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Arbitration Research Paper

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Examining the Arbitration Agreement known as the “Halachic Prenup”

Since the 1990s, a document known as the “Halachic Prenup” has been endorsed by many of the most prestigious rabbis of the Jewish world.¹ While the Halachic Prenup was primarily initiated by rabbis associated with Yeshiva University, an institution at the center of Modern Orthodox Judaism, it is now endorsed by an expanded list of Rabbis.² The Rabbinical Council of America (“RCA”) has published multiple resolutions concerning the Halachic Prenup, including a requirement that their “member rabbis” not facilitate a wedding if the couple has not signed the Halachic Prenup.³

What is the purpose of this Halachic Prenup? According to Jewish law, a man must give a bill of divorce to his wife in order to terminate their marriage, which would permit her to marry another man.⁴ This bill of divorce is called a *get*.⁵ However, the past few decades have brought attention to the plight of the *agunah*: a woman who does not have a *get* and is chained to a dead marriage.⁶ A woman can become an *agunah* in different ways, but relevantly, and most problematically in modern times, the “*Agunah Problem*” refers to cases where a husband withholds a *get* from his wife, to prevent the religious termination of their marriage and the

¹ https://www.getora.org/endorsements?petri_ovr=specs.ExcludeSiteFromSsr%3Atrue&ssrIndicator=false;
<https://www.ou.org/life/relationships/ending-agunah-problem-as-we-know-it-shlomo-wiessmann/>

² <https://rabbis.org/i-support-the-use-of-a-halachic-prenuptial-agreement/>

³ <https://theprenup.org/explaining-the-prenup/rabbinic-endorsements/>

⁴ Deuteronomy 24:1

⁵ <http://www.getyourget.com/get-basics#whatisaget>

⁶ <https://www.ou.org/life/relationships/ending-agunah-problem-as-we-know-it-shlomo-wiessmann/>

possibility of her remarriage.⁷ The Organization for the Resolution of Agunot (“ORA”) defines this recalcitrance as domestic abuse, as the husband is using the Jewish religion to exert control over his wife and render her powerless in her relationships and her future, due to her chained marital status.⁸ Further, any children a woman would have with another man in the absence of a *get* from her first husband would be considered bastards.⁹

The Halachic Prenup is a contract that seeks to rectify this power imbalance.¹⁰ However, the name “Halachic Prenup” can be misleading as to the means through which the document aims to serve its purposes.

Parties entering into a true prenuptial agreement should be each advised by separate legal counsel.¹¹ The process includes a full disclosure of both parties’ assets, which should be made by affidavit.¹² In the State of New York, a prenuptial agreement must be executed with the same formality as a property deed.¹³ This would include filing with the appropriate county clerk to record the document.¹⁴

The Halachic Prenup does not meet the above standards for a prenuptial agreement. Parties signing the Halachic Prenup are not advised in the procedural guidelines to obtain

⁷ <https://www.ou.org/life/relationships/ending-agunah-problem-as-we-know-it-shlomo-wiessmann/>

⁸ <https://www.ou.org/life/relationships/ending-agunah-problem-as-we-know-it-shlomo-wiessmann/>. The get process grants disproportionate power to the man because he is the one who must give it to the woman, and even though she must accept the *get* as well, there are more leniencies found in the man’s remarriage in regards to a recalcitrant wife.

⁹ <https://theprenup.org/the-agunah-problem/>

¹⁰ <https://www.getora.org/faqs-about-the-prenup>

¹¹ Divorce Mediation: Common Sense and the Crisis of Divorce by Robert Kirkman Collins; <https://www.pnc.com/insights/wealth-management/being-prepared-/prenuptial-agreements-key-considerations.html>

¹² Divorce Mediation: Common Sense and the Crisis of Divorce by Robert Kirkman Collins; divorcelawfirmnewyork.com/family-law/prenuptial-agreements/#:~:text=In%20order%20to%20be%20enforceable,and%20it%20cannot%20be%20unconscionable.

¹³ <https://www.nycbar.org/get-legal-help/article/family-law/marital-agreements/prenuptial-agreements/#:~:text=A%20prenuptial%20agreement%20is%20valid,property%20deed%20to%20be%20recorded.>

¹⁴ <https://www.nyc.gov/site/finance/taxes/property-recording-documents.page>

separate legal counsel, or to seek any legal advice (unless signing the “optional” sections).¹⁵ Parties are not required or suggested to disclose assets in advance of or at the signing of the Halachic Prenup.¹⁶ It is “strongly discourage[d]” to sign the Halachic Prenup at the wedding itself, since it is recommended that the parties sign upon “opportunity to read it over and accept its terms,” but an officiating rabbi can act in place of a notary if the party does choose to sign at their wedding, under New York law.¹⁷ The procedures for the signing of the Halachic Prenup are not consistent with the standards of a legal “prenup.”

Therefore, the question becomes: What actually is the legal significance of the Halachic Prenup? The most common Halachic Prenup document can be found under the “Gittin (Jewish Divorce)” section of the Beth Din [Jewish Court] of America website and clicking “Beth Din of America Prenuptial Agreement,” which will open a tab for theprenup.org.¹⁸ By clicking “sign the prenup” on the homepage of theprenup.org, five PDF options will appear, including a PDF labeled “Standard Prenup.”¹⁹ It is almost too obvious to note, but every aspect of the search for this document clearly indicates to the parties that what they are about to sign is, in fact, a prenuptial agreement.

However, inspecting the document labeled “Standard Prenup,” the heading at the top of each page does not have the title “Standard Prenup” as the PDF is labeled; rather, the biggest

¹⁵ https://www.getora.org/guide-to-signing?forceBolt=true&petri_ovr=specs.ExcludeSiteFromSsr%3Atrue&ssrIndicator=false

¹⁶ https://www.getora.org/guide-to-signing?forceBolt=true&petri_ovr=specs.ExcludeSiteFromSsr%3Atrue&ssrIndicator=false

¹⁷ https://www.getora.org/guide-to-signing?forceBolt=true&petri_ovr=specs.ExcludeSiteFromSsr%3Atrue&ssrIndicator=false. In my personal experience, signing the Halachic Prenup at the wedding itself does happen fairly often, as Rabbis with good intentions but without legal knowledge, who will not marry couples without the Halachic Prenup being signed, will bring copies to the wedding and perform the Halachic Prenup before the ceremony.

¹⁸ <https://bethdin.org/gittin/>

¹⁹ <https://theprenup.org/the-prenup-forms/>

letters of the page read: “Binding Agreement.”²⁰ While the document states that the parties “intend to be married in the near future,” which might sound like a prenuptial agreement, it is actually another form of an agreement.²¹ Page four of the document, the instruction page, notes at the bottom of the first column of the page the “Binding Civil Court Effect.”²² In addition to being enforceable under Jewish law, the legal effect of the Halachic Prenup is as follows: “When properly executed, this Agreement is enforceable as a **binding arbitration agreement** in the courts of the United States of America” (emphasis added).²³

An arbitration agreement is made to determine an out-of-court method for dispute resolution between parties.²⁴ In arbitration, an arbitrator or arbitrators specified by the arbitration agreement or assigned by a court will hear both sides of the dispute, instead of the parties appearing before a judge.²⁵ The arbitrator’s decision, known as an award, can be entered into judgment in a court of law.²⁶ A binding arbitration is final: it cannot be appealed, and will not be overturned by a court without a glaring unconscionability in procedure.²⁷ Arbitrators are not bound by American law or precedent, though they may choose to rely on such, but they may use any determination of the dispute they find best.²⁸

Arbitration agreements are commonly used by Jewish courts, which are called the “Beth Din,” as a method of allowing rabbis to make decisions based on Torah law that will be upheld

²⁰ https://res.cloudinary.com/orthodox-union/image/upload/v1649326907/prenup/2022%20pdfs/Standard_Prenup_Rev_Nov_2018_3.pdf

²¹ https://res.cloudinary.com/orthodox-union/image/upload/v1649326907/prenup/2022%20pdfs/Standard_Prenup_Rev_Nov_2018_3.pdf

²² https://res.cloudinary.com/orthodox-union/image/upload/v1649326907/prenup/2022%20pdfs/Standard_Prenup_Rev_Nov_2018_3.pdf

²³ https://res.cloudinary.com/orthodox-union/image/upload/v1649326907/prenup/2022%20pdfs/Standard_Prenup_Rev_Nov_2018_3.pdf

²⁴ <https://www.law.cornell.edu/wex/arbitration>

²⁵ 9 U.S.C.A. § 5

²⁶ 9 U.S.C.A. § 9

²⁷ ARBITRATION: THE “NEW LITIGATION”, 2010 U. Ill. L. Rev. 8; 9 U.S.C.A. § 10

²⁸ <https://lk-k.com/wp-content/uploads/Arbitral-Precedent-Dream-Necessity-or-Excuse.pdf>

by the civil courts.²⁹ Once the parties agree by writing to appear before the Beth Din as arbitrators, in an arbitration agreement called a *shtar berurin*, the rabbis of the Beth Din are authorized to make their determinations based on Torah law factors, and any other factors the rabbis deem pertinent to the case.³⁰ This often does include local state and federal law: a common principle the Beth Din may apply in ordinary business disputes is “Dina D’Malchusa Dina (literally, ‘the law of the government is the law’),” which means the Beth Din may consider American law as the basic principle in the dispute.³¹ However, arbitration allows the Beth Din to choose how much weight American law is given to any factor brought before them. The Beth Din’s award can then be entered into civil court and made enforceable by American law. This makes arbitration the ideal dispute resolution for Orthodox Jews, whose laws demand presenting any dispute between two Jewish parties before a Beth Din in a case called a *din torah*.³² Orthodox Jews are only authorized to bring their disputes with one another to the civil court if the Beth Din grants them this permission through a *heter ’arkaot*.³³

The so-called Halachic Prenup is practically not much different than a regular Beth Din agreement to arbitrate. Part I of the “Standard Prenup” agreement from theprenup.org reads as follows:

I. Arbitration. Should a dispute arise between the parties, so that they do not live together as husband and wife, they agree to submit to binding arbitration before the Beth Din of America... which shall have exclusive jurisdiction to decide all issues relating to a get (Jewish divorce), the ketubah and tena'im (Jewish premarital agreements) entered into by the Husband-to-Be and the Wife-to-Be, any issues and obligations arising from or in connection with this Agreement (including under paragraphs II, III and VI hereof) and

²⁹ <https://crcbethdin.org/about-din-torah/faq/>

³⁰ <https://crcbethdin.org/wp-content/uploads/2021/10/shtar-berurin-agreement-to-arbitrate-2021.pdf>

³¹ <https://crcbethdin.org/about-din-torah/faq/>

³² https://images.shulcloud.com/202/uploads/Divrei_Torah/Beit-Din-101.pdf

³³ <https://bethdin.org/beth-din-basics-the-hazmana-process/>

any disputes relating to the enforceability, formation, conscionability, and validity of this Agreement (including any claims that all or any part of this Agreement is void or voidable) and the arbitrability of any disputes arising hereunder.³⁴

The wording for the Chicago Rabbinical Council (“cRc”) version of the Halachic Prenup (a similar and connected entity to the RCA has much the same wording, with a couple notable exceptions.

Firstly, Part I is not distinctly labeled “Arbitration,” instead starting immediately with the words, “Should a dispute arise...” Next, the language differs by saying “... they agree to refer their marital dispute to the Beth Din Zedek of the Chicago Rabbinical Council... acting as an arbitration panel, for a binding decision,” instead of “submit to binding arbitration... which shall have exclusive jurisdiction to decide all issues relating to a *get*.”³⁵ Perhaps this is a purely irrelevant semantic difference, but one interesting to note, since the cRc document is mainly copied from the RCA’s.

The cRc Halachic Prenup continues: “II. The decision of the Beth Din shall be fully enforceable in any court of competent jurisdiction.”³⁶ This addition acknowledges a trait of arbitration that is noted by both the RCA and cRc documents in their instruction pages, but is only on the cRc version of the actual agreement.

The cRc document then utilizes the same language at the RCA regarding the Beth Din’s jurisdictional scope concerning the Jewish divorce and Jewish premarital agreements, but it does not include the jurisdiction over “any issues and obligations arising from or in connection with

³⁴ https://res.cloudinary.com/orthodox-union/image/upload/v1649326907/prenup/2022%20pdfs/Standard_Prenup_Rev_Nov_2018_3.pdf

³⁵ <https://crcbethdin.org/wp-content/uploads/2021/10/Prenup-Standard082114.pdf>;
https://res.cloudinary.com/orthodox-union/image/upload/v1649326907/prenup/2022%20pdfs/Standard_Prenup_Rev_Nov_2018_3.pdf

³⁶ <https://crcbethdin.org/wp-content/uploads/2021/10/Prenup-Standard082114.pdf>

this Agreement...”³⁷ Instead, it adds at the end of the paragraph: “Each of the parties agrees to appear in person before the Beth Din at the demand of the other party.”³⁸ This appears more legally enforceable than the RCA provision, as a provision agreeing to the Beth Din’s jurisdiction to arbitrate the “enforceability, formation, conscionability, and validity” of the very arbitration agreement itself seems to involve circular reasoning: If one was contesting an agreement’s validity, it hardly seems likely they would adhere to the agreement’s provisions on such a question.

Section II of the RCA Halachic Prenup, which is Section IV of the cRc version, is marked as “optional” on both documents. The optional section of the Halachic Prenup, which authorizes the Beth Din to arbitrate monetary disputes and child custody disputes should they arise, is a fascinating topic for exploration beyond the scope of this essay because it does not bear relevance to the *agunah* crisis. This is the section for which ORA recommends consulting with a rabbi and attorney before signing.³⁹ Interestingly, in my time as an ORA campus fellow, we were taught to discourage couples signing the prenup from signing this optional section.

The most famous section of the Halachic Prenup is the “Support Obligation.” This is based on the Jewish law from the parties’ engagement contract, their *tana'im*.⁴⁰ The *tana'im* provide that the husband is responsible to provide his wife with “food, clothing, and shelter to his wife so long as they remain married.”⁴¹ If a man is refusing to give a *get*, the parties are still married by Jewish law. The Halachic Prenup is therefore backing this Jewish law support

³⁷ <https://crcbethdin.org/wp-content/uploads/2021/10/Prenup-Standard082114.pdf>;

https://res.cloudinary.com/orthodox-union/image/upload/v1649326907/prenup/2022%20pdfs/Standard_Prenup_Rev

³⁸ <https://crcbethdin.org/wp-content/uploads/2021/10/Prenup-Standard082114.pdf>

³⁹ <https://www.getora.org/guide-to-signing>

⁴⁰ https://www.getora.org/faqs-about-the-prenup?petri_ovr=specs.ExcludeSiteFromSsr%3Atrue&ssrIndicator=false

⁴¹ https://www.getora.org/faqs-about-the-prenup?petri_ovr=specs.ExcludeSiteFromSsr%3Atrue&ssrIndicator=false

provision in a way that can become legally enforceable -- all through the arbitration agreement of the parties.

In this section, the “Husband-to-Be” obligates himself to an amount determined necessary to fulfill his obligations of providing his wife food, clothing, and shelter:

I obligate myself to support my Wife-to-Be according to the requirements of Jewish law governing Jewish husbands. Furthermore, I hereby now (me’achshav) obligate myself, in a manner that I cannot exempt myself with any claim... to support my Wife-to-Be from the date that our domestic residence together shall cease for whatever reasons at the rate of \$150 per day (calculated as of the date of our marriage, adjusted annually by the Consumer Price Index–All Urban Consumers, as published by the US Department of Labor, Bureau of Labor Statistics) in lieu of my Jewish law obligation of support, as hereinabove cited and circumscribed, so long as the two of us remain married according to Jewish law, even if she has another source of income or earnings. Furthermore, I waive my halakhic rights to my wife’s earnings for the period that she is entitled to the above-stipulated sum, and I recite that I shall be deemed to have repeated this waiver at the time of our wedding.⁴²

Essentially, this paragraph reinforces a husband’s regular, daily support obligation to his wife. The support obligation is calculated by the Beth Din in their arbitration only if the husband refuses the *get* process, and they will backdate it from the date of separation if this case.

Importantly, if it is the wife who refuses to receive the *get*, she waives all rights to the support obligation, as she is the one preventing the religious divorce.⁴³

⁴² https://res.cloudinary.com/orthodox-union/image/upload/v1649326907/prenup/2022%20pdfs/Standard_Prenup_Rev_Nov_2018_3.pdf

⁴³ https://res.cloudinary.com/orthodox-union/image/upload/v1649326907/prenup/2022%20pdfs/Standard_Prenup_Rev_Nov_2018_3.pdf

The idea behind the financial obligation is that the substantial cost of refusing to religiously divorce one's wife will motivate a recalcitrant husband to free his wife of their marriage. This is non a fail-proof idea: What if the loss of \$150 per day, which calculates to \$54,750 a year, is not enough to motivate a recalcitrant husband? ⁴⁴ Even if a court enforces the Halachic Prenup as the agreement to arbitrate, and enforces the award of the arbitrators of \$150 per day, all according to the plan the Halachic Prenup sets in place, perhaps the man is so wealthy that he would rather lose the money and spite his wife, keeping her chained to him and unable to marry another. This is a possibility, and organizations such as ORA work full-time to find different ways to end each *agunah's* plight. However, the Halachic Prenup has been 100% effective in cases where it was "properly signed and available."⁴⁵ The Halachic Prenup -- or, rather, the Jewish Premarital Arbitration Agreement-- is a huge step in ending the *agunah* crisis, and a compelling example of arbitration's unique capabilities in the interplay of Jewish and American law.

⁴⁴ https://www.getora.org/faqs-about-the-prenup?petri_ovr=specs.ExcludeSiteFromSsr%3Atrue&ssrIndicator=false

⁴⁵ https://www.getora.org/faqs-about-the-prenup?petri_ovr=specs.ExcludeSiteFromSsr%3Atrue&ssrIndicator=false