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Survey of Recent Halakhic Periodical Literature

THE *HETTER ISKA* AND AMERICAN COURTS

During the past years, the enforceability of *hetter iska* agreements has repeatedly been the subject of litigation in American courts. The rising number of challenges to the validity of *hetter iska* agreements is unwelcome but nevertheless represents eloquent testimony to the increased use of such instruments within the Jewish community. Recognition of the *hetter iska* by courts of competent jurisdiction as creating a joint venture is a matter of both religious and economic significance to observant Jews. The importance of that issue prompts this writer to revisit the topic[1] in order (1) to examine the propriety of the *hetter iska* as a means of avoiding the biblical prohibition against paying or receiving interest; (2) to explicate the nature of the *hetter iska* as a valid halakhic construct; (3) to investigate the question of whether lack of enforceability in a civil court impacts upon the halakhic validity of a *hetter iska*; (4) to analyze the relevant judicial decisions regarding the efficacy of a *hetter iska* in American law; and (5) to delineate the manner in which the instrument should be drafted in order to achieve the desired halakhic and legal result.

I. THE PROPRIETY OF A *HETTER ISKA*

Biblical law forbids both exaction of interest by a creditor and payment of interest by a debtor in loans between Jews. The underlying considerations are two-fold in nature: 1) The obligation to perform charitable deeds includes a responsibility to help the indigent by means of non-interest bearing provident loans. 2) Interest accepted in return for extending a loan involving neither risk of capital nor personal service is perceived as a form of unjust enrichment.

[1] Earlier discussions of the basic nature of the *hetter iska* and its employment in various contexts appear in this writer's *Contemporary Halakhic Problems*, II (New York, 1983), 376-396 and IV (New York, 1995), 378-384.

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Although in biblical days the economic structure of society was predominantly agrarian and loans were sought primarily for personal purposes, the strictures against usury apply with equal force to loans extended for commercial purposes. During the Middle Ages, Jews, particularly when they were forbidden to own land, turned to commercial pursuits. Frequently, they became merchants engaged in the buying and selling of goods and produce. Such pursuits required capital investment of sums which few individual Jews possessed. Loans were generally not available unless they were also of financial benefit to the lender. Since interest was not permitted, ways and means had to be found to facilitate commercial endeavors without violation of either the letter or the spirit of Jewish law.

The earliest attempt to overcome this difficulty was that of the sixteenth-century Polish scholar known as R. Mendel Avigdors of Cracow, who composed the earliest version of the *hetter iska*. The *hetter iska* is a document which specifies the terms and conditions under which money is advanced by one individual to another. Its legal purpose is to create a partnership arrangement as distinct from a debtor-creditor relationship.

The issue with which rabbinic thinkers were forced to grapple was the propriety of seizing upon lacunae in the law and fashioning contrivances in order to circumvent the violation. A subterfuge may avoid technical violation of the law but nevertheless thwart the spirit of the law.

Virtually every system of law employs legal fictions for reasons of expediency. A corporation is a legal person and is accorded such status in order to achieve perfectly cogent and moral results. Such "myths" are essentially definitional. The law determines how it wishes to treat certain arrangements and coins a term for use as a type of verbal shorthand in referring to such arrangements. At times, the law, particularly in areas of taxation, provides for options. Determination by a businessman of the beginning and end of his fiscal year is an obvious but relatively trivial example. In such matters, as Judge Learned Hand famously remarked, "Anyone may arrange his affairs so that his taxes shall be as low as possible….Over and over again the Courts have said that there is nothing sinister in so arranging affairs as to keep taxes as low as possible."[2] An individual acting in such a manner is not guilty of moral turpitude.

Jewish law is quite familiar with arrangements designed to avoid the onus of applying the full force of the law. In rabbinic literature there is a term for such an arrangement; it is known as a "*ha'aramah*," a term that probably may best be translated literally as "a cleverness." The term "device" probably

[2] *Gregory* v. *Helvering* 69 F.2d 809, 810 (2d Cir. 1934), aff'd, 293 U.S. 465, 55 S. Ct. 266, 79 L.Ed. 596 (1935).

best captures the flavor of the term without connotation of a moral judgment. Such devices fall into three distinct categories: (a) those that are disdained as inconsistent with the spirit of the law; (b) those that, for one reason or another, are regarded as commendable and actively encouraged; and (c) those with regard to which there is an attitude of complete neutrality.

Perhaps the earliest example of a *ha'aramah* involves regulations pertaining to tithing. Talmudic exegesis establishes that biblical law requires tithing only of produce brought into an abode through the gates of the courtyard. The Gemara, *Berakhot* 35b, bemoans the fact that, "while earlier generations were wont to bring in their produce by way of the front door in order to make it liable to tithing, later generations bring in [the produce] by way of roofs, yards, or enclosures in order to exempt [the produce] from tithing." Clearly, that statement reflects a negative attitude toward the moral legitimacy of the "later generations" who avail themselves of such expedients. Indeed, according to some early-day authorities, the subterfuge in question was formally banned by rabbinic law.

The reason for the negative view *vis-á-vis* utilization of such expedients is self-evident. The purpose of the tithe was to provide a livelihood for the Levites who were required to serve in the Temple and who constituted a leisure class charged with providing religious instruction on behalf of the entire populace. Were tithes not to be forthcoming, the Levites would have been compelled to seek employment as artisans or laborers, thereby making it impossible for them to discharge their sacred mission. The spirit of the law would certainly have been thwarted. Thus, this is an example of a disdained *ha'aramah*.

The second category includes devices that are designed actively to promote conformity with the manifold provisions of law. The first-born male offspring of a cow or a sheep belonging to a Jew is sanctified from birth to be brought to the Temple as a sacrificial offering. With the destruction of the Temple, sacrifices are no longer feasible. However, the sanctity of the first-born animal is in no way mitigated. The animal may not be used as a beast of burden; it is forbidden to drink its milk or use its wool. The animal is literally a "sacred cow" that roams virtually at will – as is the case even today in some Hindu communities with regard to animals they regard as sacred – until the animal develops a blemish rendering it unfit as a sacrifice. Unless and until that occurs, the animal is a halakhic nuisance in the sense that it is of no benefit to either God or man but poses an ongoing potential for inadvertent sin, "a tort waiting to happen."

The sole remedy is to prevent the animal from achieving sanctified status by transferring ownership of the pregnant animal to a non-Jew

before it gives birth. Subsequent to parturition both animals may be reconveyed to the original Jewish owner. Commandments regarding the first-born commemorate the sparing of Jewish first-born in Egypt while the first-born of the Egyptians perished in the last of the ten plagues. Hence, the first-born of an animal belonging to a non-Jew is not sanctified.[3]

No one has ever suggested that it is improper to seek such transfer of title on the grounds that it is a subterfuge designed to frustrate the purpose of the law. Such circumvention of the law represents an instance in which fulfillment of the underlying purpose has become impossible, i.e., the animal can not be brought as a sacrificial offering because the Temple no longer stands. Despite that factor, the law is not a dead letter; the restrictions governing sanctified animals remain in full force and effect. The only way to avoid transgression and violation of both the letter and spirit of the law lies in obviating its provisions by causing title to become vested in a non-Jew. That is so even if the calf or lamb and its mother are both subsequently repurchased from the non-Jew. Under such circumstances, employment of a "device" to accomplish that end is worthy of approbation.

The final category is best exemplified by the practice of selling *hamez*, i.e., food products not suitable for consumption during Passover, to a non-Jew. The sale is effected before the advent of the holiday and, typically, the same foodstuffs are repurchased from the non-Jew upon conclusion of the holiday. To some, the transaction has the appearance of a charade since the parties are fully aware *ab initio* that the effect of the sale will be rescinded at the earliest permissible opportunity.

In point of fact, this arrangement is entirely innocuous. Scripture forbids a Jew to retain any economic interest in *hamez* during the course of the Passover week. A Jew in possession of such foodstuffs on the eve of Passover may avoid the onus of transgression in one of three ways: (1) He may consume such foods in their entirety, a feat beyond human capability if the quantity is gargantuan, or inadvisable in the extreme in the case of a copious quantity of alcoholic beverages made from grain. (2) He may totally destroy such items by burning or the like, a procedure that may

[3] The transfer of ownership, however, must be carried out in accordance with the provisions of Jewish law. Such transfer entails a formal act of *kinyan*, or conveyance. Rules regarding *kinyan* are quite complex. Modes of *kinyan* for transfer of chattel between a Jew and a non-Jew differ from the modes of *kinyan* governing transfer of title between a Jew and a fellow Jew. As a result, one can open virtually any volume of 18th- or 19th- century responsa and find a discussion of at least one case in which the efficacy of an act of transfer performed in such a situation is questioned. Those discussions invariably focus upon technicalities, not upon the propriety of the procedure itself.

prove to be cumbersome and is wasteful but, nevertheless, entirely permissible. (3) He may transfer title to a non-Jew who, since the 613 biblical commandments are binding only upon Jews, is in no way subject to the prohibition. Jewish law does not accord preference to any one of these options over the others. Accordingly, the expedient of sale to a non-Jew is regarded as both halakhically and morally neutral; it is neither encouraged nor discouraged. Choice of that option is generally dictated by considerations of practicality and conservation of wealth. There are no restrictions upon acquiring *hamez* after the holiday, even *hamez* owned by a Jew before Passover, provided that the sale to a non-Jew prior to the advent of the holiday has been properly consummated.[4]

To the extent that there are intimations of criticism in rabbinic literature regarding such sales, the concern is entirely with regard to legal niceties.[5] Proper modes of formal conveyance, or *kinyan*, must be employed in transferring title. More significantly, there can be no valid transfer without a meeting of minds. Both parties must grasp the final and irrevocable nature of the transaction. Neither party may regard it is a *pro forma* ritual or liturgical act devoid of actionable effect. Small wonder, then, that rabbinic eyebrows were raised on occasion, particularly when the purchaser was an untutored and legally unsophisticated peasant.

In the modern world loans occur in situations varied and sundry. In antiquity, loans were almost always provident in nature. A farmer's crop failed and as a result he was forced to resort to a loan in order to purchase seed for planting the next year's crop. A person became temporarily incapacitated and was reduced to seeking a loan to put bread on the table. A loan of that nature is described by Scripture as an act of charity: "that your brother may live with you" (Leviticus 25:36). Charity assumes many guises. A loan represents a higher form of charity than a gift because the impoverished recipient receives full benefit of the funds advanced without being deprived of dignity. Such loans represent fulfillment of a divine command for which a person dare not demand compensation at the hands of his fellow. Moreover, unlike the majority of commandments with regard

[4] See R. Moshe Sofer, *Teshuvot Hatam Sofer*, *Orah Hayyim*, no. 102. See also R. Shlomoh Yosef Zevin, *Ha-Mo'adim be-Halakhah*, 7th ed. (Tel Aviv, 1960), pp. 245-255.

[5] Cf., a variant reading of the Tosefta, *Pesahim* 1:6, that is cited and dismissed by *Bet Yosef*, *Orah Hayyim* 448.

The objection voiced by R. Alexander Schorr, *Tevu'ot Shor*, *Pesahim* 21a, was limited to selling animals for the purpose of feeding them *hamez* during the course of the holiday. That objection was emphatically dismissed by a plethora of rabbinic scholars. See *Ha-Mo'adim be-Halakhah*, p. 250 and p. 250, note 22.

to which Scripture does not reveal the underlying rationale, in promulgating the requirement that a loan be interest-free, Scripture is quite explicit with regard to the reasoning: the borrower is in need of funds to sustain himself. The Bible regards profiting from human misery as ignominious; to demand interest is to compound the plight of an already destitute person. In earlier centuries, the Church regarded the taking of interest to be prohibited by natural law; the odiousness of interest-taking was not based upon dogmatic revelation but was regarded as readily apprehensible by the unaided light of moral reason.

In antiquity, all loans were provident in nature. At some point in human history society found it expeditious to rely upon middlemen to transfer commodities from producer to consumer. Tradesmen require at least a modest amount of capital in order to function in that capacity. Only with the advent of the industrial revolution and the construction of factories for the production of consumer goods did the need for vast amounts of capital arise; only in the modern era does capital represent the most prevalent form of generating more capital.

A person is under divine command to come to the assistance of his fellow who is in need. However, he is under no obligation to assist his fellow in amassing wealth. The rationale underlying the prohibition against interest-taking is alleviation of human misery. Yet the law acquires a life of its own. In general, Jewish law regards implementation of the law to be independent of the ends the law is designed to promote. That is the case even when those ends have been revealed to man. For that reason, in the Jewish legal system, policy considerations do not figure prominently in judicial decision-making. Hence, the prohibition against giving or taking interest is fully applicable, not only in situations in which societal goals are not advanced thereby, but even in situations in which societal goals may actually be thwarted.

A device that would enable a lender to reap profit from a provident loan would certainly offend the spirit of the law. But a device that restructures the transaction and renders it an investment makes it possible for the individual providing the financing to participate in the profits generated by the investment. Properly crafted so that it does not violate technical strictures, such a device is morally neutral when used in the context of a commercial enterprise.

Many such "devices," although entirely permissible under biblical law, were interdicted by rabbinic decree. Those restrictions were instituted either as a means of constructing a "fence" around the biblical law because of fear that if a particular legitimate practice were to be sanctioned it would rapidly result in other practices violative of biblical law or because the arrangement

might be regarded as interest-taking in the eye of an unsophisticated beholder. Practices that have come to be known as Islamic banking include a variety of devices forbidden to Jews by rabbinic decree rather than by biblical law. A repurchase agreement is a case in point: instead of lending money at interest, a "lender" sells a piece of property and agrees to repurchase it at a specified future date for a higher sum. The transaction is formally structured as a sale coupled with a repurchase agreement, but is actually a subterfuge. The funds advanced for the "purchase" of the parcel of real property are really a disguised loan since recovery is guaranteed. The "seller's" sole motivation is use of the funds in the interim; the "purchaser's" sole motivation is the interest he receives in the form of an enhanced repurchase price.

The primary device recognized by Jewish law as an acceptable means of avoiding the prohibition against extending or receiving an interest-bearing loan is known as a *hetter iska* or "permissible venture."[6] Its function is to substitute some form of profit-sharing representing a return on invested funds for what would otherwise have been structured as an interest-bearing loan.

II. THE NATURE OF A *HETTER ISKA*

The formula of the original *hetter iska* was based upon a ruling recorded in *Shulhan Arukh*, *Yoreh De'ah* 167:1, which provides that funds may be

[6] R. Baruch ha-Levi Epstein, *Torah Temimah*, Leviticus 25:36, sec. 192, defends the introduction of the *hetter iska* during the medieval period:

> At the time the Torah was given, the basis of livelihood and commerce of Jews was agrarian; agriculture was the source and support of their wealth and status for he who had copious produce was considered a rich man. Money was not fundamental or the basis of their activities; and when money was loaned it was not for the purpose of trade and acquisition, but in order to acquire bread and clothing by a person who could not afford such from the yield of his land and work. Accordingly, it is obvious that this poor debtor could not afford to pay interest, while the wealthy lender would suffer no perceivable loss in lending without interest….However, in the Middle Ages, by which time Israel had lost its share and inheritance in working the land and become a nation that sustained itself solely on commerce, the prohibition became onerous, for by then money had become the basis of [the Jews'] life and commerce; it became a business commodity to the lender and to the borrower equally. "That your brother may live with you" applied to both equally. Therefore, our sages saw fit to find a permissive manner to avoid this prohibition considering that, for such purpose, the Torah did not entirely forbid this matter.

advanced on the condition that the recipient use the funds to buy and sell merchandise on behalf of the person advancing the funds until such time as a stipulated profit has been earned; profit over and above that amount then accrues without limit to the recipient. The sum advanced in this manner is termed "half loan, half deposit" in rabbinic literature. During the initial period, the recipient acts solely as a commercial agent on behalf of the principal who advanced the funds; only after the originally stipulated profit has been earned does the deposit revert to the status of a loan and the recipient, who was heretofore considered a bailee, becomes a debtor. Subsequently, no profit whatsoever accrues to the lender and hence there is no question of forbidden payment of interest. The text incorporating this formula, which was drawn up by R. Mendel Avigdors for use in lieu of a promissory note, appears in *Nahalat Shiv'ah*, no. 40, and is known as the "*Hetter Iska* of Maharam."

The Ga'on of Vilna, *Bi'ur ha-Gra*, *Yoreh De'ah* 167:1, expresses amazement at *Shulhan Arukh*'s ruling that money may be lent in this manner. In the situation which is outlined, the "agent" undertakes to engage in the purchase and sale of merchandise on behalf of the "principal." However, his sole motivation for doing so is the stipulated agreement between the parties to the effect that the sum advanced will subsequently be available for the recipient's own personal use as a loan. Labor or personal services performed on behalf of a creditor as an inducement to extend a loan is a form of interest forbidden by Jewish law. Performance of such services without compensation is, in fact, a disguised interest premium exacted as a precondition demanded for conversion of the funds to a loan. It is for this reason that *Shulhan Arukh* stipulates that the "agent" must be paid for his services, although the payment may be nominal in nature. Such nominal payment to avoid the stricture against usury is analogous to the peppercorn recognized in common law as consideration validating a contract. The Gra quite evidently regarded token payment as inadequate; forgoing usual compensation was regarded by him as a form of interest-taking.[7]

[7] One way to avoid the problem is to structure the half loan, half deposit so that, although profits are shared equally, the recipient is to bear maximum loss of only one third of the capital. In effect, the difference between one half and one third is "insured" by the financier in return for the services performed by the recipient. That arrangement renders performance of personal services as payment in lieu of a "premium" that might ordinarily be required to insure against loss of the difference between one third and one half of the investment. See the *hetter iska* of R. Abraham Brode published in *Noheg ke-Zon Yosef, masa u-matan*, sec. 4. Cf., R. Ya'akov Yeshaye Blau, *Brit Yehudah* 37:4, 40:6, note 12 and 40:1, note 9. This expedient is employed in the *hetter iska* used by Israeli banks.

In terms of making capital available for commercial purposes, an obvious drawback with regard to this arrangement is that the "interest" received by the lender is not tied to the period of time his capital is used by the borrower and does not provide for accrual of interest or sharing of additional profit in the event that repayment is delayed. Subsequently, a modified form of the *hetter iska* which had the effect of eliminating this difficulty was developed by the 18th century authority, R. Abraham Danzig of Vilna, renowned as the author of *Hayyei Adam* and *Hokhmat Adam*.[8] Under the terms of this modified *hetter iska*, the recipient accepts fifty percent of the funds as a deposit and fifty percent as a loan. Any expenditure of a commercial or investment nature is deemed to be a joint venture in which both parties share equally. Thus, technically, half the profits accrue to the "principal" and half to the borrower. The principal may, of course, agree to accept no more than a certain stipulated amount of the profits and the agent may demand that the agreement specify that profits exceeding that amount accrue to the agent as compensation for his services.

Transformation of the *hetter iska* into a transaction in the form of half loan, half deposit is to the advantage of the investor in the sense that only half his funds are at even theoretical risk. Another advantage is that it makes accrual of presumed periodic profits possible with the result that procrastination in a repayment results in greater profit to the investor.

It may well be the case that this form of *hetter iska* was also developed, in part, to overcome the objection raised by the Gra, *viz.*, that mere token consideration in return for personal services is not sufficient to overcome the taint of usury. That objection is grounded in the concern that the recipient expends time and effort on behalf of the financier during the initial period of the arrangement in which the funds are invested solely on behalf of the financier and, clearly, that he is motivated to do so only because he desires that the sum advanced together with the profits generated during that period convert to an interest-free loan as rapidly as possible. However, it may be argued that this is not the case with regard to funds received as a half loan, half deposit. In the latter case, the recipient would expend no less time and effort were he to seek investment opportunities only for the funds he receives as an interest-free loan. No additional time or effort is expended because the investor's funds are commingled with the recipient's borrowed funds. Quite to the contrary, it is more likely than not that any entrepreneur would welcome the opportunity to double the quantity of merchandise he seeks to buy with his own already available funds by acting at the same time as an agent for

[8] See *Ginat Veradim*, *Yoreh De'ah*, *klal* 7, no. 4.

another individual desirous of acquiring the same type of merchandise or in making a similar investment. Doubling the quantity purchased or the amount of money invested affords the opportunity for taking advantage of economies of scale.

To offer a simple example: Jumbo certificates of deposit require a much higher minimum investment than ordinary certificates of deposit, but yield a higher premium. The amount of paper work involved in securing a jumbo certificate of deposit is no different from the amount of paper work required to secure an ordinary certificate of deposit. Assume that A has only $50,000 to invest but that the minimum requirement for a jumbo certificate of deposit is $100,000. Assume also that B has $50,000 available to invest. Under such circumstances prudence and good business sense would dictate that one of the parties should offer to take custody of the other party's $50,000, commingle the funds, and invest them in a joint certificate of deposit as tenants in common. The motive for doing so is not altruism in helping a friend but self-interest in becoming able to qualify for a higher yield on one's own investment. Similarly, in purchasing merchandise, it is highly likely that, the greater the quantity bargained for, the lower the cost per unit. Hence, it is certainly arguable that in accepting funds in the form of half loan, half deposit, the recipient is motivated solely by self-interest and performs no additional services as compensation for receipt of the loan.[9]

In neither of these formulations is the *hetter iska* a subterfuge or legal fiction. The determining characteristic which distinguishes a loan from a deposit or bailment is that a debtor must always repay the full amount borrowed, regardless of any losses he may suffer, while the laws of bailment provide that the bailee need not indemnify the bailor in the event of certain types of losses. Since the *hetter iska* generates a principal-agent relationship, no payment need be made if *bona fide* losses occur while the borrower functions as a bailee. Under the terms of Maharam's formula there is no obligation whatsoever on the part of the recipient if the loss is sustained during the initial period; according to the modified version, such losses are borne equally by the "principal" and the "borrower." The "principal" may, however, set forth certain stipulations to protect himself against loss. He may, for example, stipulate that the agent must bear all losses unless the merchandise purchased is at all times under the latter's personal supervision or unless the agent produces two trustworthy witnesses who testify that he had indeed properly discharged all aspects of his trust.

[9] Cf., *Tosafot*, *Bava Mezi'a* 104b, s.v. *hai iska*. The arrangement described by *Tosafot* does not seem to involve a potential for economy of scale.

Conditions such as these serve to protect the capital of the creditor, but do not at all guarantee the payment of "interest" in the event that the debtor denies that he has earned a profit. This drawback was overcome by means of a further stipulation providing that the "principal" may assume that a profit has been earned and that this presumption may be nullified only upon the solemn oath of the "agent" to the contrary. That stipulation has meaningful implications because of a singular socio-religious factor unique to Jews, Quakers, and few others. Pious Jews abjure oaths, even when called upon to swear to matters which are entirely true. Accordingly, the net effect of a stipulation requiring an oath to substantiate an absence of profit is to assure that the creditor will receive "interest" in the form of a guaranteed "profit" even if, in fact, no profit has been earned in any commercial endeavor. Thus, even if no profit has been realized, the stipulated payment is legitimately proffered as a fee for exoneration from the oath that would otherwise be imposed in order to substantiate the absence of profits. The payment is in the nature of an accord and satisfaction.

Whether or not such an oath may be demanded when the "principal" has personal knowledge of the truth of the "agent's" claim that no profit has been earned is a matter of some dispute. Some authorities assert that an oath attesting to facts already known by the party demanding the oath is forbidden as an oath taken "in vain," i.e., to no purpose. Of course, if an oath cannot be exacted, payment in lieu of the oath cannot be demanded.[10]

In an article that originally appeared in *Torah she-be-al Peh*, XIX (5727), 100-105, and was reprinted in his posthumously published *Mishkan Shiloh* (Jerusalem, 5755), pp. 281-288, Rabbi Shiloh Rafael notes that, in our day, an aversion to oath-taking is no longer to be taken for granted. Understandably, there may therefore be reluctance on the part of some persons to utilize the customary *hetter iska*. The lender may well anticipate a contingency in which the borrower will indeed swear quite truthfully that he has earned no profit. Rabbi Rafael suggests that the requirement for an oath on the part of the debtor be replaced with a stipulation giving the creditor the right to examine the financial records of the debtor and the right to participate in all decisions with regard to the expenditure of the sum advanced. The agreement between the parties

[10] *Teshuvot Shai*, I, no. 3; *Teshuvot Panim Me'irot*, II, no. 3; *Teshuvot Divrei Hayyim*, II, *hashmattot*, no. 16; and R. Moshe Feinstein, *Iggerot Mosheh*, *Yoreh De'ah*, II, nos. 62 and 63, maintain that such an oath cannot be demanded. However, R. Shimon Grunwald, *Teshuvot Maharshag*, *Yoreh De'ah*, no. 4, disagrees.

would provide that this right be abrogated upon payment of a specified sum or percentage of the capital at the discretion of the debtor.

Nevertheless, in recent years, perhaps because of concern for the qualms expressed by the Ga'on of Vilna, a new form of *hetter iska* has developed among members of the stringently observant community. That agreement is colloquially referred to as the "*hetter iska* of Bnei Brak" because of the locale in which it gained currency.[11] The arrangement is designed to eliminate any possible halakhic pitfall by providing that the funds are advanced in their entirety solely as an investment. Provision is made for payment of a stipulated periodic rate of return as profit upon the investment with any balance in excess of that rate of return to be retained by the recipient. Since there is no loan whatsoever, there can be no taint of interest. All other provisions of such an agreement are identical to those of a standard *hetter iska*. A return, even when no profit has been realized, is assured by stipulating a presumption of profit rebuttable only by a solemn oath. Capital is protected by stipulating that only the testimony of two halakhically qualified witnesses is acceptable as proof of loss. The drawback of that arrangement is that, unlike with regard to other forms of *hetter iska*, since no portion is in the form of a loan, the funds advanced are at risk in their entirety.

The *hetter iska* was originally designed to facilitate the lending of capital for commercial purposes. Since the capital was, in fact, invested in mercantile enterprises, and since the creditor assumed a measure of risk, the relationship which was formed was – factually as well as technically – that of partners in a business venture. However, with the passage of time, use of the *hetter iska* became more and more widespread. Greater and greater numbers of Jews earned their livelihood as craftsmen or as hired laborers. The use of a *hetter iska* by a person who is not in any way engaged in a business enterprise appears to be nothing more than a subterfuge. A prominent twentieth-century decisor, Rabbi Moshe Feinstein, *Iggerot Mosheh*, *Yoreh De'ah*, II, no. 62, totally ignoring earlier responsa dealing with this problem, strongly implies that a *hetter iska* may by employed only when the borrower is engaged in business ventures. Moreover, declares Rabbi Feinstein, both parties must know the nature of the commercial venture for which the money is advanced for "[the *hetter*

[11] See R. Moshe Sternbuch, *Mo'adim u-Zemanim*, VI, no. 41, secs. 1(3) and 1(7). This form of *hetter iska* seems to have been introduced by R. Ya'akov Breisch in Switzerland. See R. Ya'akov Breisch, *Teshuvot Helkat Ya'akov*, III, no. 188, sec. 2, no. 189, sec. 1 and no. 194, sec. 8, s.v. *akhen*.

iska] is not an incantation or charm."[12] Rabbi Feinstein adds that the written agreement should state that the money advanced must be used for ventures in which it may reasonably be anticipated that the total profit will be at least twice the amount of the stipulated return. Thus, according to *Iggerot Mosheh*, the *hetter iska* is reserved for use in situations in which the interest paid is, in reality, no more than the actual anticipated profit realized on the portion of the merchandise acquired on behalf of the creditor.[13]

The question of the efficacy of a *hetter iska* in conjunction with non-personal loss was raised earlier, at approximately the turn of the twentieth century, and discussed in detail by Rabbi Shalom Mordecai Schwadron, *Teshuvot Maharsham*, II, no. 216. Advancing a view contrary to that later espoused by *Iggerot Mosheh*, Rabbi Schwadron justifies the use of a *hetter iska* in conjunction with loans that are entirely of a personal nature. He concedes that when the funds have not been used for commercial purposes, and no profits have been earned, no interest need be paid. The borrower, however, certainly has the legal and halakhic option of using the money advanced for such purposes; indeed, that is the *prima facie* purpose of the loan as stated in the written agreement. Under the terms of the agreement the financier may demand a solemn oath that the money has not, in fact, been used to generate profit and that, in fact, no profit has been earned. The amount stipulated as "accord and satisfaction" is then paid by the recipient solely as a means of avoiding the oath which he is otherwise bound to swear.

In the nineteenth century, R. Joseph Saul Nathanson, *Teshuvot Sho'el u-Meshiv*, *Mahadura Kamma*, III, no. 160, justified an *iska* arrangement in conjunction with personal loans, for at least some purposes, on entirely different grounds. According to this authority, a loan which makes it possible for an individual to continue practicing his profession or to retain his income-generating employment is to be deemed a commercial enterprise. Therefore, according to *Sho'el u-Meshiv*, a teacher who is burdened by debt or by personal expenses may borrow funds under an *iska* arrangement if failure to receive the loan would force him to abandon his profession and to seek a livelihood in some potentially more lucrative endeavor. Since the loan enables him to continue in his occupation, the loan constitutes a form

[12] Similarly, *Mo'adim u-Zemanim*, VI, no. 41, sec. 1(1) writes: "Many err with regard to the intention of Maharam and imagine that [the *hetter iska*] is a chanson (*pizmon*) to render the prohibition against interest inoperative."

[13] Conflicting opinions with regard to the efficacy of a *hetter iska* in conjunction with non-commercial loans and theories upon which they may be justified are discussed in this writer's *Contemporary Halakhic Problems*, II, 379-381.

of *iska* in which the financier becomes a partner. The application of this line of reasoning to student loans designed to enable the student to pursue studies which will qualify him to enter a profession or to make him eligible for higher salaried employment is obvious.

In another responsum, *Sho'el u-Meshiv*, *Mahadurah Telita'ah*, I, no. 133, Rabbi Nathanson sanctioned an *iska* arrangement in order to enable the recipient to repay a debt and thereby to avert the forced sale of his home. This is categorized as an *iska* by *Sho'el u-Meshiv* by virtue of its service in preventing loss of capital resulting from the otherwise economically forced sale of the house and/or the opportunity to realize the contemplated appreciated value of the property.

The permissive views of *Sho'el u-Meshiv* were sharply disputed in the early part of the twentieth century by R. Meir Arak, *Teshuvot Imrei Yosher*, I, no. 108. *Imrei Yosher* maintained that the concept of *iska* is limited to profits realized from the investment of capital advanced or from sale of merchandise or goods acquired with such capital. Profits realized from avoidance of loss or from income derived from personal employment do not constitute the fruits of a joint venture and hence, according to *Imrei Yosher*, do not justify use of a *hetter iska*. This latter view is consistent with the position of most authorities, including *Ginat Veradim*, *Yoreh De'ah*, *klal* 6, no. 4; *Shulhan Arukh ha-Rav*, *Hilkhot Ribbit*, sec. 42; *Kizur Shulhan Arukh* 66:10; and *Erekh Shai* 177:7.

A contemporary scholar, Rabbi Moshe Sternbuch, *Mo'adim u-Zemanim*, VI, no. 41, sec. 2(7), s.v. *ve-hineh,* points out that with widespread investment in the stock market on the part of small investors there can be no question with regard to the creditor's lack of personal knowledge that no profit has been earned. Indeed, it is not uncommon for individuals who borrow money for personal purposes to use such funds in an attempt to reap short-term profits in the securities market. Since the creditor cannot know that this has not, in fact, occurred, he may, according to all authorities, stipulate that an oath be sworn to that effect.

III. MUST A *HETTER ISKA* BE ENFORCEABLE IN A CIVIL COURT?

Whether or not the terms of a *hetter iska* are enforceable in a secular court, and whether a civil court would treat the instrument as a loan agreement or as establishing a joint venture would appear to be of little import in determining its validity in Jewish law. The principle "*dina de-malkhuta dina* – the law of the land is the law" is irrelevant with regard

to financial and commercial dealings between members of the Jewish faith.[14] The law of the land does not supersede the rules of Jewish jurisprudence, most particularly in situations in which the state has no interest in thwarting private arrangements between the parties.

Nevertheless, the matter becomes more complex with regard to the validity of contracts. Contracts are generally not enforceable unless there is a meeting of minds, i.e., seriousness of intent and reliance by both parties. Thus, even though transfer of real property can be consummated by delivery of consideration, the Gemara, *Kiddushin* 26a, declares that in a locale in which a deed is customarily delivered to the purchaser the sale is not valid unless such a deed is executed. The reason, as explained by Rashi, *ad locum*, is that in the absence of a deed, the purchaser does not rely upon the conveyance. The question, then, is whether there is seriousness of intent with regard to assumption of a contractual obligation that cannot be enforced in a secular court.[15] Ordinarily, that is not a problem because Jewish law requires its adherents to abjure recourse to secular courts and to submit all disputes to a *bet din* for adjudication. It also categorizes any recovery obtained in a civil court that would not have been allowed by a *bet din* as extortion.

The issue becomes germane primarily in instances involving a Jew and a non-Jew, in which the contract is not enforceable in civil law but is designed to satisfy a requirement of Jewish law. The earliest discussion of this issue arose with regard to the sale of *hamez* before Passover to a non-Jew. In the 19th century, the Austro-Hungarian Empire imposed a tax upon conveyance of chattel in the form of payment for a tax stamp that they required be affixed to the bill of sale. Jews were not in the practice of purchasing stamps for use in conjunction with the sale of *hamez* and were denounced to government officials as tax-evaders. The matter reached the ears of the Emperor Franz Josef, who had a justly-deserved reputation as a philosemite. His reaction was that it is common knowledge that sale of *hamez* is not a mercantile transaction designed for profit but entirely a matter of religious scruple. As such, the Emperor had no desire to burden religious practice by taxation.

[14] See *Shakh*, *Hoshen Mishpat* 73:39 and *Hazon Ish*, *Hoshen Mishpat*, *Likkutim* 16:1.

[15] Cf., however, *Hazon Ish*, *Hoshen Mishpat*, *Likkutim* 16:5, who asserts that a biblical conveyance is valid regardless of local practice. The rule formulated in *Kiddushin* 26a, asserts *Hazon Ish*, is a rabbinic decree limited to transfer of real property without a deed. However, later, *Bava Kamma* 10:9, *Hazon Ish* reversed himself and ruled that as a matter of intrinsic law title remains vested in a Jewish seller until such time as the conveyance is consummated in accordance with applicable civil law.

Although the Emperor was satisfied, R. Baruch Frankel, author of *Barukh Ta'am,* reportedly was not. R. Baruch Frankel inferred from the Emperor's response that failure to affix tax stamps did indeed render the sale void and unenforceable. If so, he was hesitant with regard to its validity in Jewish law. Presumably his concern was that, even if in Jewish law the contract is valid in form, the non-Jew would not rely upon the conveyance. R. Moshe Sofer, *Teshuvot Hatam Sofer*, *Orah Hayyim*, no. 113, disagreed, but only because he understood Austro-Hungarian law differently (and probably more correctly). *Hatam Sofer* asserted that failure to abide by the tax statute did not serve to void the sale; it compelled only payment of the tax prior to institution of legal proceedings based upon the transaction.[16]

A somewhat different version of the problem appears in a later responsum authored by the son-in-law of R. Baruch Frankel, R. Chaim Halberstam, *Teshuvot Divrei Hayyim*, II, *Orah Hayyim*, no. 36. For reasons of Jewish law, conveyance of *hamez* is usually accompanied by sale or lease of real property so that the *hamez* may be transferred by *kinyan* in the form of *hazer*, i.e., placement in the beneficiary's domain, and by accession or *agav karka*. The Austro-Hungarian Empire apparently had a law similar to England's Statute of Frauds requiring that transfer of real property be in writing. *Divrei Hayyim*'s interlocutor apparently had concern with regard to the validity in Austro-Hungarian law of an instrument drafted in Hebrew.[17] Apparently, in that jurisdiction, instruments written in a foreign language were of no legal effect.[18] *Divrei Hayyim* responds that, under the applicable civil law, absent a valid deed, the sale is not void but merely voidable[19] and, moreover, that even when accompanied by a

[16] See also R. Menachem Krochmal, *Teshuvot Zemah Zedek*, no. 61; *Teshuvot Shev Ya'akov, Orah Hayyim*, no. 21 as well as R. Samuel Eliezer Stern, *Mekhirat Hamez ke-Hilkhato* (Bnei Brak, 5747) 16:6. Cf., the bill of sale drafted by R. Shneur Zalman of Liadi, addendum to *Shulhan Arukh ha-Rav* (Brooklyn, 5745), III-IV, 100 [1406], authorizing the non-Jew to translate the document and to pay the applicable taxes in order to render the contract enforceable in civil courts.

[17] Other authorities preferred use of the vernacular in order to assure that the non-Jew understands the nature of the transaction and that he enters into it with the requisite seriousness. Cf., *Mekhirat Hamez ke-Hilkhato* 10:10 and chap. 16, note 10.

[18] See *Helkat Ya'akov*, III, no. 192. Cf., however, *Teshuvot Maharsham*, II, no. 223, who cites statutes indicating that drafting an instrument in a foreign language did not void what would otherwise have been a valid oral contract. However, *Maharsham* contended that, in any event, a contract for the sale of *hamez* was not enforceable under applicable civil statutes because it is in the nature of a *Scheinvertrag*, i.e., a sham or fictitious contract.

[19] A number of subsequent authorities adopt the view that the sale is efficacious for purposes of Jewish law so long as the civil authorities do not interfere with transfers

written instrument, the sale is voidable unless registered in a land registry office.[20] Nevertheless, argues *Divrei Hayyim*, the validity of both an oral transfer and an unregistered transfer, even if void under the law of the land, is determined solely by Jewish law. *Divrei Hayyim* dismisses the contention that the non-Jew does not rely upon such a conveyance with the comment that a non-Jew "knows that the Jew will not renege without acquiescence of the non-Jew in order that his *hamez* not become forbidden." In other words, the non-Jew recognizes the critical nature of the transaction in avoiding transgression of a biblical command and, since he is confident that the Jew will not wish to sin, he relies upon the conveyance because he is convinced that the Jew will make no attempt to seek to rescind the sale by suing in a civil court.

A rather similar argument was advanced by R. Yitzchak Elchanan Specktor, *Be'er Yizhak*, *Orah Hayyim*, no. 7. As earlier noted, Jewish law provides that in a locale in which sale of real estate is generally memorialized by a deed, a sale for cash alone is not valid. *Be'er Yizhak* contends that if, however, it is patently clear that the seller will not renege, e.g., he seeks to divest himself of land because it is not productive (*mipnei ra'atah*), the sale is valid even if consummated only by delivery of consideration. *Be'er Yizhak* argues that a Jew will not renege on a sale of *hamez* on the eve of Passover because invalidating the sale would leave him with *hamez* from which he may derive no benefit. Hence the non-Jew has every reason to rely upon even an unconventional mode of transfer.[21]

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of property not in conformity with civil statutes. See *Hazon Ish*, *Hoshen Mishpat*, *Likkutim* 16:5 and 16:8; R. Moshe Sternbuch, *Teshuvot ve-Hanhagot*, I, no. 295; and R. Moshe Nachum Spira, *Mishnat Kesef*, I, no. 41. As noted *supra*, note 15, *Hazon Ish*, *Bava Kamma* 10:9, later reversed himself. See also R. Moshe Sternbuch, *Shemitah ke-Hilkhatah*, rev. ed. (Jerusalem, 5753), pp. 124-125.

[20] For an extensive discussion of sources addressing the validity of transfer of real property absent registration in a registry office even when the sale is not effected in order to avoid transgression of religious law, see R. Ya'akov Yeshaya Blau, *Pithei Hoshen*, VII (Jerusalem, 5754) 2:11, note 14. For a discussion of the applicability in such circumstances of *dina de-bar mezra*, i.e., the law giving the owner of an abutting property priority with regard to purchase, see R. David Horowitz, *Teshuvot Kinyan Torah*, V, *Hoshen Mishpat*, no. 146, sec. 4. See also *supra*, note 18. Cf., R. Yechiel Michel Epstein, *Arukh ha-Shulhan*, *Hoshen Mishpat* 190:25, who regards registration of the deed as a condition that upon fulfillment retroactively confers validity upon the transfer.

See also R. Yitzchak ben David, *Teshuvot Divrei Emet*, no. 12, who asserts that acceptance of the grantor's statement that he has registered the transfer suffices to establish *semikhut da'at*, or reliance, but nevertheless finds grounds to invalidate the transfer on the basis of *dina de-malkhuta dina*.

[21] Cf., the opposing view earlier advanced by R. Isaac Trani, *Teshuvot Maharit*, II, *Hoshen Mishpat*, no. 65, who limits the rule to situations in which the deed serves as *kinyan*. In such cases, in a sale *mipnei ra'atah*, there is reliance upon the deed alone.

A similar problem presented itself with regard to sale of farm land in the Land of Israel in anticipation of the sabbatical year in order to avoid difficulties arising from observance of the laws of the sabbatical year. Palestine was part of the Ottoman Empire from 1517 until after World War I. Ottoman law did not recognize the validity of transfer of real property unless the transfer was recorded in a land-registry office. That procedure was not followed in the transfer of land in advance of the sabbatical year. R. Abraham I. Kook, *Shabbat ha-Arez*, introduction, sec. 13, arrives at a conclusion similar to that earlier recorded by *Divrei Hayyim* in the context of the sale of *hamez*, *viz.*, "when the essence of the transfer is to obviate a prohibition, the grantor firmly intends to convey [by means of] such a transfer and the grantee [firmly intends] to acquire, there is proper reliance."[22]

In a similar manner, R. Shalom Mordecai Schwadron, *Teshuvot Maharsham*, I, no. 20, permitted use of a *hetter iska* by a bank even though, contrary to applicable civil law, no provision for a *hetter iska* was incorporated in the by-laws of the bank. That view was endorsed by R. Meir Arak, *Teshuvot Imrei Yosher*, I, no. 189.[23] This also appears to be the view of R. Joseph Saul Nathanson, *Teshuvot Sho'el u-Meshiv*, *Mahadura Kamma*, II, no. 136, s.v. *u-mah she-katavta*.

As stated earlier, both the Jew and the non-Jew rely upon Jewish law as governing the sale of *hamez* because the non-Jew recognizes that the Jewish party will abide by the agreement rather than commit a transgression. The non-Jew will not renege because the terms of the sale guarantee him a profit. But is this also the case with regard to a *hetter iska* in which one of the parties is a non-observant Jew who is unconcerned with the prohibition against usury and who may find it to his financial advantage to challenge the validity of the agreement in a civil court?

Maharit contends that in a locale in which a deed is customarily executed there is no reliance upon payment of cash alone since there is no proof of sale. The issue discussed by *Be'er Yizhak* is the sale of *hamez* to a non-Jew on the eve of Passover without a valid written conveyance. The question is, since the sale is *mahmat ra'atah*, can payment of cash be relied upon as a mode of conveyance? *Be'er Yizhak* rebuts *Maharit*'s view on the basis of statements of *Teshuvot ha-Rashba*, I, no. 1,226 and *Teshuvot R. Bezalel Ashkenazi*, no. 8. See also *Netivot ha-Mishpat* 191:2.

[22] See also R. Shlomoh Zalman Auerbach, *Ma'adanei Erez*, no. 18 and R. Shlomoh Yosef Zevin, *Le-Or ha-Halakhah*, 2nd ed. (Tel Aviv, 5717), pp. 119-121. See the contradictory view of *Divrei Emet* and its rejection by *Ma'adanei Erez*, *loc. cit.*

[23] R. Ya'akov Yeshaye Blau, *Brit Yehudah* 40:11, note 21, cites R. Yitzchak Schmelkes, *Teshuvot Bet Yizhak*, *Yoreh De'ah*, II, *Kuntres Aharon*, no. 32, as expressing an opposing view. However, it seems to this writer that *Bet Yizhak* is in agreement with *Maharsham* since *Bet Yizhak* writes that the *hetter iska* is effective because, since it is written to satisfy provisions of Jewish law, it may be presumed that the creditor will abide by the decision of a *bet din*.

R. Moshe Schick, *Teshuvot Maharam Shik, Yoreh De'ah*, no. 161, s.v. *mihu*, observes that, even if an attempt is made by the financier to bring an action in a civil court to demand that the document be construed as an ordinary interest-bearing loan, the recipient of the funds incurs no transgression. Nor, from the vantage point of Jewish law, has the financier transgressed the prohibition against accepting interest; the financier is an extortionist but not a recipient of interest.[24]

R. Yitzchak Ya'akov Weisz, *Teshuvot Minhat Yizhak*, IV, no. 16, secs. 4, 7-8 and no. 18, sec. 4, questions the validity of a *hetter iska* whose provisions would not be enforced by a civil court in situations in which one or both of the parties would have no compunction with regard to having recourse to a civil court rather than to a *bet din*. His concern is that some individuals do not really intend to be bound by the provisions of the *hetter iska*,[25] and hence a *hetter iska* that is not enforceable in a civil court does not constitute a valid agreement.[26] He does, however, suggest that this may not be a concern if it is only the recipient of the funds who is unconcerned with regard to the prohibition against bringing suit in a civil court. Since the provisions of the *hetter iska* are to the advantage of the recipient in providing for release from financial obligations upon adducing the stipulated proof of loss of capital and release from payment of a share of profits upon his oath that there was no profit, it is to his advantage to rely upon the *hetter iska* and hence there is no reason why he should not reach the requisite determination to be bound by its provisions. However, *Minhat Yizhak*'s argument fails in a situation in which the stipulated return would constitute usury in civil law. In such an event, the recipient would certainly have a motive to seek to have a civil court invalidate the *hetter iska* because, in light of the usurious return stipulated by the parties, the debt would not be actionable in a civil court.

[24] See also *Teshuvot Helkat Ya'akov*, III, no. 195, sec. 9.

[25] Although oral contracts are valid in Jewish law, failure to reduce the agreement to writing may create a situation in which the requisite seriousness of intent does not exist. For that reason, R. Menachem Mendel Schneersohn, *Teshvuot Zemah Zedek*, *Yoreh De'ah*, no. 88, and R. Shalom Mordecai Schwadron, *Teshuvot Maharsham*, II, no. 123, insist that the *hetter iska* must be executed in writing. See also R. Chaim Yehudah Litvin, *Sha'arei De'ah*, no. 5. *Maharsham* also makes the same point with regard to sale of *homez*. Cf., *Shitah Mekubbezet*, *Ketubot* 56a, s.v. *ve-zeh leshon ha-Ritva*.

[26] Cf., however, *Teshuvot Helkhat Ya'akov*, III, no. 194, sec. 8, who argues that, fundamentally, as stated by Rambam, *Hilkhot Geirushin* 2:20, every Jew desires to abide by the laws of the Torah and hence the requisite state of mind exists at the time the transaction is consummated. Cf., however, *idem*, no. 197, sec. 23.

IV. THE *HETTER ISKA* IN AMERICAN LAW

As has been explained earlier, the *hetter iska* constitutes a device that is in full conformity with Jewish law. The *hetter iska* has also been recognized by the civil courts as an instrument creating a *bona fide* partnership interest providing for a limited return upon an investment rather than as a loan instrument requiring payment of interest on borrowed funds. In *Leibovici* v. *Rawicki*, 57 Misc.2d 141, 290 N.Y.S. 2d 997 (Civ. Ct. 1968), the Court upheld the legality of a *hetter iska* which provided a return greater than was permitted by usury laws in effect at that time. In this decision, the Court specifically denied the plea that the agreement was merely a disguised loan and hence constituted a subterfuge to avoid the taint of usury. In a number of cases, the courts have ruled explicitly that payment of a portion of profits in lieu of interest with no guarantee of profit is not usury.[27] In *Leibovici* v. *Rawicki* the Court recognized that a *hetter iska* constitutes an agreement of precisely this nature.

There are, nevertheless, cases in which American courts, primarily New York State courts, have refused to recognize a *hetter iska* as creating a partnership or joint venture. However, in each of those cases. either (a) the *hetter iska* issue was irrelevant; (b) the testimony presented to the court with regard to the nature of a *hetter iska* was patently incorrect; or (c) the *hetter iska* was improperly drafted. Those cases underscore the need to draft a *hetter iska* properly and, when testimony is required, to have knowledgeable scholars serve as expert witnesses.

One decision in particular has great relevance with regard to a type of *hetter iska* that has unjustifiably gained currency because of its simplicity. There appears to be a fairly widespread practice within some business circles to use a standard promissory note and to write the words "*al pi hetter iska*" ("in accordance with *hetter iska*"), or to use a rubber stamp bearing those words, above the signatures of the parties. The intent of that legend is to nullify explicit references in the instrument to a loan and interest by declaring actual intent to be a joint venture and shared profit. Read literally and in its entirety, the result is an ambiguity creating doubt with regard to the nature of the instrument and hence the expedient is of dubious efficacy in obviating the prohibition against interest.[28] Moreover, the term *hetter iska* is generic in nature and does not indicate which of the available formulae or variations thereof is intended. In addition, a

[27] See *Clift* v. *Barrow*, 108 N.Y. 187, 192-194, 15 N.E. 327, 328-330 (1888); and *Mueller* v. *Brennan*, 68 N.Y.S. 2d 517 (Sup. Ct., 1947).

[28] See *Brit Yehudah* 40:8. Cf., *Teshuvot Maharsham*, II, no. 252.

significant problem arises in the event that no profits are realized from investment of the funds received. Since there is no specific provision for an oath supporting a claim of the absence of profit, there is no basis for a fee in the form of accord and satisfaction in lieu of such an oath. Accordingly, if the transaction is governed by such a *hetter iska* and no profits have been realized, any sum paid the creditor in excess of principal in the absence of profit is, at best, a "gift" in return for the loan, which is itself a proscribed form of interest.

It is quite likely that the practice of using the formula "*al pi hetter iska*" evolved from an earlier-employed expedient that was not open to these challenges. In earlier times, printed promissory notes were not used. Instead the recipient wrote out a simple declaration in the nature of "I acknowledge receipt of the sum of _____ from _____ in accordance with the *hetter iska* instituted by Maharam Avigdors of Cracow."[29] The instrument (a) contained no contradictory reference to interest; and (b) provided both for profit-sharing and for payment in lieu of an oath by means of incorporation of the provisions of a particular well-known and published *hetter iska*, *viz.*, the *hetter iska* authored by Maharam Avigdors. At times, the slightly shortened formula "*al pi hetter iska shel* [of] *Maharam*" was used on the strength of the common recognition that the only "Maharam" associated with a *hetter iska* instrument is Maharam Avigdors. Use of the formula "*al pi hetter iska shel Maharam"* when the intention is half loan, half deposit is clearly inappropriate.[30]

A New York trial court found the abbreviated formula to be ambiguous and ordered a trial to determine, *inter alia*, the nature of the instrument. In *Arnav Industries*, *Inc.* v. *Westside Realty Assoc.*, 180 A.D.2d 463, 579 N.Y.S.2d 382 (1st Dep't 1992), the Appellate Division found that inclusion of the phrase did not generate a threshold level of ambiguity sufficient to warrant denial of summary judgment on the promissory note. The promissory note that was the subject of dispute in *Arnav* contained a clause specifically stating that "[n]othing herein or in Mortgage is intended to create a joint venture, partnership, tenancy-in-common, or joint tenancy

[29] Cf., the comments of R. Ephraim Zalman Margolies published by R. Aaron Walden in *Shem ha-Gedolim ha-Hadash* (Warsaw, 5625), *Ma'arekhet Gedolim, ot mem*, sec. 51.

[30] Cf., *Mo'adim u-Zemanim*, VI, no. 41, sec. 1(2). Cf. also, the comments of R. Ephraim Zalman Margolies, cited *supra*, note 29, in which, although he decries the practice, Rabbi Margolies endeavors to justify its acceptance on the basis of the contention that because the error is so widespread it may be assumed that the party's intention is half loan, half deposit.

relationship between Borrower and Lender."[31] That clause constitutes an explicit rejection of the relationship a *hetter iska* is designed to create. Absent that clause, the issue of whether references to a loan and to payment of interest are rendered ambiguous by insertion of the phrase "*al pi hetter iska*" remains an open legal question. Nor, if an ambiguity is found to exist, is there any way to predict how a trial court might resolve that ambiguity.

The decision in *Arnav* should serve as a caution against use of an abbreviated *hetter iska* consisting of but a vague and ambiguous phrase. Since that procedure is in any event of dubious halakhic validity, the decision in *Arnav* places no significant burden upon utilization of a *hetter iska*.

Barclay Commerce Corp. v. *Abraham Finkelstein*, 11 A.D.2d 327, 205 N.Y.S.2d 551, (1st Dep't 1960) involved a case in which the plaintiff and the corporate defendant entered into a factoring agreement guaranteeing payment of monies which might become due. The suit was based upon the plaintiff's contention that the accounts receivable that had been assigned were fraudulent. The Appellate Court found that since the alleged fraud was not denied, the question of whether or not the *hetter iska* created a partnership was a "phantom" issue.[32]

In *Bollag* v. *Dresdner*, 130 Misc.2d 221, 495 N.Y.S.2d 560 (N.Y. City Civ. Ct. 1985), the parties entered into a properly drafted *hetter iska*. The defendant maintained that (a) the contract was void as usurious; and (b) the transaction constituted an investment by the plaintiff subject to any profits earned or losses sustained. The plaintiff relied upon the *hetter iska* in countering the usury defense but also incongruously alleged that he was entitled to repayment of principal and interest regardless of any profit or loss. Further muddying the waters, the plaintiff's complaint and bill of particulars categorized the instrument as a note and presented an expert witness who testified imprecisely that such forms are employed "when one party is lending money and the other party is borrowing money."[33] The Court also noted discrepancies between the *hetter iska* and testimony regarding liability in the event of absence of profit or of loss of capital. Most damaging was the unequivocal, but patently false, testimony of the expert who "testified emphatically…that the agreement did not create a joint venture or partnership."[34] Not only is that statement false, it is absurd, since, if true, it would render the *hetter iska* devoid of purpose. The Court took note of the inherent contradiction in the plaintiff's

[31] *Arnav Industries, Inc.* v. *Westside Realty Assoc.* at 383.
[32] *Barclay Commerce Corp.* v. *Finkelstein* at 553.
[33] *Bollag* v. *Dresdner* at 562.
[34] *Id* at 562.

position in observing, "Yet despite his repeated use of the above-quoted categorization of the transaction, it is 'done,' he said, 'specifically not to pay interest.'"[35]

The Court, in this decision, expressly affirmed in principle the validity of a properly drafted *hetter iska* in finding that the *hetter iska* presented to the court "as interpreted by the parties and their witnesses at trial reveals that the transaction was a loan (not an 'investment') and that plaintiff's clear intent was to exact a higher rate of interest than is permitted by law."[36] The Court distinguished the case before it from *Leibovici* v. *Rawicki* on the grounds that in *Leibovici* "the funds were clearly treated as a joint investment."[37]

In *Bollag*, the Court found that the defendant requested the loan that was the subject of litigation for business purposes rather than for personal needs. Accordingly, it found that the policy and reasoning behind the general obligation law §5-521 serve to disallow a usury defense in such circumstances. In doing so, the Court affirmed the *hetter iska* as a valid business contract. However, incongruously, and perhaps cynically, its disallowance of the usury defense notwithstanding, the Court refused to allow "interest." The Court found that the plaintiff was prevented from collecting interest by his own pleading. The plaintiff had maintained that the *hetter iska* was entered into specifically to avoid payment of interest. Yet, the plaintiff's own expert witness incorrectly categorized the claim as one to recover "interest." Giving equal credence to both the plaintiff's own statement and the testimony of plaintiff's expert witness the Court declared, "[P]laintiff has made it plain he neither wishes to nor can collect interest. Accordingly, none shall be awarded."[38] The defendant, in effect, was hung from his own petard.

Although recovery of accrued interest was denied, the Court allowed interest on the judgment at the statutory rate from the date of its entry on the grounds that there was "no testimony which would bar plaintiff from receiving interest on a judgment (as distinct from interest on a loan)." That finding reflects an erroneous assessment of Jewish law. Recovery of interest on a judgment is indeed precluded by Jewish law. Absence of testimony to that effect is but one more example of the comedy of errors and incompetence on the part of counsel and witnesses reflected in this case.

[35] *Id* at 562.
[36] *Id* at 225.
[37] *Id* at 225.
[38] *Id* at 564.

In an unreported case, *Berger* v. *Moskowitz*, N.Y.L.J., Oct. 30, 1991, at 25, col. 3 (Sup. Ct. Kings County), the Court found that a perfunctory *hetter iska* did not succeed in establishing a partnership agreement because it failed "to identify the nature of the venture let alone the specifics relating to the terms of such venture." The *hetter iska* in question was titled "Business Agreement" and did recite that the sum in question was advanced "for business and the profit of which agreed on will be ten percent, and the duration [of] the business will be three years from the signing of this agreement." Although inelegantly drafted, the agreement itself would seem to this writer to reflect the intent of the parties that the funds be applied to a business venture and that the 10% be paid out of profits, the implication being that such profit-sharing was predicated upon actual realization of profits. However, in this case also, the defendant was found liable by virtue of his own admission. The Court declared, "Nor can defendants label this transaction a business venture since MOSKOWITZ wrote a letter to the plaintiffs' attorney stating in part: 'I acknowledge that the unpaid balance of the loan with interest through November 30, 1990, is $268,200.00.'"

The decision of a U.S. Bankruptcy Court in *In re Stephen Douglas*, 174 B.R. 16 (Bankr. E.D.N.Y. 1994), does not involve any substantive matter pertaining to the legal validity of a *hetter iska*. The issue was whether a certain payment constituted a fraudulent conveyance under applicable statutes. Section 273 of the New York Debtor and Creditor Law denominates as fraudulent any conveyance made by an insolvent for inadequate consideration, without regard to actual intent. The books and records of the debtors reflected no consideration or economic benefit conferred upon Douglas by the defendant. It was also alleged that a promissory note reflecting a loan was executed but was lost. A *hetter iska* was introduced in evidence in support of existence of a loan. That evidence was dismissed on the grounds that it was written on the stationery of a corporation not involved in the proceedings. Since the *hetter iska* was dismissed as irrelevant, the Court found that there was no need to address the legal import of a *hetter iska*.

Heimbinder v. *Berkovitz*, 175 Misc.2d 808, 670 N.Y.S.2d 301 (N.Y.Sup. 1998), involved an action to invalidate various transfers to the defendant corporation which would have otherwise been available to satisfy a judgment against the defendant. The plaintiff sought to hold defendant directors personally liable for breach of fiduciary duty in effecting such transfers. Since a *hetter iska* was employed, the plaintiff also contended that the defendant, in signing the document, personally guaranteed payment of the obligation. The court cited with approval an earlier

unpublished decision in *Burger* v. *Baruch Ha'Levi Moskowitz*, Kings County Sup.Ct., Index NO. 15600/91, in which a *hetter iska* constituted the sole contract between two individual parties and was found to establish a valid guarantee. In *Heimbinder*, however, the evidence indicated that plaintiff's attorney had previously requested a personal guarantee and that the request had been refused by the defendant's attorney. Moreover, the "security agreement" executed by the parties contained a provision for a "guarantee" next to which the word "omit" was entered in handwriting; the defendant's name had been typed beneath the signature line for the guarantor but was crossed out. The plaintiff conceded that there had been a discussion of guarantees but that no agreement was reached; that he had been unaware of the existence of a guarantee provision in the form that was used and that the *hetter iska* was produced by the defendant only after discussions in which he refused a personal guarantee had been concluded; that he could not read Hebrew and relied upon the defendant's categorization of the document; and that the defendant did not portray it as a personal guarantee. Accordingly, the Court found that, in the case before it, the *hetter iska* was not intended to generate a personal guarantee of corporate debt. Nothing in the *Heimbinder* decision casts doubt upon the enforceability of the provisions of the *hetter iska* itself.

Heimbinder, however, serves to establish a significant point of law. A standard *hetter iska* signed by an officer of a corporation in circumstances other that those of *Heimbinder* may well establish a personal obligation even absent explicit indication of such intention. If this is not the desired outcome, the remedy is to indicate explicitly in the document that it is being executed on behalf of the corporation and not in an individual capacity.

Wiesel v. *Rubinstein*, 12 Misc.3d 1168(A) (N.Y.Sup. 2006), represents a foregone opportunity to seek application of a collateral provision of a *hetter iska*. Kalman Rubinstein signed a series of promissory notes in order to obtain funds to open a kosher pizza shop. The rate of return on each of the notes, most of which were short term in nature, was 14%. Despite an agreement to submit the dispute to a *bet din* for resolution, Rubinstein failed to appear before the *bet din* to which the parties agreed. The *bet din* declined to issue a default judgment. Thereupon, the estates of Sol and Harriet Wiesel sued in New York State Supreme Court. Apparently, the plaintiff made no attempt to have the Supreme Court enforce compliance with the arbitration agreement or to issue a default judgment upon failure to submit to arbitration despite the express agreement between the parties to do so that was incorporated in the *hetter iska*.

Rubinstein seems to have been under the impression that he would prevail in a civil court both because the plaintiffs' claim was barred by the statute of limitations and because the rate of interest was usurious. Nevertheless, he asserted an additional affirmative defense, *viz.*, since "each of the notes contains a notation in Hebrew indicating the notes are subject to *hetter iska*, failure of the business absolved him of the obligation to repay the amounts due on the notes."[39]

The Court denied summary judgment based on the statute of limitations on the grounds that the alleged partial payment of the debt had the effect of extending the period within which a suit might be initiated. The Court also interpreted the note as prescribing 14% per annum rather than a usurious 14% for a much briefer period. The *hetter iska* defense was ignored in the Court's rejection of the motion for summary judgment, perhaps because it was self-evident that whether or not the business did fail, and whether or not a *hetter iska* provides that such failure cancels the obligation, are triable issues.

In point of fact, a standard *hetter iska* would require a solemn oath to substantiate a claim of non-realization of profit and testimony of two halakhically qualified witnesses to establish loss of capital. In this case, an ordinary promissory note seems to have been employed but modified by inclusion of a "notation in Hebrew indicating that the notes are subject to the *hetter iska*." That "notation" was the incorporation of the earlier-discussed phrase "*al pi hetter iska*." As noted earlier, that phrase may signify only that the term "loan" should be understood as "investment" and that the term "interest" should not be construed as such but as the return of a share of the profits earned by the investment. If so, as discussed earlier, entirely different and much less onerous standards of proof might apply to establishing absence of profit and loss of capital. "Whether or not failure of the business" did indeed absolve the defendant "of the obligation to repay the amounts due on the notes" is a matter to be resolved by a *bet din*.

The above notwithstanding, in a Report and Recommendation on Motion to Dismiss in the case of *Edelkind* v. *Fairmont Funding,* 539 F.Supp.2d 449 (D. Mass. 2008), a federal magistrate asserted that in civil courts "*hetter iska* agreements have been interpreted as 'merely a compliance in form with Hebraic law'[40] that does not create a partnership between the parties."[41] In support of that assertion, the Magistrate

[39] *Wiesel* v. *Rubinstein* at 1.
[40] See *Barclay Commerce Corp.* v. *Finkelstein* at 329.
[41] *Edelkind* v. *Fairmont Funding* at 454.

wcited *Arnav Indus. v. Westside Realty Assoc.*, *Barclay Commerce Corp.* and *Heimbinder*. As has been shown, those cases do not serve to establish the Magistrate's conclusion. Quite to the contrary, each of those cases reflects acceptance of the validity of a properly drafted *hetter iska* in creating a partnership between the parties but finds the particular *hetter iska* instruments submitted in those proceedings to be faulty. The *hetter iska* employed in *Edelkind* may also have been defective but that issue was not addressed. These cases serve to underscore the necessity for careful drafting of a halakhically valid *hetter iska* agreement. A sample text of an English-language *hetter iska* agreement may be found in this writer's *Contemporary Halakhic Problems*, II (New York, 1983), 386-388.

The claim advanced in *Edelkind* was dismissed because Jamie Edelkind was found to have no standing to bring a suit as an alleged third party beneficiary of a mortgage agreement entered into by his wife. The findings with regard to the *hetter iska*, also apparently signed by the wife, constitute dicta having no bearing upon the merits of the case. Nevertheless, the facts presented in *Edelkind* underscore a serious pitfall based, not upon the validity of the *hetter iska* itself, but upon the way it was employed.

It is quite common for a lender to execute a *hetter iska* and immediately thereafter to execute a second, standard mortgage agreement. It is commonly assumed that the lender is better protected legally if he is in possession of a mortgage instrument. Whether or not that is true, there is no gainsaying the fact that the lender feels more secure with a mortgage in his possession. R. Moshe Feinstein, *Iggerot Mosheh*, *Hoshen Mishpat*, no. 62, sanctions the practice from the perspective of Jewish law in describing the mortgage instrument as devoid of halakhic validity provided that the *iska* agreement states that it is the governing instrument and the mortgage is designed merely as "*bit'honot*," best translated as "reliances" or "assurances."[42] Nevertheless, one legal ramification of such practice is evident in *Edelkind*.

[42] Cf., *Teshuvot Hatam Sofer*, *Hoshen Mishpat*, no. 48, who writes that the formula "*al pi hetter Maharam* as was spoken between us" rather than the full text of a *hetter iska* was utilized in order to give full force to the written agreement in civil law as an ordinary loan agreement. The concept seems to be identical to that formulated by *Iggerot Mosheh*. See also the discussion of R. Shlomoh Kluger, *Teshuvot Tuv Ta'am va-Da'at*, I, no. 208. The basic principle is also accepted by R. Yitzchak Ya'akov Weisz, *Teshuvot Minhat Yizhak*, IV, no.16, sec. 2. *Helkat Ya'akov*, III, no. 195, sec. 6, regards the practice as permissible even if the mortgage is executed prior to the *hetter iska*.

In instances such as those described in *Edelkind*, the mortgage agreement is crucial to the enterprise. Fairmont Funding is a mortgage broker. The principals are observant Jews. The firm enters into mortgage agreements in conjunction with the purchase of real property and then sells the mortgage loans to banks. Therein lies the dilemma: The mortgage broker is the lender, both halakhically and legally; the mortgage broker contracts for interest to be paid to himself. This, as an observant Jew, he may not do. Therefore, he avails himself of a *hetter iska*. The mortgage bankers are non-Jews; they do not understand, and would not purchase, a *hetter iska*. Therefore, the mortgage broker, in addition to a *hetter iska*, insists upon a mortgage note which he then sells to the mortgage bank, presumably without informing the bank of the existence of the *hetter iska*.

That was precisely the chain of events reported in *Edelkind v. Fairmont*. The contemplated procedure was recited in detail in the preamble to the *hetter iska* agreement. Jamie Edelkind argued that the *hetter iska* created a partnership in the mortgaged property and, accordingly, Fairmont Funding was not empowered to sell the purported loan without permission or notification of his wife who was thereby denied her option to repurchase Fairmont's investment. Edelkind categorized the mortgage document as a "fiction" and accordingly contended that neither Fairmont nor any subsequent holder of the instrument had any legal rights in the mortgage. Hence, he argued, Fairmont and his wife still own the property jointly as partners and neither Fairmont nor any subsequent holder had any foreclosure rights.

There is merit in Jamie Edelkind's contention but, if so, both he and Fairmont perpetrated a fraud upon subsequent holders of the mortgage. The sole remedy is to insert a clause in the *hetter iska* agreement authorizing the mortgage broker to mortgage the entire property. Indeed, a careful reading of the preamble to the *hetter iska* agreement between Edelkind and Fairmont Funding reveals that this was agreed to by the parties. Clearer language would have prevented Jamie Edelkind from arguing otherwise. In any event, suppression of the *hetter iska* agreement gives rise to an aura of fraud and should not be countenanced. In addition, authorization to assign a mortgage against the entire property should be carefully spelled out in the body of the *hetter iska* agreement.[43]

[43] There is an additional vague reference to *hetter iska* in a decision of a federal appeals court, *Barclays Discount Bank, Ltd.* v. *Bogharian Bros.*, 743 F.2d 722, 724 (9th Cir. Cal. 1984). In that case a district court denied a motion for reconsideration on

V. ASSURING THE VALIDITY OF A *HETTER ISKA*

It seems to this writer that, even according to the authorities who maintain that a *hetter iska* must be enforceable in a civil court, a contract containing an enforceable clause requiring arbitration before a *bet din* is sufficient. The position of those authorities is based on the contention that a contract requires a meeting of minds. Hence, if one or the other of the parties regards the agreement as a charade, the *hetter iska* is of no effect. Awareness that the provisions of that instrument are not civilly enforceable, they contend, has the effect of thwarting such a meeting of minds. However, whether the provisions are directly enforceable under applicable civil law or are enforceable only by virtue of an arbitration clause is of no material significance in this regard. So long as both parties recognize that the provisions of the *hetter iska* will be enforced by a court of competent jurisdiction, whether directly or by means of confirmation of an arbitration award, there must be seriousness of intent to abide by the provisions of a *hetter iska*.

There is, of course, the possibility that, for one reason or another, one of the parties may prove to be recalcitrant and refuse to appear before a *bet din* or that, as occurred in *Wiesel*, the *bet din* may decline to issue an award and grant leave to have recourse to a secular court. In such instances, it may be to the advantage of the person bringing a cause of action to have the court treat the instrument as an ordinary loan.

Since the parties have bound themselves to enforceable arbitration before a *bet din*, and hence at the time of the execution of the *hetter iska* there is a proper meeting of minds, the manner in which the instrument is construed by a civil court in cases of default is of no halakhic significance. The validity of that conclusion is evidenced both by *Hatam Sofer*'s ruling that an interest-bearing loan agreement may be presented to a civil court if there is default on the underlying *hetter iska*, and by the ruling of *Iggerot Mosheh* that a conventional mortgage may be executed for purposes of "*bithonot*."

Accordingly, this writer recommends that a *hetter iska* agreement incorporate two separate clauses: (a) a clause providing for binding arbitration

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the grounds that the *hetter iska* issue had not been advanced in a timely fashion and further observed that the argument based upon the *hetter iska* contradicted the defendant's own description of the relationship between the parties. In a footnote, the Appellate Court stated, "A *hetter iska* appears to be a religious document purporting to characterize the bank and those to whom the bank charges interest as a 'venture' to avoid violation of religious law." *Id* at note 2.

before a *bet din*; and (b) a clause providing that if, for any reason, the transaction governed by the *hetter iska* becomes the subject of litigation before a civil court, it is the intent of the parties that the court construe the transaction as an ordinary loan and enforce it as such. In this writer's opinion, the coupling of those two clauses renders the arrangement acceptable according to all authorities. The following text may be used to achieve that effect:[44]

> In the event of any controversy arising out of, or related to, this agreement the same shall be submitted to binding arbitration in accordance with Jewish law by a tripartite panel of qualified rabbis versed in such law.[45] Each party shall be entitled to appoint one member of this panel; the two members appointed in this manner shall appoint the third member of the panel. The award by a majority of such panel shall be confirmed in any court of competent jurisdiction pursuant to the CPLR without any right of appeal therefrom. An action shall be brought before a civil court only in the event of failure of one of the parties to appear before a rabbinic tribunal and only upon leave from a rabbinic tribunal.
>
> This undertaking shall be governed solely by the stipulations contained in this agreement. Any further documents pertaining to this transaction

[44] A full text of a *hetter iska* agreement can found in this writer's *Contemporary Halakhic Problems*, IV (New York, 1995), 380-383. The manifold provisions contained in that form may be incorporated by reference and made an integral part of any loan agreement. A standard loan form may be used provided that the words "loan" and "interest" are eliminated wherever they may occur and the words "funds" and "premium" are substituted in their stead and provided that the following clause is inserted:

> The parties to this agreement desire to comply fully with the provisions of Jewish law prohibiting payment and acceptance of interest and for this purpose agree that the terms of this agreement shall be made subject to the terms of *Hetter Iska* as provided in the form set forth in *Contemporary Halakhic Problems*, IV (New York, 1995), pp. 380-383. All provisions of said *Hetter Iska* form shall be incorporated and made part of this agreement as is fully set forth herein.

[45] The arbitration clause should clearly state that arbitration before a *bet din* is a condition precedent to any action before a civil court. In the most recent case involving a *hetter iska* agreement, *Koenig v. Middlebury Land Associates*, LLC, 16 Conn. L. Rptr. 90 (Conn. Sup. Ct. 2008), the issue was not whether the transaction was a loan or a joint business venture, but whether an arbitration clause in the *hetter iska* directing that disputes be heard by a *bet din* deprived the court of subject matter jurisdiction. The Court held that the language of the arbitration clause of the *hetter iska* did not expressly provide or necessarily imply that arbitration before a *bet din* was a condition precedent to any court action and denied the defendant's motion to dismiss.

bearing the signatures of the undersigned is hereby declared null and void insofar as Jewish law is concerned. Any such document is to be construed solely as an expedient designed to provide relief in a civil court in accordance with usual judicial procedures in the event of the undersigned's failure to appear before a rabbinic tribunal or failure to abide by the decision of that tribunal. Accordingly, it is expressly acknowledged that, in the event of recourse to a civil court by the undersigned or by any other party, the claims and privileges of the undersigned arising from any other document or from any other source are in no way to be diminished or compromised by virtue of this agreement. [46]

[46] One reason for inserting such a clause is the possible effect upon third parties who are not themselves parties to the *hetter iska*. A problem of that nature arose some time ago in *First International Bank, Ltd.* v. *L. Blankstein & Son, Inc.*, 88 A.D.2d, 501, 449 N.Y.S.2d 737 (1st Dep't 1983), aff'd, 59 N.Y.2d 436 (N.Y. 1983). That case involved an Israeli diamond merchant sued by an Israeli bank in a New York court because he failed to honor a promissory note. In a suit filed in New York State Supreme Court it was alleged that the practice in Israeli diamond circles permits return of gems to the wholesaler for any reason or for no reason. A similar issue was presented in *Israel Discount Bank Ltd.* v. *Rappaport*, 90 A.D.2d 740, 456 N.Y.S.2d 988 (1st Dep't 1982). In Israel, diamonds are typically purchased on the strength of a promissory note. That practice is described in another case, *Barclays Discount Bank Ltd.* v. *Levy*, 743 F.2d 722 (9th Cir. Cal. 1984), involving Siegman as a diamond dealer but in which he was not a party. When the market for diamonds fell dramatically in the early 1980's, Leo Siegman, recognizing that he could not realize a profit from the resale of diamonds that he had purchased, returned the diamonds to the seller. He contended that in doing so he voided the promissory note. However, in the interim, the seller had discounted the promissory note by presenting it to the Israeli bank. Executory agreements that allow for cancellation of a debt are not binding on an assignee unless the assignee has prior notice of such an agreement. The bank argued that, as an assignee, it was not bound by any executory agreement between Siegman and the seller and, accordingly, sued to collect the debt represented by the promissory note. The facts in *First International Bank* v. *Siegman* were similar to those before the Court in *Barclays* v. *Levy*. In *First International Bank* v. *Siegman*, Siegman was in a position to counter that all arrangements between Israeli banks and their clients are governed by a *hetter iska* and that the *hetter iska* creates a partnership between the bank and the party to whom it advances funds in return for assignment of the debt represented by the *hetter iska*. The Uniform Partnership Act § 12 provides that notice to one partner is tantamount to notice to all partners. See Alan R. Bromberg, *Crane and Bromberg on Partnership* (St. Paul, 1968), p. 322 and p. 322, note 73. Since the bank had effective notice of the agreement permitting cancellation of the debt upon return of the diamonds through notice to its partner, i.e., the seller, Siegman might have argued he was relieved of liability to the bank as well.

Although the *hetter iska* was not raised as a consideration in *First International Bank*, nevertheless, that case serves to underscore the fact that complications affecting third parties may arise as the result of a *hetter iska* arrangement. A clause in the nature here proposed would result in the court considering the *hetter iska* as a conventional loan agreement with regard to any suit brought by a third party.