



# Dayan Yehoshua Posen

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FEDERATION

## DEAL BREAKER

## Halachah

In the summer edition of *Oneg* we explained how a *Heter Iska* works and in which scenarios it isn't suitable. We also explained the concept of a *Heter Iska Klali* and how it works as a proclamation that all future transactions one enters into which have a problem of *Ribbis*, are to be structured as an *Iska* according to the terms of the *Heter Iska*.

In practical terms, when companies and businesses are making deals and transactions frequently, it is often not so practical to expect both parties to sign a *Heter Iska* each time. Therefore, we advise people to sign a *Heter Iska Klali*. Once a company, business or individual have a *Heter Iska Klali*, then all that is required is to insert a clause in all future contracts, stating:

**"This agreement is subject to the terms and conditions of the company's/ business's/my *Heter Iska Klali*, signed on the ....., a copy of which is attached"**

Once both parties sign an agreement/ contract with such a clause, it is as if they have both signed a *Heter Iska* specific to that deal.

### COMPLICATIONS

There have been occasions when one party has refused to change their draft of the contract to include such a clause, but they were prepared to sign a *Heter Iska* on "the side". Is this sufficient?

It is definitely preferable for a clause to be added to the actual contract. However if it is added as an attachment, then even if it's not in the actual contract, many *Poiskim* say it is enough.

However, many legal contracts have an "Entire Agreement Clause". This says something along the lines of:

*"This contract contains the final and entire agreement and understanding between the Parties and is the complete and exclusive statement of its terms. This contract supersedes all prior agreement and understandings, whether oral or written, in connection therewith."*

The purpose of such a clause, is to prevent a party from claiming at a later date, that a different point had been agreed between the parties, either verbally or in writing, and even though this point wasn't mentioned in the contract, it should still be part of the agreement, as this was how they understood the deal at the time of signing. This clause clearly states that any clause either party wish to be part of the deal needs to be written in the actual contract.

The question therefore arises, if both parties had signed a *Heter Iska*, but had not referenced the *Heter Iska* in the contract, and the contract had an Entire Agreement Clause, would the clause effectively result in the deal not be subject to the terms and conditions of the *Heter Iska*, rendering the contract a "*Shtar Sheysh Boi Ribbis*" and resulting in both parties transgressing the *Issur of Ribbis*?

There are certain limitations which would not necessarily be excluded by the Entire Agreement Clause, one of which is with regard to "implied terms". This refers to terms which both parties understood were the terms of the agreement, even if they didn't necessarily

express them in the written contract. In order to exclude implied terms as well, the Entire Agreement Clause would need to be broader. An example of a broader clause would be:

*"This instrument contains the entire agreement of the parties with respect to the subject matter hereof and there is no other promise, representation, warranty, usage or course of dealing affecting it."*

The question remaining is, if a *Heter Iska* was signed between the two parties and attached to the contract but not referenced in it, would the recipient of the funds be able to say that this was so obviously part of the deal, that its terms cannot be excluded even by the Entire Agreement Clause. Alternatively, could the person giving the funds be able to claim that because the *Heter Iska* goes to the heart of the deal and changes a deal from a loan or an investment, and was not referenced in the contract, in light of the far reaching Entire Agreement, the *Heter Iska* is excluded, and was just signed as a "religious thing" but has no real bearing on the contract or its terms?

I will leave it to the lawyers to decide, but it suffices to say that it is not clear and would probably depend on the judge on the day.

Therefore, one should definitely ensure that if there is an Entire Agreement Clause, the *Heter Iska* is referenced in the contract.

### QUOTE OF THE WEEK

**"A person should be willing to give up all his tomorrows for one today, so that he doesn't end up wasting all his todays on one tomorrow."**

The Alter of Novardhok

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2. Why is *havara*, burning, (35:3) singled out for specific mention more than any of the other 39 *Avos Melachos* of *Shabbos*?