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COMMISSION ON LEGISLATION AND CIVIC ACTION

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BY HAND

August 25, 1989

Honorable Elliott Golden
Supreme Court of the State of New York
County of Kings
360 Adams Street
Brooklyn, NY 11201

Re: Meisels v. Uhr, et al.; Index No. 20686/88

Your Honor:

We understand that the above-referenced case is scheduled for rehearing this coming Monday, August 28. We beg Your Honor's indulgence in permitting us this opportunity to convey to the Court the reasons Agudath Israel of America's Commission on Legislation and Civic Action believes that certain key components of the Court's initial decision — specifically, the Court's ruling that the failure of the arbitration agreement to delineate the issues to be considered by the beth din rendered the agreement defective and the subsequent arbitration proceeding a nullity; and that the language of the arbitration agreement did not authorize the beth din to fashion a compromise among the parties — deserve Your Honor's careful reconsideration.

Introduction and Background

Agudath Israel of America was founded in 1922 to unite the then fledgling American Orthodox Jewish community into a cohesive force on the American scene. As the community has grown, so too has Agudath Israel; to the point today where it is the nation's largest grassroots Orthodox Jewish movement, with chapters in 30 states, tens of thousands of members, and 19 divisions operating out of central headquarters in New York City. The organization is led, and its policies determined, by some of the outstanding rabbinical leaders of our generation.

One of Agudath Israel's 19 divisions is its Office of Government Affairs, which encompasses the Commission on Legislation and Civic Action. The Commission takes positions from time to time on public issues that affect the rights and interests of Orthodox Jews in New York and around the country. We, the two authors of this letter, are heavily involved in the Commission's activities: Aaron Twerski, the chairman of the Commission, is an ordained Orthodox rabbi, a professor of law at Brooklyn Law

School, former dean of the Hofstra Law School, and author of numerous scholarly books and articles; and David Zwiebel is the general counsel of Agudath Israel of America and the director of its Office of Government Affairs. Each of us has had considerable exposure to beth din practice and procedure.

Shortly after the Court issued its July 13 decision, one of the members of the beth din involved in the case requested the assistance of our Commission on Legislation and Civic Action in getting the decision reconsidered and reversed. Our first reaction was to tell the rabbinical arbitrator that our Commission typically does not get involved in ongoing litigation, especially where the parties to the dispute are members of the community whose interests we seek to represent. However, upon careful consideration of the Court's ruling, and its potentially devastating community-wide ramifications, we decided to abandon our traditional policy of non-involvement in ongoing litigation.

We know neither the petitioner nor the respondent in this action. Nor do we have knowledge of, or interest in, the underlying dispute between the parties. All we know about the case is what we read in the Court's July 13 ruling. On its face, however, the Court's ruling raises issues that far transcend the narrow case of Meisels v. Uhr. Hence our decision to communicate our views to the Court.

The July 13 decision invalidated the beth din proceeding on several grounds. No doubt the parties will address each of those grounds in their respective papers. Our focus, deriving as it does from a communal rather than an adversarial perspective, will be exclusively on two of the grounds for the decision: (1) the arbitration agreement's silence as to the issues to be determined by the beth din; and (2) the beth din's alleged lack of authority to fashion a compromise among the parties.

(1) The Arbitration Agreement's Failure to Specify the Issues

One basis for the Court's invalidation of the beth din proceeding was that the February 22, 1988 agreement among the parties to submit their disputes to the beth din (the "shtar berurin") was defective -- as a matter of both Jewish law (Decision at 19-20) and secular law (Decision at 20-24). Respectfully, we find this aspect of the Court's ruling (a) dangerous in terms of its potentially far-ranging ramifications; (b) troublesome in terms of its incorrect reading of Jewish law and, even more fundamentally, its improper intrusion into religious matters; and (c) inconsistent with settled principles of New York State law.

(a) Potential Ramifications: The shtar berurin used in this case, with its general grant of arbitration authority and failure to specify the issues to be arbitrated, is substantially similar in form to shtarei berurin used in batei din throughout the United States -- indeed, to the best of our knowledge, throughout the world. Its basic format has been in use for centuries. Although it is true that some shtarei berurin do specify particular issues to be considered by the beth din, those shtarei berurin are if anything the exception rather than the rule. At a minimum, it certainly is not aberrational for shtarei berurin to be silent as to the issues to be arbitrated.

If the Court's July 13 ruling stands, it will cast serious doubt upon the binding nature of the hundreds of beth din proceedings where the issues to be decided were not spelled out in the shtar berurin. As we understand the Court's ruling, it matters not whether there is any evidence of misunderstanding or prejudice accruing to either party as a result of the failure to specify in the shtar berurin the issues to be arbitrated; such failure per se renders the entire arbitration invalid. By so glorifying form over substance, the Court's ruling as much as solicits countless lawsuits by parties unhappy with beth din arbitration outcomes.

New litigation is not the only thing the Court's ruling solicits. It solicits a major confrontation between the secular courts and religious authorities. It essentially tells batei din: "Change the way you have done your business for centuries, or else!" The harmful ramifications of such a warning should be readily apparent to the Court. News of the Court's ruling has already begun to spread within the Orthodox community, and the uniform reaction has been one of great concern and dismay.

We do not mean to suggest that the broad negative ramifications of the Court's ruling, whether in terms of undermining the finality of numerous beth din proceedings or creating confrontation with the venerable institution of batei din, would themselves justify reversal of the Court's July 13 decision. Certainly not. If the law were indeed clear that arbitration agreements similar to the one used in this case rendered the entire arbitration proceeding invalid, so be it, and let the chips fall where they may. Nonetheless, the Court should recognize what it hath wrought, and think long and hard whether common sense or legal precedent made it really necessary to do so.

(b) The Court's Erroneous and Improper Determination of Jewish Law: "The effectiveness of the arbitration agreement as a jurisdictional document must be viewed both in the context of CPLR 7501 as well as applicable religious tenents [sic]." [Emphasis added.] So stated the Court at page 19 of its July 13 decision, proceeding from there to opine that under Jewish law the failure to specify the issue to be arbitrated rendered the shtar berurin in this case invalid.

First, as a matter of fact, the Court's reading of Jewish law is erroneous. Jewish law does not necessarily require parties to write out in a shtar berurin the precise issues to be determined by the beth din. Nothing in Jewish law precludes parties in a dispute from doing precisely what the parties did in this case: simply appointing the members of the beth din and agreeing to be bound by the beth din's ruling.

Of course, if the shtar berurin does specify the issues to be ruled upon, and if the beth din then exceeds its authority by ruling on some other issue, Jewish law would not recognize the unauthorized ruling. That is the point of the Elon treatise cited by the Court on page 20 of its July 13 ruling. ("A decision on a matter not included in the issues to be submitted to the arbitrators for decision, renders their decision void pro tanto." Elon, Principles of Jewish Law, Arbitration, at 569.) But that is a far cry from saying, as the Court did, that the shtar berurin is fundamentally defective if it is silent as to the issues to be considered by the beth din. Certainly, the fact that it is and always has been common practice for shtarei berurin to omit any recitation of the specific issues before the beth din, as discussed above, is ample testimony to the fact that Jewish law is not offended by such omission.

Even more to the point, the Court overstepped its bounds when it chose to opine on the religious validity of the shtar berurin. It is a fundamental premise of First Amendment jurisprudence that "[c]ourts are not arbiters of scriptural interpretation." Thomas v. Review Board, 450 U.S. 707, 716 (1981). As the Supreme Court observed more than a century ago, it "would lead to the total subversion of ... religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed." Watson v. Jones, 80 U.S. 679, 729 (1871). The same basic principle was expressed by James Madison, who labelled the suggestion that "the Civil Magistrate is a competent Judge of Religious truth" an "arrogant pretension." Memorial and Remonstrance Against Religious Assessments, II The Writings of James Madison 183-91 (G. Hunt ed. 1901). Or, as a contemporary constitutional scholar has stated, "government -- including the judicial as we well as the legislative and executive branches -- must never take sides on religious matters..." L. Tribe. American Constitutional Law, at 1231 (2d Ed. 1988). See generally Tribe, supra, at 1231-42.

The Court's conclusion that the shtar berurin was flawed under Jewish law is merely obiter dicta; it had little or nothing to do with the Court's ultimate decision. Yet it is one of the most troublesome aspects of the entire decision. We respectfully urge the Court expressly to disavow this aspect of the July 13 ruling in its decision on rehearing.

(c) The Validity of the Shtar Berurin Under CPLR 7501: The sole issue that was properly before the Court with respect to the shtar berurin's failure to identify the issues to be considered by the beth din was whether such failure was a fatal flaw under CPLR 7501. The Court held that it was. We believe this holding is not consistent with what appears to be settled precedent. Although the parties will likely present more extensive discussions of this point, a few words seem to be in order.

McLaughlin's Practice Commentaries to CPLR 7501 (at 258-59) summarizes the law in New York State as follows:

> "In short, if the language of the arbitration clause is broad, the courts will give effect to the intention of the parties and will lean toward leaving all issues to arbitration. On the other hand, if the language of the arbitration clause is narrow, the courts will find that the intention of the parties was to cede jurisdiction to the arbitrators only over certain issues and will lean toward retaining jurisdiction unless the intent of the parties to relegate a particular issue to arbitration is manifest." [Emphasis added.]

Here, quite clearly, "the language of the arbitration clause is broad"; accordingly, the Court should "give effect to the intention of the parties and ... lean toward leaving all issues to arbitration."

It is noteworthy that the reported cases involving shtarei berurin and batei din have never suggested that beth din proceedings are invalid where the shtar berurin does not specify the issues to be arbitrated. Consider, for example, the arbitration agreement quoted in Kingsbridge Center of Israel v. Turk, 98 A.D. 2d 664, 665 (1st Dept. 1983):

> "We the undersigned the parties to a controversy that has arisen between us hereby submit our controversy to the following Beth Din * * * We hereby expressly agree that the determination of the said Beth Din shall be binding upon us with the same force and effect as if said determination was made in a Court of Law in the State of New York. It is further agreed among us that in the event either of us does not obey fully the ruling and determination of said Beth Din (Rabbinical Court), whether by arbitration or whatever decision, then either party may enter a judgement in the appropriate Court(s) in the State of New York."

Or consider the arbitration agreement quoted in Kozlowski v. Seville, 64 Misc. 2d 109, 111 (Sup. Ct. N.Y. Co. 1970):

> "We each submit ourselves to the decision of Rabbi Israel Yitzchok Piekarski. It is Rabbi Piekarski's privilege to take to himself two other rabbis and whatever will be the decision, whether by Din Torah or by compromise similar to Din Torah, we undertake to obey such in all respects. Furthermore, with respect to the matter of the corporation (problem) we rely on Rabbi Piekarski to consult an attorney with respect to what he may suggest as best in both matters."

Neither of these arbitration agreements was any more specific in terms of identifying the issues to be determined than is the arbitration agreement at issue in this case. Yet never was it suggested in either Kingsbridge or Kozlowski that such lack of specificity invalidated the agreement.

The Court's July 13 decision thus breaks new legal ground. Respectfully, we submit that the ground would be better left intact.

(2) The Beth Din's Authority to Fashion a Compromise

A second basis upon which the Court premised its July 13 decision was the Court's determination that the beth din had exceeded the authority conferred upon it by the shtar berurin when it fashioned a compromise among the parties. (Decision at 24-33.) The Court acknowledged the fact that in cases such as Kingsbridge and Kozlowski, supra, the beth din's authority did include the power to compromise the parties' disputes. Nonetheless, the Court distinguished those cases on the factual basis that the language of the arbitration agreements in Kingsbridge and Kozlowski authorized the respective batei din to issue a compromise "pesharah" judgment; whereas here the Court found an "absence of any language in the arbitration agreement from which could reasonably be inferred that Pesharah powers were consented to be given to the tribunal..." (Decision at 33.)

For whatever reason, the Court was laboring under a factual misconception. The fact is that the shtar berurin here does expressly confer pesharah authority upon the beth din. It speaks of the beth din's authority to issue its judgment "bain b'din bain b'pesharah ha'krovah l'din" — whether by din or whether by pesharah close to din.

The operative language of the shtar berurin is thus substantially similar to the operative language of the arbitration agreements in Kingsbridge and Kozlowski. Indeed, substantially similar language appears in virtually every shtar berurin used by recognized batei din throughout the world. The practice of specifying a beth din's pesharah authority as an

alternative to the application of strict din has deep historical and religious roots. It is designed to allow a beth din to fashion a compromise judgment that may not conform precisely to strict Jewish law (din) but nonetheless appears equitable and appropriate under the circumstances. Disputants who submit themselves to a "din or pesharah k'rovah l'din" proceeding recognize full well that they have agreed to allow the beth din to fashion such a compromise.

The Court's misapprehension that such pesharah language did not appear in the shtar berurin was apparently based on a somewhat misleading translation of the word pesharah as "settlement" in respondents' initial papers. It is true that "settlement" is an accepted translation of pesharah. But so too is "compromise." As the courts found in Kingsbridge and Kozlowski, and as is universally understood among parties who submit their disputes to "din or pesharah" proceedings, it is that definition, "compromise," which establishes the outer limits of the beth din's authority.

The plain language of the shtar berurin makes it further evident that the term "pesharah" as used by the parties in this case was designed to authorize the beth din to issue a binding compromise judgment, not merely to authorize the beth din to attempt to get the parties to settle their dispute by mutual consent. The shtar berurin states that the parties agree to abide by the judgment of the beth din, whether it be "din" or "pesharah ha'krovah l'din"; and that they agree not to seek to have such judgment overturned by any other Jewish or non-Jewish court. Plainly, the parties contemplated that the pesharah authority conferred upon the beth din, no less than the din authority, could translate itself into a binding judgment.

On this issue too, if the Court's July 13 ruling is permitted to stand, its ramifications will be felt far beyond the narrow confines of Meisels v. Uhr. The authority of batei din to fashion compromise judgments in the many cases where the parties have agreed to a "din or pesharah" proceeding will be severely undermined — as will the intention of the parties themselves.

Respectfully, we urge the Court to acknowledge that its July 13 ruling that the beth din had no authority to issue a compromise judgment was based on the erroneous perception that the shtar berurin had not conferred pesharah power upon the beth din, when it in fact did confer such power; and to hold that the beth din's judgment was in full consonance with its pesharah authority.

Conclusion

The rehearing scheduled for this coming Monday affords Your Honor an opportunity to reconsider the propriety of the Court's July 13 ruling, including the Court's findings that the absence of specific enumeration of the issues to be considered by the beth din rendered the shtar berurin defective under Jewish and secular law, and invalidated the subsequent beth din proceeding; and that the language of the shtar berurin did not confer

upon the beth din the authority to compromise the parties' dispute. At stake, we submit, are not merely the dollars and cents that divide the parties, but the integrity and independence of the entire beth din institution. The gravity of the issue deserves Your Honor's very careful consideration.

Respectfully,

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cc: Counsel for the Respective Parties