

The Journal of the Beth Din of America

VOLUME 2

2014



BETH DIN *of* AMERICA

בית דין דאמריקא

The Journal of the
Beth Din of America

The Journal of the Beth Din of America

Volume 2

2014

The views expressed in this journal do not necessarily reflect the views of the Beth Din of America. *Din torah* (arbitration) proceedings are governed by the Rules and Procedures of the Beth Din of America (available at www.bethdin.org), and the articles contained herein are not meant to replace or supplement that document.

Information regarding subscriptions to The Journal of the Beth Din of America is available at www.bethdin.org/journal.

Copyright © 2014 by the Beth Din of America.

Beth Din of America
305 Seventh Avenue
12th Floor
New York, New York 10001

www.bethdin.org



BETH DIN of AMERICA

בית דין דאמריקא



RIETS/YESHIVA UNIVERSITY PRESS

THE MICHAEL SCHARF PUBLICATION TRUST

The Journal of the Beth Din of America is a publication of the Beth Din of America, in collaboration with the Rabbi Norman Lamm Yadin Yadin Kollel at the Rabbi Isaac Elchanan Theological Seminary (RIETS) of Yeshiva University. The publication and distribution of this issue of the Journal of the Beth Din of America was made possible by the Michael Scharf Publication Trust of Yeshiva University.



The Beth Din of America is affiliated with the Rabbinical Council of America and sponsored by the Union of Orthodox Jewish Congregations of America.

The Journal of the Beth Din of America

Editor

RABBI SHLOMO WEISSMANN

Copy Editing

CHEZKIE GLATT

Beth Din of America

RABBI GEDALIA DOV SCHWARTZ

Av Beth Din

RABBI MORDECHAI WILLIG

Sgan Av Beth Din

RABBI YONA REISS

Chaver Beth Din

RABBI SHLOMO WEISSMANN

Director

RABBI MICHOEL ZYLBERMAN

Sgan Menabel

ILANA BLASS

Administrative Attorney

HELEN AXELROD

CHANIE ZAHTZ

Administrative Assistants

ERIC S. GOLDSTEIN

President

Rabbi Isaac Elchanan Theological Seminary Yeshiva University

RICHARD JOEL

President

RABBI MENACHEM PENNER

Max and Marion Grill Dean of RIETS



Volume 2
2014

CONTENTS

- 9 Editor's Note
- 11 Retaining the Proceeds of Secular Court Judgments
by Rabbi Mordechai Willig
- 15 The *Torah u-Madda* Mandate for Beth Din in Today's World
by Rabbi Yona Reiss
- 31 *Beit Din's* Gap-Filling Function: Using *Beit Din* to Protect
Your Client
by Michael A. Helfand
- 49 Beth Din of America Reported Decision 3:
Meir Simons v. EChaim Tours and Josh Rosenberg
- 52 Beth Din of America Reported Decision 4:
Joseph Goldberg v. Aryeh Schwartz
- 55 Beth Din of America Reported Decision 5a:
Golan v. Schwartz
- 57 Beth Din of America Reported Decision 5b:
Golan v. Schwartz
- 61 Beth Din of America Reported Decision 6:
Kosher Quality Caterers, Inc. v. Kalman Goodman & Menachem
Moskowitz
- 66 Beth Din of America Reported Decision 7:
Yossi Mandel v. Moshe Hirsch
- 70 Beth Din of America Reported Decision 8:
United Savings, LLC v. Dunkirk Center for Health, Inc. and
Royal Rehabilitation

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.
- ☞ *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).

Editor's Note

The *beit din* is a vital institution in Jewish life. The Torah tells us that when Moshe's father-in-law Yitro ventured into the desert shortly after the Exodus from Egypt, he saw Moshe personally attending to the disputes that arose among the Jewish people.¹ There were plenty of these controversies to settle. Moshe judged cases "from morning until night;" an allusion, the Talmud teaches us, to the phrase "and it was morning and it was night" that appears repeatedly in the story of creation at the beginning of the Torah. Why? Because "a judge who adjudicates truthfully is akin to God's partner in the creation of the world."² Bach comments that such a comparison is apt because the continued peaceful existence of the world depends on the social order that a working system of justice ensures.³ For thousands of years, *batei din* have enhanced Jewish society by actively resolving conflicts based on Torah values of peace and justice, and it is this mission that guides the Beth Din of America on a daily basis.

Many hundreds of people have experienced this first hand, and have benefitted from the services offered by the Beth Din of America throughout its years. But whenever I speak in communities about the Beth Din, and particularly about its dispute resolution work, I am reminded that few people are aware of what we offer. They do not know that the North American Jewish communal structure includes a national rabbinical court which operates with uncompromising integrity and with expertise in Jewish law and secular law and business practices that permits it to adjudicate commercial cases with unparalleled competence. The Journal of the

¹ Exodus 18:14.

² *Shabbat* 10a.

³ *Bach, Choshen Mishpat*, 1:1.

Beth Din of America aims to fill this gap of information by publishing articles and decisions that showcase the work of the Beth Din of America for all to see. We hope that the articles and the six newly published decisions that are featured in this issue will shed light on the important work of the Beth Din of America.

The timing of this issue of the Journal presents an opportunity to thank two extraordinary individuals for their work in support of the Beth Din of America over the past number of years.

Allen Fagin is a leading board member of the Beth Din to whom the leadership of the Beth Din has increasingly turned over the past several years for his wise counsel and for his help in charting the Beth Din's future growth. An active communal lay leader and former managing partner of Proskauer LLP, Allen has contributed his talents to many Jewish institutions, and we are extremely grateful for Allen's significant contributions to the Beth Din. We wish him much success, and look forward to continuing to work with him as he begins his role as the new executive vice president and chief professional officer of the Orthodox Union.

On July 1st of this year, Eric Goldstein will step down from his position as President of the Beth Din of America. It would be difficult to overstate the enormity of Eric Goldstein's contributions to the Beth Din of America since he assumed its presidency in 2003. Eric has been a critical resource whenever the Beth Din has faced complex and challenging issues, consistently delivering sharp, insightful and invaluable advice. More importantly, throughout his term, Eric has championed the values of due process, integrity and transparency that have always been, and continue to be, the hallmark of our organization. Eric's own reputation for integrity – earned both professionally as a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP and in his tireless work for a vast array of communal Jewish institutions – together with his passion for the welfare of the Jewish people, will serve him and the broader Jewish community well as he assumes his new position as chief executive officer of UJA-Federation of New York, an institution with a vital impact on the global Jewish community. We are extremely grateful for Eric's great contributions of time and resources to the Beth Din of America over these past ten years, and we wish him much *batzlacha* in his new role.

Rabbi Shlomo Weissmann
New York, New York
Sivan 5774; June 2014

Retaining the Proceeds of Secular Court Judgments

Rabbi Mordechai Willig

PART I

The *Shulchan Aruch* rules that it is prohibited to have monetary disputes between two Jews decided in non-Jewish courts, even by mutual consent.¹ Rabbi Akiva Eiger adds that if one is awarded money that he is not entitled to by Jewish law, he is guilty of theft.²

Nevertheless, there are instances where a party is permitted to resort to secular court. For example, if a defendant is summoned to *beit din* and refuses to appear, a *beit din* may grant permission to the plaintiff to pursue his claim in secular court.³ *Rama* discusses a plaintiff who loses in secular court and asks a *beit din* to retry the case. He cites two views and concludes that the *beit din* should not accede to his request.⁴

The *Shulchan Aruch* and *Rama* present these two cases without any comment regarding whether the prevailing party may retain his secular court winnings. This suggests that, at least in some instances, Jewish law permits a party to retain money awarded to him in secular court, even if he would not have been entitled to that award had Jewish law been applied to the case. Especially in light of the view of Rabbi Akiva Eiger cited above, this is a surprising result. How can the ruling of the secular court govern the case? If it differs from Jewish law, one of the parties is guilty of theft!

Netivot ha-Mishpat preempts this question by ruling that a *beit din* may not grant permission to a plaintiff to pursue a claim in secular court, even if the defendant refuses to appear in *beit din*, without first ascertaining that the plaintiff's claim is viable as a matter of Jewish law.⁵ Similarly, *Netivot ha-Mishpat* rules that although a prevailing party may be immune from being summoned to *beit din*, as a *halachic* matter he is personally prohibited from retaining any portion of a secular court judgment to which he is not entitled under Jewish law.⁶

¹ *Shulchan Aruch, Choshen Mishpat*, 26:1.

² R. Akiva Eiger (1761-1837), Glosses to *Shulchan Aruch, Choshen Mishpat*, 26:1.

³ *Shulchan Aruch, Choshen Mishpat*, 26:2.

⁴ *Rama, Shulchan Aruch, Choshen Mishpat*, 26:1.

⁵ *Netivot ha-Mishpat, Biurim, Choshen Mishpat*, 26:3.

⁶ *Netivot ha-Mishpat, Biurim, Choshen Mishpat*, 26:2.

In common practice, however, these rulings of the *Netivot ha-Mishpat* are not observed. In fact, the *Erech Shai* expressly disagrees with the *Netivot ha-Mishpat* and holds that a *beit din* may give permission to a plaintiff to resort to secular court when the defendant refuses to appear before a *beit din*, even without actual knowledge of the validity of the claim.⁷ *Erech Shai* bases this on a statement of the *Maharshah* that a defendant who refused to appear before a *beit din*, and then lost in secular court, has forfeited his right to insist that his case be heard in *beit din*.⁸ Presumably, a defendant who wishes for his case to be reheard in *beit din* is of the view, perceived or real, that a *beit din* applying Jewish law to the facts of his case will conclude that the plaintiff is not entitled to the money that was awarded in secular court. The effect of the *Maharshah's* ruling, then, is that the plaintiff who prevailed in secular court will be entitled to retain amounts to which Jewish law does not entitle him. But why?

PART II

The prohibition to resort to secular courts is derived from the verse “*ve-eileh ha-mishpatim asher tasim lifneibem*” (“and these are the statutes that you shall place before them”).⁹ The Talmud derives from the word “*lifneibem*” (“before them”) that disputes are to be brought before Jewish courts, and may not be litigated before heathen courts.¹⁰ The *Ohr Zarua* explains that were it not for this derivation, it would be permitted to force a defendant to adjudicate in secular court, since Noahides are commanded to establish and abide by laws.¹¹ Moreover, if both parties agreed to be judged in secular court, and the court decided in accordance with Jewish law, the decision is binding. Even though the parties violated the prohibition of “*lifneibem*”, post facto the decision stands, since the law of the land is law (*dina demalchuta dina*).¹² This ruling of the *Ohr Zarua* establishes an important principle: the judgment of a secular court can, in limited respects, achieve *halachic* legitimacy. To be sure, Jews are ordinarily prohibited from litigating in secular courts. But those same courts play a Torah-mandated role in society, and

⁷ R. Shlomo Yehuda Tabak (1832-1907), *Erech Shai*, *Choshen Mishpat*, 26:2.

⁸ *Yam Shel Shlomo*, *Gittin*, Chapter 1, no. 22.

⁹ Exodus 21:1.

¹⁰ *Gittin* 88b.

¹¹ *Ohr Zarua*, *Baba Kama*, 1-4.

¹² *Gittin* 10b.

halacha does not necessarily disregard the outcomes of secular court proceedings. According to the *Ohr Zarua*, secular courts would have jurisdiction even over a case between two Jews, were it not for “*lifneihem*”.

Litigating a case in secular court usually involves the transgression of two separate prohibitions. First, as discussed above, it is prohibited to utilize secular court as a venue for resolving disputes. In agreeing to litigate in secular court, the parties are also tacitly agreeing to accept secular law as the system that will determine the outcome of their dispute. This constitutes an additional violation of the prohibition against litigating in secular court.¹³ This additional violation can be corrected if the parties retry the case in *beit din*, so that Torah law will prevail. Therefore, the parties must submit to *beit din*, and *beit din* must rule according to Torah law. If the secular court ruled according to Torah law, this additional violation does not occur. A retrial would not achieve anything, since the initial violation of appearing before secular court is not corrected by a retrial in *beit din*, and the secular court’s decision according to Torah law stands.¹⁴

Where both parties sought to litigate in secular court, they are both culpable for this double violation of Jewish law, and neither side may rely on the outcome. But a party who only resorted to secular court because his adversary declined to appear before a *beit din* cannot be said to have violated either element of the prohibition. He did not violate “*lifneihem*”, as he preferred not to utilize the secular courts. And he did not violate the accompanying prohibition of accepting the secular legal system, because he never willingly accepted secular law. He is the passive beneficiary of his adversary’s transgression. Since “the law of the land is law”, there is no violation of theft and he may keep the award.

PART III

As noted above, a party who will only allow his case to be adjudicated in secular court may thereby give up certain *halachic* monetary rights. There are times when a party indicates a preference to litigate in secular court, but then changes

¹³ *Beit Yosef, Choshen Mishpat*, 26:1, citing *Shu”t Rashba* 6:254. On the other hand, parties who agree outside the context of secular court litigation for their disputes to be governed by secular law or prevailing commercial custom do not thereby violate the prohibition of litigating in secular court. See Section 3(d) and (e) of the Rules and Procedures of the Beth Din of America.

¹⁴ *Tumim, Choshen Mishpat*, 22:6.

his mind and wishes to go to *beit din*. It is up to a *beit din* to determine when the party's preference for secular court "locks in" and bars him from making claims under Jewish law. As a general rule, if a plaintiff has filed in secular court, and then wishes to compel the defendant to submit the case before *beit din*, the Beth Din of America will not insist that the defendant appear before *beit din*. A defendant's request to remove the case to *beit din*, however, is generally honored so long as no substantive proceedings have begun. After that point, we do not attribute the defendant's change of heart to repentance, but rather to a sense that he is losing in secular court, and hopes to do better in *beit din*.¹⁵

If one is summoned by a fellow Jew to secular court, he may have no choice but to appear. However, he should summon the plaintiff as early in the process as possible, requesting that the case be removed from secular court and heard in *beit din*. If he did not, his continued participation in secular court proceedings can be construed as an agreement to be bound by secular law in secular court. This can result in a later inability to assert claims under Jewish law in a *beit din*.

Of course, in any given case, a *beit din* is empowered to consider other views, such as that of the *Netivot ha-Mishpat*, as well as additional considerations, in arriving at a *pesharah ha-kerovah la-din*. This overview reflects the general policy of the Beth Din of America. The final decision is made by the *dayanim* in each case.

Rabbi Mordechai Willig is the Segan Av Beth 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.

¹⁵ See *Imrei Yosher* 1:36.

The *Torah u-Madda* Mandate for Beth Din in Today's World

Rabbi Yona Reiss

The following is a transcript of remarks delivered at the first annual Sheldon Rudoff Memorial Lecture, held on March 21, 2012 at the Jewish Center in New York City. Sheldon Rudoff a"h was an important leader of the American Orthodox Jewish community until his death in 2011. Mr. Rudoff was a practicing attorney and a musmach of the Rabbi Isaac Elchanan Theological Seminary at Yeshiva University. He served with great distinction as president of the Orthodox Union and president of the Beth Din of America.

Good evening and a special welcome to Hedda Rudoff and all of the members of the Rudoff family, to Sara and Ira Olshin, to Simone and Mark Semer, to Evelyn Rochlin, to all of the grandchildren and of course, to the ever-present memory of Shaindy Rudoff *zichronah l'vracha*. Thank you to all of our guests for coming out this evening to pay tribute to a remarkable man and his legacy. I also want to acknowledge the presence of the current Director of the Beth Din of America, Rabbi Shlomo Weissmann, its President Eric Goldstein, and a member of the Beth Din's senior administration, Allen Fagin, as well as its long-time staff members, Helen Axelrod and Chanie Zahtz, who cherished Shelly Rudoff like a member of their own family.

I mentioned to Rabbi Mordechai Willig, who serves as the *Segan Av Beth Din* of the Beth Din of America, that being asked to give the first memorial lecture in tribute to the memory of Shelly Rudoff may be the highest honor that I have ever received.

I say this with the utmost sincerity. There are many figures worthy of honor and reverence, but Shelly was in a class of his own. If my sons ended up like Shelly Rudoff, I would consider myself a most successful father.

Shelly exemplified the *Torah u-Madda* ideal that we all promote at Yeshiva University and in our Orthodox communities. He was not only a combination of a Torah scholar, an accomplished attorney and a major community leader, but he was also an exquisite *ba'al midos* and family man. Both in the public sphere and in the private sphere, he was an exemplary role model for the values that we hold dear.

I still remember one of my first encounters with Shelly, when I was being considered for the position of Director of the Beth Din of America back in 1998. Shelly and I had a pleasant conversation in his office, during which he expressed

his one significant concern about my candidacy. At the time, I was 31 and still single, which was perhaps not surprising given that during the previous six years I had been working for a Wall Street law firm and putting in predictable Wall Street law firm hours. I used to say that my most stressful day in the Beth Din was less stressful than my least stressful day in the law firm – and the Beth Din could be pretty stressful. So Shelly asked me whether as a single, I would be able to relate to the hardship and emotional turmoil of the many couples who would be coming to the Beth Din for divorce matters. I responded on the spot that if anything, given my own situation, I could certainly relate to the difficulty of finding the right spouse. Shelly smiled approvingly and offered me the job. The job, I should note, turned out to be a *segulab*. I met my wife while working at the Beth Din and got married within the year.

It was only a few months ago during the *shiva* for Shelly that I learned that Shelly was also in his early 30s when he and Hedda got married, so I was able to gain a new appreciation for his ability to relate to my personal predicament during that conversation.

It was, as Shelly may have quoted from the movie *Casablanca*, the beginning of a beautiful friendship. During the years that followed, Shelly and I felt equally comfortable calling each other regarding Beth Din matters, sharing concerns, brainstorming about challenging situations, and offering and taking advice. Of course, I was more often than not the recipient of the advice, taking regular advantage of Shelly's calm and sagacious counsel.

It's an interesting thing, worthy of mention, that I don't believe I ever called Shelly anything other than Shelly. There were people much younger than him who to this day I address as Rabbi, Mister or Doctor, but Shelly was always Shelly. He was a *musmach* of RIETS and a distinguished attorney but his presence and personality bespoke humility, conveyed respect and exuded a profound sense of accessibility. He never said "just call me Shelly" – but it didn't seem to matter. It never occurred to me to address him any other way.

At one point, Shelly mentioned that as President of the Beth Din, he wanted to dedicate every Friday morning to visit the Beth Din office and watch how the affairs of the Beth Din were conducted. Now, I will be perfectly honest with you. In a normal organizational relationship, no matter how close the relationship between the director of the organization and the president of the board of trustees, this type of proposition would most likely send chills down the director's

spine. Certainly this type of request would likely spur feelings of insecurity and palpable tension. However, I can tell you with complete sincerity that my reaction to Shelly's proposal was one of joy and even exhilaration. I found him to be such a gentle, wise, reassuring and helpful presence that I couldn't wait for him to come to visit on a weekly basis. It was one of my greatest disappointments during my tenure as Director that due to Shelly's myriad commitments, he was unable to make good on his wish and I never got to enjoy the benefit of his presence in the office on a regular basis.

My story with Shelly continued after I left the Beth Din in 2008 to become Dean of Yeshivat Rabbeinu Yitzchak Elchanan at Yeshiva University. Naturally, when I was making the decision whether or not to leave the Beth Din to become Dean of the Yeshiva, I consulted with Shelly. Shelly supported the decision because he thought it would be good for me personally. This was an important quality that Shelly had. He cared deeply about the Beth Din; but more than he cared about institutions, he cared about people. I believe that Shelly's devoted work for every institution with which he was affiliated, whether it was the Beth Din, the Orthodox Union or his many other causes, was inspired by a love of the people who were served by these institutions – his organizational focus was a means to an end, not an end in itself.

After I became Dean of the Yeshiva, I saw less and less of Shelly, including one memorable encounter in which I saw him at YU leaving Belfer Hall as I was going home for the evening, and we both spent a few moments bemoaning the fact that we did not have the opportunity anymore to chat. But we finally did, albeit briefly, last year. I am particularly happy that the last moments we spent with each other did not revolve around anything communal at all, but rather consisted of pleasant and casual conversation last spring as we stood outside a baseball field in Riverdale, watching my son Yosef Chaim and Shelly's grandson Yamin playing together in a Kosher Little League game. It's a pretty safe bet that his grandson's team won because my son's team lost pretty much every game last season. I enjoyed shooting the breeze with Shelly, as we discussed the state of the Beth Din, the state of YU, but mostly just enjoyed each other's company in a relaxed setting. This year I will regrettably not have the privilege of that interaction, but what is kind of nice is that Shelly's grandson Yamin (assuming he will still be playing in the league) will be joined by another of my sons whose name also happens to be Yamin. Both of our families have very good taste in names.

This appropriately is my last abiding memory of Shelly Rudoff, a passionate community leader who always remained first and foremost a doting family man. I was privileged and am privileged to serve as an honorary member of his extended family, to have felt his nurturing love and to have shared in the fulfillment of his vision and dream for the Beth Din of America.

I wanted in our remaining time to speak about that vision and dream. Shelly was a graduate of Yeshiva College, a *musmach* of Yeshivat Rabbeinu Yitzchak Elchanan, and a person who through his dedication to Torah learning and living, and appreciation for all aspects of worldly culture and knowledge, was a consummate *Torah u-Madda* personality. The challenge with the specific institution of beth din, of revitalizing the rabbinical court system for the Jewish community, was to ensure that the rabbinical court be able to function in a fashion that was informed by the world in which we lived, and enhanced through the professionalism of the professional world which he valued.

The Torah records a requirement that all disputes be litigated in front of a beth din rather than a secular court – “*ve-eileh ha-mishpatim asher tasim lifneihem – lifneihem ve-lo lifnei ovdei kochavim*” (“and these are the statutes that you shall place before them – before them, and not before idolaters”).¹ However, in this country, the reality was that most people were not bringing their disputes to beth din. Shelly felt that this lack of utilization of *batei din* was because there was a sense that the rabbinical courts were not necessarily functional, that they were not being conducted with the requisite professionalism, and that the *dayanim* (rabbinical court arbitrators) were not in touch with the contemporary commercial marketplace. Even if a case would be heard by a beth din, there was a widespread feeling that the decisions would be issued in a way that would be unenforceable. There was much truth to these perceptions. For example, while *halacha* might allow a *kinyan sudar*, a lifting of a handkerchief, to constitute a binding commitment, if parties did not sign a *shtar berurin*, arbitration agreement, which they often did not, the beth din’s decision could not be enforced in court.

Thus, although the Beth Din of America was established in 1960 under the auspices of the Rabbinical Council of America to be a center of *gittin* and commercial disputes, by the early 1990s the Beth Din had become simply a *Get* factory but was hearing virtually no *dinei torah* (commercial cases) at all. Even in the realm of

¹ *Shemot* 21:1, as elucidated in *Gittin* 88b.

gittin, if there was a dispute regarding a Get or a potential *agunah* situation, the Beth Din was not equipped to deal with the procedural process that could bring about a resolution. It was Shelly's vision that the beth din needed to be professionalized and brought more into touch with the modern world in order to fulfill its mission and enable the realization of its Torah mandate. He thus sought to fulfill to the fullest the separate verse in the Torah requiring the Jewish community to establish proper rabbinical courts – “*sboftim ve-shotrim titein lecha bechol she'arecha*” (“judges and enforcers you shall establish in all your gates”).²

It was with this vision that Shelly undertook, with a capable team to support him but with Shelly clearly at the helm, to reconstitute the Beth Din of the Rabbinical Council of America during the mid-1990s with three essential ingredients. First, the Beth Din would be an independent entity governed by a board that combined both rabbinic leaders as well as lay leaders, or as we might say at Yeshiva University, which combined both *klei kodesh* and lay *kodesh*. Second, the proceedings of the Beth Din would be conducted in accordance with published procedural guidelines that would be binding upon its judges and that would help ensure the professionalism of its proceedings. Third, and perhaps most importantly, the personalities consisting of the professional rabbinic staff of the Beth Din and its judges would be people who were people of the world and in the world, educated both in Torah as well as contemporary business practices, and familiar with the secular knowledge and culture of our times. Both Directors of the Beth Din appointed during Shelly's tenure had law degrees in addition to our *semicha* ordination, and this trend has continued with the current Director, Rabbi Shlomo Weissmann. *Dayanim* who were appointed to sit on Beth Din arbitration cases included observant attorneys, accomplished businessmen and professional therapists, depending on the needs of each case presented to the Beth Din. Even the *Av Beth Din*, Rabbi Gedalia Dov Schwartz, harbors an English name – George Bernard – that connotes a familiarity with general culture.

These three ingredients – a combined rabbinic and lay board, a professional process, and a *Torah u-Madda* oriented staff – are the foundations that enabled Shelly to succeed in restoring the crown of beth din to its glory for the broader Jewish community. Individuals spanning from the Chassidic and Charedi population, to the Reform, Conservative and even unaffiliated Jewish populations, began to flock to the Beth Din to adjudicate their divorce and commercial disputes. Shelly took special

² *Devarim* 16:18.

pride in the case of a major national bank that brought a 100 million dollar dispute with a member of the Orthodox Jewish Community to be resolved by the Beth Din. I still remember traveling to California to meet with the parties in order to mediate a resolution to that dispute which included a RICO claim for treble damages. The non-Jewish bank felt more comfortable pursuing its case in our beth din rather than secular court based on its conviction that the defendant would have more respect for the determination of a rabbinical court. It was truly a *kiddush Hashem*.

If you pick up a Jewish newspaper today, or even a secular newspaper, you will find regular reference to the institution of beth din as a natural forum for resolving disputes and addressing communal problems. This was not the case fifteen years ago, when many people had never heard of the institution of beth din or believed it was a vestige from the past. I believe that the popular resurgence over the last fifteen years of the institution of beth din, and its re-ascendance as part of the natural infrastructure of the modern Jewish community together with the synagogue, the Yeshiva day school, the *eruv* and the *mikveh*, is largely attributable to the contemporary beth din model envisioned and enabled by Shelly Rudoff.

One question that is worth addressing is whether this *Torah u-Madda* model for beth din is a *bidieved* one, meaning a necessary but not ideal capitulation to the realities of the modern world, or whether this structure represents the Torah ideal. In formulating this question, I am not associating the term *Torah u-Madda* with any specific formulation of the concept, of which there have been many over the last number of decades, but rather I am utilizing the slogan in the broadest possible Yeshiva University sense – as recognizing the inherent value of the wisdom and the realities of the modern world while being thoroughly grounded in Torah.

I would submit that Shelly's *Torah u-Madda* model of beth din represents not merely an accommodation, but the ideal. Furthermore, he believed that every aspect of our contemporary Orthodox Jewish culture was essential to create this ideal, including the high-quality dual curriculum focus of our educational institutions, the priorities that we set in our family life in advancing an ethic of *Torah v'derech erez*, and the eclectic synthesis of worldliness and Torah that we promote in our synagogue and communal life.

The Talmud³ tells a story about when Rav (the famous talmudic sage) was training to receive *Yatir Yatir semicha*. We don't even have this version of *semicha*

³ *Sanbedrin* 5b.

anymore. We have *Yoreh Yoreh semicha*, which is the regular *semicha*. Those who are training to be a *dayan*, a Jewish law judge, train for the second tier of *semicha*, *Yadin Yadin semicha*. We award both kinds of *semicha* at Yeshiva University. But there is a third type of *semicha*, *Yatir Yatir semicha*, which was a particularly esoteric form of *semicha* reserved for those who had mastered the expertise of being able to identify permanent blemishes in first born animals to determine whether they could be slaughtered and eaten by a *koben* without having to be brought as a sacrifice in the Holy Temple. The *Gemara* says that Rav trained for 18 months – not inside the *batei midrashot*, the study halls, which undoubtedly Rav frequented in ample measure as well, but rather in the fields, so that Rav could be mentored by an expert zoologist on the fine points of zoology and zootomy and become proficient in animal anatomy. As any fine attorney knows, if you only know the law but are unable to discern the facts, you are not going to be able to decide the cases properly. Similarly, the *Gemara* understood that a necessary supplement to the Torah learning that a *dayan* needs to have is an appreciation for the facts on the field, so much so that Rav spent a year and a half apprenticing with an expert in animal anatomy in order to be qualified to make determinations about animal blemishes (he wasn't given the *semicha* anyway, but that is another story).

We are also taught in the Talmud⁴ that members of the great Sanhedrin had to be proficient in seventy languages. We live in a time when we are barely proficient in one language – even the way that English is taught and learned in many of our institutions is a combination of Yinglish and Yeshivish – and yet effective Rabbinic figures, such as Rabbi Samson Raphael Hirsch in Germany, epitomized through their writings and speeches the importance of a Torah scholar being able to express himself fluently in the vernacular of the society in which he lived.

In any event, the members of the Sanhedrin, the greatest Torah sages, were expected to be learned not merely in three languages, but in seventy of them! In fact, we read in *Megilat Esther* how Mordechai, who was a member of the Great Assembly, was able to rescue King Achashverosh and thereby bring salvation to the Jewish people because he was capable of deciphering the conversation spoken in a foreign language between Bigtan and Teresh as they were planning to assassinate the King.⁵

⁴ *Sanhedrin* 17a.

⁵ *Megilat Esther* 2:21 – 2:23.

The reason for this requirement was because it was essential for the members of the Sanhedrin to be able to understand everybody on their own wavelength, to be tuned in to the cultural nuances and expectations of each type of individual who might appear before them. This is not a *bidieved* tolerance for a member of the Sanhedrin who happens to have had the misfortune of becoming well-educated, but rather represents an ideal and even pre-requisite for those individuals entrusted with the judicial welfare of the nation. To put it in different terms, to be on the Sanhedrin, you needed to be a *Torah u-Madda* personality.

The *Rambam* (Maimonides) formulates this even more powerfully at the beginning of his second chapter of the laws of Sanhedrin: “Only men who are wise and distinctly understanding in the wisdom of the Torah, possessors of great knowledge and knowledgeable in parts of other wisdoms, such as medicine and calculations of astrological cycles... and similar to these, so that they will know to judge them, are appointed to a *Sanbedrin*, large or minor.”⁶ The commentary *Kesef Mishneh* quotes an earlier authority, the *Ramach*, who raises a question against the *Rambam* – why should a *dayan* have to know medicine or math?⁷ The answer appears to me to be precisely what we have articulated: a *dayan* must be able to understand the nuances of every type of case, and therefore must be familiar with all areas of worldly wisdom.

Furthermore, the famous eighteenth century *gaon* Rabbi Akiva Eiger makes an astonishing comment in the opening sections of *Choshen Mishpat*,⁸ the tome of the *Shulchan Aruch* that focuses on issues of Jewish monetary law. Two merchants in a particular industry had a dispute. One of them wanted to take the other one to beth din. The other merchant who had been summoned to beth din argued that the case should be decided in accordance with the custom of their industry which had designated a special arbitration board to adjudicate any disputes that might arise among members of the industry. Rather than insist that the matter be dealt with in accordance with Torah law, Rabbi Akiva Eiger ruled that in such a case the second merchant prevails and can insist that the matter be brought before the arbitration tribunal established by their commercial industry.

The modern day analog would be an architect insisting that an architectural dispute be brought before the Arbitration Association of Architects, or a diamond

⁶ Rambam, *Mishneh Torah, Hilbot Sanbedrin veba-Onsin ba-Mesurin La-bem* 2:1.

⁷ *Kesef Mishneh, id.*

⁸ R. Akiva Eiger (1761-1837), *Glosses to Shulchan Aruch, Choshen Mishpat*, 3:1.

merchant insisting that a dispute in that industry be decided by the diamond dealer arbitration board in accordance with industry custom.

The fundamental point in this ruling is that even when such a dispute is presented to a beth din, it is incumbent upon the beth din to be familiar with the local customs of the industry and to rule in accordance with those customs. A beth din must be conversant in the *minbag ha-socherim*, the customs and practices of the contemporary commercial marketplace.

Therefore, as Shelly remarked in a lecture that he delivered at Yeshiva University in 2002, when the Beth Din has a securities case, it is appropriate to put a member of the stock exchange on the panel to join the other rabbinic members of the Beth Din, or when the Beth Din has a dispute about the meaning and interpretation of a synagogue constitution, it is not a bad idea to place a constitutional attorney on the case, or at least a good contract attorney. In my own experience at the Beth Din, we would routinely include an experienced therapist in the Orthodox community to sit on child custody dispute cases, and an anti-trust partner from a respected law firm to sit on *basagat gvul* cases (such as when one pizza store opens up across the street from an existing pizza store) which implicate anti-trust considerations and concerns. When we adjudicated a case involving an allegation that one band had misappropriated the underlying score of another band's music, which required in-depth knowledge of both musical copyright law as well as expertise in deciphering musical compositions, the Beth Din retained a partner from the law firm of Fried Frank to present a review of the musical copyright issues, and a highly regarded musicologist to assist the Beth Din in figuring out whether or not any part of the musical composition had indeed been copied. Each report was shared with the parties, and in accordance with the Rules and Procedures of the Beth Din, the parties were given the opportunity to respond to the report and engage in cross-examination with respect to its findings. The ultimate decision melded a detailed analysis of the musical elements of the underlying composition with a careful analysis of the secular law, and then the application of the secular law and industry custom to the *halachic* determinations of the case. It was a classic illustration of the fine-tuned *Torah u-Madda* processes that went into the production of a Beth Din of America decision for the modern age.

This type of process brought pride to Shelly Rudoff in his role as founder of the reconstituted Beth Din for two reasons. First, it enabled the Beth Din to be relevant to the contemporary business world and issue decisions that were responsive

to the realities of the modern day commercial marketplace. Significantly, the volume of commercial cases presented to the Beth Din skyrocketed from approximately zero to one hundred a year as attorneys and business folks became more and more comfortable trusting the Beth Din to handle their disputes. Secondly, the process was transparent and fully professional, bringing a *kiddush Hashem* (sanctification of G-d's name) to the Beth Din experience. Indeed, one of the reasons Shelly liked the idea of the experts actually sitting as members of the panel, whenever feasible, was to ensure that every expert opinion was shared with the parties in a completely open and interactive fashion.

By contrast, we discovered over the years that one of the main challenges in the beth din world were ZABLA cases where the two sides cannot agree on a beth din, and each side then picks someone (known as a *borer*) to represent them and the two of them pick a third *dayan*. Generally speaking, the two members of the panel chosen by the sides are engaged in steady ex-parte communications with the sides that chose them and are expected to advocate on their behalf rather than sit as neutral judges.

This arrangement is problematic for a couple of reasons: first, it allows for ex-parte communications, prohibited both according to *halacha* and according to the secular arbitration law. It was already noted by the *Aruch ha-Shulchan* one hundred years ago that in his day parties to a ZABLA proceeding worked with the assumption that there would be ex-parte communications.⁹ The *Aruch ha-Shulchan* tried to justify the practice on the basis that the sides were presumed to waive any objection since each side wished to engage in ex-parte communications with their *borer*, but the fact is that this is clearly not the ideal.

Second, the current ZABLA process engenders an expectation that the panelist chosen by one side will invariably rule in that party's favor. However, the *halacha*, as emphatically noted by the *Rosh* in his commentary to the third chapter of Sanhedrin,¹⁰ requires that each member of the panel remain fundamentally neutral and be capable of ruling in favor of either party. This is the type of ZABLA process described in the Talmud, but we found that this ideal was simply not being met in contemporary ZABLA practice.

These concerns were shared by other *batei din* as well. The Beth Din of America over the years worked out a different and superior system together with some of

⁹ *Aruch ha-Shulchan*, *Choshen Mishpat* 13:4.

¹⁰ *Rosh*, *Sanhedrin* 3:2.

the other *batei din* in the broader Jewish community. When parties would disagree about whether to go to the Beth Din of America or beth din #2, the Beth Din of America would work out with beth din #2 that the Beth Din of America would designate a *dayan* in the case, beth din #2 would designate a *dayan*, and those two *dayanim* would designate a third *dayan*. This way each of the *dayanim* would be members of institutional *batei din* who were not specifically agents of the different parties, and there would be both a protection against ex-parte communications and a greater guarantee of neutrality among the arbitrators.

Among the *batei din* who participated in these types of cases when parties were in dispute whether to submit to our beth din or their beth din were Machon E'hoiroa, Kolliel Harabonim, the Rabbinical Court of Bet Yosef, the Bet Din of Elizabeth, the Igud Harabonim and the Bet Din of the Va'ad Harabonim of Queens. There was one time, however, when I remember being gently rebuffed in my efforts to bring about this type of cooperative effort. There was a Chassidic Rebbe in Brooklyn who was the son of a famous Chassidic *posek* (Jewish law authority) who had famously written *teshuvot* (responsa) attacking college study. It happens that I became friendly with the grandson of this famous *posek*, who was also the nephew of the current Rebbe, because this fellow was a practicing attorney in the firm of one of our board members, Eric Goldstein, who of course succeeded Shelly as President of the Beth Din.

This grandson of the original Rebbe thought that it would be a wonderful idea if I could meet his uncle, the current Rebbe, so that we could discuss ways of fostering better cooperation between our respective rabbinical courts. It happens that there had been a case or two in which one party had wanted to go to the Beth Din of America and the other party wanted to go to this particular Chassidic beth din, and the case degenerated (if I can use that word) into an unsavory kind of ZABLA. Thus, it seemed to make sense to have a conversation about each of our *batei din* assigning an arbitrator for that type of case and have the two beth din-appointed arbitrators pick the third judge to round out the panel. A meeting was arranged for *Chol Hamoed Sukkot* and I remember having a very pleasant meeting in Borough Park with the Rebbe and one or two of his *dayanim*, together with my friend his nephew. After we were able to reach agreement on virtually all issues, including the premise that the current regime of ZABLA was less than the *halachic* ideal, I mentioned my proposal to him. He shook his head and replied that it just wouldn't work. They couldn't use our *dayanim*. When I asked why, he explained

that he felt an allegiance to his father's writings, and his father could not countenance anybody who went to college. Since most of our *dayanim* had attended college, he couldn't deem them as qualified to serve as *dayanim*. I tried to reassure him that most of us had forgotten the bulk of what we studied in college. But it was clear that this tack was not going to be persuasive.

So I said something else. Even if the *dayanim* in question might not have been brought up in the same universe, and even if they had experienced college, wasn't it better to have such *dayanim* if they would be neutral and conduct themselves in a principled fashion, than for the ZABLA to deteriorate into a war between two advocates and only one neutral arbitrator? This argument certainly sounded pretty cogent, but it was clear that there was something of a cultural divide nonetheless.

One thing, however, that I learned from the Beth Din and from interacting regularly with Shelly was to be respectful of such cultural differences. In each attitude, and in each perspective, there was something to learn, there was a valuable lesson to be instilled. Much of the job of adjudicating cases in the Beth Din was to understand each party's cultural sensibilities, to be able to appreciate both their commercial customs as well as their cultural norms. This effort to understand and to relate to all segments of the Jewish community was a pivotal reason why many members of the Chassidic community were comfortable bringing their cases to us, as well as members of the non-Orthodox community.

But I also appreciated that the fact that many of our *dayanim* were college educated, and that many *dayanim* also received graduate school education in law, economics or psychology, actually made them more accessible to our broad clientele, and enabled our collective panels to synthesize more effectively the sine qua non of *halachic* expertise with an understanding of the contemporary commercial marketplace, as required by the *halacha*. Just to provide one illustration, one of our distinguished *dayanim*, Rabbi Aaron Levine of blessed memory, actually published the Oxford Handbook on Judaism and Economics, and would regularly incorporate scholarly economic analysis into his decisions.

For my part, while I was at the Beth Din, I co-authored a law review article¹¹ in which I demonstrated that the cheapest cost avoider test made famous by Guido Calabresi, pursuant to which the burden of removing a property nuisance is placed

¹¹ Karen R. Cavanaugh, Daniel Pollach, Jonathan Reiss, & Ruth Sonshine, "Liability for Environmental Damage: An American and Jewish Legal Perspective," 19 *Temple Environmental Law and Technology Journal* 77 (2000).

on the party who can avert the nuisance at the cheapest cost, was actually a principle derived from Talmudic law by the *Rosh* and later explicated by the *Netivot ha-Mishpat*, a super-commentary on the *Shulchan Aruch*. It was the YU Yadin Yadin Kollel that acquainted me with the position of the *Rosh* and the *Netivot ha-Mishpat*, and Yale Law School that enabled me to appreciate the applicability of the talmudic principle to nuisance cases in the contemporary legal world. The Beth Din enabled me to meld both of these worlds in dealing with real life cases. This type of perspective is what made the Beth Din of America both unique and able to serve the integrated needs of the larger Jewish community.

It was with this appreciation that I approached the new President of Yeshiva University, Richard M. Joel, about building more of a partnership between the Beth Din of America and the training center for *dayanim* at Yeshiva University, the Rabbi Norman Lamm Kollel L'Horaa, also known as the Yadin Yadin Kollel. It was precisely at Yeshiva University where *dayanim* could be trained to have the requisite erudition in Jewish law sources as well as the sensitivity to incorporate a broad world view into the decision making process. During the course of these discussions, President Joel offered to set aside a section of the new Glueck Center for Jewish Study building at Yeshiva University to include a satellite space for the Beth Din of America, so that it could become a “teaching” beth din for Yeshiva University rabbinical students. It was also in the course of these conversations, that I was invited to become the new Dean of the Yeshiva, so the connection between the new entities is not only institutional but also personal.

The respect that the approach of the Beth Din of America has engendered throughout the larger world is evident almost every day. Just prior to this lecture, the New York Times published an article about the effectiveness of the Beth Din's pre-nuptial agreement, skillfully drafted under the guidance of its *Segan Av Beth Din* Rabbi Mordechai Willig, pursuant to which parties who are getting married agree that if they end up having marital difficulties, any dispute regarding a *Get* will be submitted to the Beth Din of America. The agreement also provides for the husband to provide a quantifiable support amount of \$150 a day from the time of separation until the couple is no longer married according to Jewish law. As related in the article, this combination of provisions has led to the resolution of scores of divorce cases and has ensured that a *Get* is given in a timely fashion. What the article doesn't mention is that the steps taken to perfect and popularize the pre-nuptial agreement took place under the tenure of Shelly Rudoff at the Beth Din.

What the article also doesn't mention is that part of the popularity of this document is that it adopted a *Torah U'Mada* approach, if you will, to the exercise of the Beth Din's jurisdiction. The agreement enables couples to submit all future monetary disputes to the adjudication of the Beth Din, as well as child disputes. For those couples who feel more comfortable with adjudicating any such disputes in accordance with secular law, the agreement enables them to choose the option to authorize the Beth Din to decide their case in accordance with principles of New York's equitable distribution law, or Connecticut's community property law. This way the case is still properly brought before a beth din in accordance with Jewish legal principles, while at the same time enabling the parties to have their assets divided in accordance with their reasonable expectations based on their monetary practices. And of course, when such cases are brought before the Beth Din, the Beth Din has a capable cadre of trained attorneys to participate on the Beth Din panel and make the determinations in accordance with the parties' choice of law request.

I would be remiss if I did not mention the aspect of Beth Din proceedings that at times seemed to generate the most passion on Shelly's part, and that is that once the Beth Din issued a decision, it was actually binding. In other words, the same way that a secular court decision could be enforced by the civil court system, any arbitration before the Beth Din of America, where the parties had signed an arbitration agreement and the Beth Din issued a written decision, was capable of being enforced in the identical fashion.

Shelly's exuberance about the enforceability of the Beth Din's decisions was based on two considerations. First, the fulfillment of the mitzvah of appointing *shoftim*, of establishing *dayanim* and rabbinical courts, is dependent, as the verse indicates, on having both *shoftim ve-shotrim*. Without *shotrim*, the enforcers of the beth din decisions, there could be no *shoftim* – the beth din would not be able to function.¹² It is thus necessary to ensure that the decisions of the beth din are rendered in a fashion will be enforced by those with the power to enforce, namely the secular court system. Second, there is a metaphysical element. We recite in our Tuesday morning prayers that “*Elokim nitzav ba-adat Kel be-kerev elohim yishpot*” (“G-d stands amongst the congregation of the Lord, amidst judicators He will judge”).¹³ The Gemara¹⁴ understood from this verse that the Divine Presence

¹² See R. Yoezer Ariel, “*Hatzorech Habelchati Be’Shtar Borerut*”, *Techumin* 14 (1994), 147.

¹³ *Tebille* 82:1.

¹⁴ *Brachot* 6a.

rests upon the members of a beth din when they hear a case and render a verdict. A proper beth din process – “*baleich achar beit din yafeh*” (“go after a desirable beth din”)¹⁵ – engenders a religiously meaningful experience. The beth din experience presents an opportunity to connect with the divine in what would otherwise be a relatively mundane dispute resolution process. This is the significance of the Talmudic passage that relates that when “*mi-bei dina shakel glima*,” when beth din has ruled that the defendant in a case has to lose the shirt off his back, rather than be depressed over the verdict, “*lizamer zemer ve-leizal be-orcha*,” literally meaning “he should sing a song and dance along”.¹⁶ In other words, there should be a sense of jubilation that everybody involved in the case, including *dayanim* and litigants, have fulfilled a mitzvah and come closer to G-d because of their commitment to the beth din process and to the fact that the beth din was able to bring finality to the dispute in the manner required by the Torah.

Shelly was fond of a certain explanation of the juxtaposition between the *parsha* (weekly Torah portion) of *Sfoetim*, dealing with laws of judges, and the conclusion of the previous *parsha*, *Re'eh*, which states “*ish ke-matnat yado ke-birchat Hashem elokecha asher natan licha*” – that on the holy festivals, everyone should ascend to the Temple with whatever sacrificial offerings they could afford to contribute based on the blessings bestowed upon them by *Hashem*.¹⁷ Shelly quoted an explanation that the Torah is saying that having *sfoetim*, having a beth din, is “*ke-birchat Hashem*,” is itself the greatest source of blessing. Shelly added one footnote of his own: the verse says “*ish ke-matnat yado*” – each person according to his means. This teaches us, he understood, that every person should contribute his or her unique talents in order to ensure that we have the best possible beth din system. Attorneys should contribute their legal expertise, businesspeople should contribute their business expertise, communal leaders should contribute their communal leadership skills, everybody should contribute their worldly wisdom and expertise to enable the beth din to be responsive and responsible, *halachic* and at the same time holistic.

I would add one last footnote to Shelly’s footnote: the *Netziv*, in response to the same question regarding what the juxtaposition of these verses teaches us, takes the message in the opposite direction. If you have respect for the judges, for

¹⁵ *Sanbedrin* 32b.

¹⁶ *Sanbedrin* 7a.

¹⁷ Deuteronomy 16:17 – 16:18.

the institution of beth din, for the decisions that are issued by the beth din, says the *Netziv*, “*bi-zeman she-mechabdin et ha-dayanim*,” then it will be “*ke-birchat Hashem elokecha asher natan licha*” – then the community will be truly blessed with prosperity and happiness.¹⁸ Shelly Rudoff caused all of us to be truly blessed through his tremendous respect for the beth din process, and through his monumental efforts in resurrecting the Beth Din of America and restoring the glory of the Jewish court system. Shelly’s indelible mark, his broad worldview grounded in Torah and in his love for his fellow Jew, will continue to be imprinted upon every proceeding of the Beth Din of America. May we all be inspired by his example. *Yehi zichro baruch* – may his memory be a blessing.

Rabbi Reiss, a graduate of Yale Law School, is the Av Beth Din of the Chicago Rabbinical Council, a Rosh Yeshiva at the Rabbi Isaac Elchanan Theological Seminary at Yeshiva University, and Chaver Beth Din at the Beth Din of America. He was previously the Max and Marion Grill Dean of RIETS, and before that he served as Director of the Beth Din of America.

¹⁸ R. Naftali Tzvi Yehuda Berlin (1816 – 1893), *Haemek Davar*, *id.*

Beit Din's Gap-Filling Function: Using *Beit Din* to Protect Your Client

By Michael A. Helfand

INTRODUCTION

In recent years, scholars, courts, and practitioners¹ have all become increasingly interested in religious forms of arbitration.² Not only does resolving a dispute through religious arbitration enable parties to avoid the lengthy judicial process, but it also speaks to the religious objectives of many parties; by signing religious arbitration contracts, parties can agree to have disputes resolved in accordance with a shared corpus of religious law and for that law to be applied by mutually agreed upon religious authorities. In so doing, the parties ensure that their dispute's resolution conforms to a set of shared religious principles and values. For this reason, many see religious arbitration as enhancing the religious liberty of the participants, providing access to legally enforceable methods of dispute resolution that speak to the religious affiliations of the participants.³

This narrative – the religious value of religious arbitration – tracks the longstanding centrality that religious arbitration has played within Jewish legal doctrine. Thus, Jewish law requires litigants to submit their disputes to a *beit din* for resolution in accordance with Jewish law. By adhering to this rule – that is, submitting disputes to be resolved by a rabbinical and not secular court – litigants can demonstrate their fidelity to value system embodied by Jewish law; accordingly,

¹ For recent articles addressing the topic, see Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 *New York University Law Review* 1231 (2011); Nicholas Walter, *The Status of Religious Arbitration in the United States and Canada*, 52 *Santa Clara Law Review* 501 (2012); Farrah Ahmed & Senwung Luk, *How Religious Arbitration Could Enhance Personal Autonomy*, 1 *Oxford Journal of Law and Religion* 424 (2012); Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 *Vermont Law Review* 157 (2012).

² For a recent discussion of this phenomenon in the Christian context, see Mark Oppenheimer, *An Argument to Turn to Jesus Before the Bar*, *New York Times* (Feb. 28, 2014), available at http://www.nytimes.com/2014/03/01/us/before-turning-to-a-judge-an-argument-for-turning-first-to-jesus.html?_r=0.

³ See Helfand, *supra* note 1 at 1240-41 (“[R]eligious arbitration courts serve particular religious communities by enabling them to resolve disputes in accordance with their shared religious values and obligations.”); Ahmed & Luk, *supra* note 1 at 427 (“[R]eligious arbitration could enhance autonomy by facilitating the option of religious practice.”).

to violate this rule, would be “tantamount to a declaration by the litigant that he is amenable to allowing an alien code of law to supersede the law of the Torah.”⁴

But beyond the core *balachic* imperative to submit a dispute before a *beit din*, there are also other important and practical reasons for a Jewish litigant to submit disputes to a *beit din*. Under current U.S. constitutional doctrine, civil courts are prohibited from resolving disputes that either interfere with the internal decision-making of religious institutions or require the court to resolve “religious question.” These twin limitations on judicial authority – respectively referred to as the “church autonomy” and “religious question” doctrines – prohibit courts from adjudicating a wide range of religious disputes, including interfering in the hiring and firing of ministers or interpreting religious terminology in a contract. In such circumstances, a court will simply dismiss the case, leaving the parties – and the assets in question – wherever it found them.

The “church autonomy” and “religious question” doctrines have wide-ranging applications when it comes to common disputes with Jewish communal and institutional life. In many circumstances, it will require a court to dismiss claims without providing any sort of remedy. As described below, prominent examples of this phenomenon include cases where a rabbi challenges his termination for cause or where a consumer complains that his purchase of a religious item – for example, kosher food products – failed to comply with agreed upon religious standards. In each of these circumstances, courts will refuse to address a plaintiff’s claims, leaving the plaintiff without a legal remedy in court.

It is in this context where *battei din* serve their central “gap-filling” function. In cases where courts are constitutionally prohibited from engaging in religious adjudication, *battei din* can provide a forum for the parties to resolve their disputes. Parties can submit disputes to a *beit din* that turn on the resolution of religious questions – from determining whether a rabbi was justifiably terminated for cause to whether delivered food was kosher – and the *beit din* can issue a decision that is legally enforceable in court. Indeed, the interaction between constitutional law and arbitration doctrine in the United States allows a court to enforce the decision

⁴ J. David Bleich, *Litigation and Arbitration Before Non-Jews*, 34:3 Tradition 58, 63-64 (2000) (characterizing one of two primary views of the rationale behind the requirement). For further discussion on this point, see Yaacov Feit & Michael A. Helfand, *Confirming Piskei Din in Secular Court*, 61 Journal of Halacha and Contemporary Society 5, 6-9 (2011); Simcha Krauss, *Litigation in Secular Courts*, 2 Journal of Halacha and Contemporary Society 35 (1982).

of a *beit din* even though the court would be constitutionally prohibited from adjudicating that very matter on its own. In this way, *battei din* ensure that individuals with a certain subset of religious claims can secure legally enforceable judgments – and this highlights how *battei din* not only advance core *halachic* principles, but also protect individuals from suffering unaddressed legal harms.

This article proceeds in two parts. Part I considers the “church autonomy” and “religious question” doctrines as well as their applications to religious disputes in the United States. Part II then considers this dynamic in the context of typical Jewish communal and institutional disputes, explaining how *battei din* can play an important “gap-filling” function and thereby protect parties from suffering otherwise unaddressed legal harms.

I. RESOLVING RELIGIOUS DISPUTES IN U.S. COURTS

Consider the following case. A synagogue hires a rabbi. They first enter a contract for two years and then, when the two years elapse, they sign a contract for five additional years. As the five-year contract draws to a close, the rabbi and synagogue begin contract negotiations for a long term deal. The synagogue is quite happy with the rabbi’s performance and the rabbi both enjoys his congregation and is interested in the stability that a long term contract provides. And so the two parties enter a lifetime contract that can be terminated by the congregation only for “cause.” Such contracts are relatively common in the synagogue industry and provide the rabbi with the security to make ideological decisions that conform to his *halachic* worldview.

As years pass, the rabbi becomes increasingly bold in his decision-making. His sermons become increasingly aggressive, he stops attending daily *minyan* consistently because, in his view, the atmosphere distracts him from properly concentrating on his prayers, and he begins using the synagogue’s discretionary fund for projects that, while undeniably religious, offend many of his congregants. Despite interventions by many of the synagogue’s most senior members, the rabbi persists in his conduct. Lamenting the growing divide between the synagogue and the rabbi – and its detrimental impact on the congregation – the synagogue board and general membership vote to terminate the rabbi for cause.

If the rabbi were to file suit for breach of contract in civil court, what would be the likely outcome? On the one hand, the rabbi might claim that his conduct did not amount to sufficient “cause” to justify termination. On the other

hand, the synagogue would presumably disagree. But a court would never consider these opposing arguments and instead would dismiss the case before it got started. To understand why requires understanding the limitations placed by the U.S. Constitution on judicial resolution of religious disputes.

A. THE CHURCH AUTONOMY DOCTRINE

Parties have long attempted to draw U.S. courts into various religious disputes in the hopes of using government's authority to secure a beneficial outcome.⁵ But judicial intervention in religious disputes raises two related types of constitutional worries.

The first is what is often referred to as the "church autonomy doctrine,"⁶ which prohibits courts from resolving cases that raise questions of religious "discipline, or of faith, or ecclesiastical rule, custom, or law."⁷ The church autonomy doctrine derives from the First Amendment, which prohibits government from passing laws "respecting an establishment of religion, or prohibiting the free exercise thereof."⁸ And judicial intervention into questions of religious faith, doctrine or law is seen as contravening both the Establishment Clause – that is, the prohibition against passing laws "respecting an establishment of religion" – as well as the Free Exercise Clause – that is, the prohibition against passing laws that "prohibit the free exercise [of religion]."

Along these lines, the Supreme Court has explained that the First Amendment "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."⁹ Thus, courts have understood that the "wall of separation" between

⁵ One of the first church property disputes heard by the Supreme Court dates back to 1872. *See* *Watson v. Jones*, 80 U.S. 679 (1872).

⁶ To be sure, the term church, when deployed in the context of First Amendment doctrine, refers not only to churches, but to all houses of worship.

⁷ *Ogle v. Hocker*, 279 Fed. Appx. 391, 395 (6th Cir. 2008) (quoting *Watson v. Jones*, 80 U.S. 679, 727, 20 L. Ed. 666 (1872)); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002) ("This church autonomy doctrine prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity."); *see also* *Minker v. Balt. Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990); *Rweyemamu v. Cote*, 520 F.3d 198, 205 (2d Cir. 2008).

⁸ U.S. Constitution, Amend. I.

⁹ *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952).

church and state frequently requires that courts avoid interfering in the internal religious decision-making of religious institutions.¹⁰

Now, to be sure, the contours of this doctrine are far from settled. It is surely not the case that religious institutions have free reign to engage in whatever conduct they so choose without fear of any legal ramifications.¹¹ Indeed, the limits of these principles have been hotly contested for some time.¹² But the more a particular case draws a court into the very center of the religious faith and doctrine of a religious institution, the more likely a court is to dismiss the case. Thus, for example, courts have generally dismissed claims of clergy malpractice – allegations that a clergyman’s failure to act in accordance with the due standard of care for clergy caused harm to one of his parishioners – because doing so would require a court to determine to impose an appropriate standard of care for clergymen.¹³ And to do so, in the words of one court, “would certainly be impractical, and quite possibly unconstitutional” because “[s]uch a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity.”¹⁴

¹⁰ See, e.g., *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972).

¹¹ See, e.g., *F.G. v. MacDonell*, 150 N.J. 550, 560 (N.J. 1997) (noting that “courts have recognized claims for intentional torts against clergymen [such as] fraud . . . sexual assault . . . unlawful imprisonment . . . alienation of affections . . . and for sexual harassment, intentional infliction of emotional distress, and defamation”).

¹² See, e.g., Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 *Iowa Law Review* 1 (1998); Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 *Georgetown Journal of Law and Public Policy* 119, 122 (2007); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 *Columbia Law Review* 1373 (1981); Thomas Berg, Kimberlee Wood Colby, Carl H. Esbeck, and Richard W. Garnett, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 *Northwestern University Law Review Colloquy* 175 (2011); Marci A. Hamilton, *Religious Institutions, The No-Harm Doctrine, and the Public Good*, 2004 *Brigham Young University Law Review* 1099 (2004); Paul Horwitz, *Act III of the Ministerial Exception*, 106 *Northwestern University Law Review Colloquy* 156, 161-62 (2011); Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *Fordham Law Review* 1965 (2007); Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 *North Carolina Law Review* 1, 58 (2011).

¹³ See, e.g., *Wisniewski v. Diocese of Belleville*, 406 Ill. App. 3d 1119, 1158 (Ill. App. Ct. 2011); *White v. Blackburn*, 787 P.2d 1315 (Utah Ct. App. 1990); *Nally v. Grace Community Church*, 47 Cal. 3d 278 (Cal. 1988); *Jones v. Trane*, 153 Misc. 2d 822, 827 (N.Y. Sup. Ct. 1992); *Schmidt v. Bishop*, 779 F. Supp. 321, 327 (S.D.N.Y. 1991); *H.R.B. v. J.L.G.*, 913 S.W.2d 92 (Mo. Ct. App. 1995); *F.G. v. MacDonell*, 696 A.2d 697, 703 (N.J. 1997).

¹⁴ *Nally v. Grace Community Church*, 47 Cal. 3d 278, 299 (Cal. 1988)

The most significant and widespread application of this doctrine has come in the context of hiring and firing ministers.¹⁵ Known as the “ministerial exception,” federal courts have uniformly held¹⁶ that religious institutions cannot be held liable for violating various anti-discrimination statutes when hiring and firing ministers – such as Title VII, which prohibits discrimination in employment on the basis of race and sex;¹⁷ the American with Disabilities Act, which prohibits discrimination in employment on the basis of disability;¹⁸ and the Age Discrimination in Employment Act, which prohibits discrimination in employment on the basis of age.¹⁹ The Supreme Court recently affirmed the ministerial exception, explaining:

Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.²⁰

Accordingly, religious institutions can employ religious principles when hiring and firing ministers even if doing so would otherwise constitute impermissible discrimination.²¹ And the ministerial exception has been applied even to employees of religious institutions that are not ministers, but so long as their employment

¹⁵ When discussing “ministers” in this context, courts refer to religious leaders of all religions, including imams and rabbis.

¹⁶ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705 (2012) (noting the uniform acceptance of the “ministerial exception” among the federal courts of appeals).

¹⁷ 42 U.S.C. § 2000e-2.

¹⁸ 42 U.S.C. § 12112(a).

¹⁹ 29 U.S.C. § 623(a).

²⁰ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

²¹ There does remain a question as to whether a court can intervene in such cases where the plaintiff claims that the alleged religious grounds for his or her dismissal were pretextual. For discussion of this point, see Michael A. Helfand, *Religion’s Footnote Four: Church Autonomy as Arbitration*, 97 Minnesota Law Review 1891, 1957-60 (2013).

duties are sufficiently tied to the religious mission of the institution,²² including music directors,²³ a press secretary,²⁴ and a director of a church’s “Worship Arts Department.”²⁵

B. THE RELIGIOUS QUESTION DOCTRINE

In addition to the restrictions of the church autonomy doctrine, courts are also limited in their ability to resolve religious disputes by the “religious question” doctrine. This religious question doctrine became of increasing importance to the Supreme Court in the latter half of the 20th century, as the Supreme Court held that lower courts could resolve religious disputes so long as they did so only with reference to “neutral principles of law” – that is, only by relying upon “objective, well-established concepts of . . . law familiar to lawyers and judges.”²⁶ On this approach, while courts may not resolve “controversies over religious doctrine and practice”²⁷ and must “avoid . . . incursions into religious questions,”²⁸ courts can resolve religious disputes so long as the contracts and documents at the heart of the dispute employ secular – as opposed to religious – terminology. Where parties employ secular terminology, courts need not dismiss claims on First Amendment grounds; instead, the neutral principles of law approach allows lower courts to

²² See, e.g., *Ross v. Metro. Church of God*, 471 F. Supp. 2d 1306, 1311 (N.D. Ga. 2007) (“[T]here can be little doubt that Plaintiff’s position as the director of the Worship Arts Department of the Metropolitan Church falls within the ambit of the ministerial exception. It is clear from Plaintiff’s Complaint that his position as Pastor of Worship Services is important to the spiritual and pastoral mission of the church.”) (internal quotation marks and citation omitted).

²³ See *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 802-03 (4th Cir. 2000) (“Music is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred. Music is an integral part of many different religious traditions.”); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir. Ill. 2006) (emphasizing the vital discretionary role played by the plaintiff, a music director, in the religious life of the church); *Starkman v. Evans*, 198 F.3d 173, 177 (5th Cir. La. 1999) (noting that the plaintiff conceded that “for her and her congregation, music constitutes a form of prayer that is an integral part of worship services and Scripture readings.”).

²⁴ *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 704 (7th Cir. Ill. 2003) (holding that “[t]he role of the press secretary is critical in message dissemination, and a church’s message, of course, is of singular importance.”).

²⁵ *Ross v. Metro. Church of God*, 471 F. Supp. 2d 1306, 1311 (N.D. Ga. 2007).

²⁶ *Id.* at 603.

²⁷ *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449-50 (1969) (“But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.”).

²⁸ *Elmora Hebrew Ctr. v. Fishman*, 125 N.J. 404, 415 (1991).

resolve religious disputes where they can do so by focusing exclusively on the secular elements of the case.

This “neutral principles of law” framework emerges from the “religious question” doctrine, which understands the First Amendment as prohibiting judicial resolution of religious questions.²⁹ Commentators have debated the principle behind the “religious question” doctrine.³⁰ For some, the constitutional bar against judicial intervention in religious disputes draws directly from the church autonomy doctrine, which grants religious institutions the authority to direct their own internal affairs free from government interference.³¹ Yet others have interpreted the religious question doctrine as protecting against governmental endorsement of one religious view over another.³² Still others have contended that courts are

²⁹ *Jones v. Wolf*, 443 U.S. 595, 603 (1979) (noting that the neutral principles of law approach “promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice”); *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969) (“And there are neutral principles of law, developed for use in all property disputes, which can be applied without ‘establishing’ churches to which property is awarded.”). *But see* Michael A. Helfand, *Litigating Religion*, 93 Boston University Law Review 493 (2013) (arguing that the “religious question” doctrine stems from a misunderstanding of Establishment Clause principles).

³⁰ While as a matter of legal doctrine, courts continue to uniformly apply this doctrine, it has endured significant criticism from a number of scholars. *See, e.g.*, Samuel J. Levine, *Rethinking the Supreme Court’s Hands-Off Approach to Questions of Religious Practice and Belief*, 25 Fordham Urban Law Journal 85 (1997); Jared A. Goldstein, *Is There a Religious Question Doctrine?: Judicial Authority to Examine Religious Practices and Belief*, 54 Catholic University Law Review 497 (2005); Helfand, *supra* note 29.

³¹ *See, e.g.*, Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa Law Review 1 (1998); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 Harvard Civil Rights-Civil Liberties Law Review 79, 87 (2009); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 Villanova Law Review 273, 288 (2008); Berg et. al, *supra* note 12; Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 William & Mary Bill of Rights Journal 43, 48-49 (2008); Horwitz, *supra* note 12 at 161-62; Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 Georgetown Journal of Law and Public Policy 165, 177 (2009); Nelson Tebbe, *Nonbelievers*, 97 Virginia Law Review 1111, 1167 (2010).

Andrew Koppelman has provided a somewhat different take on this general argument, suggesting that government intervention in religious questions is problematic because governmental involvement degrades and corrupts religion. *See*, Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 William and Mary Law Review 1831 (2009).

³² *See, e.g.* Laurence H. Tribe, *American Constitutional Law* § 14-11, at 1231 (2d ed. 1988) (noting that the prohibition against “doctrinal entanglement in religious issues” “more deeply [] reflects the conviction that government – including judicial as well as the legislative and executive branches – must never take sides on religious matters”); Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 Notre Dame Law Review 807, 812 (2009) (“If government were to endorse some interpretations of religious doctrine at the expense of others, it would thereby favor

constitutionally barred from resolving claims that turn on religious doctrine or practice because they lack the adjudicative capacity to address religious questions.³³

But regardless of the theory, courts do not resolve religious questions and therefore will dismiss any case that requires them to do so. It is only where courts can avoid religious questions – and focus solely on secular inquiries – where they will resolve religious disputes. Examples of cases where courts encounter religious questions are manifold, but two particular categories of cases are worth noting in this context.

The first is the sale of religious goods.³⁴ Producers of religious goods advertise, market, and sell to clientele specifically interested in the religious quality of these goods.³⁵ In so doing, these producers often employ religious terminology to describe their goods to attract the interest and earn the trust of interested purchasers. Sales in the United States of religious goods are extremely significant, including a \$4.6 billion Christian products industry,³⁶ and a \$12.5 billion kosher food market.³⁷ However, courts have limited ability to resolve disputes that arise over agreements to purchase such religious goods and services.

some religious persons, sects, and groups over others.”); see also Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 Southern California Law Review 781, 804 (1998) (arguing in the context of state kosher laws that judicial resolution of inter-denominational disputes may be perceived as “the possible endorsement of one minority group”).

³³ See Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 Geo. J.L. & Pub Pol’y 119, 122 (2007) (arguing that the Establishment Clause instructs courts not to interfere in cases implicating religious doctrine or practice because such “claims would require courts to answer questions that the state is not competent to address”).

³⁴ Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and its Importance to the Law*, 51 Buffalo Law Review 127, 180-83 (2003); see generally R. Laurence Moore, *Selling God: American Religion in the Marketplace of Culture* (1994).

³⁵ See, e.g., Andrew Stone Mayo, Comment: *For God and Money: The Place of the Megachurch Within the Bankruptcy Code*, 27 Emory Bankruptcy Developments Journal 609, 620-22 (2011) (describing the market for “quasi-religious products and services” and noting the \$4.6 billion Christian products industry). For some examples of companies marketing Christian goods and services, see Christian Retailing, www.christianretailing.com (last visited Dec. 3, 2013); Faith Centered Resources, www.faithcenteredresources.com (last visited, Dec. 3, 2013).

³⁶ See, e.g., Jay Reeves, *Some in \$4.6B Christian Industry Copy Designs, Logos*, USA Today (Dec. 18, 2009), available at http://usatoday30.usatoday.com/news/religion/2009-12-18-christian-copyright_N.htm; *Christian Product Sales Put at \$4 Billion Plus*, Los Angeles Times (July 7, 2001), available at <http://articles.latimes.com/2001/jul/07/local/me-19488>; see also Andrew Stone Mayo, Comment: *For God and Money: The Place of the Megachurch Within the Bankruptcy Code*, 27 Emory Bankruptcy Developments Journal 609, 620-22 (2011) (describing the market for “quasi-religious products and services” and noting the \$4.6 billion Christian products industry).

³⁷ See *KosherFest: The Business of Kosher Food and Beverage*, at <http://www.kosherfest.com/about-kosher>.

For example, consider the recently dismissed class action lawsuit against ConAgra, the parent corporation of the Hebrew National brand. According to a complaint filed in 2012, ConAgra advertises and sells meat products under the Hebrew National label, describing them as “100% kosher” “as defined by the most stringent Jews who follow Orthodox Jewish law.”³⁸ However, the plaintiffs contended that contrary to these representations, Hebrew National meat products did not satisfy these kosher standards.³⁹ As a result, purchasers of Hebrew National meat products overpaid for these products, mistakenly believing them to be “100% kosher.”⁴⁰ And having misrepresented the kosher quality of these meat products, ConAgra should be held liable for damages under various consumer protection laws as well as for breach of contract and negligence.⁴¹

Not surprisingly, a federal district court dismissed the lawsuit, concluding that “[t]he definition of the word ‘kosher’ is intrinsically religious in nature, and this Court may not entertain a lawsuit that will require it to evaluate the veracity of Defendant’s representations that its Hebrew National products meet any such religious standard.”⁴² Thus, the court held that the religious question doctrine prohibited judicial consideration of the plaintiffs’ claims.

Another example of the impact of the religious question doctrine is where courts are asked to determine whether a party has breached a contract to perform a particular religious function. One of the more common examples of this dynamic is cases – like the hypothetical described at the outset of Part I – where a minister or rabbi is dismissed for “cause.” Such cases recur with some regularity. And courts uniformly dismiss such cases because determining whether a rabbi or minister has been terminated for cause invariably requires a court to assess what type of religious misconduct is sufficient to trigger a breach of contract. Although such an inquiry merely requires interpreting the text of the agreement between the parties, it still clearly represents an impermissible inquiry into a religious question.

For example, in 2009 the U.S. Court of Appeals for the Second Circuit addressed the lawsuit of a rabbi claiming wrongful termination; the synagogue countered

³⁸ Wallace v. ConAgra, Complaint, 0:12-cv-01354-DWF-TNL, at *3 (D. Minn. June 6, 2012).

³⁹ Id. at * 17-21.

⁴⁰ Id. at *64.

⁴¹ Id. at *46-64.

⁴² Wallace v. Conagra Foods, Inc., 920 F. Supp. 2d 995, 999 (D. Minn. 2013), *rev'd on other grounds*, Wallace v. ConAgra Foods, Inc., No. 13-1485, 2014 U.S. App. LEXIS 6230 (8th Cir. Apr. 4, 2014).

that the rabbi had been justifiably terminated under the terms of the employment agreement for “gross misconduct” and “willful neglect of duty.”⁴³ The federal district court, in hearing the case, had dismissed the rabbi’s lawsuit and the Court of Appeals did the same. Explaining its reasoning, the Court of Appeals noted:

[R]eview of Freidlander’s claims in this case would require scrutiny of whether she should have, *inter alia*, read more extensively from the Torah at certain services, prepared students for their Bar or Bat Mitzvah more adequately, performed certain pastoral services that were not performed, or followed the Temple’s funeral service policies. . . . We agree with the district court that such review would involve impermissible judicial inquiry into religious matters.⁴⁴

This outcome is far from unique. In 2007, a federal court in Iowa dismissed a similar lawsuit from a rabbi claiming wrongful termination. The court dismissed the lawsuit on First Amendment grounds, noting that at “[t]he heart of Defendants’ alleged justification for terminating Rabbi Leavy’s employment is the board and congregation’s dissatisfaction with her level of attentiveness and general suitability for the needs of the congregation.”⁴⁵ Accordingly, the court could not resolve the dispute without impermissibly resolving a religious question.⁴⁶

Together, the church autonomy and religious question doctrines limit the ability of courts to resolve religious disputes. Under the religious question doctrine, courts cannot intervene in the internal religious decision-making process of religious institutions; and under the religious question doctrine, courts cannot adjudicate claims that require resolving religious questions. These two related doctrines have significant impact in a wide range of cases. And, as a result, they also help highlight the importance of *battei din* for securing final and enforceable judgments in many Jewish communal and institutional disputes.

⁴³ *Friedlander v. Port Jewish Ctr.*, 347 Fed. Appx. 654 (2d Cir. 2009).

⁴⁴ *Id.*

⁴⁵ *Leavy v. Congregation Beth Shalom*, 490 F. Supp. 2d 1011, 1026 (N.D. Iowa 2007).

⁴⁶ *Id.*; *see also Kraft v. Rector, Churchwardens & Vestry of Grace Church*, 2004 U.S. Dist. LEXIS 4234, 22-23 (S.D.N.Y. Mar. 15, 2004) (dismissing a priest’s lawsuit because evaluating the grounds for the dismissal would have required impermissible inquiry into Canon law).

II. HOW *BEIT DIN* ARBITRATION CAN PROTECT YOUR CLIENT

Current constitutional doctrine prohibits courts from resolving a wide range of religious disputes. From disputes over the hiring and firing of ministers to disputes over the kosher status of various food products, the First Amendment prohibits courts from resolving religious disputes that lead the court to trespass on the autonomy of religious institutions or draw the court into debates over religious questions. And without more, that would mean plaintiffs in a wide range of circumstances – plaintiffs wrongfully terminated for cause or wrongfully denied truly kosher food products – would not be able to secure compensation for legal harms they had endured.

But courts are not the only institutions that can provide final and enforceable legal judgments. In the United States, *battei din* function as arbitration panels. And, under current arbitration doctrine in the United States, the decisions of arbitrators are final and enforceable so long as rendered pursuant to a duly signed arbitration agreement. Moreover, *beit din* arbitration panels have the authority to resolve disputes that entail religious questions or intrude on religious autonomy – and those decisions can be enforced by the very same courts that would be prohibited by the First Amendment from hearing those cases in the first instance.

A. *BATTEI DIN* AS ARBITRATION TRIBUNALS

In the United States, parties to a dispute can forego their right to pursue their claims in court; instead, they can choose to sign an arbitration agreement and thereby submit their dispute to a neutral third-party for binding resolution.⁴⁷ Indeed, pursuant to the Federal Arbitration Act, arbitration agreements are placed “on equal footing with all other contracts,” ensuring that courts enforce them according to their terms.⁴⁸ Accordingly, the mechanism to have a claim arbitrated by a *beit din* is the same as it is for standard arbitration courts; the parties must either sign an arbitration agreement to have a religious arbitral panel resolve the relevant dispute or include such an arbitration clause in a signed contract.⁴⁹ In so doing,

⁴⁷ 9 U.S.C. § 2.

⁴⁸ *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995) (internal citations omitted)).

⁴⁹ *Tal Tours v. Goldstein*, 808 N.Y.S.2d 920, 920 (2005) (“An agreement to proceed before a *bet din* is treated as an agreement to arbitrate.”); see also Ginnine Fried, Comment, “The Collision of Church and State: A Primer to *Beth Din* Arbitration and the New York Secular Courts,” *Fordham Urban Law Journal*, 31: 633-655 (2004).

parties consent to exit the realm of standard legal adjudication and enter into binding arbitration.⁵⁰

Once submitted via a binding arbitration agreement, a *beit din* has the authority to conduct proceedings, hear testimony and admit evidence.⁵¹ When the proceedings are complete, the *beit din* issues an award that provides a judgment on the submitted claims.⁵²

The victorious party can then petition the relevant court to “confirm” the award, beginning the process to render the *beit din*’s award legally enforceable just like any other court judgment.⁵³ Upon receiving such a motion, a court must confirm the award – thereby making it enforceable like any other legal judgment – unless there exists some reason to vacate – that is, reject – the arbitration award. A court can only vacate a *psak din* under very limited circumstances. As a general matter, such circumstances typically include, among others, “corruption, fraud or misconduct in procuring the award” or “partiality of an arbitrator appointed as a neutral . . .”⁵⁴ Accordingly, courts will refuse to confirm an arbitration award where the award fails to represent the decision of a neutral arbitrator freely chosen by the parties.

Importantly, such grounds for vacating a *psak din* do not allow a court to revisit the merits of the underlying dispute when considering whether or not to confirm an award.⁵⁵ Thus, “[a] court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one.”⁵⁶ Furthermore, “[c]ourts are bound by an

⁵⁰ *Kingsbridge Center v. Turk*, 469 N.Y.S.2d 732 (1983) (confirming the *beth din* decision because the parties consented, through a written agreement, to have the *beth din* panel adjudicate the matter); *Kovacs v. Kovacs*, 633 A.2d 425 (Md. Ct. Spec. App. 1993) (confirming *beth din* award because parties “knowingly chose” to participate in the arbitration).

⁵¹ *See, e.g.* 9 U.S.C. § 7.

⁵² Arbitrators, however, are not required to provide a written explanation of their award. *See, e.g.*, *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (“Arbitrators have no obligation to the court to give their reasons for an award.”); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998) (clarifying that arbitrators have no general obligation to explain their awards in writing).

⁵³ *See, e.g.*, 9 U.S.C. § 9.

⁵⁴ CPLR §7511(1) (listing the statutory grounds for vacatur in New York); *see generally* Amina Dammann, *Note: Vacating Arbitration Awards for Mistakes of Fact*, 27 *The Review of Litigation* 441, 470-75 (2008) (collecting state grounds for vacatur).

⁵⁵ *See, e.g.*, *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563 (1976) (“[Courts] should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen by the parties finally to settle their disputes.”).

⁵⁶ *TC Contr., Inc. v. 72-02 N. Blvd. Realty Corp.*, 39 A.D.3d 762, 763 (2d Dep’t 2007).

arbitrator's factual findings, interpretation of the contract and judgment concerning remedies."⁵⁷ In fact, "even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice."⁵⁸ In this way, the decisions of *battei din* – like all other arbitration tribunals – are afforded wide deference. And this deference has important ramifications for the "gap-filling" role that *battei din* can play.

B. THE GAP-FILLING ROLE OF *BATTEI DIN*

As discussed above, courts cannot resolve religious questions nor can they interfere with the core decision-making of religious institutions. When a plaintiff files a claim that requires a court to violate either of these constitutional principles, the court will simply dismiss the case.

However, when courts review the arbitration awards of *battei din*, courts will not investigate the merits of the decision. This is because *battei din* – like all arbitration tribunals – are granted deference regarding the substance of their decisions. Courts cannot second-guess the decisions of arbitrators.

As a result, a court can confirm a decision of a *beit din* – even if the *beit din* addressed religious questions in their decision – without violating any constitutional principles. Indeed, courts routinely confirm awards issued in cases turning on religious questions – just as they would any other arbitration award – and have consistently done so over and above any First Amendment objections.⁵⁹ Enforcing such awards avoids inquiry into any religious questions because the courts, when enforcing arbitration awards, are instructed not to investigate the merits of the dispute between the parties.⁶⁰ Instead, when reviewing arbitration awards, courts

⁵⁷ N.Y. State Corr. Officers & Police Benevolent Ass'n v. State, 94 N.Y.2d 321, 326 (1999).

⁵⁸ Id. There are other potential non-statutory grounds for vacating an arbitration award, such as "manifest disregard of the law" and public policy, although such grounds have been brought into some doubt by the Supreme Court's decision in *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576 (2008).

⁵⁹ See, e.g., *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1113 (D. Colo. 1999); *Elmora Hebrew Ctr., Inc. v. Fishman*, 593 A.2d 725, 731 (N.J. 1991). See generally *Walter, supra* note 1 at 522-25 (discussing general enforcement of religious arbitration awards over First Amendment objections).

⁶⁰ See, e.g., *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 354 (D.C. Cir. 2005) (holding that granting action to compel arbitration before rabbinical court did not violate First Amendment because "the resolution of appellants' action to compel arbitration will not require the civil court to determine, or even address, any aspect of the parties' underlying dispute").

must simply ensure that the arbitrators' decision was issued pursuant to an arbitration agreement between the parties and that the arbitrators complied with the statutorily mandated procedural requirements.

By contrast, were the parties to have submitted those very same claims in court – instead of submitting them for *beit din* arbitration – courts would dismiss the case where resolving the claims would entail an impermissible inquiry into religious question or impermissible trespass on an institution's religious autonomy. In this way, filtering such claims through *beit din* provides the parties with access to enforcement power of the judicial system while avoiding these constitutional prohibitions.

To appreciate the impact of this dynamic, consider again our opening hypothetical about the terminated rabbi. Recall that the rabbi and the synagogue signed an agreement whereby the rabbi could only be terminated for cause. And the synagogue – upset with the rabbi's increasingly aggressive sermons, inconsistent *minyán* attendance and offensive use of his discretionary fund – voted to terminate the contract on the grounds that the rabbi's conduct constituted “cause.”

In such a case, the rabbi could, of course, file suit in civil court for breach of contract. But the court would have to dismiss the case because resolving the dispute would require the court to determine what a sermon is supposed to say, how often a rabbi should attend *minyán*, and what type of charities a rabbi should support out of his discretionary fund. These types of inquiries not only interfere in the internal decision-making process of a religious institution, but clearly entail providing answers to inherently religious questions.

By contrast, a *beit din* could resolve such a case; there would be nothing problematic with a *beit din* passing judgment on a rabbi's sermons, *minyán* attendance and philanthropic choices.⁶¹ All of those are precisely the types of questions a *beit din* is well-suited to consider. More importantly, once a *beit din* rendered a decision in such a case, the winning party could petition a court to confirm the award. And a court would be able to do so – thereby rendering the *beit din*'s judgment legally enforceable – without running afoul of any constitutional objections. This is because, as noted above, a court would not have to review the substance of the

⁶¹ For an example of a case where a court enforced a *beit din* decision regarding “cause” for terminating a rabbi, see *Brisman v. Hebrew Acad. of Five Towns & Rockaway*, 895 N.Y.S.2d 482 (App. Div. 2010).

beit din's decision, only that the decision was issued pursuant to a duly executed arbitration agreement and that the *beit din* abided by the statutorily required procedural rules that ensure the fairness of the hearings.⁶²

This same dynamic would be true for breach of contract claims related to the alleged failure of one party to deliver products that conform to an agreed upon religious standard. As noted above, kosher food is a classic example. If a plaintiff filed suit for breach of contract, claiming that the defendant failed to provide him with food that was "truly kosher," a court would have to dismiss the case. However, a *beit din* could easily hear the case and a court could enforce whatever award the *beit din* issued.

This dynamic holds an important lesson for attorneys and potential litigants. Individuals who plan on entering agreements with Jewish institutions – such as Jewish schools or synagogues – or are entering agreement for religious products – such as kosher food – have a strong incentive to ensure that such agreements contain *beit din* arbitration provisions. Such provisions would ensure that any disputes arising under the relevant contracts would be submitted to *beit din*. Without such a provision, employees or consumers would have no way of ensuring that the institution or producer would agree to go to *beit din*. And if a dispute arose regarding the employees' religious conduct or the religious quality of the delivered goods in, the defendant would have a strong incentive not to go to *beit din*; if submitted to a court, the case would be dismissed on First Amendment grounds.

Of course, one would expect a Jewish institution or individual to willingly submit their disputes to a *beit din* given the unequivocal *halachic* requirement to do so.⁶³ But the financial incentives to avoid doing so are strong – sometimes too strong to ignore. By incorporating *beit din* arbitration provisions into the original agreements, parties can avoid any uncertainties and ensure that their claims do not go unheard.

CONCLUSION

The purpose of this article has been to explore the "gap-filling" function of *beit din* arbitration. Beyond the central *halachic* values embodied in the requirement to submit disputes to *beit din*, parties to religious agreements – from a rabbi signing

⁶² 9 U.S.C. § 10.

⁶³ See *supra* note 4.

his contract to a store purchasing ostensibly kosher food – have significant incentives to ensure that any disputes arising under such agreements are submitted to a *beit din* for binding resolution. Without an agreement to submit such disputes to a *beit din*, parties would be unable to have their case heard in court because their claims would invariably require the court to either impermissibly trespass on the constitutionally protected authority of a religious institution – like a synagogue – or resolve a substantive religious question – like what qualifies as kosher. In all such instances, the U.S. Constitution instructs courts to dismiss the case, leaving the plaintiff with no option for recourse in the judicial system.

By contrast, *battei din* have the ability not only to resolve those disputes, but to have their awards enforced in court. As a result, they fill the gap created by current constitutional doctrine and ensure that parties have access to a forum where their claims can be heard and their damages compensated.

Michael A. Helfand is Associate Professor of Law at Pepperdine University School of Law, Associate Director of the Diane and Guilford Glazer Institute for Jewish Studies, a member of the faculty of the Straus Institute for Dispute Resolution, and serves as a dayan for the Beth Din of America.

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 3
Meir Simons v. L'Chaim Tours and
Josh Rosenberg

DECEMBER 27, 2004

The Beth Din of America, having been chosen by the parties as arbitrators in an arbitration agreement between Meir Simons, as Plaintiff, and L'Chaim Tours and Josh Rosenberg, as Defendants, 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:

The Beth Din was asked to resolve a dispute arising from an alleged breach of contract and failure of performance. The Beth Din heard extensive testimony from the parties, as well as reviewed the documentation submitted by both the parties. Defendant Josh Rosenberg was sued in his individual capacity and as the principal of L'Chaim Tours.

Defendant organized and ran a *Pesach* program in 2003, which involved an intricate setup in which Defendant rented a block of private apartments on a cul-de-sac in Dawson, Georgia. These apartments were then rented for the duration of *Pesach* (12 days in all) to program participants, and Defendant agreed as well to provide food for all meals (including *sedarim*), a shul, *shiurim* by a group rabbi, group and children's activities, and cleaning service before and after the *sedarim*,

which were conducted privately by each family in its individual apartment. One apartment served as a commissary to which food would be delivered before *yom tov* from a kosher caterer in Macon, and from there distributed to each apartment.

Plaintiff signed on to the program, and rented two apartments to be used by his family. He paid \$19,000 in advance, and signed the registration form that read, in pertinent part: “Guest understands that there are no refunds for any unused portion of reservations.” Although Plaintiff raised several issues that ultimately amounted to inconveniences and not breaches of the agreement, Plaintiff is seeking a refund of the \$19,000 paid based exclusively on one alleged breach.

Plaintiff asserted that the delivery of food for the *sedarim*, and for the first two days of *yom tov*, took place on *yom tov* itself. This alleged breach of *halacha* embarrassed and vexed Plaintiff to the extent that his *simchat yom tov* was so irreparably ruined that he and his family left at the first opportunity, Sunday, the Second Day of *chol hamoed*, and checked into a hotel in Macon – paying an additional \$25,000 for the balance of *yom tov*.

Defendant conceded that some deliveries took place on *yom tov* against his will, and due to the negligence of the caterer. Defendant’s agreement with the caterer, The Kosher Deli, based in Macon, called for deliveries to be made before *yom tov*, and Defendant testified that he and his *mashgiach* grew increasingly agitated on *erev Pesach* when the delivery did not come – even calling the caterer several times in increasingly exasperated tones. This program was under the *hashgacha* of the Macon Rabbinical Council (MRC), and the decision to accept delivery of the food on *yom tov* was made not by Defendant but by the MRC rabbinical representative who based his decision on the *halachic* principles of *sha’at ha-d’chak* and *tzorech rabim* (exigency and public need). That *mashgiach*, Rabbi Yehuda Silver, testified by phone that his decision to accept delivery was subsequently ratified by the MRC as the correct decision under the circumstances. In any event, the problem was rectified on *chol hamoed*, and all deliveries for the end days of *yom tov* took place on *chol hamoed*.

We find for Defendant, and dismiss Plaintiff’s claim for a refund. Plaintiff knowingly signed on to a program under the MRC *hashgacha*, implicitly accepting their *halachic* rulings, and willingly accepted delivery of the food on *yom tov* himself. Plaintiff further knowingly signed the registration form, and was indeed orally reminded as well at the time of the occurrence that “there are no refunds for any unused portion of reservations.” Defendant’s acceptance of delivery of the food on

yom tov was not inherently unreasonable under the circumstances, although surely improper if planned *ab initio*. As the problem was rectified on *chol hamoed*, Plaintiff could have stayed without experiencing any further discomfort.

We find therefore that the Defendant fulfilled the terms of the contract with Plaintiff, and Plaintiff left of his own volition.

Defendant counterclaimed for alleged property destruction caused by Plaintiff and/or his family in one of the apartments they occupied, which required Defendant to pay damages of \$500. Defendant conceded that he had not informed Plaintiff of this damage claim until the testimony at this trial, and that part of the alleged damage – to a kitchen countertop – he had not personally witnessed. Defendant conceded as well that he had insurance to cover him against this type of loss, but did not file a claim. We find that Defendant’s counterclaim is not supported by sufficient credible evidence, and it is hereby dismissed.

We respectfully urge the parties to relate to each other without rancor or acrimony, and wish them continued *batzlacha* in their business endeavors.

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 decision may be modified with the consent of both parties. All of the provisions of this decision shall take effect immediately.

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

By: _____
Rabbi AA, Esq. Rabbi BB Rabbi CC, Esq.
Dayan Dayan Dayan

Beth Din of America Reported Decision 4 Joseph Goldberg v. Aryeh Schwartz

DECEMBER 29, 2011

The Beth Din of America, having been chosen by the parties as arbitrators pursuant to an arbitration agreement, dated as of April 29, 2011, between Joseph Goldberg, with an address at 1000 Amsterdam Avenue, Passaic, New Jersey 07055, as Plaintiff, and Aryeh Schwartz, with an address at 144-99 77th Avenue, Flushing, New York 11367, as Defendant, to submit to the Beth Din of America for a binding decision with respect to certain differences and disputes pertaining to monies allegedly owed to Plaintiff, having given said matters due consideration, and having heard all parties present testify to the facts, does decide as follows:

FACTS AND CLAIMS:

In 1984, Plaintiff loaned \$128,000 to members of Defendant's family. The loans and repayments terms were evidenced by three separate promissory notes. All three notes called for interest to accrue at the rate of 15% per annum and contained customary *shtar iska* provisions. The first note, in the amount of \$25,000, was dated October 29, 1984 and was signed by Alvin Schwartz, a brother of Defendant. The second note, in the amount of \$53,000, was dated November 1, 1984 and was signed "Zalman Schwartz/ Fallview Trading and [illegible] Corp." Zalman Schwartz is also a brother of Defendant. The third note, in the amount of \$50,000, was dated September 1, 1984 and was signed by Zalman Schwartz. The

November 1st and September 1st notes called for repayment “one year after date for value received.” The October 29th note was silent with respect to a repayment date.

Since the date of the initial loans, Plaintiff has recovered approximately \$100,000 from Alvin Schwartz and Zalman Schwartz. Plaintiff acknowledges that Defendant is not a signatory to the notes, and that he had no dealings with Defendant in connection with the loans. Nevertheless, Plaintiff claims that Defendant is liable for repayment of up to 14% of the principal amount of the loan since Defendant was a 14% shareholder in Fallview Trading and Import Corp. (“Fallview”) and the loans were made for the purpose of capitalizing that entity.

DECISION:

Defendant did not sign a note obligating the repayment of the loans. Accordingly, he is not personally liable to Plaintiff to repay any portion of the loans.

With respect to Plaintiff’s argument that Defendant is liable by virtue of his ownership of shares in Fallview, even if we were to agree with Plaintiff’s contention that Fallview is liable to repay the loans, that liability is limited to the assets of the corporation. The corporation is not a party to this *din torah*. Based on testimony of the parties, we understand the corporation is insolvent.

One of the essential features of a corporation is its promise of limited liability to its shareholders. See William Meade Fletcher, *Cyclopedia of the Law of Corporations*, Section 14 (“The rights and liabilities of a corporation are distinct from those of its members, and thus, the shareholders of a corporation are ordinarily not liable for the corporation’s obligations, liabilities, or debts.”) Although the concept of a corporation, per se, is not indigenous to Jewish law, Jewish law does recognize the ability of debtors and creditors to agree to a limitation of liability.¹ In addition, Jewish law recognizes that when parties conduct business, there is a presumption that the commercial laws and practices of their locale are implicitly adopted by them as terms of their agreement.² Thus, even if the loans in this case were made by Plaintiff to the corporation, an implicit term of the loan

¹ See Rambam, *Mishna Torah, Hilchot Makveh Viloveh*, 18:3.

² See R. Moses Feinstein (1895-1986), *Iggerot Moshe, Choshen Mishpat* I, No. 72.

transaction would have been to limit the obligation to pay back the loan to the assets of the corporation.³

Accordingly, Plaintiff's claims are denied in their entirety. All other applications and claims are hereby denied.

The obligations set forth herein shall be enforceable in any court of competent jurisdiction, in accordance with the rules and procedures of the Beth Din of America 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 of America, and the arbitration agreement of the parties. Any provision of this decision 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 Rabbi CC, Esq.
Dayan Dayan Dayan

³ See R. Yaakov Yishaya Blau, *Pitchei Choshen - Hilchot Shutfin Umatzranut* (Jerusalem: Beit Horaab Te-vunot Aryeh, 1991), 1:33 and note 65, who expressly adopts this rule with respect to transactions done with a corporation.

Beth Din of America Reported Decision 5a Golan v. Schwartz

INTERIM DECISION

JULY 25, 2011

The Beth Din of America was chosen by the parties as arbitrators pursuant to an arbitration agreement dated as of the 21st day of July, 2011, between Gabriel and Gertrude Golan, with an address at 154 King Street, Chappaqua, New York (“Plaintiffs”), and Shalom and Shoshana Schwartz, with an address at 200 N. Bedford Road, Chappaqua, New York (“Defendants”), to submit their disputes to the Beth Din of America for a binding decision with respect to the rental of 200 N. Bedford Road, Chappaqua, New York, with each party having certain claims and counterclaims against each other.

Section 21 of the Rules and Procedures of the Beth Din provides that, “the Beth Din may issue such orders as it may deem necessary or appropriate to preserve and safeguard any property that is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute.” In addition, the arbitration agreement provides that, “[i]n addition to any final award, the arbitrators may make other decisions, including interim or partial orders and awards.” This is a final award of the Beth Din regarding the issue of occupancy of 200 N. Bedford Road, Chappaqua, New York (the “Premises”). Notwithstanding

the foregoing, the Beth Din reserves continuing jurisdiction over all matters of this dispute.

Pursuant to Section 1 of the Lease Agreement for the Premises signed by all parties for the term of August 15, 2010 to May 15, 2011, Shalom Schwartz and Shoshana Schwartz shall vacate the Premises no later than August 14, 2011.

The obligations set forth herein shall be enforceable in any court of competent jurisdiction, in accordance with the Rules and Procedures of the Beth Din of America and the Arbitration Agreement. Any request for modification of this award by the arbitrator 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 decision may be modified with the consent of both parties. All of the provisions of this order shall take effect immediately.

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

By: _____

Rabbi AA

Dayan

Beth Din of America Reported Decision 5b Golan v. Schwartz

FINAL DECISION

DECEMBER 5, 2011

The Beth Din of America, having been chosen by the parties as arbitrators pursuant to an arbitration agreement (the “Arbitration Agreement”), dated as of July 21, 2011, between Gabriel and Gertrude Golan, with an address at 154 King Street, Chappaqua, New York (“Plaintiffs”), and Shalom and Shoshana Schwartz, with an address at 200 N. Bedford Road, Chappaqua, New York (“Defendants”), to submit their disputes to the Beth Din of America for a binding decision with respect to issues related to the rental of a residence, with the parties having acknowledged that the Beth Din of America is authorized to resolve all disputes related to and arising from this relationship, and having heard all parties testify as to the facts of said disputes and differences, does decide as follows:

FACTS

Plaintiffs and Defendants entered into a binding contract under the terms of which Defendants agreed to rent a residence at 200 N. Bedford Road, Chappaqua, New York, for a term of nine months, starting on August 15, 2010. The lease

provided that the tenant has the right to continue that lease on a month-to-month basis and the landlord has the ability to terminate this right by giving thirty days' notice.

Other relevant sections of the lease provide: (i) a \$100 penalty for rent payments that are more than five days late; (ii) that the property was rented "as is"; (iii) a hold-over clause which provides that if the tenant fails to vacate he must pay an additional 50% rent for the additional months; and (iv) that in the event of an arbitration, the losing party must pay the prevailing party's attorney's fees and costs.

Defendants did, in fact, continue the rental on a monthly basis, and on June 11, 2011, Plaintiffs gave notice that the right was being terminated and demanded that Defendants vacate the premises by July 14, 2011. Defendants responded that they could not leave since their new house was not ready.

The Beth Din filed an interim decision, dated July 25, 2011, which ruled that Defendants had to vacate the premises by August 14, 2011. Defendants did comply with the Beth Din's order.

CLAIMS

Plaintiffs set forth a variety of claims, namely: (i) \$4,200 for 150% of the \$2,800 rent owed for the month Defendants remained after receiving notice of termination; (ii) \$100 for late payment of said rent; (iii) \$300 for arbitration fees in the Beth Din; (iv) \$408.88 for legal fees to Abraham Agushewitz for work related to the eviction of Defendants; (v) \$2,012.50 for legal fees to Richard Rossman for work related to the Beth Din case; (vi) \$600 for additional expenses related to Defendants' late arrival to the Beth Din hearing; (vii) \$1,400 for replacement of an air conditioner compressor; and (viii) \$69.73 for monies due on water bills.

Defendants counterclaim for monies they spent on repairs to the residence and costs related to a water problem which caused damage to their clothing, rendered the water unfit for bathing and drinking, and required that laundry be done at the laundromat. Defendants demand \$4,520 for the above claims.

DISCUSSION

The lease was clearly drafted by Plaintiffs and strongly supports their case. Therefore, costs for minor repairs are the responsibility of the tenant(s). However, the lease is ambiguous as to what constitutes major repairs. The lease mentions two examples: roof repair and cracks in the foundation. Using the rule that

contracts should be construed against the drafting party, it is reasonable to assume that a repair which cost over \$1,000 and affects a permanent fixture of the house, as is the case with the air conditioning system, shall be considered major repair work and is the landlord's responsibility. This is supported by the fact that the landlord will receive almost the entire benefit of the repair.

While Defendants are liable to pay the \$4,200 for rent, they are not responsible to pay the additional \$100 since such a payment is a violation of the rabbinic prohibition against usury (*ribbit*).

Regarding the various claims for attorneys' fees and litigation costs, Defendants clearly were the losing party with respect to the eviction and payment of rent. However, other equitable considerations mitigate against an award of the full amount of the costs incurred by Plaintiffs. The application of *pesharah ha-kerovah la-din*, as well as New York case law, which has held that, "[w]hile ... entitlement to attorneys' fees under a lease clause is a matter of contractual right, a court's authority to withhold fees in a particular case is not so closely confined and may turn upon equitable factors or other considerations fact-specific to the litigation"¹, justifies a reduction by two-thirds of Defendants' liability for costs, for a total obligation of \$907.12 ($\$408.88 + \$2,012.50 + \$300 = \$2,721.38 \times 1/3 = \907.12).

Defendants' late arrival to the *din torah* does not appear to have been caused by Defendants' negligence. Accordingly, Defendants should not be obligated to reimburse Plaintiffs for their costs incurred as a result thereof.

Defendants admit that they must reimburse the amount paid for water charges.

PESAK

1) Defendants are liable to pay: (i) \$4,200 for rent; (ii) \$907.12 for attorneys' and arbitration fees; and (iii) \$69.73 for water bills. This totals \$5,176.85.

2) All of the counterclaims of Defendants are rejected, but Defendants may apply the \$2,800 security deposit towards the amount due.

3) In sum, Defendants are ordered to pay Plaintiffs \$2,376.85.

All other applications and claims are hereby denied. The obligations set forth herein shall be enforceable in any court of competent jurisdiction, in accordance with the rules and procedures of the Beth Din of America and the Arbitration

¹ Rose v. Montt Assets, Inc., 723 N.Y.S.2d 592 (2000).

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 of America and the Arbitration Agreement of the parties. Any provision of this decision may be modified with the consent of both parties. All of the provisions of this order shall take effect immediately.

The parties are urged to relate to each other in peace and friendship.

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

By: _____

Rabbi AA

Dayan

Beth Din of America Reported Decision 6
Kosher Quality Caterers, Inc. v.
Kalman Goodman
& Menachem Moskowitz

JANUARY 19, 2005

The Beth Din of America, having been chosen as arbitrators pursuant to an arbitration agreement between Kosher Quality Caterers, Inc. (represented by Shmuel Shendofsky and Benjamin Baron) as plaintiffs and Kalman Goodman and Menachem Moskowitz as defendants to submit their disputes in reference to damages allegedly suffered from an aborted sale of a business interest, having given proper notice of the time and the place of meeting, having given said matters due consideration, having heard all parties and witnesses testify to the facts of said dispute and differences, and having received documentary evidence submitted by the parties, does conclude as follows:

FACTS

In late 2002 and early 2003, plaintiffs sought to sell Paradise Pizza Corp. (“Paradise Pizza”), a kosher pizzeria in upstate New York that plaintiffs had been operating in the summers to serve the Jewish summer camp market. Paradise Pizza would in any case undergo significant change for the summer of 2003 because it

would be moving to a new and larger location (“the Vista site”). The landlord, Mr. George Johnson (“Landlord”), was building a new building for Paradise Pizza on the Vista site, and Paradise Pizza would be expected to enter into a new lease and make other capital investments to ready the property.

Defendants expressed interest in purchasing a 50% interest in Paradise Pizza, and the discussions led to the writing of a term sheet in mid-March 2003. While the term sheet is unsigned, all parties agree that it reflected the general terms of a mutually-acceptable business deal. The term sheet explicitly contemplates that a full, written contract would be signed by the parties, after which defendants would deliver a first payment of \$30,000 toward the full purchase price of \$119,000.

Plaintiffs and defendants dispute whether defendants continued to insist upon a written contract. It is undisputed, however, that the defendants wrote a total of four checks totaling \$30,000 to Landlord’s attorney to be held in escrow for the new lease. One check, for \$10,000, was dated April 15, 2003, and the other three checks are dated May 8-9, 2003. The new lease was signed in either early April or early May 2003 (the document contains an uninitialed change) by Mr. Shendofsky, on behalf of either Kosher Quality Caterers, Inc., or Paradise Pizza Corp. (again an uninitialed change). Mr. Baron also signed, apparently simultaneously, a personal guarantee backing the lease.

On May 19-20, 2003, defendants stopped payment on the checks to landlord’s escrow, giving rise to the current *din torah*. Defendants argue that they stopped payment on the checks because the plaintiffs’ continued failure to provide them with a written contract had diminished their confidence in the plaintiffs as partners.

As things turned out, due to a failure to perform by Landlord and/or his sub-contractors, the new Paradise Pizza building at the Vista site was not ready for occupancy for either of the 2003 or 2004 summers. The Beth Din has received no evidence that any rent was paid under the lease for either summer, which is consistent with the failure of Landlord to perform under the lease agreement.

CLAIM

When pressed by the Beth Din to define the damages sought, the plaintiffs offered the following rationale in their submission of August 30, 2004, and it is upon the basis of this claim that we rule (we cite from Point 2 of the submission): “[I]f Kalman and Menachem had not stopped payment and continued with the deal[,]

Kosher Quality would have received \$119,000 even if the building would not have been ready....”

In essence, plaintiffs argue that defendants were *halachically* obligated to consummate the business deal and should be liable for their failure to do so in an amount totaling the full purchase price.

In support of their argument that the amount of damages should equal the full purchase price, plaintiffs argue that they could not have found a subsequent buyer for an equal price because (1) the business suffered from having been closed in summer 2003 and (2) the reputation of the business had been damaged by “word on the street that we had a terrible problem with this business deal.”

HOLDINGS AND RATIONALE

While this case involves a complex set of facts, many of which are disputed, the essential facts – as presented above – are clear. We also believe that the *halacha* involved is clear.

This case arises in the context of partnership, and could have posed issues related to the *balachot* of partnership. Defendants arguably became partners by writing checks to Landlord’s escrow prior to the execution of the lease by Mr. Shendofsky and withdrew from the partnership subsequent to the execution of the lease. Had any rent been paid by Kosher Quality to Landlord, it is possible that defendants would have been liable for half of the rent. However, we received no proof of such payment. To the contrary, it seems that Landlord failed to perform his obligations under the lease, leaving him in no position to demand rent.

In the absence of a claim based on partnership, this case turns on whether the business deal agreed on in the unsigned term sheet is *halachically* binding. On this, the *halacha* is clear: in the absence of a written agreement or *kinyan*, a contract is not binding.¹ We also note that the subsequent diminution of the value of Paradise Pizza is much more likely to be attributable to Landlord’s failure to make the premises available for either 2003 or 2004 than to any action by the defendants. We thus find for the defendants as a matter of law.

Despite our holding that the defendants were not technically bound by their oral agreement, we wish to emphasize that the *halacha* views their failure to

¹ *Shulchan Aruch, Choshen Mishpat*, 189:1.

consummate the transaction in 2003 as morally wrong. While oral agreements do not create binding contracts, the *halacha* considers a person who reneges on an oral agreement to be a *mechusar amanah*, a person lacking in trustworthiness and integrity in business affairs.² In order to escape a finding of *mechusar amanah* in this case, the defendants carry the burden of proof to demonstrate that their cancellation of the checks given to Landlord's escrow was appropriate. This could be so only if the check cancellation was due to changed circumstances either (1) caused by the plaintiffs' negligence or (2) not anticipated as a risk at the time that the defendants reached their oral agreement with the plaintiffs and submitted their checks. (The general question of whether unanticipated changed circumstances permit a party to renege on an oral agreement is a subject of *halachic* controversy.³) We hold that the defendants have not proved that the plaintiffs were negligent in fulfilling any of their material responsibilities or that Landlord's failure to have the building completed by the summer was an unanticipated risk. As a result, the defendants remained morally obliged to consummate the transaction. However, as noted in the previous paragraph, the defendants' moral failure does not give rise to a payment obligation at this time.

Both parties have made claims against the other for legal fees related to the case. Legal fees are generally not recoverable except where the Beth Din believes that the equities of the case require it. In this case, we believe that neither side is entitled to the recovery of legal fees from the other. The plaintiff's case cannot be seen as frivolous in light of our finding that the defendants had a moral obligation to fulfill their oral commitment reflected in the unsigned term sheet.

Both sides also submitted claims to recover advertising and promotion costs relating to the planned opening of Paradise Pizza in 2003. As neither side has provided proof of such costs, we deny the claims of both parties to such costs.

The parties shall not speak disparagingly of each other. The obligations set forth herein shall be enforceable in any court of competent jurisdiction, in accordance with the rules and procedures of the Beth Din of America 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 of

² *Shulchan Aruch, Chosben Mishpat*, 204:11.

³ See *Rama, Shulchan Aruch, Chosben Mishpat*, 204:11 and *Biur HaGra, Chosben Mishpat*, 204:18.

America, and the Arbitration Agreement of the parties. Any provision of this decision may be modified with the consent of both parties. All of the provisions of this decision shall be effective immediately.

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

By: _____
Rabbi AA BB, Esq. Rabbi CC
Dayan Dayan Dayan

Beth Din of America Reported Decision 7 Yossi Mandel v. Moshe Hirsch

JANUARY 1, 2011

The Beth Din of America, having been chosen by the parties as arbitrator pursuant to an arbitration agreement, dated as of July 3, 2010, between Yossi Mandel, with an address at 500 West 119th Street, New York, New York 10027 (“Plaintiff”) and Moshe Hirsch, with an address at 100 West 116th Street, New York, New York 10026 (“Defendant”) to submit their disputes to the Beth Din of America for a binding decision with respect to monies allegedly owed, having given said matters due consideration, and having heard all parties testify as to the facts of said disputes, does decide as follows:

FACTS:

Defendant agreed to share an apartment in New York with Plaintiff and two other apartment mates, which the group was to rent through August 2010. The verbal agreement among the apartment mates called for rent and utilities to be split evenly among the four of them. For reasons unrelated to the apartment or his three potential apartment mates, Defendant did not move in at the start of the rental in September 2009 and, sometime in November 2009, he informed the others that he would not be moving in at all.

In an e-mail to the apartment mates in November of 2009, Defendant indicated that he was prepared to pay his share through the end of December 2009

and to assist in finding a replacement roommate. Defendant maintains that he followed through on his commitments, by paying his share of the rent and utilities through the end of the year, and by presenting potential roommates to take his place. Plaintiff claims that each one of the potential roommates introduced by Defendant was unsuitable for one reason or another. Plaintiff claims that Defendant still owes some of the rent and utilities attributable to December 2009 and, further, that Defendant should be obligated to pay his share of rent and utilities until June 2010, when a replacement apartment mate that was acceptable to the others finally moved in. Plaintiff calculates his share of the total amount owed to be \$831.27. (The other apartment mates are not parties to this *din torah*; one waived his claims against Defendant and the other pursued his claims in a separate *din torah*.)

DISCUSSION:

As a matter of Jewish law, an agreement among individuals to rent a residence together is binding, and a party to the agreement may not substitute himself or herself with a replacement roommate.¹ Since residential living is a private affair, each roommate may rightfully assert that they entered into the agreement based on their comfort with the roommates who are parties to the agreement, and that they do not wish to live with any substitutes offered in their stead.² Strictly applied, this would mean that by virtue of his agreement with the other apartment mates Defendant remained obligated in the full amount of the rent and utilities incurred until a replacement apartment mate took his place in June 2010.

Nevertheless, a strict application of the foregoing would be unduly harsh in light of prevalent custom. Absent express contractual terms to the contrary, Jewish law generally recognizes the binding nature of local customs and courses of dealing.³ More often than not, and especially among students in transient communities such as the one where the apartment in question is located, potential apartment mates who back out at the last minute are not left to shoulder the entire rent due for the duration of the rental period. Instead, the parties work together to try to

¹ *Shulchan Aruch, Choshen Mishpat* 316:2.

² *Ibid.*, based on *Teshuvot HaRosh*, cited in *Tur, Choshen Mishpat* 316:2.

³ See *Shulchan Aruch, Choshen Mishpat* 331. See also R. Yaakov Yeshaya Bloi, *Pitchei Choshen, Hilchot Sechirut* 1:5.

find a replacement apartment mate, and release the apartment mate who backed out after a reasonable time.

This custom is reflected in the secular case law on this topic, which recognizes that parties to a contract have a duty to mitigate damages suffered.⁴ New York courts have held that the common law duty to mitigate that generally pertains to contracts does not apply in the context of leases of real property, since they are not executory contracts but rather present transfers of real property.⁵ However, a rent allocation agreement among apartment mates arguably does not constitute a present transfer of an estate in real property. In addition, the lease cases in which courts have found no duty to mitigate typically involve leases which call for rent to accelerate upon the tenant's vacating the premises, and where the duty to mitigate is expressly waived.⁶ Here, the agreement between the apartment mates was oral, and contained no such express waiver.

The custom is also consistent with what appears to have been the expectation of the apartment mates at the time Defendant announced he would not be moving into the apartment, since there was no immediate objection to the statement in Defendant's November 2009 e-mail that, "I have paid up until the end of December.. I think a month should be enough to find someone you guys would like." Notably, Defendant did not completely abandon his responsibilities, and continued to actively solicit and introduce potential replacements beyond December of 2009.

With respect to December 2009 rent and utilities that Plaintiff claimed were unpaid, Defendant's assertions that he paid in full for this period are credible. Payments were typically made to one apartment mate, who then made distributions and otherwise reconciled the accounts of the others on an ongoing basis, and it is likely that the amount Plaintiff claims is missing is the result of a miscalculation among the apartment mates. In any event, Plaintiff's claim is subject to the rule of *hamotzi me'chaveiro alav ba'raaya* (the burden of proof is on the claimant), the burden of which was not met.

⁴ See, for example, *Losei Realty Corp. v. City of New York*, 254 N.Y. 41 (1930).

⁵ See *Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*, 87 N.Y.2d 130 (1995) ("Leases are not subject to [a duty to mitigate damages], for, unlike executory contracts, leases have been historically recognized as a present transfer of an estate in real property. Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages.")

⁶ See, for example, *Rios v. Carrillo*, 861 N.Y.S.2d 129 (2008).

DECISION:

The arbitration agreement that governs this *din torah* allows for an award on the basis of *pesharah ha-kerovah la-din*, by which an outcome otherwise mandated by the letter of the law can be modified to take into account equitable factors. Accordingly, Defendant is ordered to pay Plaintiff the amount of \$250.00. This figure was calculated by multiplying \$125.00 by three (representing Plaintiff's share of rent for January through March, which, together with the December rent already paid, represents a respectable four month period following Defendant's notification that he would not be moving in), and then discounting by one-third (the discount recommended in *Shvut Yaakov* 2:145 with respect to awards based on *pesharah ha-kerovah la-din*). Based on the equitable factors enumerated in this decision, charges for utilities were not included in the base amount.

All other claims and counterclaims are hereby denied. Any request for modification of this decision shall be in accordance with the Rules and Procedures of the Beth Din of America, and the arbitration agreement. Any provision of this decision may be modified with the consent of both parties. All of the provisions of this decision shall take effect immediately.

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

By: _____

Rabbi AA, Esq.

Dayan

Beth Din of America Reported Decision 8
United Savings, LLC v. Dunkirk
Center for Health, Inc. and Royal
Rehabilitation

FEBRUARY 13, 2014

The Beth Din of America, having been chosen by the Parties to commence administration of an arbitration case pursuant to an arbitration agreement (the “Arbitration Agreement”), dated as of May 20, 2012, between United Savings, LLC, with an address at 555 Ceder Rd, Buffalo, NY, (the “Claimant”) and Dunkirk Center for Health, Inc. (“Dunkirk”) and Royal Rehabilitation LLC (“Royal”) with an address at 888 Washington Street, Dunkirk, NY, (Columbus and Royal, collectively, the “Respondent”) (the Claimant and Respondent, collectively, the “Parties”), with respect to certain differences and disputes in reference to monies owed with respect to a cost savings, with each Party having certain claims and counterclaims against each other, does decide as follows:

HEARING:

Hearings (the “Hearings”) in this matter took place at the Beth Din on October 12, 2012; January 17, 2013; April 8, 2013; and June 3, 2013. Following the Hearings, the Parties made various written submissions to complete the record

in this case. Present at the Hearings were Mr. Harvey Goldman, on behalf of the Claimant, and Dr. Mark Furst and Mr. Yosef Green, on behalf of the Respondent. The Claimant was represented Michael Schwartz, Esq. and Jonathan Miller, Esq.; the Respondent was represented David Goldberg, Esq. For the sake of convenience, in this decision, unless it would lead to a lack of clarity, written correspondence to us from or statements made before us by attorneys on behalf of the Parties are attributed to the Parties rather than the attorneys.

FACTS AND CLAIMS:

A. THE AGREEMENT

The Claimant is a utility-cost-savings consultant. On January 10, 2008, Mr. Joe Bush (“JB”), an individual, who represented that he was authorized to sign a contract on behalf of Dunkirk, signed a cost recovery agreement (the “Agreement”) that authorized the Claimant to try to recover utility costs expended by Dunkirk. The Respondent provided us with two versions of the Agreement. In one, JB did not date, enter his title, or print his name. In the other, we noted JB’s title and the date (January 10, 2008) he purportedly executed the Agreement. (We note that the Respondent submitted to us an undated copy of a “Letter of Authorization” signed by JB that included his printed name, and “Owner,” as his title.). The Agreement, in general, provided that JB, on behalf of Dunkirk, retained the Claimant to correct and reduce its gas, electric, and oil costs, including taxes, and that any dispute arising under it “will be resolved in accordance with the laws of the State of New York State [sic].” The Agreement also generally provided that the Claimant would be entitled to receive an amount equal to one-third of the total utility savings generated by the Claimant as compensation for its services. The savings generally would be calculated based on actual cost recovery, as well as for 30 months of projected savings. We also note that although the Claimant did not provide us with a cost-recovery agreement executed on behalf of Royal, the Claimant’s August 20, 2013 letter to us asserts that such an agreement was executed.

The Respondent asserted that the Agreement is invalid because it was not signed by an officer of the Respondent who was authorized to enter into agreements on behalf of the Respondent. The Claimant argued that JB was authorized by the Respondent to execute the Agreement, and that even if JB was not actually authorized to act on behalf of the Respondent, his signature on the Agreement is

nevertheless legally binding upon the Respondent under the secular legal doctrine of apparent authority. Under this doctrine, a principal can be bound by the actions of a purported agent in some circumstances if a reasonable person would conclude, based on various factors, that the agent duly represents the principal.

JB was no longer alive by the time we convened; thus, we were never able to interview him.

B. THE SAVINGS

The Parties disagree about how much the Claimant saved, if any, for the Respondent.

Ultimately, the Claimant requested that, pursuant to the Agreement, we award it \$243,130.77 for invoices related to savings for Dunkirk, \$4,333.22 for invoices related to savings for Royal, plus an unspecified amount of attorneys' fees. Initially, the Claimant requested a higher amount, \$312,990, but after questioning by the arbitrators, the Claimant reduced its claim.

The Claimant assumes that without its intervention the Respondent would have paid a negotiated rate (the "Negotiated Rate") of an amount equal to 19.539 percent less than the posted interruptible transportation rate (the "Posted Rate"). The Claimant bases its assertion on looking at an average percentage difference between (a) the actual rate the Respondent was billed and (b) the Posted Rate for the seven months from February through August 2009, as cited in an email dated May 23, 2013, from Mr. Chris Johns to Mr. Fred Strand. Ultimately, the Claimant switched to a firm transportation rate (the "Firm Rate"), resulting in significant savings compared to the Negotiated Rate.

In contrast, the Respondent asserts that even without the Claimant's intervention and a switch to the Firm Rate, it is reasonable to assume that over time its Negotiated Rate would have been lowered to a rate equal to 20 percent more than the Firm Rate. The Respondent bases its assertion on what four customers on a negotiated Posted Rate paid compared to those on the Firm Rate. Accordingly, the Respondent argued that the baseline for determining savings should be a rate equal to 20 percent more than the Firm Rate, and even if we were to rule against it on every other issue, the most it should be required to pay is \$37,136.15.

Particularly with respect to certain gas-price savings, the Respondent asserts that the Claimant did not achieve the savings on behalf of the Respondent it claimed because New York Gas Company, the gas-transportation company used

by the Respondent, would have inevitably, without the Claimant's intervention, offered to the Respondent the cost-effective Firm Rate (albeit the Claimant may have accelerated the period when the savings began) and therefore the claimed savings were never achieved by the Claimant.

In addition, the Respondent counterclaimed that it had been overbilled (and therefore had overpaid) for invoices 77-1352, 77-1364, and 77-1376. Applying a 19.539 percent discount to the posted firm rates of the months to which those invoices pertain yields an amount of \$4,548.77 due to the Respondent.¹

DISCUSSION:

A. THE ARBITRATION AGREEMENT

The Arbitration Agreement provides that the arbitrators may choose to resolve the controversy in accordance with either *din* (strict application of the law) or *pesharah ba-kerovah la-din*, which essentially grants *dayanim* (arbitrators) discretion on many issues to arrive at a conclusion that is equitable, in a manner that may depart from the application of Jewish law in its strictest sense. The Rules and Procedures of the Beth Din state that unless there is an agreement otherwise, the case will be resolved according to *pesharah ba-kerovah la-din*. Although they had the discretion, the arbitrators saw no compelling reason not to resolve the controversy in accordance with *pesharah ba-kerovah la-din*. There is a general preference in *halacha* (Jewish law) for the resolution of conflicts in an equitable manner. Consistent with that, some of the decisions contained in this ruling may reflect the application of *pesharah ba-kerovah la-din*.

B. THE AGREEMENT

The Agreement is effective and the Parties are bound by the Agreement. We base this conclusion on six separate lines of reasoning:

I. APPARENT AUTHORITY AS A CUSTOM OF THE MARKETPLACE

Although JB was not technically authorized to bind the Respondent, he possessed apparent authority to do so. As a matter of New York law, "a principal is

¹ We believe that the Claimant made a mechanical error and used the wrong meter charge when it recalculated the revised amount due on invoice 77-1352. See Exhibit B.

bound by a transaction entered into by its agent where the principal's conduct creates the appearance that the agent has such authority."²

The doctrine of apparent authority is a creature of secular law, with no equivalent theory under *halacha*. By engaging in commerce through the mechanism of a corporation or limited liability company, the Respondent, however, has implicitly agreed to be bound by *dina demalchuta* (secular law) and by the customs that generally pertain to corporate entities and limited liability companies.

Except in the context of major transactions, it is generally customary to rely on the apparent authority of an individual to bind an entity, and not to demand evidence that such authority exists. In turn, all business entities understand that unless they adequately notify third parties to the contrary, individuals who appear to possess authority may legally bind them in some instances. By engaging in business in the general marketplace as a corporation or limited liability company, the Respondent implicitly accepted the norms of that marketplace and subjected itself to liability through the doctrine of apparent authority.

Based on the testimony we heard, it is our view that JB possessed apparent authority. Notwithstanding the fact that the Respondent convinced us that it attempted to take steps to demonstrate that JB had no actual authority, the issue is whether those steps were sufficient to put outsiders on notice as to his lack of authority. The facts and circumstances of his relationship with the Respondent lead to the conclusion that the Respondent was aware or should have been aware of his activities, and that the Respondent should be held responsible for any misapprehension regarding his ability to bind the company.

2. *DINA DEMALCHUTA DINA*

In some cases, *halacha* sanctions the binding nature of secular rules and regulations that are legislated for the economic benefit of the marketplace.³ The doctrine of apparent authority allows the market to conduct business in an efficient manner, as it allows its participants to rely on their reasonable perceptions of who is able to bind an entity, without burdening them with the requirement of obtaining detailed corporate documents and certificates to transact routine business.

² Goldston v. Bandwith Technology Corp., 859 N.Y.S. 2d 651, 654 (2008) citing Hallock v. State of New York, 485 N.Y.S.2d 510 (1984).

³ R. Moshe Sofer (1762–1839), *Shu"t Chatam Sofer, Choshen Mishpat*, No. 44.

Given the sound policy basis for allowing parties to rely on apparent authority, we feel that, in the case at hand, Chatam Sofer would recognize the binding nature of this doctrine.

3. APPARENT AUTHORITY AS A HALACHIC DOCTRINE

According to a strict interpretation of *halacha*, the Claimant should have ascertained from the Respondent the scope of the authority of JB, was not permitted to rely on JB's representation alone, and bore the risk that JB was not authorized to bind the Respondent.

Notwithstanding the foregoing, the argument can be made that *halacha* itself recognizes some concept of apparent authority, based on the view of Shach.⁴ Shach addresses the case of an agent who was authorized in writing, but where the principal later revoked the agent's authority. The third party, unaware of the revocation, acted in reliance on the written *barsbaah* (authorization) presented to him by the agent; the *halacha* recognizes the validity of that transaction. We think it is reasonable to argue that Shach's opinion is not limited to a case where there was a valid *shlichut* (agency) that was later revoked, but that such opinion applies to any case where the third party acted reasonably in reliance on the validity of the agency. The reasonableness of relying on an individual's capacity as a *shaliach* (agent) is based on the circumstances of the particular case. As described above, it is our view that in the contemporary business context the Claimant reasonably relied on JB's apparent authority.

4. RATIFICATION

Even if it could be argued that the Respondent was not initially bound to the Agreement, the Respondent effectively ratified the Agreement through its course of conduct following its execution. For a significant period following the execution of the Agreement and its implementation, employees of the Respondent communicated with the Claimant about the services he was rendering; furnished documents and other information to the Claimant, which the Claimant used to generate savings for the Respondent; and paid some of the invoices presented by the Claimant. The Respondent did not repudiate the Agreement at any point during this time.

⁴ *Shach, Choshen Mishpat*, 122:11.

5. ACTUAL HALACHIC AUTHORITY BY VIRTUE OF SPOUSE'S OWNERSHIP

There is a dispute among contemporary *poskim* (Jewish legal decisors) as well as secular legal scholars as to who is the owner of a corporation. John Marshall said, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."⁵ Shareholders hold shares, which entitle them to certain contractual rights.

There are multiple *halachic* perspectives on how to treat a corporation. One view is that it is a separate legal entity, i.e., the shareholders do not own assets but have a residual claim. A second one is that it is a partnership, whose "shareholders" own the assets. A third idea is that shareholders are creditors of the company. A fourth analysis is a hybrid of the first and second opinions: sometimes a corporation is regarded as a separate entity and at other times it is treated as if it were a partnership. In one *teshuvah* (responsum), R. Moshe Feinstein held that a corporation is the *halachic* equivalent of a partnership, and that shareholders retain title to the company's assets as partners.⁶ Yet, elsewhere he classifies a corporation as an independent entity separate from its shareholders.⁷ R. Feinstein's outlook on the *halachic* nature of corporations appears to depend on the character of the particular corporation. Where the same persons hold ownership and managerial control, the entity is akin to a partnership, and the shareholders are deemed to own the assets. Where there is a functional separation of ownership and control, the corporation is its own entity. One of the owners of Dunkirk and Royal was the wife of JB. Under a literal application of the *halachic* concept that a wife's assets vest in her husband, the authority of the wife of JB to bind the entities would inure to JB. Because Dunkirk and Royal are closely-held and, effectively, owner-managed entities, we believe that R. Feinstein would say that they are *halachically* classified as partnerships, and that JB had the authority to bind them.

6. BENEFIT RECEIVED

We note that even under a strict application of *halacha* without regard for the applicability of secular law or commercial custom in this case, it is possible that

⁵ Dartmouth College v. Woodward, 17 U.S. 518 (1819).

⁶ R. Moses Feinstein (1895-1986), *Iggerot Moshe, Choshen Mishpat* I, No. 15.

⁷ *Iggerot Moshe, Even ha-Ezer* I, No. 7.

the Claimant would be entitled to receive compensation for the value of the work it performed under the *halachic* principle of *yored litoch sdei chaveiro shelo birshut* (if one enters his the field of his neighbor [and plants in it] without his permission).⁸ Had we issued an award under that theory, we would have had to assess the benefit to the Respondent and what portion of that benefit the Claimant would have been entitled to receive.

C. CHOICE OF LAW

According to clause (d) of Section 3 of the Rules and Procedures of the Beth Din, “[i]n 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 permitted by Jewish Law.” Since the Agreement was valid and binding upon the Parties, and contained a New York governing law provision, any substantive disputes arising under it must be resolved according to the laws of the State of New York.

D. THE SAVINGS

The Agreement provides that, “[i]f a course of action suggested by [the Claimant] is substantially implemented and a credit, refund or saving is achieved, [the Respondent] will pay [the Claimant] a performance fee... of Thirty Three and Third Percent (33 1/3%) of all refunds, credits, savings or other benefits recovered for [the Respondent] from prior billings... and 33 1/3% of all credits, savings, reductions or other benefits to [the Respondent’s] taxes, rates and Costs as compared with [the Respondent’s] former taxes, rates and Costs for a period of 30 months from the date the credit savings reductions or other benefits received are first reflected in the Bills.”

The Respondent asserts that certain savings would have been realized even without the efforts of the Claimant. Were a binding contract not in effect, we would be sympathetic to such an assertion. The Agreement, however, states that if a course of action suggested by the Claimant is substantially implemented and a credit, refund, or saving is achieved, the Respondent will compensate the Claimant. As a matter of New York law, contracts are to be interpreted in line

⁸ *Baba Metzria* 101a.

with their plain meaning.⁹ The Agreement did not include carve-out language that excluded from compensation savings that ultimately could have been achieved by the Respondent without the intervention of the Claimant. We are therefore prepared to award compensation to the Claimant based upon the full savings it achieved for the Respondent.

As set forth above, the Parties disagree regarding the baseline from which to calculate the savings, leaving us with two possibilities: an estimate relative to the Posted Rate and one relative to the Firm Rate. The Agreement does not specify precisely how the savings should be calculated in instances when such savings must be estimated, and here, again, our task is to ascertain the intent of the Agreement based on the plain meaning of the language of the Agreement. While both methods could be bona fide approaches to estimating the savings, we find the one proposed by the Claimant to be more compelling because it is based upon historical data applicable to the Respondent's savings, while the one suggested by the Respondent is derived from hypothetical savings to unrelated third parties, whose profile could materially differ from that of the Respondent. In our view, the Claimant's methodology offers the simpler and more straightforward path towards calculating the "savings" to which the Agreement refers.

Based on this, the Claimant is entitled to \$247,677.63 from Dunkirk.

Dunkirk is entitled to a credit of \$4,548.77 relating to overpayments it made for invoices 77-1352, 77-1364, and 77-1376.

Thus, the net amount that Dunkirk owes to the Claimant is \$243,128.86.

The Claimant asserts that Royal owes to it \$4,333.22. In its July 11, 2013 and August 18, 2013 letters to us, the Respondent did not contest the calculations behind such assertion. Accordingly, Royal owes to the Claimant \$4,333.22.

A spreadsheet showing how we arrived at our calculation is attached as Exhibit B.

E. COSTS OF PROCEEDINGS

According to Section 28 of the Rules and Procedures of the Beth Din, "[t]he Beth Din, in its award, may assess arbitration fees and expenses in favor of any

⁹ *Accurate Realty, LLC v. Donadio*, 915 N.Y.S.2d 394 (2011) ("Interpretation of a written agreement requires us to determine the parties' intent as derived from the language of the instrument, with the words and phrases employed given their plain meaning.")

party and, in the event any administrative fees or expenses are due the Beth Din, in favor of the Beth Din.” Fees and expenses are generally paid by the side that incurs such fees, unless it is clear that one side acted improperly such as by initiating frivolous actions. In this case, we have ruled on some matters in favor of the Claimant and on some matters in favor of the Respondent, thus indicating that the matters brought before us were not frivolous. Moreover, the Arbitration Agreement gave us the discretion whether to resolve the controversy according to *din* or *pesharah ba-kerovah la-din*. Thus, had we resolved the case in accordance with *din*, we would have determined that the Respondent’s liability to the Claimant was less than what we have stated in this decision. Therefore, each side shall pay its own fees and expenses in connection with these proceedings.

DECISION:

1) Dunkirk owes to the Claimant \$243,128.86, and Royal owes to the Claimant \$4,333.22 (the “Amounts”). The Amounts are due within thirty (30) days of the date hereof, provided, however, that each of Dunkirk and Royal shall be entitled to pay its portion of the Amounts in installments if it notifies the Claimant, in writing within thirty (30) days of the date hereof, that the immediate payment of the Amounts presents a bona fide cash flow problem for it (the “Cash Flow Letter”). In such case, Dunkirk and Royal, as the case may be, shall pay its portion of the Amounts as soon as it can, but at a minimum in six (6) equal monthly installments, the first due simultaneously with the delivery of the Cash Flow Letter, and each subsequent payment due on the monthly anniversary thereafter. If Dunkirk or Royal fails to make a timely minimum payment, then the entire remaining balance it owes shall be due immediately and the Claimant may sue in secular court to obtain such outstanding balance.

2) Each of the Parties must pay its own costs and fees, and neither side is entitled to reimbursement for such costs and fees from the other side.

3) All other applications and claims are hereby denied. The obligations set forth herein shall be enforceable in any court of competent jurisdiction, in accordance with the rules and procedures 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. Any provision of this decision may be modified with

the consent of both Parties. All of the provisions of this Order shall take effect immediately.

We encourage the parties not to speak negatively of one another with regard to the differences and disputes upon which we have ruled. We wish *brachah v'batzlachah* to the Parties in their endeavors.

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

By: _____
Rabbi AA Mr. BB Rabbi CC
Dayan Dayan Dayan

GETTING MARRIED OR KNOW SOMEONE WHO IS?

Help solve the agunah crisis.

www.theprenup.org

THE  PRENUP
THE SINGLE MOST PROMISING SOLUTION TO THE AGUNAH CRISIS

Non Profit Org.
US Postage
PAID
Hanover, PA 17331
Permit No. 4

The Journal of the Beth Din of America



BETH DIN of AMERICA
בית דין דאמריקא



RIETS/YESHIVA UNIVERSITY PRESS
THE MICHAEL SCHARF PUBLICATION TRUST

BETH DIN OF AMERICA
305 Seventh Avenue
12th Floor
New York, New York
10001



The Beth Din of America is affiliated with the Rabbinical Council of America and sponsored by the Union of Orthodox Jewish Congregations of America.