

The Impartial Rabbis or Bias in the Bet Din

By Steven Schmidt-Lackner

According to Rabbi Yisrael Belsky, “It is rare – almost to the point of being nonexistent – that after one listens to a Dayan, one fails to understand what went on in the *be[t] din* [or] that he was indeed treated fairly.”¹ What are a Dayan and a Bet Din, and who would possibly feel they were treated unfairly are only some of questions the average person listening to Rabbi Belsky might ask. As is well known, alternative dispute resolution provides a variety of forums in which disputes could be resolved outside of typical civil litigation. These range from negotiation, to mediation, to arbitration, and more. This article intends to focus on a particular form of arbitration. It is important to note first that though arbitration is lauded for its many benefits,² there is generally still judicial hostility toward arbitration that continues today, with state courts having “been among the most vocal critics of arbitration's expansion beyond commercial contexts.”³ One type of arbitration that both includes commercial and non-commercial contexts is religious arbitration, which has been accompanied by its own unique controversies.⁴

Within the Jewish community there exists alternative dispute resolution along the range of

1 Binyamin Rose, *Trying Times for Beis Din*, Mishpacha Magazine, Sep. 30, 2009, at 24.

2 See National Arbitration Forum, *The Benefits of Arbitration*, <http://www.adrforum.com/main.aspx?itemID=1293&hideBar=False&navID=6&news=3#Courts>

3 Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U.L. Rev. 1420, 1432 (2008). The “massive expansion” of arbitration has not been “embraced everywhere,” and “state courts are certainly not alone in this.” *Id.*

4 This is especially true in regard to controversies that have emerged surrounding Islamic Sharia Courts. For example, a “proposal to permit use of Islamic law in arbitration and mediation of family disputes in Ontario, Canada erupted in a firestorm of protest . . . Attracting international attention, the proposal produced heated debate and protests.” Martha Minow, *Is Pluralism an Ideal or a Compromise?: An Essay for Carol Weisbrod*, 40 Conn. L. Rev. 1287, 1294 (2008). Another example of such “high profile issues in recent news” surrounding religious arbitration saw co-religionists and others calling “for the resignation of the Dr. Rowan Williams from the post of Archbishop of Canterbury after he suggested that Great Britain consider including some parts of Sharia (Islamic religious law) under a jurisdiction parallel to secular law in order to acknowledge religious differences and also aid social cohesion.” *Id.* at 1289.

possibilities. The type of alternative dispute resolution forum this article intends to focus on is a specific type of religious arbitration found within the Jewish community known as the “*Bet Din*.”⁵ In America and abroad there are rabbinical courts that serve as binding arbitrations, resolving disputes and religious matters of all kinds.⁶ A rabbi serving on such a panel is referred to as a “*Dayan*” (plural “*Dayanim*”), which is the Hebrew word for “judge.” Part I of this article will further elucidate the role of the Bet Din as a Jewish forum of alternative dispute resolution.

This article shall also emphasize the relationship of these Jewish religious arbitration panels and the ability of decisions rendered therein to be overturned by secular American courts on the grounds that a litigant faced a religious tribunal which appeared to not have the ability to treat him fairly. The article will focus on some of the most recent examples in which U.S. courts have decided upon challenges to rabbinical court decisions, all of which were decided on the same grounds. The common ground upon which the civil courts decided whether to vacate the arbitration award was based on the lack of impartiality of the rabbinical arbitrators involved. Some of these cases have elicited some controversy within the Jewish community. Part II of this article will focus on the legal ground of

5 The phrase “Bet Din” is spelled differently in English depending on the source. Some common alternative spellings include Beth Din or Beis Din. In plural, the phrase appears as Batei Din. The spelling that I choose to use throughout is Bet Din. However, other spellings appear in direct quotations found throughout the article in which another author chooses a variant spelling.

6 Bet Din arbitration is the most well-known Jewish forum for alternative dispute resolution, as the Jewish community at large “are simply unaware of mediation.” Rabbi Adam Berner, *Divorce Mediation: Gentle Alternative to a Bitter Process*, <http://www.jlaw.com/Articles/berner.html>. Yet at the same time mediation is getting increasing attention by rabbis and community leaders as a form of dispute resolution that should be more often relied upon to resolve disputes among Jews. See Joanne Palmer, *Can This Relationship Be Solved – The Mediation Project*, The United Synagogue of Conservative Judaism (2007), http://www.uscj.org/Mediation_Project7436.html. A vast array of sources in Jewish literature makes clear that mediation “is strongly encouraged by Jewish law.” Rabbi Jonathan Reiss, *Jewish Divorce and the Role of Beit Din*, *Jewish Action*, 4, n.4 (Winter 1999), available at <http://www.ou.org/publications/ja/5760winter/biet%20din.pdf>. “The Beth Din of America encourages divorcing spouses to resolve their differences through mediation . . . Through the mediation process . . . the parties can avoid much of the acrimony that often results from litigation.” *Id.* As but one example, “[t]he Canadian Jewish Congress has . . . established Jewish Mediation Services of Ontario. Disputants can pay two hundred dollars for a three-hour session with a” mediator schooled in Jewish law “in an attempt to reach a mutually acceptable resolution. The Beth Din of America provides similar services.” Kellie Johnston, Gus Camelino, & Roger Rizzo, *A 'Return' To Traditional Jewish Dispute Resolution: An examination of Religious Dispute Resolution Systems* (2000), http://cfcj-fcjc.org/clearinghouse/drpapers/traditional.htm#N_31_.

impartiality allowing for the vacation by secular courts of rabbinical Bet Din decisions. Part III will then focus on some of these recent civil court cases in which the impartiality of a Bet Din was under review. This will provide clear examples from which the reader can understand how the impartiality standard is used in practice by judges in this context.

A further question that will be analyzed in Part IV of this article is whether impartiality may be an elusive standard in the religious arbitration context. The article emphasizes that there are additional factors to be taken into account by a judge when deciding whether to vacate a Bet Din decision on the grounds of impartiality. Within Part IV, the article argues that there are very strong reasons for deference being shown to a Bet Din arbitration panel. It further proposes that judges should give more consideration as to whether the “impartiality” objection was waived by the complaining party that has moved for the secular courts to overturn the Bet Din, as well take into consideration when making such a decision the wider communal role of a rabbi that decides to serve as a Dayan.

Before delving into some of the various legal issues involved in recent cases, it is important to provide a basic backdrop to the rabbinical courts known as the Bet Din and why they exist.

I. What Is A *Bet Din*, Who Uses It, and Why?

The Bet Din is the Hebrew term which translates as “House of Judgment.”⁷ In the Jewish community it serves as forum of alternative dispute resolution where Jews can solve disputes among themselves, most commonly by a panel of three rabbis knowledgeable in the relevant Jewish law serving as arbitrators. In all Jewish sects the Bet Din controls religious matters such as conversion or divorce, but in the Orthodox Jewish community the Bet Din is used for common and sometimes complex business disputes as well. In the Orthodox Jewish Community the Bet Din plays a very prominent role in dispute resolution. Despite the fact that Christians and Muslims also use arbitration,

⁷ Jacqueline Shields, *Bet Din*, Jewish Virtual Library, <http://www.jewishvirtuallibrary.org/jsource/Judaism/BetDin.html>

the Jewish alternative dispute resolution “tradition has the strongest focus on arbitration.”⁸

Those who agree to have their case decided by this rabbinical court sign a contract of binding arbitration. The Bet Din differs from most arbitrations in a very important respect, as there is no statutory obligation to utilize Bet Din, and rarely is there a contractual obligation either.⁹ The signing of an arbitration agreement prior to entering into Bet Din serves the dual purpose of making “sure the decisions can be enforced in a secular court,” but also to clarify the nature dispute that is being decided under Jewish law.¹⁰ At the end of the proceeding, the decision is issued in writing, though often no

8 R. Seth Shipee, *Blessed are the “Peacemakers”*: Faith Based Approaches to Dipute Resolution, 9 ILSA J Int'l & Comp L 237, 239-40 (2002). In fact, “Jews needing to arbitrate business and personal disputes are increasingly turning to” the “ancient legal system.” David Margolis, *Many Jews Turning to Old System for Justice*, Los Angeles Times, Dec. 22, 1990, available at http://articles.latimes.com/1990-12-22/news/ss-6097_1_bet-din. According to Rabbi Avrohom Teichman of the Los Angeles Bet Din, the Bet Din had already seen as of 1990 a “tremendous explosion of interest.” *Id.* It is important to note that rabbinic literature throughout the ages makes clear that a Bet Din judge is not to view his role as purely adjudicatory, like the role of the judge rendering a ruling in the adversarial American litigation process. In but one of many similar such expressions and sentiments found in the Talmud, Rabbi Shimon son of Gamliel states that “the strength of compromise (or *p’sharah* in Hebrew) is greater than the strength of adjudication according to strict law.” The Artscroll Series, The Schottenstein Edition (English Translation), *Talmud Bavli*, Tractate Sanhedrin, Volume I, Chapter One, (Mesorah Publications, NY) 1993, p. 5b³. As but one practical example of how this effects the Bet Din process itself, Bar-Ilan University Professor Gerald Steinberg points out that the *Shulchan Aruch* (“Code of Jewish Law,” compiled by the 15th century Rabbi Yosef Karo) requires that rabbinical judges open proceedings with a hypothetical compromise proposal for the litigants, and that even after hearing all the evidence the judge “may also offer to mediate a solution . . . to encourage a peaceful settlement. Gerald M. Steinberg, *Conflict Prevention and Mediation in the Jewish Tradition*, Jewish Political Studies Review on “Jewish Approaches to Conflict Resolution,” 7 (2000), available at <http://faculty.biu.ac.il/~steing/conflict/Papers/conflictprevention.pdf>.

9 Randy Linda Sturman, *House of Judgment: Alternative Dispute Resolution in the Orthodox Jewish Community*, 36 CAL. W. L. REV. 417, 418 (2000). The Bet Din is an institution that has “existed for thousands of years. Though it has changed over time, it remains an important part of the Orthodox Jewish community's ability to maintain itself and its traditions.” *Id.* at 435. Though generally Bet Din cases are a result of parties voluntarily agreeing to bring their dispute before a rabbinical court, this does not mean there are not other processes by which a case ends up in the Bet Din. Parties may also agree by contract that in the event that a dispute arises, such as a dispute in some sort of business relationship between religious Jewish parties, the Bet Din should resolve the issue. The Bet Din may also use the “*Hazmana*” (summons, or more literally translated as “invitation”) process to coax a party to appear before Bet Din for dispute resolution. Beth Din of America, *Laymen's Guide to Dinei Torah (Beth Din Arbitration Proceedings)*, 2, available at http://www.bethdin.org/docs/PDF1-Layman's_Guide.pdf (hereinafter, “Beth Din of America Laymen's Guide”).

10 Beth Din of America Laymen's Guide, *supra* note 9, at 3. Examples of a “Binding Arbitration Agreement” of the Beth Din of America can be found on the internet. See, e.g., *Beth Din of America Binding Arbitration Agreement*, http://www.bethdin.org/docs/PDF8-Postnuptial_Agreement.pdf

reasoning is provided, and the decision “doubles as an 'arbitration award' so as to be enforceable under secular law as well.”¹¹ In fact, it is because “Beth Dins make an effort to conduct their proceedings in a manner consistent with secular arbitration law” that “their rulings are usually binding and enforceable in the secular court system.”¹²

An adjudication system based on the Bible and Talmud has always existed within the Jewish faith.¹³ Independent religious courts have been a part of the Jewish experience even as Jews came under the control of foreign and secular powers. In fact, in Israel today rabbinical courts have jurisdiction over certain matters granted to them by the government.¹⁴ In the United States, the Bet Din

11 Beth Din of America Laymen's Guide, *supra* note 9, at 5. Attorney Baruch Cohen explains the lack of fully-reasoned rulings by saying that “the *batei din* are a little 'camera shy' in promoting their own scholarship because of the fear of appeals and motions to vacate, so decisions are not published as they are in a court of law, and the *batei din* tend to give brief and cursory rulings.” Binyamin Rose, *Trying Times for Beis Din Part 2*, Mishpacha Magazine, Dec. 2, 2009, at 35. Though this is not uniform, as rabbinical judge Yonason Abraham says that his rulings contain “a clear legal background and context for the finding, and the award.” *Id.*

12 Shipee, *supra* note 8, at 254. New York Attorney Steven Mostofsky, who has represented clients in both Bet Din and in civil courts, says that the “*beis din's shtar berrurin* – binding arbitration agreement – is accepted in court, and it is very difficult to overturn an arbitration.” Rose, *supra* note 1, at 24. Furthermore, Rabbi Yitzchok Adlerstein, a professor of Jewish law at Loyola School of Law, points out that “[t]here are judges around who will not listen to a case unless some attempt has been made to use some kind of alternative dispute resolution” and that the “Beit din happens to be one that works particularly well.” Amanda Bronstad, *Traditional Jewish Arbitration Panels Find New Converts*, Los Angeles Business Journal, March 31, 2003, <http://www.come-and-hear.com/editor/so-rcc-gentiles/index.html>. Furthermore, “when controversies include substantially religious issues, courts have declined to make their own judgments until a rabbinical court has had the opportunity to rule on the issues.” Shipee, *supra* note 8, at 254. In fact, a case in which an individual reneged on a \$25,000 pledge towards building a synagogue reached the Michigan Supreme Court. The defendant “claimed the court lacked jurisdiction” on the grounds that “the enforceability of the pledge was an issue of Jewish law, and, as such, it must be taken first to a Beth Din. After hearing expert testimony from rabbinical scholars of Jewish law, the Supreme Court of Michigan agreed, and remanded the case to the Beth Din.” *Id.* at 254-55. See *Congregation B'nei Shalom v. Martin*, 173 N.W.2d 504 (Mich. 1969).

13 See Shields, *supra* note 7. The Talmud is a voluminous rabbinic commentary that was completed in its compilation around 500 CE. It is a commentary on the Mishnah (c. 200 CE), the first written compendium of Judaism's oral laws and traditions. The foundations of Jewish law itself are found in the Talmud which largely records ancient rabbinical debates over issues of biblical exegesis and Jewish legal procedure. See generally Jewish Virtual Library, *Talmud/Mishna/Gemara*, http://www.jewishvirtuallibrary.org/jsource/Judaism/talmud_&_mishna.html.

14 Shields, *supra* note 7. In Israel “an elaborate network of bet dins were established under the Supreme

is a “well organized” system that has to play a central role in resolving disputes among Jewish religious disputants.¹⁵ Branches of standing rabbinical courts can be found throughout the country. The Beth Din of America was founded in 1960 in New York and it is “the most prominent” Bet Din. It is also affiliated with the Rabbinical Council of California (RCA).¹⁶ It is important to note that it is Los Angeles and New York that have the largest concentrations of Jews, especially Orthodox Jews, and it is therefore these cities that have some of the most well established Bet Din systems.

Participation in a Bet Din as the forum for resolving disputes is voluntary.¹⁷ As such it is important to understand various possible reasons why Jewish disputants would choose to turn to the Bet Din to resolve disputes. The reasons that Jews may choose Bet Din can be similar to the reasons one would choose alternative dispute resolution generally. Litigation in civil court can be costly, time-

Rabbinical Court in Jerusalem. The State of Israel has taken over this system, giving the bet din exclusive jurisdiction over the Jewish population in matters of personal status such as marriage, divorce, and inheritance; however, secular courts oversee” the vast majority of civil matters. *Id.*

15 Caryn Litt Wolfe, *Faith Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and their Interactions with Secular Courts*, 75 Fordham L. Rev. 427, 438 (2007). Not only are they “well organized” in terms of the arbitration bodies which are themselves made available to the Jewish community, but among “faith-based arbitration systems, Judaism’s is the most formal and trial-like.” *Id.* In comparison “to the ADR traditions of Islam and Christianity, the Jewish approach to faith-based dispute resolution is the most formal and can often be conducted very much like a secular trial, firmly rooted in process and law. Along the ADR spectrum, Jewish dispute resolution falls somewhere between arbitration and full adjudication.” Shipee, *supra* note 8, at 249. In fact, the Beth Din of America even has a list of “rules and procedures” for how the arbitration is to be conducted from beginning until end. *See* Beth Din of America, *Rules and Procedures of the Beth Din of America*, http://www.bethdin.org/docs/PDF2-Rules_and_Procedures.pdf. That being said, there are those who have worked within the Bet Din system that point out that there is room for organizational improvement. Attorney Steven Mostofsky says that “[t]he biggest problem I see is that we don’t have an organized system of *batei din*” in that “[t]here is no national database that has records, or a place *batei din* decisions are scanned into a central location so we can do research and background checking.” Rose, *supra* note 11, at 37. Rabbi Avrohom Union says that he would “like to see *batei din* networking worldwide. I have suggested convening a general conference of *dayanim*” to “assist one another in creating professional standards and resolving issues.” *Id.* Rabbi Michael Broyde further suggests that there should be a more “formal process for training *dayanim*.” *Id.*

16 Wolfe, *supra* note 15, at 438.

17 “A bet din is still used today *voluntarily* by Jews to settle disputes within the community, for conversion, and the validation or nullification of marriage and divorce documents” (emphasis added). Shields, *supra* note 7.

consuming, and potentially emotionally draining or reputation harming.¹⁸ However, there are additional and unique reasons that some would choose Bet Din. The primary reason is a “sense of religious obligation,”¹⁹ but it can also be attributed to general social pressures and the belief that Jewish law and experts therein should decide disputes.²⁰ From a historical perspective, the pressure might be external to the Jewish community, as reluctance to use a non-Jewish forum for dispute resolution would stem “from a fear of anti-Semitism.”²¹ Another reason is that *Halakhah* (“Jewish Law”) itself forbids “Jewish disputants from taking their case to a secular court.”²² As Rabbi Jonathan Reiss, the Director

18 The Bet Din “proceedings are substantially cheaper, quicker and more private than civil court.” Margolis, *supra* note 8. In fact, “there are even historically recorded instances of two non-Jewish parties that utilized the beth din for this very reason.” Ginnine Fried, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 Fordham Urb. L.J. 633, 640 (2004).

19 Sturman, *supra* note 9, at 435. This sense of religious obligation may arise out of the fact that Jewish law dates “back to ancient times” and covers “minute procedural details.” This especially “heightens the importance of the Bet Din to Orthodox Jews, whose central beliefs revolve around rituals and traditions set forth in the law and followed for thousands of years.” Orthodox Jews therefore have a “need to follow their laws and traditions.” *Id.*

20 Social pressure can be seen as “maintaining a sense of community, of viewing each other as extended family, which manifests itself in their acquiescence to social pressure to use the Bet Din.” Sturman, *supra* note 9, at 436. A Bet Din may even issue a “*seruv*, a document noting that a party has chosen to pursue his or her case in a secular court” which can lead to further social ostracizing depending on the community and case involved. Wolfe, *supra* note 15, at 441.

21 Fried, *supra* note 18, at 639.

22 Heshey Zelcer, *Two Models of Alternative Dispute Resolution*, in *Hakirah: The Flatbush Journal of Jewish Law and Thought*, 14, available at <http://www.jlaw.com/Articles/Zelcer.pdf>. One of the earlier sources of rabbinic literature discusses “the prohibition against resorting to a secular court” and “proves that it is forbidden to adjudicate disputes in a secular court even if the court’s ruling would conform to” Jewish law. *Id.* Zelcer points out that even though rabbinic sources discuss “idolaters” there is no distinction in Jewish law between a secular court and a court in idolatrous societies. *Id.* There are examples of this Jewish tradition found in the Talmud itself. For example, “R' Tarfon used to say: wherever you find gatherings of idolaters serving as judges, even though their laws are identical to the laws of the Jews, you are not permitted to submit to them for a judgment of your dispute.” The Artscroll Series, *The Schottenstein Edition (English Translation), Talmud Bavli, Tractate Gittin, Volume II, Chapter Nine*, (Mesorah Publications, NY) 1993, 88b². “Thus, while the secular courts of the United States government may be just and proper, interpretation of the Talmud suggests that an obligation to utilize a Jewish forum to adjudicate disputes still exists.” Fried, *supra* note 18, at 636. This is not the only reason for this religious injunction, as there are “[a]dditional reasons that exist for the ban in contemporary Jewish law.” *Id.* However, Rabbi Doniel Neustadt explains that there are exceptions to this general rule, as “[u]nder certain circumstances it is permitted to use the secular court system.” Rose, *supra* note 11, at 40. As but one example “the Talmudic ban only prohibits a Jew from being the first to resort to the secular courts, and does not prohibit a Jewish defendant from appearing in

of the Beth Din of America, states, “The presumptive rule is that when members of the Jewish faith have a dispute, they must submit it to a Jewish court to resolve the matter in accordance with Jewish law.”²³

With a basic understanding of what the Bet Din system in the United States is and why people voluntarily partake in it, the important issue that arises is the relationship that the Bet Din has with the civil courts.

II. Widespread Grounds for Vacation Based on Impartiality

An arbitrator's decision is “subject to limited review by a court on motion to confirm or vacate the arbitration award.”²⁴ In specific instances, a court can also modify or correct an award.²⁵ There are

a secular court when summoned. To the contrary, the overarching rule of *dina de'malchutah dina* would apply in that situation, meaning, ‘the law of the land is the law.’” Fried, *supra* note 18, at 637.

23 Jonathan Reiss, *When a Jew Sues: How do Rabbinical Courts Work?*, Wall Street Journal, May 12, 2006, available at <http://www.opinionjournal.com/taste/?id=110008370>. It is important to note that the idea of self-adjudication and resolving disputes outside of secular courts is not unique to Judaism alone. Early Christians did not permit the use of Roman Courts. Fried, *supra* note 18, at 635 n. 13 (citing ISRAEL GOLDSTEIN, JEWISH JUSTICE AND CONCILIATION: HISTORY OF THE JEWISH CONCILIATION BOARD OF AMERICA, 1930-1968, AND A REVIEW OF JEWISH JUDICIAL AUTONOMY (1983)). In fact, scripture in the New Testament can be cited to support this proposition today, as “[a]ccording to 1 Corinthians 6:1-8, a Christian is not to civilly file a lawsuit against another Christian in a secular court of law. Rather, the disputed matter should be arbitrated or judged by a wise Christian or Christians.” *Christians and Lawsuits: “Two Wrongs Don't Make a Right”*, http://www.christian-attorney.net/christians_lawsuits.html. In general, there is a sense of importance given to resolving disputes outside of secular courts in the traditions of Christianity and Islam as well. See generally Shipee, *supra* note 8. For example, Peacemaker Ministries was founded in 1982 as a forum for Christian ADR, known as Christian conciliation, and it “offers disputing parties a process to resolve their disputes out of court following biblical principles.” Wolfe, *supra* note 15, at 439. The Qur'an “urges mediation or arbitration” rather than litigation, and the Christian faith also “discourages the use of secular courts.” *Id.* at 441.

24 STEVEN C. BENNETT, ARBITRATION: ESSENTIAL CONCEPTS 5 (2002). Rabbi Avrohom Union, who serves as a Bet Din judge in Los Angeles, points out that “[a]t least forty-eight US states have arbitration statutes on the books. So if you agree to binding arbitration according to Jewish law or . . . any other legal tradition, the court doesn't care about the legal reasoning of the decision. There are very specific grounds for disqualifying arbitration rulings. The fact that civil law may reach a different conclusion is not one of them.” Rose, *supra* note 1, at 24. Using California as an example of statutorily provided reasons for vacating an award, the law states that “the court shall vacate the award” if: “(1) The award was procured by corruption, fraud or other undue means. (2) There was corruption in any of the arbitrators. (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator. (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown thereof or by the refusal of the arbitrators to hear evidence material to the

essentially two main contexts that allow for civil court intervention: (1) disputes regarding the validity of the agreement to arbitrate itself, and (2) disputes regarding the arbitration award itself and whether it should be vacated.²⁶ In the Bet Din context, challenges to the validity of the arbitration agreements are less common as the Bet Din has become aware of the contractual intricacies necessary to create a binding arbitration agreement.²⁷

There are state, federal,²⁸ and international laws²⁹ that provide for enumerated grounds in which

controversy or by other conduct of the arbitrators contrary to the provisions of this title. (6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified . . . but failed upon receipt of timely demand to disqualify himself or herself as required by that provision.” Cal. Civ. Proc. Code § 1286.2 (2009).

25 Using federal statute as an example, a court “may make an order modifying or correcting the award upon the application of any party to the arbitration” if there was a material miscalculation or mistake in the award, if the arbitrators ruled on a matter that was not submitted to them, or if the award is “imperfect in a matter of form not affecting the merits of the controversy.” 9 U.S.C. § 11 (2009).

26 Wolfe, *supra* note 15, at 442. Of course, if the religious tribunal were deciding upon a purely “ecclesiastical matter” there is a “generally accepted rule that ecclesiastical questions belong to the ecclesiastical tribunals, and their decisions thereon are binding, conclusive, and not reviewable by the civil courts” as “civil courts have no ecclesiastical jurisdiction.” *Schwartz v. Jacobs*, 352 S.W.2d 389, 392 (1961) (quoting *Briscoe v. Williams*, 192 S.W.2d 643 (Mo. App. 1946))

27 “The Beth Din of America, for example, requires parties to enter into a legally binding arbitration agreement [*sh'tar birurim*] in accordance with New York law CPLR §75 and also presents the parties with a brochure of its Rules and Procedures prior to each hearing so that the parties are fully aware of their procedural rights.” Reiss, *supra* note 6, at 3. This is not to say that Bet Din decisions have never been thrown out because the arbitration agreement itself was not binding. There have been cases where the courts have held that in submitting the dispute to the rabbi there was “absent the threshold requirement of a written arbitration or submission agreement.” *See Hellman v. Wolbrom*, 298 N.Y.S.2d 540, 543 (1969). Rabbi Avrohom Union in fact states that “[o]ne of the most important suggestions for *batei din* is that they make sure they have experienced and capable legal counsel to guide them on a seemingly endless array of legal matters that can interfere with the ability to function and ensure” that Bet Din decisions “are respected.” Rose, *supra* note 1, at 26.

28 The relationship between arbitration, including faith-based arbitration, and secular courts is “determined largely by the FAA [Federal Arbitration Act] and state arbitration statutes, many of which follow the RUA [Revised Uniform Arbitration Act].” Wolfe, *supra* note 15, at 442. A list of specific enumerated reasons for vacating or modifying an arbitration award can be found in the FAA and state statutes. *See, e.g.*, 9 U.S.C. §§ 10-11 (2009).

29 *See, e.g.*, United Nations Commission on International Trade Law, *UNCITRAL Arbitrations Rules*, G.A. Res. 31/98 (Dec. 15, 1976).

an arbitration award can be vacated or modified. Common among the various sources of applicable law is the requirement of impartiality of the arbitrators deciding a case. It is important to note that whereas the ideas of arbitrator “independence” and arbitrator “impartiality” are actually conceptually different, in general “independence is woven into the concept of impartiality.”³⁰ The rationale behind demanding impartiality of judges and arbitrators alike can be found in an English criminal case where Lord Hewart CJ in 1924 wrote that it is “of fundamental importance that justice not only be done, but should manifestly and undoubtedly be seen to be done.”³¹ The “premise for the standard is that the appearance of fairness is as important as fairness itself.”³²

Before examining the relevant law itself, it is important to first understand what exactly arbitrator impartiality and independence usually entails. Some of the common challenges to an arbitrator's appointment on the grounds of impartiality include a relationship between the arbitrator and a party, a relationship between the arbitrator and a party's lawyer, involvement in a related proceeding,

30 Naser Alam, *Independence and Impartiality in International Arbitration - an assessment*, 1 Transnat'l Disp. Mgmt. May 2004, available at <http://www.transnational-dispute-management.com/samples/freearticles/tv1-2-article205b.htm>. Impartiality includes “bias of an arbitrator either in favor of one of the parties or in relation to the issues in dispute . . . Bias could either be actual or imputed bias.” *Id.* On the other hand, the concept of independence “is measured in terms of the degree of the relationship between an arbitrator and one of the parties, whether financial or otherwise.” *Id.* While independence deals with the relationships of an arbitrator, “impartiality has more ethical nuance . . . An arbitrator's independence does not necessarily mean that he may be impartial. Again, lack of independence would trigger, in reality, a justifiable doubt as to impartiality. Nevertheless, the contrary may not happen. Here lies the difference between the practical applications of these two concepts.” *Id.*

31 *R v Sussex Justices, Ex parte McCarthy*, 1 K.B. 256, 259 (1924). Judicial impartiality has strong and early historical roots in the United States as well. “By establishing a government of separated powers, the framers of the Constitution intended to create an independent judiciary. The legal system of the United States reflects a strong belief in the principle that judges should be independent. The American principle of an independent judiciary originated from the days when the United States was still a British colony. The colonial courts that were established in the United States were under the control of the King of England, who could dictate the decisions made by the courts. From this experience, the American colonists came to recognize the need for an independent judiciary that would resolve disputes impartially.” Jeffrey M. Sharman, *Judicial Ethics: Independence, Impartiality, and Integrity*, Inter-American Development bank, Sustainable Development Department State, Governance and Civil Society Division Judicial Reform Roundtable II, 2 (1999), <http://www.iadb.org/sds/doc/sgc-doc40-4-e.pdf>.

32 Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 Geo. J. Legal Ethics 55, 66 (2000).

or having previously expressed opinions on the issues.³³

Looking first to federal and international law, a challenge is allowed in certain international arbitration contexts on the basis of “justifiable doubts as to the arbitrator’s impartiality or independence.”³⁴ On the federal level, the Federal Arbitration Act (“FAA”) provides the court with the power to vacate arbitration decisions “where there was evident partiality or corruption in the arbitrators.”³⁵ In fact, in the seminal Supreme Court case on arbitrator impartiality, Justice Hugo Black wrote for a plurality of the Court that an arbitrator under the FAA’s “evident partiality” standard must not only “be unbiased but also must avoid even the appearance of bias.”³⁶ This includes disclosure of that which might just “create an impression of possible bias.”³⁷ Further, foreign arbitrations being

33 Ronnie King & Ben Giaretta, *Independence, Impartiality, and Challenging the Impartiality of an Arbitrator*, in INTERNATIONAL COMPARATIVE LEGAL GUIDES (“ICLG”) TO INTERNATIONAL ARBITRATION, 27-28, available at http://www.ashurst.com/doc.aspx?id_Content=1538. Though this article examines these grounds of impartiality from an English and international legal perspective, they are applicable to arbitration generally as “similar approaches are adopted internationally.” *Id.* at 26.

34 UNCITRAL Arbitration Rules, *supra* note 17, at Article 10(1).

35 9 U.S.C. § 10 (2009).

36 *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968). In this case, a subcontractor filed suit against “the sureties on the prime contractor’s bond to recover money alleged to be due for a painting job.” *Id.* at 146. Pursuant to an agreement, the subcontractor “appointed one arbitrator, the prime contractor appointed the second, and these two” arbitrators together selected a third, who was “supposedly neutral.” *Id.* at 146. The third arbitrator had actually “served as an engineering consultant” for the prime contractor, including “the very projects involved in this lawsuit.” *Id.* They did not disclose the relationship until after an award was made. *Id.* The lower courts had refused to set aside the award, and the Supreme Court reversed saying it could not “believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.” *Id.* at 150. Justice Abe Fortas dissented, arguing that in his judgment the “*per se* rule” announced by the Court “has no basis in the applicable statute or jurisprudential principles . . . I do not believe that it is either necessary, appropriate, or permissible to rule, as the Court does, that, regardless of the facts, innocent failure to volunteer information constitutes the ‘evident partiality.’” *Id.* at 153-154 (Fortas, J., dissenting).

37 *Commonwealth Coatings*, 393 U.S. at 149. It is important to note that the “Supreme Court’s unfortunately opaque analysis” of the phrase “evident partiality” in “the arbitral context has left the standards for review based on arbitral bias in a state of flux.” Matthew T. Ballenger, *The Price of Justice: The Role of Cost Allocation in the Employment Arbitration Fairness Analysis*, 18 LAB. LAW. 485, 497 (2003). Federal appellate courts do not necessarily hold this plurality opinion as being a strict standard to be applied to all cases. As but one example, the Second Circuit has expressly stated that it has “viewed the teachings of *Commonwealth Coatings* pragmatically, employing a case-by-case approach in preference to dogmatic

considered by U.S. federal courts, such as those involving American businesses in international trade that have disputes decided in arbitration, have similar grounds for vacation as the FAA implements the Convention on the Recognition and Enforcement of Foreign Arbitrary Awards (“the Convention”) as a matter of federal law.³⁸

A brief overview of some state statutes that recognize impartiality as a statutory cognizable ground for vacation of an arbitration award is important to understand the relationship between U.S. courts and arbitrations such as *Bet Din* on this issue. When looking to state statutes, it makes most sense to look toward California and New York as these are the states, due to the presence of large religious Jewish populations, where judges will most often be asked to confirm a *Bet Din* decision. In California, the statute states that “when a person is to serve as a neutral arbitrator, the . . . neutral arbitrator shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.”³⁹ A New York statute likewise allows for vacation if the rights of the party who participated in the arbitration were prejudiced by the “partiality of an arbitrator appointed as neutral.”⁴⁰

It is the statutes in New York, California, and the implementation of the Convention via the FAA, respectively, that played a role in three separate 2009 court decisions where a judge had to decide whether to vacate a *Bet Din* ruling based upon the possible partiality of the rabbinical court. For just

rigidity. It is certainly fair to say that we have not been quick to set aside the results of an arbitration because of an arbitrator’s alleged failure to disclose information.” *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 700 (2d Cir.1978).

38 9 U.S.C. §§ 201, 207 (2009). The Convention on the Recognition and Enforcement of Foreign Arbitrary Awards does not specifically state that impartiality is itself a ground for vacating an arbitration award. Rather it states the award can be “refused” if the “recognition or enforcement of the award would be contrary to the public policy of that country.” Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V(2)(b). Given the ample support for “impartiality” as a policy consideration, embodied both in case law and statute, U.S. courts can analyze the impartiality of the arbitrators in certain international business arbitration contexts as well. *See, e.g., Schwartzman v. Harlap*, 2009 WL 1009856, 1 (E.D.N.Y.) (2009).

39 Cal. Civ. Proc. Code § 1281.9 (2009).

40 N.Y. C.P.L.R. Law § 7511 (2009).

as in other arbitrations contexts, the impartiality of one of the rabbinical judges can be called into question and the civil court can on that basis vacate a Bet Din decision, known as a *psak din* or *psak halakha* ("ruling of law").

A review of these various sources of law makes it clear how widespread the requirement impartiality is in the arbitration context. It is a challenge to arbitration that can be considered by judges in courts of varying jurisdictions. In judicial review of arbitration, impartiality stands as an important means upon which judges can vacate arbitration awards, including those rendered by Bet Din. It is critical to understand this when looking at the recent cases in which a civil judge has decided whether to confirm or vacate a religiously-based arbitration award of the Bet Din.

III. The Recent Impartiality Bet Din Cases

Recently a number of cases have appeared before courts in which the central issue the court considered was whether to vacate the Bet Din decision on the basis of some impartiality or bias on the part of a rabbinical judge. Examining some of these cases is important to understand how the above mentioned statutes are actually used by judges in rendering decisions on the basis of lack of impartiality. It also provides critical examples of how the impartiality standard is used in reviewing Bet Din decisions.

A. Beth Jacob Seminary Inc. v. Beis Chinuch Le'Bunos-Bas Melech: Workers and Wives

A New York state court reviewed a Bet Din decision in 2009 which included a challenge based on the partiality of the Bet Din. In the *Beth Jacob Seminary* case, Beth Jacob Seminary petitioned the court for a confirmation of the arbitration award in their favor in which a dispute pertaining to a lease was submitted to a rabbinical court.⁴¹ The losing party cross-motivated asking for the award to be

⁴¹ *Beth Jacob Teachers Seminary, Inc. v. Beis Chinuch Le'Bunos-Bas Melech*, 2009 WL 782549, 1 (N.Y.Sup. 2009). “[B]as Melech claimed that the backyard of an adjacent apartment in a building not owned by Beth Jacob but by Mr. Joseph was part of the premises it had rented from Beth Jacob. Beth Jacob argued that it was not and could not have included the backyard area as part of the rental to Bas Melech because, Beth Jacob first rented the adjacent apartment after it had entered into the rental agreement with Bas Melech.” *Id.*

vacated.⁴² Rabbi Yerachmiel Barash was employed as the Bet Din's secretary and clerk. The Bet Din did not disclose at the outset to Bas Melech School for Girls, a party in the dispute, that Barash was married to an employee of the Beth Jacob Seminary, the opposing party before the Bet Din.⁴³ Rabbi Barash had not disclosed to the rabbinical judges that his wife worked for Beth Jacob because she was employed by a department "completely independent of the one involved in the rental dispute."⁴⁴ Rabbi Daniel Geldzahler, who served on the arbitration panel, in fact said the arbitrators learned about the relationship because "Beth Jacob mentioned the employment of Rabbi Barash's wife and suggested that she be called to verify" relevant information regarding the dispute "in front of the Dayanim and Rabbi Welz of Bas Melech. The Dayanim had no prior knowledge of the employment of Mrs. Barash, they first learned of it then, at the same time Rabbi Welz did."⁴⁵ Rabbi Geldzahler stated not only that the Bet Din and Rabbi Welz found out about Barash's wife at the same time, but that "Rabbi Welz did not make any objection at that time" and that "he has never questioned the veracity of the information confirmed by Mrs. Barash."⁴⁶ At this point alone, the impartiality of the Beth Din could arguably be seen as almost intact.

The problem was that Rabbi Welz, the losing party, had a slightly different version of events. Rabbi Welz, in his affidavit, claimed that Beth Jacob Seminary was not the first to disclose the information regarding the marital relationship, but rather that "Rabbi Geldzahler himself volunteered

42 Beth Jacob Teachers Seminary, 2009 WL 782549 at 3.

43 Beth Jacob Teachers Seminary, 2009 WL 782549 at 1.

44 Rose, *supra* note 1, at 24.

45 Beth Jacob Teachers Seminary, 2009 WL 782549 at 2.. Further, Rabbi Yitzchok Kaplan of Beth Jacob Seminary averred in an affirmation that "I never knew or had any connection with Yerachmiel Barash, the Beth Din's clerk, and did not know he was employed by the Beth Din." *Id.*

46 Beth Jacob Teachers Seminary, 2009 WL 782549 at 1.

the information” regarding the marital relationship.⁴⁷ Further, he “directed that Rabbi Barash call his wife,” a conversation that took place on a private line between husband and wife, that neither Rabbi Welz nor any of the Dayanim ever heard in person.⁴⁸ Bas Melech notified the Bet Din that because of the spousal relationship it was “canceling the arbitration agreement,” but that it would agree “to sign a new arbitration agreement before another Rabbinical Court.”⁴⁹ The Bet Din ignored this, and a few weeks after it ruled in favor of Beth Jacob.

In his analysis, the judge cited the New York code⁵⁰ regarding the impartiality of arbitrators in deciding whether to vacate the award that had been in Beth Jacob's favor. The judge said that no matter how the relationship was disclosed, it was clear that it was not disclosed at the outset and that the relationship was “significant enough” that it should have been disclosed prior to the agreement of binding arbitration.⁵¹ The judge reasoned:

The fact that the Beth Din's clerk, who was present during the entire arbitration hearing, was married to an employee of Beth Jacob in conjunction with the fact that the clerk informed the Beth Din of the results of a private telephone conversation he had with his wife during the hearing with respect to one of the issues in dispute which resolved this issue in Beth Jacob's favor creates more than the requisite inference of partiality and bias.⁵²

It was on this basis that the ruling of the rabbinical court was vacated.

B. *Pauker v. Ohana: The Previously Expressed Opinion*

A Los Angeles Superior Court also vacated a Bet Din award on the basis of impartiality. In a

47 Beth Jacob Teachers Seminary, 2009 WL 782549 at 1.

48 Beth Jacob Teachers Seminary, 2009 WL 782549 at 1.

49 Beth Jacob Teachers Seminary, 2009 WL 782549 at 1.

50 N.Y. C.P.L.R. Law § 7511 (2009). “We . . . hold that the failure of an arbitrator to disclose facts which reasonably may support an inference of bias is grounds to vacate the award under CPLR 7511.” J.P.Stevens & Co. v. Rytex Corp., 34 N.Y.2d 123, 125 (1974).

51 Beth Jacob Teachers Seminary, 2009 WL 782549 at 3.

52 Beth Jacob Teachers Seminary, 2009 WL 782549 at 3. The “general reluctance to disturb arbitration awards must yield . . . to the clear necessity of safeguarding the integrity of the arbitration process.” Goldfinger v. Lisker, 68 N.Y.2d 225, 231 (1986).

dispute over ownership of Torah scrolls,⁵³ the Bet Din ruled that “[b]ased on the evidence and the law, the Beis Din determines that the Sifrei Torah [Torah scrolls] must be returned to the Plaintiff for said distribution” and “[t]he respondent shall return . . . the four Sifrei Torah to the Plaintiff within thirty days.”⁵⁴ Eighteen months prior⁵⁵ to being on the rabbinical panel that rendered this decision regarding the Torah scrolls, Rabbi Nachum Sauer, who was serving as a Dayan in the case, had been interviewed by the Los Angeles Daily Journal. The Daily Journal asked the rabbi about the Torah scroll dispute. The Daily Journal reported that “[l]ending a Torah to a synagogue is a common way Jews fulfill a mitzvah, or good deed, said Rabbi Nachum Sauer . . . 'It is on long-term loan to their synagogue, but he still owns it,' Sauer said.”⁵⁶ Rabbi Sauer stated in his declaration to the court that he did not know the facts of the case at the time he made the statement to the Daily Journal. Further, he said that his response was to a general inquiry and not the facts of the instant dispute.⁵⁷

Judge Sinanian said that even “accepting Rabbi Sauer's declaration (and the Court has no reason to doubt it) the fact remains that Rabbi Sauer's . . . quotation could create the strong impression in the mind of a reasonable person that the matter had been prejudged by him.”⁵⁸ The judge said that when

53 *Pauker v. Ohana*, L.A. Super. Ct. Case No. BS 119163, 2 (2009). The Torah scrolls were owned by the late husband of Rita Pauker, Rabbi Norman Pauker of Beth Midrash Mishkan Israel Synagogue in North Hollywood, California. In 1994 he retired and transferred most assets to Rabbi Samuel Ohana. Rita Pauker claims that the Torah scrolls “were not given to Ohana, but instead loaned for a limited time period.” *Id.* After the time period expired, Pauker demanded the Torahs be returned but Rabbi Ohana refused. *Id.* “After Rabbi Pauker's death, the matter was referred to the rabbinical court – or Bais Din. Eventually, Rabbi Ohana agreed to arbitrate the matter before Bais Din.” In January, 2009, the rabbinical court issued a judgment in favor of Pauker. *Id.*

54 *Pauker*, L.A. Super. Ct. Case No. BS 119163 at 2.

55 Phone call with Attorney G. Scott Sobel, who succeeded in getting the Bet Din award vacated.

56 *Pauker*, L.A. Super. Ct. Case No. BS 119163 at 5.

57 *Pauker*, L.A. Super. Ct. Case No. BS 119163 at 6.

58 *Pauker*, L.A. Super. Ct. Case No. BS 119163 at 6. “A person who is nominated or appointed as an arbitrator must disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial.” Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Standard 7(d) and 7(d)(14)(A), *available at* <http://www.courtinfo.ca.gov/rules/documents>

looking only to Rabbi Sauer's role and obligation as an arbitrator, “the statement to the media in the context of the instant matter – however misconstrued it may be and however unbiased Rabbi Sauer may be – could cause a reasonable person to entertain doubts as to Rabbi Sauer's impartiality.”⁵⁹ The judge ruled that Rabbi Sauer had a statutory obligation to disclose the interview and the failure to do so results in “the mandatory vacation of the award.”⁶⁰

C. **Schwartzman v. Harlap: No “Second Bite At The Esrog”**

In a case that appeared before a federal district court, Yaakov Harlop of Queens, New York, had contracted to purchase *esrogim* (a *citrus medica* purchased by Jews for the autumn holiday of Sukkot)⁶¹ grown in Israel by Betzalel Schwartzman. The dispute revolved around the fact that Harlop refused to pay the balance on his account because he claimed his U.S. sole distributorship had been violated by the grower and wholesaler of the *esrogim*. A hand-written arbitration clause at the bottom of the exclusive distributorship contract specified that in the event that a conflict arises Rabbi Eliezer Stern of Israel would “arbitrate any disputes.”⁶² It also said that Schwartzman “will maintain the *hakosher* [kosher certification] on all *pardesim* [orchards] from [the] Belz [organization] or Rav [Rabbi] Stern.”⁶³

/pdfFiles/ethics_standards_neutral_arbitrators.pdf.

59 Pauker, L.A. Super. Ct. Case No. BS 119163 at 6.

60 Pauker, L.A. Super. Ct. Case No. BS 119163 at 6.

61 See *Etrog*, Jewish Virtual Library, available at http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0006_0_06118.html. “The *esrog* or *etrog* is an ancient fruit referred to in the Bible that is valued among Jews in connection with the harvest festival holiday of *Sukkot*.” *Schwartzman v. Harlap*, 2009 WL 1009856, 1 (E.D.N.Y.) (2009).

62 *Schwartzman*, 2009 WL 1009856 at 1. “A contract dated September 8, 2005 set forth the terms governing their relationship for that year. The contract provided that with regard to *esrogim* harvested prior to *Rosh Hashanah* (the Jewish New Year) of that year, none could be sold to any third party without notice to respondent. The contract also provided that respondent would be the exclusive American distributor for all *esrogim*.” *Id.*

63 *Schwartzman*, 2009 WL 1009856 at 1. “[I]n order to market the *esrogim*, petitioner assumed and acknowledged the obligation to obtain kosher certification for the fruit, without which its market would have been eliminated or greatly reduced.” *Id.*

Rabbi Stern ruled in favor of Schwartzman who was to receive an arbitration award of \$66,000.

Harlop, however, then claimed that Rabbi Stern was a partial arbitrator because Harlop was not made aware of the fact that the kosher certification had switched from the “Belz organization,” who had long certified the *esrogim*, and that Rabbi Stern had been hired for that purpose.⁶⁴ Rabbi Stern therefore had a material relationship with a party in the case in which he served as arbitrator, and the question for the Court was whether the lack of disclosure of the relationship “warrants denial of recognition.”⁶⁵

Looking to the facts of the case, the court noted that the contract itself noted that Rabbi Stern might be called upon to “give the *hakosher* for the orchards” and that Harlap would expect Stern to receive a fee.⁶⁶ Even if he did not know at the time of the arbitration that this had actually happened, he had “already 'blessed' the arrangement” when he signed the business contract.⁶⁷ The Court therefore ruled that there was not a valid claim of partiality based on the non-disclosure of the relationship.⁶⁸

Unlike in the two previously mentioned cases, the opinion by District Judge Cogan cited Second Circuit precedent to stress the deference that must be afforded to arbitration by civil courts upon review. The judge wrote that “an arbitral litigant should not be allowed to sit back, hope for a successful outcome, and then raise the alleged non-disclosure only if he is unhappy with the result.”⁶⁹ As the judge wittingly wrote, the losing party in the Bet Din arbitration “cannot use this Court to obtain

64 Schwartzman, 2009 WL 1009856 at 1.

65 Schwartzman, 2009 WL 1009856 at 1. The district court was able to review the arbitration award regarding this international trade contract because “the policy considerations set forth in the case are . . . applicable through the 'public policy' standard for non-recognition in the Convention” on the Recognition and Enforcement of Foreign Arbitraty Awards. *Id.* at 2.

66 Schwartzman, 2009 WL 1009856 at 3.

67 Schwartzman, 2009 WL 1009856 at 3. Harlap's “argument boils down to his contention that at the time he signed the agreement, he knew it was possible, and allowable, for Rabbi Stem to give the kosher certification, but he did not know, at the time of the arbitration, that it had actually happened. That does not matter.” *Id.*

68 Schwartzman, 2009 WL 1009856 at 3. *See also* Lucent Technologies, Inc. v. Tatung Co., 379 F.3d 24, 28-29 (2d Cir. 2004).

69 Schwartzman, 2009 WL 1009856 at 2.

a second bite of the *esrog*.”⁷⁰ Therefore, the “award must be recognized.”⁷¹

Though there are certainly other cases that have dealt with impartiality of the Bet Din, these few cases, all from 2009, serve to inform the reader of the sorts of disputes that appear before Bet Din and how impartiality is used to challenge a Bet Din verdict in civil court. It also serves to illustrate the reasoning that a judge may use when deciding whether to confirm or vacate a Bet Din arbitration award on the basis of a claim regarding impartiality.

IV. Impartiality as an Elusive Standard In the Context of Bet Din

When the autonomy of the Bet Din or the validity of their rulings are called into question by secular courts, it will be viewed not only by the party in whose favor the Bet Din ruled, but by the wider Jewish community, as worthy of being “closely monitored.”⁷² It is undoubtedly true that any search from the losing party for a higher secular authority to overturn a religious tribunal is seen as controversial within that religious community. The participant in the Bet Din challenging the Bet Din ruling is viewed as displaying a lack of respect for the religious authority that already decided the case. Some Orthodox Jews argue that when a losing participant in a Bet Din forum challenges the ruling in a civil court it gives “the impression that secular law is superior to Jewish Law but even worse—that the process of Jewish justice does not work.”⁷³ The two cases mentioned above, in which the court vacated the Bet Din decision on impartiality grounds, fall under the latter category, as the cases were vacated on

70 Schwartzman, 2009 WL 1009856 at 2.

71 Schwartzman, 2009 WL 1009856 at 3.

72 Rabbi Gershon Tannenbaum, *Beth Din Decisions in Secular Courts*, The Jewish Press, <http://www.jewishpress.com/page.route.do/39261>

73 Zelcer, *supra* note 22, at 26-27. In fact, this in and of itself provides the rabbinical arbitrators with an additional motive to attempt to be as impartial as possible so that the decisions will in fact be confirmed by the secular court. This is because if the “*bet din* acts ethically and adheres to arbitration statutes, it can minimize the risk that its decisions will be overturned.” *Id.* at 27.

“procedural grounds that did not necessarily relate to the material facts of the case.”⁷⁴ However, cause for concern goes beyond merely avoiding controversy within a religious community. Judges themselves must realize when vacating a Bet Din decision, even if only based on process, that they are inevitably interfering with the independence of tribunals set up according to religious values and laws, and calling into question the competence and veracity of religious clergy and leaders involved in those arbitrations.

The direct issue at hand that must be analyzed is whether the specific standard of impartiality has left secular courts with the power to arbitrarily overturn decisions of a religious tribunal without a full understanding of the nature of the Bet Din arbitrators and process. There may be additional factors that should be weighed by judges in the Bet Din context when making this determination. Important lessons can be derived from the cases discussed above, and they can also be used as examples upon which to discuss possible strengths and weaknesses with the impartiality standard.

A. **The Rationale for Generally Showing Deference to Bet Din on Impartiality**

It is critical for civil judges reviewing the impartiality of a Bet Din to appreciate the central point stressed in *Harlop v. Schwartzman* which “unambiguously upheld” the Bet Din judgment.⁷⁵ This is because a party’s challenge to a Bet Din decision, brought to civil court on the grounds of impartiality only after having lost a case in the religious setting, can sometimes be nothing more than an attempt to get a “second bite” or chance at winning the case in a new forum. This is why, as in all arbitration, “[t]he judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality.”⁷⁶ When a participant moves in civil court to have a Bet Din overturned, any judge must

⁷⁴ Rose, *supra* note 1, at 25.

⁷⁵ Tannenbaum, *supra* note 72.

⁷⁶ Commonwealth Coatings, 393 U.S. at 151 (White, J., concurring). “That role is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.” *Id.*

be aware of the fact that opportunism on the part of the losing party searching for a new forum with higher authority is always a possible motive for moving for vacation in secular court. In arbitration generally a “suspicious or disgruntled party can seize” on impartiality “as a pretext for invalidating the award.”⁷⁷ It is equally true that a challenge to Bet Din may not be based on an actual or perhaps even perceived lack of impartiality, but rather simply brought by “unscrupulous or disgruntled individuals”⁷⁸ who regret partaking in the Bet Din arbitration forum after the results of the Bet Din did not comport with what they had expected.

This is especially true in the Bet Din forum where participation is voluntary. Judges need to remember at the outset that Bet Din in this respect may not be like many other arbitrations and that this provides an additional impetus for judicial deference. The rabbinic administrator of the Rabbinical Council of California (RCC) Rabbi Avrohom Union,⁷⁹ who regularly serves as a Bet Din arbitrator and served on the Bet Din in *Pauker v. Ohana*,⁸⁰ says that a disputant “must carefully look into the Rabbinical Council before bringing a case to them and be convinced of the impartiality of the rabbi. Once you believe they’re impartial, it’s unfair to say you’ve been had.”⁸¹ This alone is one important reason that the evidence of bias demanded by courts should arguably be heightened in Bet Din cases.

Judicial review of the impartiality arbitrators has been described as an “elusive standard” as

77 *Commonwealth Coatings*, 393 U.S. at 151 (White, J., concurring).

78 Zelcer, *supra* note 22, at 27. Bet Din cases “will see the light of day in court only if one party . . . decides after the fact not to honor the *beis din* ruling or to appeal it even after agreeing that that the *beis din* will be the final arbiter . . . What makes honorable people agree to binding arbitration and then disregard the arbitrator's decision? Dayanim contend that the losing party has a difficult time facing its loss, which sometimes carries a stiff penalty financially.” Rose, *supra* note 1, at 26.

79 Rose, *supra* note 1, at 24

80 *Pauker*, L.A. Super. Ct. Case No. BS 119163 at 2.

81 Bronstad, *supra* note 12. New York's Court of Appeals has even stated that a party to an arbitration may not “sit idly back and rely exclusively upon the arbitrator's disclosure. If a party goes forward with arbitration, having actual knowledge of the arbitrator's bias, or of facts that reasonably should have prompted further, limited inquiry, it may not later claim bias based upon the failure to disclose such facts.” *J. P. Stevens & Co. v. Rytex Corp.*, 34 N.Y.2d 123, 129 (N.Y. 1974).

“parties remain unsure of the standards that the courts may employ to measure an arbitrator's impartiality.”⁸² It is fair to say that in the context of Bet Din, an arbitration system that many judges will no doubt know much less about than a typical arbitration and which involves religious leaders serving as judges, that the standard becomes even more “elusive.” In fact, in regard to “recognition of Bet Din Jurisdiction” generally, it has been noted:

“The fate of Bet Din as they have passed in decisions before secular courts has been chancy at best. Judicial reactions have ranged erratically from non-interference . . . to rejection of Bet Din procedure for failure to comply with technical arbitration requirements . . . to expressions of peevish pique . . . to approving acceptance.”⁸³

What the three aforementioned Bet Din cases clearly show is that the impartiality standard is broad and leaves judges weighing the facts without a definite rule to lead them. Though this is often the role of the judge in any case, it is important to analyze whether there are any additional factors to be taken into consideration in the Bet Din context by a judge making the decision whether to confirm or vacate the arbitration award based on impartiality.

B. Giving More Weight to Whether the Impartiality Objection was Waived

Because the Bet Din arbitration is voluntary, it might be wise for judges to give greater weight to whether the complaining party was aware of the conflict of interest and decided to proceed with the arbitration anyway. In the *Beth Jacob Seminary* case, Judge Schneier said that “how the relationship was disclosed” was immaterial as the relationship “should have been disclosed” prior to the signing of the arbitration agreement.⁸⁴ Perhaps even more surprising is that Baruch Cohen, the attorney who lost in *Pauker v. Ohana*, claims that he circulated the article that contained the rabbi's controversial quotation prior to the Bet Din hearing and signing of the arbitration agreement. The

82 Andrew S. Boris, *Arbitrator Impartiality – An Elusive Standard?*, Insurance Journal, Jan. 30, 2006, available at <http://www.insurancejournal.com/news/national/2006/01/30/64783.htm>.

83 Bernard J. Meislin, *Recognition of Bet Din Jurisdiction*, 223, as appeared in THE JEWISH LAW ANNUAL (Bernard S. Jackson ed., E.J. Brill, Leiden, The Netherlands) (1978).

84 *Beth Jacob Teachers Seminary, Inc.*, 2009 WL 782549 at 3.

opposing party denies this took place and claims he only found out about the quote through his attorney after the Bet Din ruling.⁸⁵ Yet this factual dispute appears nowhere in the L.A. Superior Court opinion and was in no way addressed by the judge.

Regardless of whose versions of events are correct in those cases or whether the judges in those cases actually confronted those issues at all, both cases do show that the actual impartiality of the rabbinical court may be intimately related to a factual dispute surrounding how new information was disclosed and how the parties responded to the information at the time of disclosure. Due to the fact that this no doubt plays a role in a number of Bet Din impartiality cases, courts should consider whether the complaining party in any way consented to what they now claim is evidence of partiality. If there is evidence of consent prior or during the proceeding, a civil court should be reluctant to vacate the Bet Din's ruling.

In fact, New York Judge Jeffrey Sunshine did exactly this in a case involving a rabbi's impartiality. He wrote that for a party to continue to “participate in the arbitration with knowledge of” the “alleged conflict of interest” of the Rabbi will be deemed by courts as tantamount to having “waived any objection by his continued participation in the hearings.”⁸⁶ The judge noted that relevant case law makes clear that “a party waives the right to object to a determination on the ground of partiality of an arbitrator by participating in the arbitration without objection after observing the conduct they believe revealed such partiality.”⁸⁷ This can and should be a key tool in ferreting out complaints that “are premised upon nothing more than . . . apparent dissatisfaction with the Award

85 Rachel Heller, *Widow to Appeal Ruling on Torah Scrolls Ownership*, Jewish Journal, April 15 2009, available at http://www.jewishjournal.com/community/article/widow_to_appeal_ruling_on_torah_scrolls_ownership_20090415/

86 Berg v. Berg, 2008 NY Slip Op 51823U, 9 (N.Y. Sup. Ct. 2008).

87 Berg, 2008 NY Slip Op 51823U at 8.

rendered.”⁸⁸

C. The Role of the Rabbi and the Previously Expressed Opinion

Waiving an objection based on impartiality is not the only consideration that courts should focus on. The courts should pay careful attention to the unique and diverse role of the rabbi in the Jewish community, whose service on a Bet Din may only be a small part of his responsibilities. Yet judges may simply refuse to consider how the role as a community rabbi would affect impartiality. In *Pauker*, the Court recognized “that Rabbi Sauer has diverse responsibilities beyond his role as an arbitrator in this action,” but immediately said that the “limited scope of the Court's inquiry addresses only that obligation.”⁸⁹

One might think, however, that in the case of a previously expressed opinion, the role of the rabbi would be especially important to consider. This is because this “issue is arguably more sensitive where there is a . . . philosophical element to the question in dispute.”⁹⁰ A statement from a clergyman regarding religious law should no doubt be subject to such sensitivity. In *Pauker*, despite the fact that the judge states he has “no reason to doubt” the Rabbi's assertion that his previous statement was in response to a general inquiry, the Bet Din decision was nonetheless vacated based on impartiality. Baruch Cohen criticized the court saying that “by saying this, you are making a leap. The court should base its decisions on evidence and fact, not leaps.”⁹¹

In all arbitration, arbitrators should not “to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs . . . that they are

88 Berg, 2008 NY Slip Op 51823U at 8.

89 *Pauker*, L.A. Superior Court Case No. BS 119163 at 6.

90 King & Giaretta, *supra* note 33, at 28.

91 Heller, *supra* note 85.

effective in their adjudicatory function.”⁹² This is especially true for a Bet Din arbitrator that must be a scholar in Jewish law to serve on the Bet Din, and it is because they are rabbis and community leaders that they are able to serve as adjudicators. It is unrealistic to expect a rabbi to act like a Supreme Court nominee before a Senate Committee, refusing to answer questions of law because it may result in his being seen as partial.

It only makes sense to look to the diverse duties of the rabbi when making a judgment that he lacks or appears to lack impartiality. Judges should consider the special “role of rabbinical authority” in these cases and understand that “[a]s community leaders and religious authorities, the rabbis are responsible for interpreting and enforcing the Halacha (the legal code).”⁹³ This role extends not just to those who bring cases before a Bet Din, but to inquiries regarding Jewish law outside the Bet Din as well. Civil court judges should take into account that a rabbi is expected to respond to general inquiries regarding Jewish law, and that statements made therein should not lead a reasonable person aware of this role to find partiality.⁹⁴

V. Conclusion

The importance of the impartiality standard in the context of arbitration, and specifically in the Bet Din context, cannot be underestimated. The three cases from 2009 which all use this standard to review a Bet Din decision demonstrate the range of possibilities in using this standard, and the differing judicial attitudes toward deference to Bet Din. Though the impartiality standard remains elusive, this only means that judges need to be careful in how they utilize it. They should not ignore the uniqueness

92 *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring). In his dissent, Justice Fortas also wrote that the Supreme Court plurality itself in *Commonwealth Coatings* had applied “to this process rules applicable to judges and not to a system characterized by dealing on faith and reputation for reliability.” *Id.* at 155, (Fortas, J., dissenting).

93 Steinberg, *supra* note 8, at 16 (2000).

94 “Given the relative ease of making an allegation of negative appearances, the need for proof is vital when the justification for recusal is the residual ‘might reasonably be questioned’ language.” Abramson, *supra* note 32, at 60.

of the religious institution that is the Bet Din or view the Bet Din as any other typical arbitration when deciding whether to vacate or confirm a rabbinical ruling. They should understand further that a person serving on a Bet Din panel is not just another arbitrator, but a clergyman ruling on issues by use of religious law with a wide variety of responsibilities and duties to the community. New York Judge Edward McCarthy III pointed out in a Bet Din case that involved “the claim of bias” that there is ample demonstration for courts to realize there are “difficulties posed in attempting to 'shoehorn' an ecclesiastical determination into the arbitration procedures of the secular courts.”⁹⁵ It is for this reason that courts should pay careful attention to the nature of the religious council and the participants involved when deciding a case based on impartiality.

⁹⁵ Fein v. Fein, 610 N.Y.S.2d 1002, 1003 (1994).