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ADVISING THE ORTHODOX JEWISH LITIGANT

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INTRODUCTION¹

The purpose of this paper is to provide litigation lawyers and other interested parties with insight into the specific needs of Orthodox Jewish clients. It is important in developing a litigation strategy for those clients to understand how some of the tenets of their faith impact on the litigation of disputes and the financial and personal risk that the clients may be placed in as a result.

What colours the process of developing a litigation strategy for Orthodox Jews is the belief that generally, litigation between two Jews in civil court is forbidden by Jewish law (“*Halacha*”).² This paper articulates the parameters of those restrictions and outlines

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1. *The Advocates' Quarterly* has published this abridged version of this article. The complete article can be obtained under the publications list on Charles Wagner's profile page, at www.wagnersidlofsky.com/charles-wagner.
2. *Halakha* is a Hebrew word from the root *Halacha*, meaning “to go”. This term is not easily defined and we invite the reader to access the *Encyclopedia Judaica* (MacMillan, 1978), Vol. 8, p. 1155, for an appreciation of what this term has meant in the context of Talmudic study from the Middle Ages to the 21st century. See also M. Elon, *Jewish Law: History, Sources, Principles*, trans. by B. Auerbach and M.J. Sykes (Philadelphia, Jerusalem: 1994), Vol. I, p. 93: “The term Halacha . . . refers to the normative portion of the Oral Law.” The Halacha includes all of the precepts in Judaism – those laws involving the commandments concerning the relationship between people and G-d as well as those laws applicable to relationships in human society. In the context of this paper, Halakha describes the Jewish legal framework through which Orthodox Jews govern their lives. It is an all-consuming body of Jewish religious law that governs every aspect of life. Halakha is based on rabbinic analysis and interpretation of Biblical verses, Talmudic discourse and earlier rabbinic examination of those texts and questions. Orthodox

the circumstances where *Halacha* permits resort to civil courts.³ The authors also address instances where, notwithstanding the prohibition, there are many reported cases where Orthodox Jews will seek the determination of their legal disputes in civil courts.⁴ Why they do so is relevant for several reasons. Even if a client does not feel bound to adjudicate the dispute before a religious court the other party may attempt to compel him or her to do so.⁵ Secondly, these cases highlight under what circumstances an arbitration⁶

Jews take upon themselves the observance of Halakha in all things, including disputes that would ordinarily be resolved in civil court.

3. For a summary of the religious Jewish law on the subject, I refer the reader to Rabbi Ari Marburger, *Arkaos, Civil Litigation, and Halachah*, online at the Jewish Law Blog: www.jlaw.com/Articles/Arkaos%20V1.3.pdf.
4. For a few examples see *Finkelstein v. Bisk* (2004), 129 A.C.W.S. (3d) 644, 2004 CarswellOnt 1129, [2004] O.J. No. 1176 (Ont. S.C.J.), additional reasons (2004), 130 A.C.W.S. (3d) 461, [2004] O.T.C. 265, 2004 CarswellOnt 1670, affirmed (2004), 191 O.A.C. 166, 134 A.C.W.S. (3d) 755, 2004 CarswellOnt 4365 (Ont. C.A.); *Levitts Kosher Foods Inc. v. Levin* (1999), 175 D.L.R. (4th) 471, 87 C.P.R. (3d) 505, 42 C.P.C. (4th) 302 (Ont. S.C.J.); *Blank v. Blank*, 2010 QCCS 6311, 195 A.C.W.S. (3d) 1094, 2010 CarswellQue 14137 (C.S. Que.), affirmed 2011 QCCA 449, 2011 CarswellQue 2253, EYB 2011-187622 (C.A. Que.); *Kashruth Council of Canada / Conseil Cacherout du Canada v. Rand* (2011), 2012 C.L.L.C. 210-057, [2011] O.L.R.B. Rep. 820, 2011 CarswellOnt 12208 (Ont. L.R.B.); *Gerstel v. Kelman*, 2015 ONSC 978, 40 B.L.R. (5th) 314, 253 A.C.W.S. (3d) 272 (Ont. S.C.J.); *Finkelstein v. Bisk* (2004), 129 A.C.W.S. (3d) 644, [2004] O.T.C. 265, 2004 CarswellOnt 1129 (Ont. S.C.J.), additional reasons (2004), 130 A.C.W.S. (3d) 461, [2004] O.T.C. 265, 2004 CarswellOnt 1670, affirmed (2004), 191 O.A.C. 166, 134 A.C.W.S. (3d) 755, 2004 CarswellOnt 4365 (Ont. C.A.); *Cawthorpe v. Cawthorpe*, 2010 ONSC 1389, 319 D.L.R. (4th) 746, 86 R.F.L. (6th) 225 (Ont. S.C.J.); *Mernick v. Mernick* (2007), 32 E.T.R. (3d) 288, 2007 CarswellOnt 3631 (Ont. S.C.J.), additional reasons (2007), 33 E.T.R. (3d) 104, 2007 CarswellOnt 4165, additional reasons (2007), 34 E.T.R. (3d) 150, 2007 CarswellOnt 5436; *Mernick Construction Co. v. Gerstein* (2008), 170 A.C.W.S. (3d) 781, 2008 CarswellOnt 6429 (Ont. Master).
5. In *Berg v. Schochet* (1995), 58 A.C.W.S. (3d) 26, 1995 CarswellOnt 4655, [1995] O.J. No. 2983 (Ont. Master), Rabbi Berg brought a claim alleging defamation against Rabbi Schochet in civil court. Rabbi Schochet took the position that the civil court should not entertain a dispute between two rabbis, as the Orthodox view of the Jewish faith required that a dispute such as this be adjudicated by a *Beis Din* (para. 3). In response, Rabbi Berg argued that it would be “impossible for him to have a fair hearing before any such tribunal, because of the wide-spread bias against him among Orthodox Rabbis” (para. 4).
6. Setting up the proceeding before a religious court as an arbitration is done to ensure the enforceability of the religious court’s decision by a civil court. This characterization of the religious court proceeding as an arbitration is permissible by Jewish law. Historically, where either through moral suasion or when a *Beis Din* was part of a theocratic religious Jewish state, litigants

before a religious court may be vulnerable to appeal and or judicial review. Understanding how civil courts deal with these issues will certainly allow counsel to better serve their clients.

THE ROOTS OF THE HALACHIC TRADITION

(a) The basis for religious Jewish Law

The development of Orthodox Jewish law is explained by Maimonides (also known as Rambam)⁷ in the introduction to his seminal text, the *Mishneh Torah*.⁸ The *Mishneh Torah* is a code of Jewish religious law (*Halacha*) that contains a compilation of the entire Oral Law from the time of Moses until the completion of the Talmud.⁹ In the *Mishneh Torah*, Maimonides explains that the written Jewish religious law (the five books of Moses) was given to Moses at Mount Sinai along with an oral tradition explaining the laws contained therein. According to Maimonides:

abided by the decision of the Beis Din and there was no need for the adjudication to proceed by way of a government sanctioned arbitration process. However, in Ontario, if the litigants do not sign an arbitration agreement then the Beis Din's decision would not be enforceable by the civil courts in Ontario, rendering the question of an appeal or judicial review moot.

7. Maimonides was a preeminent medieval Sephardic Jewish philosopher and became one of the most prolific and influential Torah scholars of the Middle Ages.
8. Within a century of Maimonides' death, the *Mishneh Torah* was universally accepted as a major halachic work (*Mishneh Torah*, translation by Rabbi Eliyahu Touger (New York: Moznaim Publishing Corporation, 1989) [*Mishneh Torah*] at 7.
9. *Ibid.*, p. 7. In his introduction to his English translation of the *Mishneh Torah* Rabbi Eliyahu Touger explains, in part:

with its publication, the *Mishneh Torah* touched off a major controversy in the Rabbinic world. Some of the philosophic points included with *Sefer Mada* ('the Book of Knowledge') found opposition among the Rabbis. In addition, the Rambam's style of stating a law without quoting his sources was hard to accept by many. In some communities, the books were even burned. Within a little more than a century after the Rambam's death, however, the *Mishneh Torah* had been universally accepted as a major halachic work. Subsequent codifications of Torah law – e.g., the *Tur* and the *Shulchan Aruch* – refer to it extensively.

The *Mishneh Torah* is available online: www.chabad.org/library/article_cdo/aid/5634/jewish/Mishneh-Torah-Hebrew.htm, with Rabbi Touger's translation online: www.chabad.org/library/article_cdo/aid/901656/jewish/Introduction-to-Mishneh-Torah.htm.

“The Torah” refers to the written law and “the mitzvah”, to its explanation. [G-d] commanded us to fulfill “the Torah” according to [the instructions of] “the mitzvah”. “The mitzvah” is called the Oral Law.¹⁰

While each of the Israelite tribes was given a Torah scroll (also referred to as “the mitzvah”), the explanation of the Torah was passed from the elders to Joshua who taught the Oral Law to the Jewish people.¹¹ Maimonides bases this tradition on the tractate of *Pirkei Avot*¹² which provides that Moses received the Torah from Sinai and gave it over to Joshua. Joshua gave it over to the Elders, the Elders to the Prophets, and the Prophets gave it over to the Men of the Great Assembly. The oral tradition was passed down through generations of rabbis and Jewish courts until it reached Rabbi Yehuda¹³ who Maimonides describes as Rabbenu Hakadosh (“our saintly teacher”). Rabbenu Hakadosh composed the Mishnah and put it down in writing. He collected all of the intergenerational teachings, laws and commentaries so that the Oral Law would not be forgotten by the Jewish people. Maimonides explained that this was a necessary break from tradition to curb the influence of the Roman Empire. With the Jewish Temple destroyed and its institutions decimated Rabbi Yehudah’s efforts stand out as a singular monumental landmark in preserving the Jewish faith, its history and Jewish law. The rabbis during the time of the Mishnah are referred to as *Tannaim*. Those who followed and created the Talmud are referred to as *Amorim*. Explains Maimonides:

From the entire [body of knowledge stemming from] the . . . Talmud can be derived the forbidden and the permitted, the impure and the pure, the liable and those who are free of liability, the invalid and the valid as was received [in tradition], one person from another, [in a chain extending back] to Moses at Mount Sinai . . . It also includes marvelous judgments and laws that were not received from Moses, but rather were derived by the courts of the [later] generations based on the principles of Biblical exegesis. The elders of those generations made these decisions and concluded that this was the law. Maimonides goes on to explain that after the time the Talmud was completed Jewish communities set up courts in every country inhabited by Jews. “These courts issued decrees, enacted ordinances, and established customs for the people of that country – or

10. *Ibid.*, p.12

11. *Ibid.*, p. 13

12. The *Mishneh Torah* contains 63 tractates dealing Jewish law. One of the tractates addresses Jewish ethics. This tractate is called *Avot* – literally translated as “Fathers”.

13. Rabbi Yehudah HaNasi was also referred to as “Rebbi” or teacher. For a brief biography of him we refer the reader to the *Jewish Virtual Library*, online: <https://www.jewishvirtuallibrary.org/jsourc/biography/hanasi.html>.

those of several countries. These practices, however, were not accepted throughout the Jewish people, because of the distance between [their different] settlements and the disruption of communication [between them] . . . The [Talmudic] Sages who established ordinances and decrees, put customs into practice, arrived at legal decisions, and taught [the people] concerning certain judgments represented the totality of the Sages of Israel or, at least, the majority of them. They received the tradition regarding the fundamental aspects of the Torah in its entirety, generation after generation, [in a chain beginning with] Moses, our teacher. All the Sages who arose after the conclusion of the Talmud . . . taught the approach of the Talmud, revealing its hidden secrets and explaining its points, since [the Talmud's] manner of expression is very deep . . . The inhabitants of each city would ask many questions of each Gaon who lived in their age, to explain the difficult matters that existed in the Talmud. They would reply to them according to their wisdom.

With the closing of these academies there was a gap. There no longer existed a universally recognized Jewish legal authority to determine issues of legal importance for the religious Jewish communities. In response, certain Jewish rabbis broke with tradition much the same way as did Rabbi Yehudah HaNasi when he wrote the Mishnah by preparing codes of Jewish law based on the Talmud and the decisions of the *Geonim*. The *halachic* codes of Jewish law by Rabbi Yitzcak Lafasim, Rabbi Asher ben Yechiel and Maimonides were the result.¹⁴ These rabbis lived from 103-1328 CE and are known as the *Rishonim* or first codifiers. In 1525 CE, based on these previous works, Rabbi Yosef Caro wrote the Shulchan Arukh which was the most widely accepted code of Jewish law. The question arises: why did these rabbis break with tradition?

The rabbis who followed the Rishonim are called Achrnoim. These rabbis were later codifiers who, for the most part, did not part from the decision of the Rishonim.

So how are religious decisions made today?

There are many great religious Jewish legal authorities in the 20th and 21st centuries who are asked questions and issue a ruling referred to as a "*psak*". For example, *The Responsa*, by Rabbi Moshe Feinstein, Rabbi Solevechic, Rav Kanievsky, Rav Shlomo Zalman Auerback and Rav Ovadia Yoseph are often published. Local rabbis often rely on these publications to respond to their congregants' questions. So, with that background, we now discuss what religious Jewish law says about litigating in civil court.

14. *Ibid.*, at p. 121.

THE RELIGIOUS JEWISH COURT AND ARBITRATION

Bringing a dispute before a religious court is essentially agreeing to arbitrate the dispute. The litigants will have chosen a different forum over the regular court process. The choice is not just between a civil and a religious court. The parties may also seek to choose between different religious courts that may be available to them. In Toronto one may go before the *Beis Din of the Vaad Harabonim of Toronto*¹⁵ or the Bais Din of the Kollel Toronto.¹⁶ There are many other religious courts in Montreal, New York and Chicago. Each Beis Din may have its own unique rules of procedure including how they receive evidence, the use of advocates (“Toen”) and their respective views of Jewish law. These are factors to take into account by the litigant when choosing a Beis Din. The costs also vary from one Beis Din to another. What they have in common is that there are always three Dayanim/Judges on the panel. Depending on the Beis Din the Dayanim may be pulpit rabbis who, on top of their regular duties, also serve as Dayanim. In other jurisdictions being a Dayan may be a full time job.

Equally important, there are different Jewish courts in different jurisdictions. These different courts may have Dayanim/Judges who may be prone to interpret Jewish law differently and one Jewish court may be more likely to do so in a way that favours one litigant over the other.

Advising clients about choosing the most advantageous forum for their specific case is not unusual. In the course of some civil litigation disputes, there may be more than one province or country that has jurisdiction to adjudicate a dispute. In these circumstances, lawyers are often called upon to address whether it is prudent to litigate in one jurisdiction over the other and often seek a venue whose laws favour their particular client. The dilemma for the Orthodox Jew is that, regardless of the tactical advantages of a particular forum, he or she is bound by his or her faith to litigate in accordance with *Halacha*. The authors, in this paper, will endeavour to present a primer on how to navigate the *Halachic* process to assist the client in having his or her dispute determined before their preferred adjudicator.

In advising a client it is not enough to be able to recognize where they would receive a more favourable hearing. It is therefore

15. The registrar of this Beis Din is Rabbi Asher Vale: (416) 841-7318, beis_din@hotmail.com.

16. Kollel Toronto's Bais Din is supervised by Rabbi Akiva Steinmetz and Rabbi C. Ehrentreu. They can be contacted at 416-785-7902.

important to understand the *Halachic* process in order to help this type of client who wishes to avoid criticism by their coreligionists and or sanctions by their community and still have their dispute resolved in the forum most favourable to them. This is nothing new for lawyers who are often called upon to deal with the complicated issue of forum *non conveniens*, comity and private international law and argue for the most favourable forum for their client.¹⁷ In this context however, it is fundamentally important to understand the concerns and rights of a litigant under *Halacha*.

Finally, an Orthodox Jewish client may wish to comply with *Halacha* and still have his or her matter adjudicated in civil court. To accomplish this goal one must become familiar with the rules of procedure before the *Beis Din*,¹⁸ the rights of the parties to ask the *Beis Din* to ask for a *siruv* and or a *heter arkaos*. There are also instances where Jewish law recognizes that the plaintiff may proceed to civil court and need not go to a *Beis Din*.

ARAKOS - PROHIBITION ON ORTHODOX JEWS LITIGATING IN CIVIL COURTS

Whoever submits a suit for adjudication to non-Jewish judges . . . is a wicked man. It is as though he reviled, blasphemed, and rebelled against the Torah of Moshe.¹⁹

This quote, attributed to Maimonides,²⁰ is both succinct and sharp. Rabbi Jachter, in his text, *Gray Matter volume 2*, quotes Rav Uri Dasberg who explains why the prohibition is so strident.

The role of a *beit din*²¹ is not merely to rule on the disputed monies, but also to offer moral criticism. A *beit din* might recommend that a litigant

17. Castel and Walker, *Canadian Conflict of Laws*, 6th ed. (Toronto: LexisNexis, 2005), at 13.1 Forum Shopping.

18. Each *Beis Din* may have its own rules of civil procedure. For example, the rules and procedure for the Beth Din of America can be found online: <http://s589827416.onlinehome.us/wp-content/uploads/2015/07/Rules.pdf>. For the Rules of Civil Procedure that are in use by the Rabbinical Court in Israel we refer the reader to the scholarly work of Eliav Shochetman who is the Dean of Sha'arei Mishpat College (Law School) and Professor Emeritus of Jewish Law at the Hebrew University of Jerusalem. The book is entitled *Seder Hadin bebeit hadin harabani*.

19. Chaim Jachter, *Gray Matter*, vol. 2 p. 165, quoting the Rambam (Hilchot Sanhedrin 26:7 and Shulchan Aruch).

20. Rabam.

21. The Jewish courts are sometimes referred to as a *Beis Din* and at other times as a *Beit Din*. In Hebrew the word *Beit/Beis* is made up of three letters. The last letter of the word is a *taf* and in the Hebrew alphabet is written like this

pay more than the strict law requires, as an act of decency. Moreover, a *beit din* demands of the litigants that they conduct themselves in an ethical manner, above and beyond the strict letter of the law. By contrast, a civil court judge has no mandate to demand more than the letter of the law. Thus, a Jew who adjudicates in civil court, even if the court rules just as a *beit din* would have ruled, rejects the value system that we strive to integrate into our legal system.

It is a fundamental belief of Orthodox Judaism that G-d²² gave the Jewish people the Torah at Mount Sinai and that those holy laws govern every aspect of a Jew's life, including the adjudicating of disputes. To adherents of that belief, litigating in the civil court system constitutes a rejection of Torah law. Jewish law mandates that disputes between Jews are to be resolved through the *Beis Din*. The term *Beis Din* means "house of judgment" and refers to a rabbinical court of justice that adjudicates disputes according to the principles set out in the Torah and the Talmud. However, despite the *Halachic* imperative for Jews to adjudicate disputes before a religious Jewish court, there are times when a litigant may litigate in a civil court within the *Halachic* framework.²³

Under the *Halachic* framework parties must attend before a *Beis Din* and submit to their authority. The present custom is for the parties to sign an arbitration agreement so that the *Beis Din*'s decision is enforceable in civil court just as any other arbitration decision would be.²⁴ The litigants will have their case heard by three rabbinical judges.

In *Halacha*, the plaintiff is referred to as the *toveah* and the defendant as the *nitvah*. In such cases the *toveah* would approach a *Beis Din* and request their assistance in bringing the dispute before them. In turn the *Beis Din* would send a *hazmanah* to the *nitvah* to attend before the court to adjudicate the dispute. The literal

ת. Those who use a *havarah Sepharadi* pronounce the letter *taf* like the letter "t". Those who speak Hebrew with a *Havarah Ashkenazi* pronounce the letter *taf* like the letter "s". For our purposes in this paper we will use the word *Beis* and *Beit* interchangeably. For more information on this topic, I refer the reader to two articles in the *Encyclopedia Judaica*, "Ashkenaz" and "Sepharidm" (Jerusalem: Keter Publishing House, 1972). As well, see Shira Schoenberg, *The Jewish Virtual Library, Judaism: Ashkenazim*, online: www.jewishvirtuallibrary.org/jsource/Judaism/Ashkenazim.html.

22. Orthodox Jews are wary of writing out their Lord's name because the name itself has sanctity; accordingly the authors, when referring to the Lord's name in English, have not written out the name in full out of respect for readers who may hold this belief.

23. Rabbi Yaacov Feit, "The Prohibition against Going to Civil Courts", *The Journal of the Beis Din of America*, at p. 1.

24. *Ibid.*, p. 23.

translation of the word *hazmanah* is invitation. However, in this context it is a summons to appear before the Jewish court. A refusal to appear before the *Beis Din* may have consequences for the religious Jewish client.

SHTAR SIRUV - SANCTIONS FOR LITIGATING IN THE CIVIL COURT SYSTEM

A person who has been summoned to the *Beis Din* will usually be given 30 calendar days in which to respond. If a party declines to attend, the *Beis Din* may issue the *Shtar Siruv* (the “*siruv*”). This is akin to a finding of contempt by a civil court.²⁵ In her article, “The Collision of Church and State: A primer to Beth Din Arbitration and the New York Civil Courts,”²⁶ Ginnine Fried explains the significance of the *siruv*:

In Jewish communities that are close-knit and insulated, a *siruv* is a formidable threat. A *siruv* can result in the individual being shunned in the community that recognizes that rabbinical court; in other words, it is a modern-day version of the discontinued *cherem*²⁷ . . . (*one*) can feel Jewish in a Jewish community as a result of proceedings in the *beth din*... One can be: disinvented to weddings, asked not to come to the synagogue, disinvented to all social gatherings.

A litigant who refuses to appear before a *Beis Din* in response to a *siruv* may be precluded from participating in communal services. For example, he may not serve as cantor on Jewish holidays.²⁸ In one recent case, the parties were members of the Orthodox Jewish faith and the plaintiff received a *hazmanah* from the *Vaad Harabonim Beis Din*.²⁹ When he later appealed the decision of the *Beis Din* to a civil

25. *Ibid.*

26. Ginnine Fried, “The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Civil Courts” (2003), 31 *Fordham Urb. L.J.* 633, online at <http://ir.lawnet.fordham.edu/ulj/vol31/iss2/8>.

27. The reader is referred to Israel Goldstein, *Jewish Justice and Conciliation: History of the Jewish Conciliation Board of America, 1930-1968*, and *A Review of Jewish Judicial Autonomy 3* (1983). The *Cherem* is described as being ostracized by the community such that a person could be excluded from the synagogue, their businesses being boycotted and no one from the community would marry their children.

28. *Mishneh Berurah*, 53:82

29. *Gerstel v. Kelman*, 2015 ONSC 978, 40 B.L.R. (5th) 314, 253 A.C.W.S. (3d) 272 (Ont. S.C.J.). There are two Orthodox Jewish Courts in Toronto. One is the *Beis Din of the Vaad Harabonim* serving the Toronto area community. In matters dealing with divorce, one should contact Rabbi Ochs at (416) 782-9621, and with respect to other disputes contact Rabbi Vale at (416) 841-7318. The second *Beis Din* is the *Kollel Toronto's Beis Din*, which is super-

court, the plaintiff testified that he agreed to go before the *Beis Din* only under duress. Specifically, he feared that if he did not respond to the *Beis Din* it would issue a *siruv* resulting in severe consequences, including his being ostracized or excommunicated from the community. Similarly, in *Cawthorpe v. Cawthorpe*,³⁰ a case involving a married couple who agreed to arbitrate various issues arising from their divorce before a *Beis Din*, when appealing the decision of the *Beis Din*, the husband claimed that he was pressured to appear before the *Beis Din* out of fear of being shunned from his religious community. In particular, he claimed to have been terminated from his position as a school teacher in a Jewish school because of his reluctance to appear before the rabbinical court. Undoubtedly, for people whose livelihood or social interaction centres around the Orthodox Jewish community, the prospect of being shunned has to be taken into account when developing a litigation strategy. Otherwise, any success may prove to be a Pyrrhic victory.

A LAWYER'S WISE WORDS TO THE ORTHODOX JEWISH LITIGANT

A lawyer who is advising a client on the advantages or disadvantages of adjudicating a dispute before the *Beis Din* must be familiar enough with *Halacha* to provide some assessment of the client's prospects for success. That analysis should also include a review of the civil law and the client's chances of winning in that arena. Litigation lawyers go through a similar exercise when dealing with a case where the subject matter of the litigation has a substantial connection to more than one jurisdiction and litigants have to deal with the issue of *forum non conveniens*.³¹ The wrinkle here is that the issue of jurisdiction flows from the religious belief of your client and not an argument over which forum is best suited to hear the litigation

vised by Rabbi Akiva Steinmetz and Rabbi C. Ehrentreu, senior members of the Kollel, under the auspices of the Rosh Kollel Rabbi Miller Shlita.

30. 2010 ONSC 1389, 319 D.L.R. (4th) 746, 86 R.F.L. (6th) 225 (Ont. S.C.J.).

31. Pursuant to the doctrine of *forum non conveniens*, a civil court retains a residual power to decline to exercise its jurisdiction in favour of a forum that is in a better position to dispose of the litigation. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens*. If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. To satisfy the burden imposed on a party asking for a stay on the basis of *forum non conveniens*, the party must show that the alternative forum is clearly more appropriate.

and what law should apply. But the choice of the forum and applicable law is no less important.

When advising an Orthodox Jewish client, his or her lawyer should ask himself or herself the following questions. Will the client fare better in a Jewish court? If the issue involves an estates matter, will the forced heirship regime in *Halacha* supplant the client's entitlement under the last will and testament? If the client is chasing a bankrupt debtor who has transferred his or her assets to a spouse, does the Jewish court recognize bankruptcy? If the client is suing over a matter that occurred several years ago, does the Jewish court recognize limitation periods? These are just a few examples of where it may be beneficial to litigate before the *Beis Din* depending on which side of the argument you are advocating. Further, this is an important issue if the client is choosing between different *Beis Dins*, as opposed to between a civil or *Halachic* court system.

Exceptions to the general rule

Insurance claims

In cases where the defendant possesses insurance that would cover the plaintiff's claim, if proven, the insurance company is considered an interested party to the dispute. This issue frequently arises in cases involving professional negligence, personal injury and damage to property. As the prohibition against suing in civil court is limited to actions between Jews, an observant Jew is permitted to sue a non-Jewish insurance company in civil court.³² Practically speaking, a plaintiff will sue the individual who caused the harm rather than the insurance company directly. This occurs even where it is clear that the insurance company will pay out any amounts awarded to the plaintiff. If the effect of the dispute would result in litigation between two Jewish parties, the prohibition on litigating in civil court would seem to apply. However, authorities on Jewish law have determined that while the dispute is technically between two Jewish parties, the plaintiff's intention is to seek compensation is from the insurance company. Therefore, since it will be possible to enforce a claim only against an insurance company in a civil court, it is not a rejection of the authority of Jewish law to pursue an action in a civil court.³³ But the question of what makes a company Jewish and subject to

32. Rabbi Ari Marburger, "Arkaos, Civil Litigation and Halacha", at p. 15.

33. *Ibid.* See footnotes 17-19 and pp. 8-11 in Rabbi Ari Marburger's article, "The Halachic Status of Jewish-Owned Banks", online at http://businesshalacha.com/en/system/files_force/audio_general/pdf/Hedge%20Fund-s%20%26%20Hilchos%20Ribbis.pdf?download=1.

religious Jewish law is a very complex one. Beyond the cursory treatment below, it is well beyond the scope of this article.³⁴

Does a non-Jewish Corporation have to appear before Beis Din?

This question is addressed directly by Professors Broyde and Resnicoff:³⁵

When a corporation is involved in a dispute that may lead to civil litigation, it may be essential to determine whether the corporation or its shareholders are the real parties. For example, Jewish law does not ordinarily allow one Jew to sue another in a civil court, unless the plaintiff has first obtained express permission to do so from a rabbinical court. If, however, a corporation is considered an independent legal entity, Jewish law may allow the corporation to sue or be sued in a civil court. Similarly, although Jewish law does not allow one Jew to recover from another for certain types of injuries, it may permit such recovery from an independent corporate entity.

In cases where the defendant possesses insurance that would cover the plaintiff's claim, if proven, the insurance company is considered to be an interested party to the dispute.

When considering whether an insurance company is Jewish, the faith of the shareholders may be relevant to making that determination. This leads to the question whether a Jewish plaintiff may pursue a claim in a civil court if the insurance company involved has Jewish shareholders?

Three arguments may be advanced to permit a Jewish plaintiff to pursue such a suit in civil court:

1. *The insurance company is not the defendant*

Practically speaking, a plaintiff will sue the individual who caused the harm rather than the insurance company directly. This occurs even where it is clear that the insurance company will pay out any amounts awarded to the plaintiff. If the effect of the dispute would result in litigation between two Jewish parties, the prohibition on litigating in civil court would seem to apply. However, as indicated above, authorities on Jewish law have determined that while the dispute is technically between two Jewish parties, the plaintiff's intention is to seek compensation from the insurance company.

34. We refer the reader to an article penned by professors Michael J. Broyde and Steven H. Resnicoff entitled, "Jewish Law and Modern Business Structures: The Corporate Paradigm", 43 *Wayne L. Rev.* 1685. It is also available online: www.jlaw.com/Articles/corporations.html.

35. *Ibid.*, at p. 2.

2. *An insurance company cannot be said to be “Jewish”*

Professors Michael Broyde and Steven Resnicoff argue³⁶ that a corporation may not be the sum of its parts. Even should all of the employees be Jewish, and all of the shareholders likewise, the legal entity may be considered its own person. Not all Jewish authorities accept this proposition. They suggest that if decision makers are Jewish, or beneficiaries of the company’s business are Jewish, can one truly claim that the company is not “Jewish”?

3. *An insurance company is “Jewish” only if Jews have significant number of shares*

Rabbi Moshe Feinstein, a leading twentieth century American *halachic* authority, contended that a corporation would not be considered “Jewish” unless Jewish shareholders owned a controlling interest in the company.³⁷ One difficulty in implementing Rabbi Feinstein’s standard is that he does not define “controlling interest”; to what extent must Jews influence the direction of the company, or own its assets? Another difficulty is that Rabbi Feinstein does not address the case of a company which is led by Jewish executives.

Accordingly, when the Orthodox Jewish client seeks legal advice and expresses concern that he or she may have an obligation to proceed before a *Beis Din*, the lawyer should discuss the ownership structure of the parties with the client. Jewish law may not apply to certain corporations and there might not be an obligation to proceed through the religious Jewish court system. This is not to suggest that the lawyer interviewing his or her client, relying on this article, should tell his client that definitively he or she need not worry about facing recriminations for not proceeding before the religious court. Rather, if the client is concerned about any perceived obligation to adjudicate the dispute before a religious court, it is incumbent on the lawyer to raise this issue and suggest that the client seek Rabbinic guidance on whether the corporation involved is obligated to appear before the religious Jewish court.

36. Michael J. Broyde and Steven H. Resnicoff, “Jewish Law and Modern Business Structures: The Corporate Paradigm”, 43 Wayne L. Rev. 1685.

37. See footnotes 17-19 and pp. 8-11 in Rabbi Ari Marburger’s article, “The Halachic Status of Jewish-Owned Banks”, found online: http://businesshalacha.com/en/system/files_force/audio_general/pdf/Hedge%20Fund-s%20%26%20Hilchos%20Ribbis.pdf?download=1. We also refer the reader to *Igros Moshe* CM 2:15; OC 1:19, 4:54, and *Igros Moshe* EH Vol. 1, sec. 7.

Proceeding to Civil Court may be permitted as an Interim step

There are times when a defendant will use the *Beis Din* process to thwart the plaintiff's efforts to recover damages or misappropriated property. For example, if a local *Beis Din* provides a defendant with 30 days to respond to each *hazmanah* (a summons to appear before the *Beis Din*), it is likely that three *hazmanot* will be issued prior to the issuance of a *siruv* or *heter arkaos* (permission to bring a matter concerning Jewish litigants before civil court). By the time the *Beis Din's* usual protocol takes place, it may already be too late as the property has been rendered untraceable. To remedy this situation, it is recommended that plaintiffs contact their personal rabbi who, in the authors' experience, may permit the Orthodox Jewish litigant to preserve their rights in civil court with the expectation that once their rights are safeguarded, the parties will have the matter arbitrated by the *Beis Din*. The types of scenarios that may require a plaintiff to take active steps to preserve their rights in the litigation include:

- a. *Limitation period issues*: while limitation periods do not exist in Jewish law, many claims become statute barred after the expiry of the limitation period in the local jurisdiction where the damage occurs. A defendant wishing to avoid judgment may try to delay responding to the *Beis Din* to avoid liability;
- b. *Probate*: in a will challenge there is a concern that once probate is issued the executor may distribute the assets of an estate in accordance with the challenged will. The time delay for the *heter arkaos* process may result in the distribution of the estate's assets before the plaintiff can establish their interest in the estate;
- c. *Thwarting judgment by hiding assets*: in order to thwart a judgment, a defendant will sometimes conceal or transfer assets outside the court's jurisdiction. Seeking an injunction to prevent a rogue from a misdeed may be permitted.

Where a plaintiff initiates proceedings in a Beis Din and a defendant refuses to appear

It is not hard to imagine a circumstance where a person summoned before a *Beis Din* refuses to attend either because they do not wish to adjudicate the dispute in a rabbinical court or believe that they would be at a disadvantage before the *Beis Din* as opposed

to civil court. In such a situation, the *Shulchan Aruch* permits the person bringing the dispute to resort to civil court.³⁸

The process for gaining approval from the *Beis Din* under this exception is as follows. The plaintiff opens a file at a *Beis Din*. The *Beis Din* then issues a *hazmanah* to the defendant. If the defendant does not respond to the initial *hazmanah*, the *Beis Din* may issue an additional *hazmanah*. If the defendant fails to respond to the subsequent *hazmanah*, the *Beis Din* can elect to issue a *heter arkaos*. The *Beis Din* can grant a plaintiff permission to proceed in civil court if the defendant has been properly notified and fails to respond to the *hazmanah* within 30 days.³⁹ However, it is important to remember that a *heter arkaos* is not automatically issued by the *Beis Din*. The plaintiff must request that the *Beis Din* issue it and follow up to obtain it before proceeding to civil court.

Where an observant defendant is summoned to civil court by a fellow Jew

Where an observant defendant is summoned to appear before a civil court by a fellow Jew, there are differing opinions on whether the defendant must first receive permission from a *Beis Din* to defend themselves in civil court.⁴⁰ Ultimately, the defendant is entitled to defend themselves in civil court, if required.

Where the other party is a non-observant Jew or is not Jewish

Halacha prohibits observant Jews from initiating litigation in a civil court against any other Jew, regardless of the other Jew's level of observance, without a *heter arkaos*. However, as it is unlikely that a non-observant Jew will agree to submit to the authority of a *Beis Din*, the *Beis Din* will typically issue the *heter arkaos* quickly and may not wait for the other party to ignore the three *hazmanah*.⁴¹ In theory, the prohibition on attending civil court applies even where the counterparty is a non-Jew. However, because it is unlikely that a non-Jew would submit to adjudication of the dispute by the *Beis Din*, it is not necessary to send a *hazmanah* or receive a *heter arkaos* where the other party is a non-Jew.

38. Rabbi Yaacov Feit, "The Prohibition against Going to Civil Courts", *The Journal of the Beis Din of America* at p. 31.

39. *Ibid.*

40. For further discussion see Rabbi Yaacov Feit, *ibid.*, in the footnotes at p. 32.

41. Rabbi Ari Marburger, "Arkaos, Civil Litigation and Halacha", at p. 7.

When the *nitvah* may choose the forum

According to Jewish law the defendant/*nitvah* must appear before a *Beis Din* once he or she receives a *hazmanah*, but the *nitvah* can choose to have the dispute adjudicated by an alternative *Beis Din* recognized by the *Beis Din* who sent the *hazmanah*.⁴² That is what happened in *Gerstel v Kelman*.⁴³

Gerstel obtained a ruling from Rabbi Miller, the head of the *Kollel Beis Din* (another prominent *Beis Din* in Toronto) which stated that Gerstel could appear before a different *Beis Din*. Gerstel obtained the ruling because he preferred that the dispute be handled by the *Kollel Beis Din* rather than the *Vaad Harabonim Beis Din*.

Chances are that the plaintiff has chosen the specific *Beis Din* that originated the process because he/she believes that this particular Jewish court will favour him/her or at least treat him/her fairly. When the *nitvah* chooses another *Beis Din* the *toveah* may not agree to go there. In such a scenario the *nitvah* can invoke *zabla*.

Zabla

Rav Moshe Feinstein⁴⁴ says that all *Batei Din* (the plural of *Beis Din*) in New York are regarded as *ad hoc*.⁴⁵ If one accepts that to be true of New York it is no less so for the religious Jewish courts located in Toronto. The Rema⁴⁶ says that if the *Beis Din* who issued

42. See page 2, paragraph b, of the Rules of Procedures of the Beth Din of America, available online: <file:///P:/word/law/LEGAL%20RESEARCH/Beis%20Din/Rules%20of%20Beth%20Din.pdf>

43. 2015 ONSC 978, 40 B.L.R. (5th) 314, 2015 CarswellOnt 5346 (Ont. S.C.J.) at para. 9.

44. The Jewish Virtual Library describes Rabbi Moshe Feinstein as:
the leading halachic (religious law) authority of his time and his rulings were accepted worldwide . . . Rabbi Feinstein's halachic decisions have been published in a multi-volume collection titled *Igros Moshe* (The Letters of Moshe). He also published several volumes of in depth discussions about the Talmud. Rabbi Moshe Feinstein was one of the last of the great leaders and sages from Europe and was a representative of the greatness the Jewish people had before the destruction of the Jewish communities during World War II. We were greatly privileged to have such a giant here in America. When he passed away in 1986 the Jewish people lost a great and caring leader and one of our last connections to the greatness of European Jewry.

45. Igor Moshe, *Choshen Mishpat* (2), *Siman* 3.

46. See the Rema, *Choshem Mishpat* 3:1. The Rema in an acronym for Rabbi Moses Isserles. He lived in the 16th century. The Jewish Virtual Library describes the Rema as:

world-renowned scholar, a *Posek*, and was approached by many other

the *siruv* is ad hoc, then the *nitvah* has a right to demand *zabla*. That process involves each party nominating one judge, and the two judges together with the litigants select a third.⁴⁷ This process may provide some solace to a client that he will have a favourable forum to hear his/her grievances. In addition, some see the process as beneficial because the litigants will have confidence in the process given that they chose the judges and each of the judges will feel the onus of fully evaluating the arguments of the party who selected him.⁴⁸

However, others object to the *zabla* process seeing it at best as an inferior adjudication process and at worst a ruse to rig the adjudication. Imagine the defendant choosing a Rabbi/*Dayanim* who the plaintiff feels is biased against him. The defendant may never agree to such a person on the panel. Inevitably, when one party chooses a panellist unfavourable to the other, the *zabla* process will fail and the disgruntled party will return to the *Beis Din* and seek a *heter arkaos* permitting the matter to go before the civil courts. The following is an excerpt from remarks made by Rabbi Yona Reiss⁴⁹ about the *zabla* process:

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 civil 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. 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

well-known rabbis for Halachic decisions, including Joseph Caro, Solom Luria and Joseph Katz. One of his most well-known commentaries was the Mappa (the Tablecloth), a commentary on the Shulchan Aruch, written by Joseph Caro. The Shulchan Aruch focuses mainly on Sephardic rite and customs, while the Mappa emphasizes Ashkenazic customs, henceforth expanding the influence of the work to Eastern European Jewry.

47. Aruch HaShulchan, *Choshen Mishpat* 13:1.

48. See the Rema *Choshen Mishpat* 13:1.

49. Rabbi Yona Reiss, is also a lawyer who also served as director of the Beth Din of America from 1998 to 2008. He is a member of the New York State Bar Association, a certified mediator for the City of New York court system, and a member of the Family and Divorce Mediation Council for New York. A full biography of Rabbi Reiss is at www.yutorah.org/Rabbi-Yona-Reiss.

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.

THE BEIS DIN AS A RELIGIOUS ARBITRATION PROCEEDING

The evolution of the arbitration process in Ontario

The process implemented by the *Beis Din* falls under the legal definition of an arbitration. Arbitration is the settlement of a dispute or a difference between the parties by the decision of a group of persons rather than in a court.⁵⁰ In the early 1990s, Ontario adopted the *International Commercial Arbitration Act* and the *Arbitration Act* came into force for domestic arbitrations.⁵¹ The *Arbitration Act* applies to arbitrations conducted domestically under an arbitration agreement and generally deals with civil law matters including property, and inheritance.⁵²

It is beyond the scope of this article to fully address the *Family Statute Law Amendment Act, 2006*, the reasons for its passing and its impact on using a *Beis Din* to resolve family disputes. There were concerns that women were being treated by religious tribunals in a way that was inconsistent with Canadian law and commonly held principles in our society. Suffice it to say that the prospective Orthodox Jewish family law client faces additional hurdles when wanting to have his or her family law issues adjudicated by a *Beis Din*. Such a client would be well advised to seek out an experienced family law lawyer when dealing with custody, support issues or a religious Jewish divorce. For our purposes, we wish to be clear that family arbitration is regulated by both the Ontario *Arbitration Act* and the *Family Law Act* and the discussion in this article may not be applicable to that situation.⁵³

To resolve a dispute by arbitration, the parties involved in a dispute must voluntarily authorize a third party to decide the dispute

50. *Collins v. Collins* (1858), 26 Beav. 306, 53 E.R. 916, 28 L.J. Ch. 186 (Eng. Ch. Div.)

51. *Arbitration Act, 1991*, S.O. 1991, c. 17, and *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9.

52. *Arbitration Act, 1991*, s. 1 and s. 2(1).

53. For a more in-depth treatment of this subject we refer the reader to McGill, Shelley, "Family Arbitration: One Step Forward, Two Steps Back" (2007), 21 *J. Law & Social Pol.* 49-62, online: <http://digitalcommons.osgoode.yorku.ca/jlsp/vol21/iss1/3>.

after hearing both sides of the argument. The *International Commercial Arbitration Act* is applicable to commercial disputes with an international scope⁵⁴ and adopts the Model Law on International Commercial Arbitration initially adopted by the United Nations Commission on International Trade Law on June 21, 1985, which requires courts in contracting countries to give binding effect to private agreements to arbitrate and enforce arbitration awards made in other contracting states.⁵⁵ Following the implementation of the *International Commercial Arbitration Act* and the *Arbitration Act*, courts in Ontario have noted, “a clear shift in policy towards encouraging parties to submit their differences to arbitration where an arbitration agreement exists”.⁵⁶ Among other possibilities, the passage of the *International Commercial Arbitration Act* and the *Arbitration Act* has created the possibility of enforcing religious arbitrations, which are now considered *prima facie* enforceable in Ontario.⁵⁷

The Orthodox Jewish lawyer’s dilemma

For most litigation lawyers the client’s choice to proceed to a regular court is the end of the discussion. The *Rules of Professional Conduct* do not require lawyers to educate clients about their obligations as Orthodox Jews to comply with Jewish law. However, for Orthodox Jewish lawyers it raises a moral quandary as to whether there a *halachic* obligation for the Orthodox Jewish lawyer to turn down this type of file? Professor Steven H. Resnicoff,⁵⁸ if an attorney represents a client who sues in civil court explains it as follows:

The client may be deemed to be in the process of his transgression from the beginning of the trial to its end, or to the collection of the money. There would be a great risk that the lawyer would wrongfully provide verbal encouragement to his client during this time.⁵⁹ He further

54. Nicholas Walter, “Religious Arbitration in the United States and Canada” (2012), 52:2 *Santa Clara Law Review* 530.

55. See Article 1, schedule to the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9.

56. *Ontario v. Abilities Frontier Co-operative Homes Inc.* (1996), 5 C.P.C. (4th) 81, 1996 CarswellOnt 2720, [1996] O.J. No. 2586 (Ont. Gen. Div.) at para. 27, leave to appeal refused (1997), 68 A.C.W.S. (3d) 227, 1997 CarswellOnt 587, [1997] O.J. No. 238 (Ont. C.A.).

57. Nicholas Walter, “Religious Arbitration in the United States and Canada” (2012), 52:2 *Santa Clara Law Review* 530.

58. Steven Resnicoff is both a Rabbi and a Professor of Law. He is the Co-director of Center for Jewish Law and Judaic Studies at De Paul University College of Law.

explains, "The Torah commands that, 'in front of the blind (*lifnei iver*), do not place a stumbling block.' Among other things, the *lifnei iver* doctrine proscribes enabling people to violate Jewish law."

There are very few instances when a lawyer may not turn down a retainer.⁶⁰ Rule 3.01 of the *Rules of Professional Conduct* of the Law Society of Upper Canada provides:

The lawyer has a general right to decline a particular representation (except when assigned as counsel by a tribunal), but it is a right to be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation.

For the lawyer who feels torn between his/her personal religious beliefs and the obligation to his client there is a conflict. The commentary of the Rules of Professional Conduct defines a conflict of interest as arising "when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest". If the client decides to litigate in civil court and the lawyer's fulfillment of that task is compromised by the lawyer's religious belief then that lawyer needs to consider whether to take on the file.

No matter what the faith of the lawyer or the religion of the client may be, any lawyer has a fiduciary duty to provide the client with proper and full advice. This includes informing clients on how to best advance their case through the litigation process. If that advice is contrary to *Halacha* and the lawyer feels conflicted, then he or she should not take on the retainer.

59. We refer the reader to Steven H. Resnicoff, "The Attorney-Client Relationship: A Jewish Law Perspective" (2000), 14 *Notre Dame J.L. Ethics & Pub. Policy* 349.

60. See para. 61 of *Hall v. Bennett Estate* (2003), 227 D.L.R. (4th) 263, 15 C.C.L.T. (3d) 315, 2003 CarswellOnt 1730 (Ont. C.A.), wherein the context of accepting a retainer to make a will the Ontario Court of Appeal states:

I find it important to note, if only for guidance in future cases that, in my view, it is at least questionable whether Frederick, regardless of his opinion on Bennett's capacity, could be found to be under any legal obligation to accept the retainer to prepare Bennett's will. If, for example, the facts had been otherwise and Frederick had been of the view that Bennett was able to make a will but nonetheless declined the retainer, the exigent circumstances would undoubtedly give rise to a serious question of professional conduct and, depending on all the circumstances, could form the basis of disciplinary proceedings.

CIRCUMSTANCES WHERE THE COURT WILL INTERVENE TO SET ASIDE A DECISION OF A RABBINICAL COURT

When advising a client on the legal advantages and/or disadvantages on litigating before a *Beis Din*, it behooves the litigator to review the case law on how the courts view those decisions and their vulnerability to judicial review. Frequently, arbitration agreements signed by the parties appearing before the *Beis Din* will have a provision denying the parties the right to appeal the decision to a civil court. However, it is important to note that the inclusion of such a provision does not necessarily preclude a civil court from commencing a judicial review of the *Beis Din* decision.

(i) The appeal of an arbitration decision

In anticipation of the fact that many parties who agree to arbitration do so to avoid litigating in a civil court, s. 3 of the *Arbitration Act* allows parties to vary or exclude most of the provisions of the *Arbitration Act* with limited exceptions.⁶¹ While the agreement to forego a right to appeal can limit a civil court's ability to interfere in an arbitration decision, the agreement of the parties to a "final and binding decision" in the arbitration does not absolutely preclude a civil court from ruling on an arbitration decision.

For example, s. 45 of the *Arbitration Act* allows a party to appeal the decision of an arbitrator if the arbitration agreement does not deal with appeals on questions of law. It provides that the court shall grant an appeal on a question of law if the following two criteria are satisfied: first, the importance to the parties of the matters at stake in the arbitration justifies an appeal; and second, determination of the question of law at issue will significantly affect the rights of the parties. Section 45 of the *Arbitration Act* also allows a party to appeal an arbitration agreement on questions of fact or mixed fact and law, if the arbitration agreement provides for an appeal on this basis.⁶² Where a court finds that a right of appeal is permitted for an arbitration decision, the court can provide a party with the following remedies: the court may confirm, vary or set aside the award, or may remit the award to the arbitral tribunal with the court's opinion on the question of law, in the case of an appeal on a question of law, and give directions about the conduct of the arbitration.⁶³ It is important

61. *Arbitration Act*, 1991, s. 3.

62. *Ibid.*, s. 45(3).

63. *Ibid.*, s. 4(5).

to consider s. 45 of the *Arbitration Act* when reviewing the terms of an arbitration agreement before a *Beis Din*.

In the appeal of an arbitration decision, a court is entitled to regard the arbitrator's decision with a certain amount of deference. The appropriate degree of deference with which a court will consider an arbitration decision is called the standard of review. When considering the circumstances in which an appeal of an arbitration decision should be permitted, the Superior Court of Justice has held that "a court should not interfere with the arbitrator's award unless it is satisfied that the arbitrator acted on the basis of a wrong principle, disregarded material evidence or misapprehended the evidence".⁶⁴

(ii) Judicial review

The strongest mechanism for challenging an arbitration decision is through judicial review of a procedural issue that arose either at the time that the arbitration agreement was executed or during the arbitration as outlined in s. 46 of the *Arbitration Act*. Significantly, s. 46 is one of the few provisions of the Act the parties cannot contract out of in their arbitration agreement.⁶⁵ Section 46(1) provides that a court may set aside an arbitration award on any of the following grounds:

- (a) *A party entered into the arbitration agreement while under a legal incapacity*

A court will not enforce an arbitration agreement where one of the parties was legally incapable at the time of execution. A party would be considered incapable if they were a minor or impaired by a disability or cognitive disease that rendered the party incapable of making legally binding decisions.⁶⁶

- (b) *The arbitration agreement is invalid or has ceased to exist*

An arbitration agreement may be invalidated if the time frame set out in the agreement has passed or if a particular procedural guarantee provided for in the agreement was not satisfied by the *Beis Din*. In addition, academics have suggested that this section could be

64. *Robinson v. Robinson* (2000), 99 A.C.W.S. (3d) 377, 2000 CarswellOnt 3264, [2000] O.J. No. 3299 (Ont. S.C.J.), at para. 5.

65. *Arbitration Act*, s. 3

66. Natasha Bakht, "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women" (2004), 1 *Muslim World Journal of Human Rights* 14.

used to set aside arbitration awards that are unconscionable or void for public policy.⁶⁷

The following sections address challenges to an arbitration decision based on the procedural compliance of the *Beis Din* to the terms outlined in the arbitration agreement:

- (c) *The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement*
- (d) *The composition of the arbitral tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with this Act*

The arbitration agreement can establish limits for the issues before the *Beis Din* and specify the composition of the *Beis Din* determining the agreed upon issues. If a *Beis Din* decision includes the determination of issues outside the parameters established in the arbitration agreement, it can be challenged for exceeding the terms the parties agreed to. However, lawyers representing parties in negotiations of an arbitration agreement should note that a civil court will be prevented from intervening on this basis where a party has agreed to resolve a dispute or matter, waived the right to object to its inclusion, or agreed that the *Beis Din* has the power to decide what disputes have been referred to it.⁶⁸

A decision of the *Beis Din* is also open to interference from a civil court if it can be shown the procedural guarantee ensures that the manner in which the arbitration is conducted is consistent with the intent of the parties (as expressed in the arbitration agreement).

- (e) *The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law*

An arbitration agreement can be set aside where it is outside the jurisdiction of Ontario law. For example, an arbitration agreement for the determination of an issue before a *Beis Din* that purports to bind a third party would not be enforceable on this basis.⁶⁹

The following sections would allow a civil court to intervene in the decision of a *Beis Din* where the arbitration procedure was unfair to one of the parties or otherwise in violation of the *Arbitration Act*:

67. *Ibid.*, at p. 15.

68. *Arbitration Act*, s. 46(3).

69. Natasha Bakht, "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women" (2004), 1 *Muslim World Journal of Human Rights* at 1.

- (f) *The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator*
- (g) *The procedures followed in the arbitration did not comply with this Act*
- (h) *An arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias*
- (i) *The award was obtained by fraud*

The case law suggests that parties challenging a decision of the *Beis Din* will often do so by alleging that the arbitration was unfair or that they were pressured into submitting to arbitration by the threat of receiving a *shivuy*.⁷⁰

(iii) Recent case where an arbitration decision was challenged in civil court - Popack v. Lipszyc

In a recent judgment the Ontario Court of Appeal, an award granted by a Jewish court in New York to a Canadian businessman was upheld despite a proven breach of the arbitration agreement between the parties.⁷¹

CONCLUSION

An Orthodox Jewish client who by virtue of his or her fidelity to *Halacha* feels bound to deal with the *Beis Din* poses a difficulty for the litigation lawyer. On the one hand, it is necessary to deal with the real economic and social threat to the client for failure to adjudicate their dispute before a Jewish court. On the other hand, the client's adversary may not feel bound by the same rules and your client's economic interest may be at risk. Even if the other party wants to appear before the *Beis Din*, your client may fare better before a civil court than before the *Beis Din*. The answer is to know your client, familiarize yourself with his or her needs, and understand the *halachic* process. The lawyer must therefore ask:

70. *Gerstel v. Kelman*, 2015 ONSC 978, 40 B.L.R. (5th) 314, 253 A.C.W.S. (3d) 272, 2015 CarswellOnt 5346 (Ont. S.C.J.); and *Cawthorpe v. Cawthorpe*, 2010 ONSC 1389, 319 D.L.R. (4th) 746, 86 R.F.L. (6th) 225 (Ont. S.C.J.).

71. *Popack v. Lipszyc*, 2016 ONCA 135, 396 D.L.R. (4th) 57, 129 O.R. (3d) 321 (Ont. C.A.).

1. Does Jewish law require this type of litigation to be before a Jewish court?
2. Does Jewish law permit an interim step before the civil court in order to protect your client's interest?
3. Is there a way, within the *Halachic* framework, to secure the most advantageous forum for the client?

Understanding how clients can conduct themselves within the *Halachic* framework will avoid the sanctions of their community and can still allow them to have their case adjudicated in a forum that best protects their interests.