta*").<sup>41</sup> There is broad authority for this power based on a number of sources among the *Rishonim*, and the *Shulchan Aruch* ultimately codifies the ability of a *beit din* to impose extrajudicial remedies to benefit society.<sup>42</sup>

Notwithstanding the general rule under Jewish law that precludes the recovery of costs incurred in litigating in *beit din*, we have demonstrated that there are a number of exceptions to this rule. Often, litigation costs must simply be written off as a "cost of doing business," except in those circumstances where an adversary's actions fall into the particular categories set forth above.

*Rabbi Shlomo Weissmann, a graduate of Columbia Law School, practiced law for several years and now serves as the Menabel (Director) of the Beth Din of America.*

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<sup>39</sup> Ibid.

<sup>40</sup> Ibid., note 93.

<sup>41</sup> Ibid., 293.

<sup>42</sup> See *Shulchan Aruch, Choshen Mishpat*, 2. It is worth noting, however, that both the *Shulchan Aruch* and Rama premise the authority of a *beit din* to impose such remedies on the existence of a central, organized communal structure. Given the lack of such structure in our contemporary communities, any solution based on *makim vi'onsbin sbelo min badin* is likely to remain a theoretical, rather than practical, suggestion.



# Proceedings of the Beth Din of America



This section of *The Journal of the Beth Din of America* contains actual *piskei din* (arbitration decisions) delivered in *din torah* (arbitration) proceedings before the Beth Din of America. These decisions are presented as part of an effort to raise awareness of the substantive work of the Beth Din of America, and to familiarize litigants and their attorneys with the types of decisions typically rendered in cases heard by the Beth Din of America.

Consistent with the confidentiality policies of the Beth Din of America, the names of the parties, dates and other identifying information contained in the following decisions have been changed. In addition, the parties to the cases have consented to their publication.

Beth Din of America Reported Decision 1  
Colossal Containers, Inc.  
v. Exquisite Crafts, Inc.

MARCH 17, 2004

The Beth Din of America, having been chosen by the parties as arbitrators in an arbitration agreement dated as of October 28, 2003 between Colossal Containers, Inc. as plaintiff, and Exquisite Crafts, Inc. as defendant, to decide the matters described in such arbitration agreement, having given proper notice of the time and the place of meeting, and having also given said matters due consideration, and having heard all parties testify as to the facts of said dispute and differences on December 11, 2003, does decide and agree as follows:

1. In November 2002, Exquisite Crafts, Inc. (“Exquisite”) made an order of plastic bags from Colossal Containers, Inc. (“Colossal”) with various specifications. Shortly thereafter, Colossal shipped 55,000 bags to Exquisite and Exquisite rendered payment in full to Colossal in the amount of \$7,790. The bags were manufactured on behalf of Colossal by Venus Synthetics, Inc. (“Venus”) and were intended for Sol’s Shopping Savers, a customer of Exquisite. Upon receipt of the bags, Sol’s Shopping Savers (“Sol”) complained that the bags were defective insofar as they did not open easily and did not contain the company name. Sol also received complaints from its customers concerning the fading of the ink on the bags. Sol’s complaints were communicated to Colossal. After looking into ways to remedy the problems, Colossal

offered a full credit for all bags that would be returned. In the meantime, Exquisite received four additional deliveries of merchandise from Colossal, incurring a bill in the amount of \$6,724.80. Approximately 30,000 bags from the original order were returned (the precise number appears to be 29,500) and Colossal gave a full credit to Exquisite in the amount of \$4,140 for the returned bags to be applied to Exquisite's outstanding balance of \$6,724.80 (the credit relates to the original \$7,590 paid for the bags themselves, and not to the additional \$200 charge for the four plate changes). Exquisite gave a full credit to Sol for the bags based on the complaints concerning the bags raised by Sol. Colossal also arranged for a new shipment of 10,500 bags to be shipped to Exquisite. These bags, which arrived towards the end of the summer, were returned unused by the ultimate customer and Colossal never charged for these additional bags. In a letter to Colossal dated December 8, 2003, Venus, the manufacturer of the bags, claimed that all of the bags were perfect and that the complaints by the customer were unfounded. However, Colossal did not dispute that there were indeed problems with the bags.

2. According to Chaim Weinstein, the President of Sol, the approximately 25,000 (the precise number appears to be 25,500) unreturned bags were all used and sold to Sol's customers. The main problem with the bags was the additional time that it took to open the bags, resulting in Sol realizing only approximately 50% of the value of the bags due to increased production costs. Sol also incurred an additional financial burden based on the fact that Sol had not received its original plates. However, it was not demonstrated during the *din torah* proceeding that Colossal was responsible for this latter problem. Mr. Weinstein also did not indicate that the problem of the fading ink caused a reduction in the value realized by Sol in this particular sale. However, he did indicate that based on the various problems in the order, he suffered a loss of future business from the same customers.

3. Colossal asserts that the industry custom dictates that the appropriate remedy for Exquisite in this case is either to receive a reduction in the price of all 55,000 bags to reflect the amount in which they were usable, or alternatively, to give a credit in full for all returned bags assuming the bags were not usable. Since Colossal was prepared to give a credit in full for all of the returned bags, Colossal claims that Exquisite should pay the full amount over and above the credit amount given for the returned bags. Since there is an outstanding bill of \$6,724.80 and Colossal gave a credit in the amount of \$4,140 for the approximately 30,000 returned bags, Colossal claims an amount of \$2,584.80. Exquisite, on the other hand, claims that

according to industry practice it should receive a full credit for the amount paid for the 55,000 bags based on their defects and that Exquisite should therefore be exempt from paying any of the outstanding amounts due.

4. According to principles of Jewish law, if merchandise is defective, the purchaser has the option of returning the merchandise and receiving a full refund of the purchase price. Neither the purchaser nor the seller can insist upon the purchaser retaining the merchandise and receiving a partial refund of the purchase price if the other party would prefer to cancel the entire transaction and have all of the merchandise returned to the seller and a full refund to the purchaser. As a general rule, if the purchaser is aware of the defects and chooses to use the merchandise anyway, he may not receive a credit for the used merchandise. However, where there is an understanding that the merchandise will be sent to a customer of the purchaser so that the purchaser does not have the ability to return the merchandise at will, this rule does not apply (this principle will be discussed further in paragraph 6). Similarly, if the defect is only discovered upon use of the merchandise so that the merchandise can no longer be returned after the defect is discovered, the purchaser may still receive credit for the decreased value of such merchandise. If there is a clear custom in the industry which differs from these principles, the custom would override usual principles of Jewish law.

5. In this case, the merchandise was used by Exquisite's customer (Sol) even after it was discovered that the bags took twice as long to open. Contrary to the initial testimony of Exquisite, there was no indication from Mr. Weinstein's testimony that the bags needed to be "re-bagged" afterwards. In fact, Sol was even paid for the subsequent sale of the bags to its own customers. While another defect, i.e., the fading ink, was not discovered until after the bags had been used, this problem

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<sup>1</sup> See *Shulchan Aruch, Choshen Mishpat*, 232:3 and *Aruch Hasbulchan, Choshen Mishpat*, 232:6.

<sup>2</sup> See *Shulchan Aruch, Choshen Mishpat*, 232:4.

<sup>3</sup> See *Shulchan Aruch, Choshen Mishpat*, 232:11, 232:20 and 232:22; *Pitchei Teshuva, Choshen Mishpat*, 232:1; and R. Shmuel DeModena (1505-1589), *Shu"t Maharashdam, Choshen Mishpat*, no. 147.

<sup>4</sup> See *Shulchan Aruch, Choshen Mishpat*, 232:19, *Aruch Hasbulchan, Choshen Mishpat*, 232:30 and *Pitchei Teshuva, Choshen Mishpat*, 3:2.

<sup>5</sup> See *Shulchan Aruch, Choshen Mishpat*, 232:10 with respect to the distinction between material defects and non-material defects.

<sup>6</sup> See *Shu"t Maharashdam, Choshen Mishpat*, no. 147. See also *Shulchan Aruch, Choshen Mishpat*, 234:2 and R. Joshua Falk (1555-1614), *Sma, Choshen Mishpat*, 234:3.

appeared to be a less significant defect as evidenced by the fact that Sol was able to collect and retain full payment for the bags despite the eventual discovery of this defect by its customers. The fact that some customers may not have returned to Sol for repeat business would be classified as “*grama*,” or indirect damages, according to *halacha* (Jewish law) and would not give rise to an actionable claim.

6. The Beth Din does not find the industry custom in this case vis-à-vis the relationship between Colossal and Exquisite to be clearly contrary to normal principles of Jewish law. Accordingly, the Beth Din shall utilize principles of *halacha* in this case. According to principles of *halacha*, it was appropriate for Colossal to give a credit against Exquisite’s outstanding balance in the amount of the returned bags. The proper allocation of the initial price for the bags of \$7,590 (not including the \$200 charge for the plate changes) to the 29,500 bags that were returned should be \$4,071. Although the remaining bags were used after discovery of their major defects, they were not used by Exquisite but rather by Exquisite’s customer, Sol, which chose to use the bags because they needed bags to fill their customers’ orders. When there is an understanding that the direct customer will not be in possession of the merchandise but rather will pass the bags on to its ultimate customer (as in this case where the shipment by Colossal was made directly to Sol) and the ultimate customer utilizes the merchandise for diminished value, the direct customer (Exquisite) is entitled to a credit in the amount of the difference between the price paid by the direct customer for the merchandise that was used and the price paid to the direct customer for the merchandise. Sol testified that based on the defects in the bags, it would have paid the price of the bags less the additional production costs that it incurred in the amount of \$1,875 based on an extra cost of \$0.075 cents a bag for 25,000 bags (any additional offsets claimed by Sol were not attributable to the merchandise delivered by Colossal and are therefore not relevant to this calculation). Since Sol was charged \$4,133.75 for 25,000 bags (at 16.535 cents a bag), the price for 25,500 bags (the number that was actually used) would be \$4,216.43. Therefore, Sol would have paid \$4,216.43 minus \$1,912.50 (at a cost of \$0.075 per 25,500 bags), amounting to the sum of \$2,303.93 for the 25,500 bags that were used. Although Exquisite gave a full credit to Sol, it was demonstrated during the *din torah* that Exquisite was not aware of the fact that Sol did receive some use from the bags, and therefore Colossal should not be penalized for Exquisite’s generosity towards Sol. Accordingly, Exquisite is entitled to a credit of \$1,215.07 for the difference between the price paid by Exquisite towards the bags (\$3,519.00 for

25,500 bags) and the amount the bags were worth to its customer (\$2,303.93).

7. In accordance with the foregoing, Exquisite should receive a credit from Colossal in the aggregate amount of \$5,286.07 (\$4,071.00 plus \$1,215.07). Based on this calculation, Exquisite Crafts, Inc. owes Colossal Containers, Inc. the remaining balance on their account in the amount of \$1,438.73 (\$6,724.80 - \$5,286.07). Therefore, the Beth Din rules that Exquisite Crafts, Inc. must pay Colossal Containers, Inc. a total sum of \$1,438.73.

8. Upon request by Exquisite, Colossal shall return any plates in its possession to the owner of the plates.

9. Other than for purposes of enforcement, the provisions of this order shall be kept confidential between the parties. May peace and harmony reign between the parties and with respect to their business dealings in the future.

10. This panel shall retain jurisdiction over this dispute and penalties for the violation of any of these clauses shall be set by the Beth Din of America, in accordance with the rules of the Beth Din and the arbitration agreement.

11. Any request for modification of this award by the arbitration panel shall be in accordance with the rules and procedures of the Beth Din of America, and the Arbitration Agreement of the parties.

Any provision of this agreement may be modified with the consent of both parties. All of the provisions of this order shall take effect immediately.

This seventeenth day of March, 2004.

By: \_\_\_\_\_  
Rabbi AA                      Rabbi BB                      Rabbi CC, Esq.  
Dayan                          Dayan                          Dayan

# Beth Din of America Reported Decision 2 Delicious Foods vs. Good Chocolates

MAY 21, 2005

The Beth Din of America (“Beth Din”), having been chosen by the parties as arbitrators in an arbitration agreement (attached hereto as Exhibit A) dated February 1, 2005 between Moses Schreider, representing Delicious Foods (“DF”), with an address of 32 Tappan Rd., Baldwinville, Georgia (“Plaintiff”) and Daniel Gold, representing Good Chocolates (“GC”) with an address of 39 Tappan Rd., Baldwinville, Georgia (“Defendant”) to decide the matters described in such arbitration agreement, having given proper notice of the time and the place of meeting, and having also given said matters due consideration, and having heard all parties testify as to the facts of said dispute and differences, does decide and agree as follows:

**BACKGROUND:** Plaintiff, who lives in Baldwinville, purchased DF, a small candy and gift basket store in 2002, and has been operating it since that time. The store sells nuts, dried fruits, candy and chocolate, in bulk and as part of gift baskets. DF does not produce any of its own inventory, and is solely a retail outlet. The premises are certified kosher under the supervision of the Vaad Hakashrut of Baldwinville (“Vaad”). The operating hours are from 10AM-5PM on Tuesdays and Wednesdays, 10AM-7PM on Thursdays, 9AM-2:30PM (or later) on Friday, and 10AM-2PM on Sunday. DF is closed on Mondays. DF also operates a web site – [www.baldwinvillefoods.com](http://www.baldwinvillefoods.com). According to the Plaintiff’s documents and testimony, the store has not been profitable, and Mr. Sch-

reider has not drawn a salary since he acquired the business.

In May 2004, Defendant opened a chocolate store across the street with Vaad certification, selling chocolates, specialty desserts, pancakes, fruit glacés, and hot and cold beverages, all with a chocolate motif. In addition, he produced made to order centerpieces for festive occasions. Defendant produces all the chocolate on-site and offers customers a seating area to eat in a restaurant atmosphere as well as to take home. GC's store hours are from 10AM-8PM on Monday through Thursday, 10AM-11PM on Friday, 10AM-1AM on Saturday and 10AM-6PM on Sunday.

In addition to the stores' differences in products, atmosphere and hours, Defendant claims that his chocolate is of an essentially dissimilar nature, without shortening and preservatives, and that this results in a higher quality, better tasting and more expensive chocolate than the chocolate offered by Plaintiff.

Prior to Defendant's opening, the Vaad notified the Plaintiff of Defendant's plans and informed DF that Defendant's store would begin operations serving only dairy chocolate. They explained that DF could challenge the opening in *beit din* if they perceived it as violating the prohibition of *hasagat gevul* (literally "overstepping boundaries," but used generally to refer to ruinous or unfair competition). Plaintiff, in recognition of GC's exclusive use of dairy chocolate and seeing it as an eating establishment and not a retail marketer, refrained at that time from pursuing a claim.

Defendant informed the Vaad sometime around November 2004 that he wished to offer a pareve, or non-dairy, version of his chocolate in both a restaurant and retail venue. When Plaintiff became aware of this intent, they elected to exercise their right to challenge in *beth din* this expansion.

### **CLAIMS AND COUNTERCLAIMS TO THE BETH DIN**

Plaintiff, in letters and presentation to the Beth Din, makes two related claims, both of which are based on the argument that GC's proposed pareve chocolate line represents a direct competitive threat to DF's entire operation since pareve chocolate is the most important aspect of what they offer:

1) The kosher candy market in Baldwinsville is unable to support two outlets, and in the competitive atmosphere, one will succumb. In particular, GC's entry would likely cause DF to become insolvent, given DF's general financial status and its struggles to maintain its business, which was there first.

2) DF deserves to keep its longstanding customers, who were cultivated in the years since the original store opened and who have increased during the three years



that DF has been operated by Mr. Schreider due to his investment of time, energy, and service. GC should be seen as an interloper that would erase and swallow their painstaking work.

Plaintiff has therefore requested that Beth Din protect the entity that began its operations first (DF), and award DF the necessary monopoly to protect its business by enjoining Defendant from receiving kashrut certification from the Vaad to produce pareve chocolate.

### THE DEFENDANT'S COUNTER CLAIMS AND RESPONSES WERE:

1) GC, along with its large investment in the business, has accepted and conformed completely to all the demands the Vaad had placed on it, and while acknowledging DF's previous entry into the market, claims the right to free enterprise and allowing the consumer to choose.

2) The stores are not in direct competition; DF is essentially a multi-candy store, and much of what DF offers (nuts, dried fruit, and candies) is not sold by GC. The incursion in the chocolate line cannot be seen as a threat to the business as a whole.

3) Even granting the Plaintiff's claim that pareve chocolate is the heart of DF's business, GC's proposed pareve chocolate will be a completely different product, manufactured from more expensive ingredients that produce a different taste and appeal to a higher-end customer.

4) Citing the limited hours that DF operates during the week and the customers who arrive at GC's store during the times that DF is closed, the market is not being served adequately by DF, and there exists no necessary monopoly to protect.<sup>1</sup>

In an attempt to mediate the dispute, the Beth Din suggested the possibility that the parties could enter into a business supply arrangement that would take advantage of GC's expertise in manufacturing chocolate and DF's retail establishment. This type of arrangement, which had also been suggested by the Vaad, was rejected by the parties.

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<sup>1</sup> Defendant also claims that he already has unilateral authority to produce pareve chocolate under his contract and certification from the Vaad. The Beth Din rejects this reading of the contract, noting the passage dealing with pareve production limits this only to wholesale manufacture. See Vaad Contract, Clauses H and I. The contract also recognizes the possible challenge GC could face from a competitor bringing a *hassagat gevul* conflict to *beth din*. See Vaad Contract, Clause U. Over and above these points, the Vaad's contract provides it with the right to withdraw its certification on any grounds. See Vaad Contract, Clause P. As a result, even if the Beth Din agreed that the contract provided Defendant with kashrut certification for pareve chocolate, the Vaad could withdraw this right if this Beth Din determined that Defendant's introduction of a pareve chocolate line of products violated *halachah* (generally accepted Jewish Law).

**ANALYSIS:** While the Torah requires businesses to operate honestly, it does not include any explicit limitation on competition. Nonetheless, several passages in the Talmud indicate that certain types of ruinous or unfair business practices are prohibited.

One passage that speaks directly to our litigation is the Talmudic debate regarding an individual who wishes to open a business in close proximity to an existing business (*Bava Batra* 21b). Rav Huna asserts that the owner of the first business may prevent the newcomer from setting up shop, as the newcomer will interfere with the first inhabitant's livelihood. Rav Huna the son of Rav Yehoshua (who is different from the previous Rav Huna) argues that this is permitted as the competitor may claim, "Whoever will come to me, will come to me, and whoever will come to you, will come to you." Virtually all *Rishonim* and *Poskim* follow the view of Rav Huna the son of Rav Yehoshua, as do the *Shulchan Aruch* and most of its commentaries.<sup>2</sup> If these were our sole sources, then even if we accept fully the Plaintiff's claims, it would be relatively easy to conclude that Defendant's first response is sufficient and to decide in favor of the Defendant based upon the opinion of Rav Huna the son of Rav Yehoshua.

The preeminent Halachic authority since World War II, Rabbi Moshe Feinstein, however, has taken the position that new entrants should be enjoined in certain circumstances.<sup>3</sup> Rabbi Feinstein based his decision on the interpretation of the Talmudic passage cited above and subsequent rulings of the greatest jurist of the first half of the 19th Century, Rabbi Moshe Sofer.<sup>4</sup> According to Rabbi Sofer, Rav Huna the son of Rav Yehoshua holds his opinion only if the new store merely decreases the profits of the existing competitor. If the new entry eliminates the profits, thereby preventing the existing competitor from earning a livelihood, then Rabbi Sofer believed that even Rav Huna the son of Rav Yehoshua would agree that such entry is forbidden. Rabbi Sofer supported his understanding of the Talmudic debate in *Bava Batra* by quoting

<sup>2</sup> See *Shulchan Aruch, Choshen Mishpat*, 156:5 and *Aruch Hashulchan, Choshen Mishpat*, 156:6-7.

<sup>3</sup> See R. Moshe Feinstein (1865-1986). *Iggerot Moshe, Choshen Mishpat* I, no. 38.

<sup>4</sup> See R. Moshe Sofer (1762-1839), *Shu"t Chatam Sofer, Choshen Mishpat*, nos. 78 and 118, cited by *Pitchei Teshuvah, Choshen Mishpat*, 156:3.

<sup>5</sup> An alternative interpretation of the braitā is that the first fisherman had taken ownership of the fish that were certain to enter his net, and the second fisherman fish is effectively stealing fish that already belong to someone else. In this interpretation, the braitā protects incumbents from unfair or predatory competition, but would not prohibit a new competitor from attempting to win business that was not certain to go to the incumbent. Thus, in this interpretation, the *Braitā* would have little bearing on our case as the Plaintiff does not allege that Defendant would be engaging in unfair or predatory competition if it began to offer pareve chocolate.

an unchallenged Talmudic *Braita* that prohibits the placement of a fishing net too close to the existing net of another fisherman. Rabbi Sofer understood the injunction on the second fisherman as resulting from the fact that his actions would have a severe impact on the first fisherman's catch, effectively eliminating his income.<sup>5</sup>

Rabbi Feinstein expands the scope of protection to cover situations where the incumbent's earnings are not eliminated, but instead would fall below that of his socioeconomic peer group. Simply put, Rabbi Feinstein rules that a loss of livelihood is not defined by a loss of one's home or his ability to put food on the table, but rather, one has effectively lost his livelihood if he can no longer afford what he used to be able to afford.

While DF's first claim, arguing that GC's entry would cause DF to become insolvent, appears consistent with the position of Rabbi Feinstein, our examining of the facts and financial information presented to us preclude any reliance on Rabbi Feinstein.

1) DF has been operating at a loss since it was taken over by the Plaintiff. As a result, it is not clear, and in any event, Plaintiff has failed to show, that even the total loss of the business would have an impact on Plaintiff's socioeconomic well-being.

2) Rabbi Feinstein's directives specifically concern a situation where the existing, threatened business is the primary income of the incumbent firm, and its diminution is therefore a threat to the owner's complete socioeconomic status. Plaintiff has not presented to us evidence that this is the case, and given that DF has been operating at a loss, it appears unlikely to be true.

3) Rabbi Feinstein's ruling involves cases of competitors that offer virtually identical products (referred to as homogeneous products in the economic literature) so the addition of a new competitor does not affect demand for the relevant product; a customer gained by one competitor reflects the loss of a customer to the other competitors. DF's first claim is that pareve chocolate is their main offering. The facts, however, do not support their contention, and the Beth Din accepts the Defendant's counterclaim of the disparate nature of the two stores. DF's web site offers 47 different products by the pound; only 14 are chocolate. Even the chocolate line's complete dissolution cannot be seen as a threat to the business as a whole, as the same customer who would now frequent GC for chocolates, could still purchase other items from DF.

As to Plaintiff's claim that the candy market cannot brook the entry of a new vendor since the relevant customer base is only sufficient to support DF alone, the business records submitted by the parties suggest the reverse. DF's revenues increased

by \$7,000 in 2004 relative to 2003, when DF did not face competition from GC, suggesting that GC's presence in the kosher sweets market of Baldwinsville has had a positive (or at least not a significantly negative) effect on DF. Furthermore, demand for kosher sweets sold by kosher sweets retailers increased in 2004 over 2003 by both the additional \$7,000 of sales made by DF and the entire amount of sales made by GC. We suggest that the various differences that will always stand between the shops have allowed Defendant to attract a new audience to his store without detracting from Plaintiff's business. It may also be that the presence of two candy shops in close proximity has brought more customers to the area. Either way, it seems clear that the potential pool of candy customers is not fixed and that GC's entry expanded the pool of dessert purchases by kosher conscious consumers. Granting the right to produce *pareve* chocolates may increase that base even wider.

In this regard, the Beth Din accepts Defendant's citation of the significant difference in the hours of operation between the two stores. GC is open more than twice as many hours as DF (76 hours to approximately 33 hours). Plaintiff argues that he occasionally opens his store at other times at the request of customers that call him, but this itself only underscores the salient contrast between the two stores as well as the existence of customers who are eager to purchase products in the hours that DF is not regularly open.

Before dealing with Plaintiff's second claim, it is worth noting that the decisions of Rabbis Sofer and Feinstein that provide the greatest support for Plaintiff's first claim also suggest that the foregoing discussion provides a basis to reject this claim. Specifically, Rabbis Sofer and Feinstein allow new competition when its presence clearly benefits local consumers, notwithstanding the adverse effects it might have on incumbent merchants. While Rabbinic authorities debate whether a lower price could serve as a sufficient benefit, there is unanimity among the authorities to allow new entrants that provide a better quality. The Beth Din recognizes that it is not a confectionery connoisseur, however Defendant's presentation leads us to agree that he is offering a better product that will benefit the kosher consumers.

As noted above, DF's second main claim is that GC's entry would effectively snatch the gains that DF is poised to make. This claim has a distinct Talmudic basis, namely the Talmudic prohibition of *ani mehapekeh bechararah* (literally "a poor person seeking a piece of bread," which refers to a case where a usurper comes in and takes the bread that the poor person was trying to get), which brands the usurper a wicked person (*Kiddushin* 59a). If this injunction applies in our case, it would be difficult

to allow GC to produce their line, despite the reasons enumerated above.

It is clear, however, from the *Shulchan Aruch* and from the discussion of the subject by Rabbi Feinstein, that this principle in a commercial setting applies only when the parties reach agreement regarding price, and the only matter missing is the symbolic act of kinyan on the part of the buyer to make the deal legally binding.<sup>6</sup> The *ani me-hapekb* principle has no application to attempts to lure away future business.

We therefore reject Plaintiff’s claim and find that Defendant’s proposed introduction of a pareve line of chocolate products to be sold as retail items does not violate *halachah*. However, in reaching this decision, we note that we likely would have reached a different conclusion if GC was expanding into nuts, dried fruit and candies, in addition to pareve chocolate.

**RULING:** Plaintiff’s request for an injunction preventing Defendant from introducing pareve chocolate is denied.

The Beth Din shall retain jurisdiction over this dispute and penalties for the violation of any of these clauses shall be set by the Beth Din, in accordance with the rules of the Beth Din and the arbitration agreement.

Any request for modification of this award by the arbitration panel shall be in accordance with the rules and procedures of the Beth Din, and the arbitration agreement of the parties.

Let peace and harmony reign between the parties.

Any provision of this agreement may be modified with the consent of both parties.

All of the provisions of this order shall take effect immediately.

IN WITNESS WHEREOF, we hereby sign and affirm this Order as of the date written above.

By: \_\_\_\_\_  
 Rabbi AA                      Rabbi BB                      CC, Esq.  
 Dayan                              Dayan                              Dayan

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<sup>6</sup> See *Shulchan Aruch, Choshen Mishpat*, 237 and *Iggerot Moshe, Even HaEzer* I, no. 91.

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