



Restoring the Primacy of Choshen Mishpat

INTERNATIONAL TRADE AND *HALACHAH*

We live in an era of increasing globalization. Even the simplest of goods are often designed in one country, manufactured in a second, on behalf of a company located in a third country. While international trade enables consumers to benefit from products made throughout the world, it comes at the cost of increased complexity of supply chains, legal matters, and some fascinating halachic questions, which are the focus of this article.

Minhag, business norms, will play a critical role in monetary transactions. When parties enter into an agreement, it is certainly wise to specify all of the terms of the transaction. If, however, aspects of the transaction are not discussed, the local *minhag*, or business norms, will govern. In fact, the *Yerushalmi* writes: *Minhag mevatel halachah* — *minhag* actually overrides the laws of *Choshen Mishpat*.

This does not mean that one can violate a prohibition if it is the *minhag* to do so. *Minhag* simply defines the terms of an agreement, even in ways that may differ from the halachic default.

When trade is local, a *minhag* is fairly simple to verify: A simple query to a handful of local businessmen is sufficient. When trade is international, however, the question becomes more complex. How does *minhag* govern trades between different locations that have conflicting norms? Which party's *minhag* would prevail, and to what extent can a foreign party be held liable for a local *minhag* of which he may not have been aware?

To properly understand these issues, we need a basic understanding of why *minhag* plays such an important role in *Halachah*. The reason is that parties are presumed to be operating according to normative business practices, unless they specify otherwise. Thus, whenever a deal is made without clearly stipulating the terms, the parties are implicitly agreeing to all of the typical terms and conditions. A party that desires different terms has the burden of making such stipulations before the deal is finalized.

A common modern application of *minhag* is terms. If the industry standard is to allow customers 30 or 60 days to pay their invoices, all customers would be entitled to that grace period unless the parties specified otherwise in advance.

Normative Practices

Based on the above, *minhag* is only meaningful if it is well known and widespread.¹ Since its halachic underpinning is that the parties to an agreement are implicitly accepting the *minhag*,² they can only be held to *minhagim* that they were aware of. If, however, there are differing practices within the local community, or if the matter is uncommon and not well known, there would be no qualified *minhag*, and the default *halachah* would apply. Thus, if many wholesalers in a particular industry give their customers 60 days to pay their invoices, but some do not, a customer would not be entitled to those terms unless it was specified in advance. Because the practice is not universal, it would not qualify as a *minhag*.

Doing Business With Foreigners

This leads to a crucial point. When both parties to a trade are local, they are both familiar with the local norms. What is the *halachah* if a foreigner does business and then claims to have been unaware of local practice? This question is subject to significant debate. *Shach* 42, *Tumim* 61 (3) rule that the *minhag* is not binding on a party unaware of its existence. *Erech Shai*, *Even Haezer* 50:7 adds that a foreigner is believed if he claims to have been ignorant of the practice. Thus, a Belgian businessman who sells diamonds at a trade show in the U.S. would not be bound to local practice of which he was unaware.

However, *Chochmas Shlomo* 42 argues that the burden of proof is on the person claiming ignorance of the local practice. In the absence of proof, we presume he was aware of the local *minhag*.³

The same would apply to an internet-based transaction. If the location of the customer or provider is not obvious, one cannot argue that either party accepts being bound by local norms, since no one is aware of which location they are dealing with. In such a case, only terms specified in the agreement would be applicable.

This discussion applies when one party was (or claims to have been) unaware of specific practices in the area in which they were doing business. What happens when the trade is done between two locations in each of which well-

known but conflicting practices are held? Whose rules govern the transaction?

Importing Workers

Yerushalmi, Bava Metzia 7:1 discusses a case involving employment agreements between residents of two cities. Workers in one particular city worked longer hours than workers in the other. The *Yerushalmi* rules that if a worker from the city with longer hours travels to the city with shorter hours and is hired, he works only the shorter hours as per the custom of the city in which he was hired. If an employer from the city with shorter hour travels to the city with longer hours and hires workers, they must work the longer hours, as per the norm in the location of the hiring. Even if the actual work is done in the city with shorter hours, we presume the reason the employer traveled was to benefit from the longer working hours, since the employment agreement was reached in the city with longer hours, and the worker is bound to this custom.

Based on this, if a client hires a service provider in a cheaper location without discussing the fees, he typically pays the cheaper rate regardless of where the work will be performed. Therefore, a customer who meets with a company in New Jersey to provide service for him in Manhattan would pay based on the Jersey rate, not the New York rate.

Services Provided Across Borders

The above applies when the employer or employees physically traveled to another city to transact. How would this apply to a transaction that takes place over the phone or internet?

Igros Moshe 2:57 discusses a *shadchan* who “redt” a *shidduch* over the phone to someone living in a foreign country. The *shadchan* did not discuss the fee, and the two countries had different norms regarding how much a *shadchan* was paid. *Igros Moshe* writes that we follow the *minhag* based on the location of the *shadchan*. Since the *shadchan* is working in his/her physical location, he/she is paid based on his/her local norm, regardless of where the *chassan* or *kallah* is located.

Similarly, tech-support personnel based in India would only be entitled to the local rate in India, even if they were hired to service American clients, while a U.S.-based company could bill at the U.S. rate, even for services provided to Indian customers. (See, however, *B’tzel Hachochmah 3:28*, which disagrees.)

Who Initiated the Transaction

There is, however, an additional factor to consider. *Erech Shai* suggests that just as a party who physically travels to another city to transact is bound by the local practice where the transaction took place, this applies to a remote



transaction as well.

Although the parties do not physically travel to another city, we view the party who took the initiative by either calling or sending a letter to the other party as if he traveled to the recipient’s location. In such a case, the party who initiated the contact is implicitly accepting the practices of the location that he is contacting. Therefore, a consumer who calls a company in a cheaper country to retain its services is the equivalent of the consumer who actually traveled to the cheaper country, and he pays the lower price. We presume that he specifically reached out to a company located in the cheaper country in order to avail himself of the discounted rate.

The same is true if a client contacts a provider who is in a more expensive location: There is an implied acceptance to pay the higher rate. In contrast, if the service provider initiated the contact and called the client who resided in the more expensive location, the reverse would hold true. The provider is presumably reaching out overseas because of the greater pricing there, and is entitled to the higher rate unless specified otherwise. Thus, we do not focus on the physical location of either the services or the provider. Rather, we focus on which side initiated the contact, and we follow the *minhag* of the passive party.

In conclusion, while it is always important to have clear and specific contracts, it is especially critical when engaging in cross-border transactions. Otherwise, determining which location’s *minhag* should apply is dependent on the various technical factors mentioned above, and the results may be rather unpredictable. ■

1. *Rema* 331.

2. *Radvaz* 1:545.

3. See however *B’tzel Hachochmah 3:29* which maintains that local norms are usually binding on all, regardless of the parties’ knowledge.

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