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DEMYSTIFYING THE **HETER ISKA**

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Rabbi Aaron Kraft is a cRc Dayan Kavua. He also serves as Rosh Bais Midrash in Bais Chaim David. Among his many duties, Rabbi Kraft works on providing explanations on Bais Din halakhic forms.

Access to capital is a key component to a successful capitalist economy. Without the availability of funds, the economy cannot maintain its stability or promote financial growth and opportunity. Therefore, forbidding interest-bearing loans risks stifling the sustainability of the economy. People are incentivized to lend money by affixing a time-value to those funds, allowing the creditor to collect interest payments in return for extending the loan to the borrower in need. If not for the institution of interest, loans for personal and business needs would be significantly more difficult to procure. We should therefore try to understand the nature of the Torah's *issur ribbis*, prohibition to lend money with interest to fellow Jews.

Rav Michael Rosensweig, *shlit"a*, suggested that in order to appreciate this phenomenon, we should view the *issur ribbis* through the lens of *tzedakah*. Two of the three mentions of *ribbis* in the Torah (see *Shemos* 22:24 and *Vayikra* 25:35-38)¹ appear in the context of *tzedakah*. The *Rambam* (*Hilchos Matnos Aniyim* 10:7) teaches that assisting a person in need by helping him or her achieve financial independence constitutes the highest form of charity. He cites granting a loan as an example of such charity that assists an individual achieve financial self-sufficiency. It would be overwhelming and burdensome for such an individual, attempting to attain financial stability, to repay the loan with additional interest. In this way, an interest free loan further fulfills our obligation to help and support those in need through acts of love and kindness. With this background, we turn to loans even outside the context of charity. Even in the world of capitalist ventures, when a fellow Jew needs access to capital, we approach this need from a place of love and kindness. In a sense, the foundation of the *issur ribbis*, is predicated on the idea of *tzedakah*

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FOR THE SAKE OF KASHRUS

by Rabbi Akiva Niehaus

Rabbi Akiva Niehaus is the Director of Kashrus Operations of cRc Kosher and Rabbinical Coordinator of the Liquor Department. He is the author of Sherry Casks: A Halachic Perspective, a groundbreaking work on the kashrus of Scotch aged in sherry casks. He is also a Certified Sake Professional.

In the course of an average day, the cRc receives multiple inquiries from consumers regarding the kashrus of various alcoholic beverages. As part of our efforts to help the kosher consumer find kosher options, we do our best to stay on top of the kosher liquor industry. This involves studying governmental regulations, keeping up with industry trends, visiting liquor shops – and sometimes even scheduling a visit to Japan – the hometown of sake.

Japan – the land of the rising sun – is viewed as a mysterious country, with interesting customs and rituals – and it is certainly that, plus more. Leave your shoes by the door – put on slippers. (It's a good idea to wear slip-on shoes when visiting Japan.) Get ready for small hotel rooms – land space is at a premium. (In fact, the Tokyo hotel I stayed in had the lobby on the 27th floor – the lower 26 floors were an office building.)

What is sake? Sake is Japanese rice wine, made by fermenting steamed rice. It has been produced in Japan for over 1000 years, and it's becoming more popular around the world. The ingredients are simple: rice, water, yeast and koji mold spores (more on this a different time) – all of which present minimal kashrus concerns. Some varieties may have alcohol added to the product which may add some kashrus concerns; one should look for bottles labeled as Junmai ("pure") which do not have added alcohol. The production equipment is largely dedicated to sake – not shared with other products.

So, what is the kashrus issue? Surprisingly, the main issue may be *bishul akum*. When one thinks about *bishul akum*, one often thinks about restaurants – make sure the Mashgiach turned on the fire under the steak. It also applies to homes – make sure the household help doesn't cook supper without your involvement. But

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1. Contrast with Devarim 23:20-21

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and *chessed* regardless of whether extending a loan to an indigent individual or to a business entrepreneur.²

This perspective can also help us appreciate the existence of the *Heter Iska* contract. When it comes to business loans in particular,³ lending the large sums often needed without the possibility to profit from interest, is not always feasible. Throughout different periods in history, this difficulty was amplified by virtue of the fact that moneylending was perforce one of the primary Jewish professions. The origination of the *Heter Iska* is sometimes misunderstood and characterized as a legal loophole that defies the Torah value of lending money interest free, and permits moneylending with interest, despite the prohibition. However, both assertions should be revisited. In light of the context provided by Rav Rosensweig, the *Heter Iska* need not be viewed as a legal subterfuge defying the values of Torah at all. To the contrary, the *issur ribbis* defines the relationship between lender and borrower as one predicated on *tzedakah* and *chessed*. However, if this exuberant expression of *chessed* leads to a hesitance amongst Jews to lend each other money, then it essentially undermines the more basic level of *tzedakah*, namely the lending of money to begin with. In other words, if interest-free loans are unsustainable due to the economic circumstances that define our reality, certainly the Torah desires that the *chessed* of lending money, even if it is a lower-level expression of *chessed*, should still exist. In this sense, the *Heter Iska* is not a suspicious means of circumventing the Torah law, but rather an ingenious way of upholding one of the Torah's values – the importance of accessible capital to all those who need.

As far as the second misconception, we should emphasize that the *Heter Iska* does not permit *ribbis* at all, a point mentioned by Rav Moshe Feinstein in his responsa (*Y.D.* 2:62). To appreciate this fact, let us examine the mechanics of the *Heter Iska* contract to better understand

why it serves as a favorable substitute for an interest-bearing loan.

The *Heter Iska* contract that is commonly employed in business deals to avoid problems of *ribbis* does not appear in the Talmud. However, it emerges from a concept that originates in the Talmud (*Bava Metzieh* 104b) known as an *iska* partnership agreement. An *iska* agreement consists of an investing partner who funds a

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venture and a managing partner who operates the venture. The agreement is known as a *palga milveh palga pikadon*, half loan – half investment. If the venture generates profits, the investing partner is entitled to half of the profits corresponding to his half of the invested principal and the managing partner is entitled to the other half of the profits corresponding to the other half of the principal that is characterized as

a loan to the managing partner. After the profits are realized, the investing partner receives back his principal and half of the profits, and the managing partner keeps half the profits and returns the other half of the principal to the investing partner. Therefore, if Shimon fronts \$1,000 for Levi to invest, \$500 constitutes Shimon's investment and \$500 is a loan to Levi. If Levi invests the funds and generates a profit of \$500, Shimon is entitled to the return of his principal plus half of the profits, which would total \$750. Of the remaining \$750, Levi keeps his portion of the profits, \$250, and returns the loan amount of \$500 to Shimon. If the investment suffers a loss, the two partners bear the loss equally. In other words, if the principal decreases by \$250, Shimon's principal value would decrease to \$375 and Levi would still owe \$500 for the portion of the original funds that constitutes a loan. Because the managing partner exerts considerable effort to invest the funds or operate the business, the *iska* arrangement requires that he receive some degree of additional compensation (even if only minimal) so that his efforts not be considered a form of *ribbis*, or extra “payment” to the investing partner in return for the half of the principal that was given to him as a loan (*Shulchan Aruch Y.D.* 177:2).

We can now understand the *Heter Iska* contract. If a lender wishes to loan money to a Jewish borrower with interest, he must structure the transaction as an *iska* arrangement. Instead of lending \$1000, he will invest in the borrower's business as described above. \$500 will be considered the investment portion of the transaction and the other \$500, a loan. The lender, as an investing partner, can collect his share of the profits. The rest of the profits accrue to the managing partner who received this “loan.” However, recharacterizing the lender as an investing partner exposes him or her to more significant risk than a classic loan. Namely, if the business venture underperforms, an

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2. Rav Rosensweig also notes that in his opening comments to *Hilchos Malveh v'Loveh*, the *Rambam* emphasizes that the basic foundation of lending money relates to assisting those in need.

3. The *Heter Iska* document is also used for personal loans as well and depending on the nature of the transaction, the language of the document may need to be adjusted. This article will focus on the basic *Heter Iska* contract commonly used in business transaction loans.

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what does it have to do with sake? Everything.

Shulchan Aruch (Yoreh Deah siman 113) states that any food which is a) not edible raw (*ne'echal chai*), and b) suitable to be served at a royal banquet (*oleh al shulchan melachim*), must be cooked by a Jew. Is rice edible raw? No. Is rice suitable to be served at a royal banquet? Yes. Ruling: Rice is subject to concerns of *bishul akum*. Since the sake rice is prepared without the involvement of a Jew, perhaps the sake is forbidden due to *bishul akum*.

Very few sake brands are produced under hashgacha, so before being able to guide consumers on the kosher status of sake, we needed more information. So began the long journey, starting with conversations with Mashgichim who visit Japan and sake experts, even taking a 3-day intense course on sake, but we felt that we needed to see it in person. Hence, my visit to Japan to visit sake breweries and see the process firsthand.

The first question we tackled is if sake rice in particular is suitable for a royal banquet. Most premium sake manufacturers use a special type of rice known as sakamai – high in starch, low in fat and protein – and we weren't sure how tasty it would be. Well, I had the opportunity to taste several samples of freshly steamed rice and it wasn't very good; it tasted chewy, rubbery, dry and starchy. In addition, the rice kernels looked small, round, clumpy, and piecey. I added some salt and pepper (you know those little packets in the airline meals) and it didn't substantially improve the taste. The steamed rice was definitely edible (at least *k'ma'achal ben drusa'i*) but it certainly wasn't *oleh al shulchan melachim*.

Both because of the taste and appearance, this rice would never be eaten at a regular meal and certainly not at a royal dinner. However, we suspected that perhaps the rice wasn't tasty enough to be served by a royal function only because it wasn't fully cooked, but perhaps further cooking would enhance the rice. So, we took samples of the steamed rice and after additional cooking, we concluded that the rice improved enough to be considered *oleh al shulchan melachim* (see *Chesed L'Avrohom* cited in *Darkei Teshuvah* 113:9, and *Chelkas Binyomin* 113:9 *biurim d.h. im* for a full discussion of this topic).

Now that we clarified that steamed sake rice is considered *oleh al shulchan melachim*, the next topic to explore was the method of cooking. The prohibition of *bishul akum* only applies to standard forms of food preparation, such as cooking with liquids or roasting over a fire; other types of preparation, such as smoking, are not included. What about steaming? *Minchas Yitzchok* (3:26:6, 10:67; see, also, *Darkei Teshuvah YD* 113:16) rules that foods cooked by steam are excluded from the prohibition of *bishul akum*, especially when combined with other factors (as will be discussed below). It is the policy of many kashrus agencies (cRc included) that food produced with live steam is not subject to *bishul akum*, whereas some other agencies are lenient only with other factors. Since sake rice is always steamed – never cooked – this may be considered strong grounds to argue that sake is not subject to the concerns of *bishul akum*.

The final area we explored is the steaming equipment. Rav Moshe Feinstein is cited as

ruling that food prepared in a commercial setting on specialized equipment is not subject to *bishul akum*.

Why is this? The primary reason behind the prohibition of *bishul akum* is to avoid socialization with the other nations. There is generally no concern of socialization with anonymous workers. Although we would generally apply the prohibition in all circumstances (*lo plug*), we can be lenient where the equipment is specialized and different than homemade production.

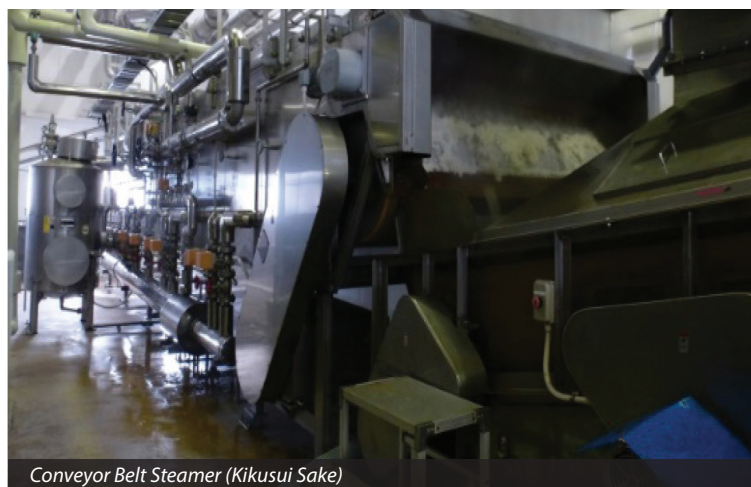
With regard to sake production, sake breweries use different types of steamers. Some traditional sake breweries use domestic-like pots (often just in a larger size), but a large percentage of sake on the market, especially the products prepared for export (which are often prepared by large breweries), is prepared with specialized equipment, such as with a large conveyor belt steamer, and these would not be subject to the prohibition of *bishul akum*. Thus, it appears that the vast majority of breweries have this leniency. In practice, many kashrus agencies do not rely on this leniency on its own, and only apply this in conjunction with other factors, such as cooking via steam.

In conclusion, sake with a reliable hechsher is the best way to go, but if not available, unflavored sake is acceptable without hashgacha (unless it was aged in wine casks), but it is advisable to only use products labeled as Junmai.

Helping consumers keep kosher is our mission statement and sometimes that takes us across the ocean, all the way to Japan, for the **sake** of kashrus.



Fukumitsuya Sake Brewery



Conveyor Belt Steamer (Kikusui Sake)

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investing partner could lose a portion of the investment and not receive any profits. A loan, on the other hand, is guaranteed regardless of business performance. In order to protect the initial invested principal (the substitute for the loan principal) and to ensure a rate of return in the profits (the substitute for the fixed interest rate), two additional features appear in the standard *Heter Iska* contract.

Unlike a loan where the principal is guaranteed, the managing partner of the *iska* cannot guarantee that the investment portion of the *iska* will be repaid. Definitional to the concept of an investment is that the principal is at risk of being lost (*Rama* *ibid.*). However, if the *Heter Iska* contract cannot secure the principal in a compelling manner, lenders will hesitate to enter such an agreement and may resort to lending money in a prohibited fashion. Therefore, the *Heter Iska* document includes a clause that requires any loss of principal be verified by testimony from two kosher witnesses (*Shach* *Y.D.* 167:1). Although possible to produce such witnesses, it is unlikely to have two witnesses who meet the strict *beis din* standards and also have complete knowledge of the business operation such that they are qualified to testify. In the absence of such witnesses, the investing partner can assume that no loss occurred and demand the return of the entire principal including the investment portion.⁴

Additionally, an interest-bearing loan accrues interest irrespective of the venture's success. In contrast, an investment cannot guarantee realized profits. For the potential lender to feel confident entering into an *iska* arrangement, the *Heter Iska* must also ensure that in all likelihood profits will be realized. The contract therefore stipulates that the investing partner may assume that the anticipated profits are realized unless the managing partner takes a solemn oath in *beis din* to the contrary (*Shach* *ibid.*). The eventuality of someone taking this oath is unlikely as *batei din* discourage taking oaths and Jews generally refrain from swearing. Usually, the expected profits are set as a fixed number or rate of return at the onset of the transaction. This amount is known as *schar hispashrus* because it is an agreed upon sum that the investing partner accepts, regardless of how much profit is produced, in lieu of the managing partner's oath detailing the exact accounting of the profits in the venture (see Rav Binyamin Cohen's *Kuntres Heter Iska* section 2).

Therefore, without witnesses to the contrary and without a solemn oath in *beis din*, the managing partner who received the funds in the form of a *palga milva palga pikadon*, half loan – half investment, must repay the initial principal and agreed upon rate of return even from his personal funds should the venture not achieve the anticipated success. However, we should note that because the investing partner is only entitled to half of the profits, the rate of return "guaranteed" by the *Heter Iska* contract should be half of the reasonably expected profits from this type of business venture. So, if the rate of return is 10%, the business venture should be able to reasonably generate a 20% profit margin (*Kuntres Heter Iska* *ibid.* and *Igros Moshe* *Y.D.* 2:62).

Another version of the *Heter Iska* known as a *kulo pikadon*, complete investment, agreement exists as well. The same principles govern the structure of this document with one major difference. Instead of the investing partner fronting the money half as an investment in the business and half as a loan to the managing partner, all the funds are designated as an investment in the managing partner's business. This version may be preferable when trying to substitute a high interest rate when the business transaction is not expected to yield a high enough profit margin to justify half of those profits equaling the going interest rate. In this scenario, in the unlikely event that the managing partner would prove with witnesses that all or a portion of the principal was lost, the investing partner could potentially suffer a greater loss because all the money was advanced as an investment and is therefore subject to being lost entirely. In the half loan – half investment version, the investing partner only risks losing half of the principal advanced in the form of an investment.

The purpose of this article is to demystify the *Heter Iska* contract, but not to address many of the nuanced questions that can arise when conducting a transaction that would require a *Heter Iska* to avoid the prohibition of *ribbis*. Before engaging in such a transaction, a *rav* or *beis din* should be consulted to ensure proper application of these principles. Of course, if someone has the financial wherewithal to lend money without charging interest, doing so constitutes a great mitzvah and promotes true love and kindness amongst Klal Yisrael.

4. In the vast majority of cases this provision will prevent the investing partner from incurring a loss of principal; however, there are some unusual circumstances where a loss of principal could be realized. See *Igros Moshe* *Y.D.* 2:62.

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