Jewish Law, Civil Procedure: A Comparative Study

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PART 1: THE ARBITRATION AGREEMENT[1]

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

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

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

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

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

[3] See Uniform Arbitration Act, §1 and §16 and New York CPLR §7501-7502.

[4] See Uniform Arbitration Act §§12-13.

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

[6] See Oehmke at §4.

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

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

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

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

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[7] Uniform Arbitration Act §1.

[8] CPLR §7501.

[9] See Rama, *Choshen Mishpat* 3:1; *Halacha Pesuka*, *Choshen Mishpat*, 13:11-16.

[10] See R. Moses Feinstein (1895-1986), *Iggerot Moshe*, *Choshen Mishpat* I, 3.

[11] "*ZABLA*" is an acronym for "*Ze Borrer Lo Echad*", or "he chooses one for himself," referring to this process of selecting judges.

[12] See *Shulchan Aruch, Choshen Mishpat*, 13:1.

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

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

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

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[14] In fact, this may be a fulfillment of the commandment set forth in *Deuteronomy 16* for Jewish communities to have both "*shoftim*" – judges, and "*shotrim*" – policemen to enforce the judgments. Taking steps to ensure that the arbitration will be enforced by the secular court system provides the "*shotrim*" needed for a *beit din* to be able to function. See R. Yoezer Ariel, "*Hatzorech Hahelchati Be'Shtar Borerut*," *Techumin* 14 (1994), 147.

[15] See *Bava Metzia* 74a; *Shulchan Aruch, Choshen Mishpat*, 201:2.

[16] See *Shulchan Aruch*, *Choshen Mishpat*, 40 and 69.

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

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

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

PART 2:
Compelling Participation in a *Beit din* Arbitration Proceeding
I. Introduction

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

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

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[18] See Rama, *Choshen Mishpat*, 12:7; *Sma, Choshen Mishpat*, 12:18; *Halacha Pesukah* to *Hilchot Dayanim* 12:298.

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

[20] *Midrash Tanchuma, Parshat Shoftim,* 3, s.v. "*shoftim v'shotrim*."

[21] See, *e.g.*, Kingsbridge Center of Israel v. Turk, 469 NYS2d 732 (1983).

[22] See New York CPLR §7501

law authorities (serving as the "police officers") to summon the parties for a proceeding and to issue an enforceable decision.[23]

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

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

II. The Power of a *Beit din* to Compel a Party's Submission

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

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

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

[24] See Rashi, Exodus 21:1, s.v. "*lifneihem*." See also R. Yaacov Feit, "The Prohibition Against Going to Secular Courts," *The Journal of the Beth Din of America* 1 (2012): 30.

[25] See Commentary of the *Ramban*, Exodus 21:1.

[26] See Rama, *Choshen Mishpat*, 3:1.

[27] R. Avrohom Yeshaya Karelitz (1878-1953), *Chazon Ish, Sanhedrin* 15:7.

[28] See *Iggerot Moshe, Choshen Mishpat* II, 3.

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

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

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

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[29] *Mishna, Moed Kattan* 3:3, commentary of R. Ovadia Bartenura *ad loc*.

[30] See R. Shimon ben Tzemach Duran (1361-1444), *Shu"t Tashbetz* I, no. 161.

[31] See R. Avrohom Derbamdiker, *Seder Hadin* (2009), 1:32.

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

[33] See *Shach, Choshen Mishpat*, 12:12 (settlement between parties is considered binding).

[34] See R. Avraham Dov Kahane Shapiro (1870-1943), *Teshuvot D'var Avrohom*, no. 1:1 (3) (criminal prosecution is within province of governmental authority).

[35] See *Rama, Choshen Mishpat*, 11:1.

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

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

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

[37] Neiman Ginsburg v Goldburd, 684 NYS2d 405, at 407 (1998).

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

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

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

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

III. Civil Court Enforcement of *Beit din* Jurisdiction

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

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[40] See, *e.g.*, R. Derbamdiker, *Seder Hadin*, 1:45.

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

[42] See R. S. Sha'anan, "*Hafniyat Tovea Le'Beit Mishpat*," *Techumin* 12 (1992), 251 at 252 and R. Moshe Sofer (1762–1839), *Shu"t Chatam Sofer, Choshen Mishpat*, no. 3.

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

[44] See *Aruch HaShulchan, Choshen Mishpat*, 22:8

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

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

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

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[45] New York CPLR §7503(a), Uniform Arbitration Act §7.

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

[47] *Rama, Choshen Mishpat*, 26:1.

[48] *Ibid*.

[49] *Aruch HaShulchan, Choshen Mishpat*, 388:7.

[50] See R. Eliezer Y. Waldenberg (1915-2006), *Teshuvot Tzitz Eliezer*, no. 19:52.

[51] See R. Yehoshua Falk (1555-1614), *Sefer Meirat Eynaim*, *Choshen Mishpat*, 26:5.

[52] See, *e.g.*, Hirsch v. Hirsch 774 NYS2d 48 (2004). Glauber v. Glauber 600 NYS2d 740 (1993).

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

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

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

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

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[53] See New York Domestic Relations Law, §236(B)(3).

[54] See Rakosynski v. Rakosynski, 663 NYS2d 957 (1997).

[55] Fawzy v. Fawzy, 199 NJ 456 (2009), Johnson v. Johnson 204 NJ 529 (2010).

[56] See Aflalo v. Aflalo, 295 N.J.Super. 527 (1996).

[57] See Avitzur v. Avitzur, 459 NYS2d 572 (1983); cf. Aflalo, supra note 56 at 541.

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

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

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

IV. Conclusion

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

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

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[59] R. Shlomo Zalman Auerbach (1910-1995), *Minchat Shlomo*, 3:103(24).

[60] See, *e.g.*, New York CPLR §7504, Uniform Arbitration Act §11.

[61] See *Sanhedrin* 23a.

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

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

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[62] See *Rosh, Bava Kamma* 92b, s.v. *mina hach milta*.