Beit Din Basics

by Rabbi Chaim Jachter

Many otherwise knowledgeable Jews find the contemporary workings of financial litigation in Beit Din to be obscure and even foreign. In this series we will highlight some basic points about Beit Din that every Jew should find helpful. In an effort to enhance comprehension, we will present a fictional case and explain how a Beit Din could resolve such a situation.

In order to make matters simpler, we will forego our usual copious citations to the sources of the issues we discuss. Many sources for these issues appear in the second volume of my Gray Matter where commercial litigation in Beit Din is discussed at great length. We will begin our discussion by presenting seven introductory concepts that are essential for understanding how Batei Din currently function.

Batei Din, Civil Courts and Attorneys

Halacha forbids us to submit financial disputes to a Nochri court for adjudication. Our financial disputes with our fellow Jews should be resolved "within the family" and according to the rules of our tradition. We should emphasize that this is entirely in harmony with civil law, as civil courts are most pleased with alternative dispute resolution. Civil courts are overburdened and the government is delighted to be relieved of the burden of resolving our disputes.

Indeed, civil courts will most often enforce the decisions of Batei Din. It is sound civil public policy to encourage such arbitration. However, the civil courts will enforce a Beit Din ruling only if the Beit Din adhered to the civil rules for arbitration. For example, a civil court will not enforce a Beit Din ruling if the Beit Din did not permit each litigant to be represented by a licensed attorney of their choice. For this and other reasons, litigants are often represented in Beit Din by attorneys, even though the Mishnah and Gemara hardly ever describe the presence of lawyers in a Beit Din.

It is very much in the interest of Halacha for Batei Din to hew closely to the civil procedures for arbitration, since civil courts are currently the only mechanism for enforcement of Piskei Din (Beit Din rulings). The Torah speaks of the Mitzvah to appoint "Shofetim V'Shoterim", judges and policemen to enforce the rulings of the Dayyanim (rabbinic judges). In a Torah society, the Jewish government appoints Shoterim to enforce the rulings of the Beit Din. In American society, the civil courts function as our Shoterim. Those who reside in the United States are most fortunate that the courts are strongly inclined to enforce properly adjudicated Batei Din arbitrations. This is not the case in other jurisdictions.

The Role of Civil Law in Beit Din – Three Portals

One might be rightfully puzzled at the title of this section – after all, a Beit Din is supposed to rule in accordance with Halacha. What role could civil law have in Beit

Din? There are, however, three portals through which Halacha potentially incorporates civil law. The first is that in regards to financial matters, Dina D'malchuta Dina, Halacha obligates us to honor the laws of the jurisdiction in which we reside. However, there is considerable difference of opinion in regard to the scope of the applicability of this rule. Moreover, Posekim are most reluctant to eviscerate Halacha by too liberal an application of Dina D'malchuta Dina.

Many Dayyanim are more comfortable with a different portal, Minhag HaMedinah – the common commercial practice of a particular locale. The Mishnah and Gemara quite often apply Minhag HaMedinah even when it is not identical to Halachic practice. Work hours are a classic example (Halacha expects employees to work from dawn to dusk). The common commercial practice of fewer working hours, overrides the Halacha. It is important to note that Dina D'malchuta Dina often determines and creates the Minhag Hamedinah.

In fact, the rules and procedures of the Beth Din of America (available at www.bethdin.org) state that its Dayyanim will incorporate common commercial practice in their rulings "to the fullest extent permitted by Jewish Law". A contemporary example is building codes. A Beit Din will not, for the most part, adjudicate a dispute between a home owner and a building contractor based on the standards for buildings articulated by the Gemara. Instead compliance with contemporary building codes is the basis, for the most part, of the decision. Indeed, the parties to a building agreement expect contemporary building codes to serve as the benchmark for proper fulfillment of their contract. Thus, civil building codes create a Minhag Hamedinah and are incorporated into the Halacha.

A more controversial portal is the contractual agreement for a Beit Din to adjudicate disputes in accordance with civil law of a specific jurisdiction as of the day of the contract. The Beth Din of America will, generally speaking, honor such agreements. They reason that Halacha follows Rabi Yehuda who permits structuring financial affairs in any manner provided that it is honest, consensual and does not violate ritual law (such as the prohibition of Ribbit, charging interest).

Other Batei Din, however, view such agreements as a violation of the prohibition to adjudicate in civil court. They reason that Halacha forbids submitting both to the authority of a Nochri court and to Nochri law. The Beth Din of America, however, argues that one submits to the authority of the civil law only if the contract calls for the Beit Din to rule in accordance with the civil law as of the date of the adjudication of the future dispute.

Indeed, the prenuptial agreement promoted by the Rabbinical Council of America and the Beth Din of America (and approved by Rav Ovaida Yosef) offers the option for couples to submit to the jurisdiction of the Beth Din of America for adjudication of any financial dispute emerging from divorce, based on civil equitable distribution laws or community property laws. Of course, the agreement calls for the Beit Din to apply these civil laws as they apply on the day of the signing of the prenuptial agreement.

Considering that Halacha incorporates some aspects of civil law, it is often desirable to select at least one Dayyan who is expert in the civil law of the specific matter that is being adjudicated by the Beit Din. Some of the Dayyanim who serve on the Beth Din of America have a law degree.

Shtar Beirurin/Binding Arbitration Agreement

Batei Din require litigants to sign a Shtar Beirurin/binding arbitration agreement before they will adjudicate a dispute. Without such consent, the Beit Din might not have Halachic jurisdiction over the parties and the parties might choose to ignore the Beit Din's rulings. Moreover, a civil court will not enforce a ruling unless the parties signed a proper binding arbitration agreement. Batei Din do not enjoy authority in a country that separates state and religion, unless the parties contractually agree to submit to the jurisdiction of a specific Beit Din to settle a specific dispute.

Indeed, refusal to sign a Shtar Beirurin is regarded by Batei Din as tantamount to refusal to adjudicate the dispute in Beit Din, and one who acts thusly is held in contempt of rabbinic court ("Mesareiv L'Din"). Refusal to sign a Shtar Beirurin/binding arbitration agreement is a strong indication that the party does not intend to respect and honor the Beit Din ruling if it is not rule in his favor.

Since the Shtar Beirurin/binding arbitration agreement is both a Halachic and civil necessity, it must conform both to Halacha and to civil law. The Beth Din of America Shtar Beirurin is in English, for example. The aforementioned RCA/BDA prenuptial agreement is written in English and is independent of the Ketubah and the Tenaim.

The composers of the RCA/BDA prenuptial considered the dissenting opinion in a classic New York civil court five to four ruling in "Avitzur vs. Avitzur", upholding the civil enforceability of the Conservative movement's prenuptial agreement, which adds a binding arbitration clause to their "Beit Din" written in Aramaic and incporated to the traditional Ketubah. The dissent argued that a civil court is not permitted to enforce a "liturgical document". In addition to avoiding the Conservative prenuptial's Halachic flaws, the Orthodox prenuptial steers clear of this critique thereby enhancing its likelihood of enforceability in civil court.

One Dayyan or Three Dayanim

The first Mishnah of Masechet Sanhedrin teaches that a Beit Din of three is required for adjudication of commercial disputes. However, Halacha permits parties to choose one Dayan to judge their dispute. As we mentioned earlier, Halacha grants us great flexibility in regards to financial matters. The advantages to choosing one judge is that the matter can be resolved more quickly since time is not needed for the judges to agree upon a ruling. Moreover, the expense of paying more than one Dayyan is avoided.

The advantage of a Beit Din of three Dayanim is that there will be much more grappling with the issues involved. Most likely, a better decision will be reached since more perspectives are involved at arriving at a decision. Pirkei Avot specifically advises rabbis to refrain from resolving monetary disputes alone without the benefit of two additional Dayyanim.

It is especially recommended to use a Beit Din of three Dayanim if the matter is under serious dispute and emotions are running high. In such cases, creating/restoring peaceful relationships is a major goal of a Din Torah (Beit Din litigation). There is much greater chance of achieving Shalom there three Dayyanim decide a case. The losing party is much more likely to reconcile himself to a decision of three experts rather than only one. A rational individual who is convinced of his stance in a dispute will relent when three respected figures believe otherwise.

Beit Din Kavua vs. Zabla

Halacha offers two basic options of choosing a Beit Din to adjudicate a dispute. One is a sitting Beit Din (Beit Din Kavua) and the other is a Zabla Beit Din in which each litigant chooses a Dayan and then the two Dayanim choose a third Dayan. There are advantages and disadvantages to each type of Beit Din. Some prefer a Zabla because the parties exercise some control over the choice of Dayanim. Customarily, the two Dayyanim chosen by the parties ascertain that the third Dayan (Shalish) is acceptable to both litigants.

A disadvantage of this type of Beit Din is that sometimes the Dayanim chosen are not compatible and do not work well together. While each Dayan may be excellent in his own right, the combination might not work well. Another disadvantage is that a Zabla Beit Din will, generally speaking, will be more expensive since the Dayyanim serve not only as the judges but also administrators of the case. Since the Dayyanim must invest more time, their fees are higher. Visit www.bethdin.org for a list of fees charged by the Beth Din of America, a Beit Din Kavua.

Another advantage of using a Beit Din Kavua is that many Batei Din, such as the Beth Din of America and the State of Israel rabbinic courts, have published formal rules and procedures for the Dinei Torah that they adjudicate. An ad hoc Zabla Beit Din does not such rules and procedures which specifies the rules the Dayyanim will follow. A solution to this problem, however, is to denote in the Shtar Beirurin/binding arbitration agreement that the Zabla Beit Din will be following the rules and procedures of a specific Beit Din.

Choice of Law – Din, Pesharah and Pesharah Kerovah L'Din

As surprising as it sounds, there is a choice of law in Beit Din. While every Beit Din judges based on Jewish Law, Halacha offers three options regarding the methodology of decision making to be employed by the Beit Din. One option is Din, the strict application of the Halacha. Another is Pesharah, which can mean either

compromise or equity (Batei Din vary in their understanding of the term Pesharah). The third option is Pesharah Kerovah L'Din which is a blend of Din and Pesharah.

While the Beth Din of America used to offer the choice of pure Din in their rules and procedures, in recent years it offers only either Pesharah or Pesharah Kerovah L'Din. Both the Gemara and the Shulchan Aruch strongly discourage applying strict Din in practice. In fact, many Batei Din today regard a litigant who insists on a Din judgment as a Mesareiv L'Din, in contempt of rabbinic court. Such is the extent of the avoidance of conducting a Din Torah (Beit Din litigation) in accordance with Din.

The preferred method is Pesharah Kerovah L'Din since Pesharah often appears to be arbitrary. Indeed, Batei Din will apply Pesharah only if the parties specifically request a pure Pesharah. Pesharah Kerovah L'din is the preferred method of conflict resolution since on the one hand it hews for the most part to the rules set forth in the Shulchan Aruch, but it nonetheless offers some flexibility to consider equity and fairness in decision making.

One would think that a plaintiff would prefer Din since this would allow collection of all he is owed without compromise. However, a plaintiff might prefer Pesharah since the rules of evidence are somewhat relaxed in such case and therefore it may be easier for him to prove his case to the Beit Din. In addition, some Batei Din will not excuse Gerama (indirect damage) if ruling in accordance with Pesharah unlike pure Halacha which does not obligate one to pay for damage done indirectly. Thus, there are both potential advantages and disadvantages to both plaintiff and defendant in regards to choosing either Din, Pesharah or Pesharah Kerovah L'Din.

The choice of Din, Pesharah and Pesharah Kerovah L'Din is spelled out in the Shtar Beirurin/binding arbitration agreement signed by the litigants appearing before Beit Din. Litigants should also ask the written clarification for their understanding and application of Pesharah (is it compromise or equity) and Pesharah Kerovah L'Din (is it inclined more to Pesharah or to Din). The Beth Din of America explains their standards regarding Pesharah and Pesharah Kerovah L'Din in their rules and procedures, available at www.bethdin.org.

We should clarify that Pesharah is not an extra-Halachic consideration. Rather it is an integral component of Halacha since the Torah commands us (Devarim 6:18) "V'asita Hayashar V'Hatov B'eini Hashem Elokecha", to do the right and the good in the eyes of Hashem. Rashi explains that this refer to the idea of Pesharah. Thus, when Dayyanim apply Pesharah Kerovah L'Din or Pesharah they are acting well within their Torah mandate and not outside the boundaries of Halachic dispute resolution.

Role of your Rabbi

Generally speaking, it is not a good idea for one's Rav to resolve a monetary dispute. Tensions often run very high regarding monetary disputes and it is usually preferable for a neutral and disinterested party or parties to resolve the dispute.

Moreover, a Rav is biased towards his congregants since he presumably has a deep connection with them, thereby rendering him disqualified to render an unbiased decision regarding a dispute.

Introduction to the Fictional Case

Before we present our model case we need to introduce three basic Halachic concepts. The first is Hamotzi Meichaveiro Alav HaRa'ayah, the burden of proof rests upon the plaintiff. Witnesses and documents are classic forms of evidence. E-mail correspondence today is often used as evidence in contemporary Batei Din. Thus, if one claims that his friend owes him $24,000 and produces no evidence to that effect, the Beit Din will not award any compensation to the plaintiff.

The second concept is Shevu'at Modeh B'Miktzat. In this case, the plaintiff makes a claim and the defendant admits to part of the claim. Admission is the strongest form of evidence as Hazal teach Hoda'at Ba'al Din K'Mei'ah Eidim Dami, an admission is the equivalent of a hundred witnesses. However, if there is no evidence beyond the amount of admission, the Beit Din does not obligate the plaintiff to pay any more than he has admitted.

However, since he has admitted to part of the claim, the Torah demands an oath from the defendant that he does not owe any more money than that which he admitted. Thus, for example, if one demands $24,000 from his friend and he admits to $100 of the claim, the friend is required to pay only $100 since there is no evidence to the amount beyond that sum. However, he must take an oath that he truly owes no more than $100.

The third concept is called Pidyon Shevuah, the redemption of an oath. As we discussed at length last year in Kol Torah (archived at www.koltorah.org) the virtually universally accepted among contemporary Batei Din is to refrain from administering oaths. In a situation where one is obligated to take one of the three Torah level oaths, Modeh B'miktzat, Shevuat Eid Ehad (where there is one witness to bolster the plaintiff's claim) and Shevuat Hashomerim (the oath taken by a watchman who claims that the item he was guarding was stolen, that he did not take the item) the Beit Din will impose a Pesharah upon the parties. The Beit Din in issuing such a Pesharah must exercise good judgment to insure that a fair and reasonable decision is issued, as we discussed at length last year.

A Fictional Case

The following dispute was brought to a Beit Din in Northern California in the winter of 2012. Any resemblance to any individual or event is purely coincidental. A musician hired a website designer to help sell twelve of his recordings on the internet. The musician engaged the website designer to perform three tasks – edit the recordings, post them to his website and to add e-commerce capability to his website. In testimony before the Beit Din, the musician and website designer had no disagreement about this point.

They did, however, sharply disagree about the terms of payment. Plaintiff (the website designer) claimed he was hired to work for $120 per hour and that he worked for 200 hours to complete the assigned tasks. Thus, he claimed that he was owed $24,000. The defendant (the musician) claimed that the agreement was to pay twenty five percent of the proceeds from the sale of the recordings. Defendant stated that he received a total of $400 for the recordings. Thus, he claimed that he owed only $100. The terms of payment were not recorded in a document nor were there any witnesses to testify what the parties agreed to pay.

Our Fictional Case

The following dispute was brought to a Beit Din in Northern California in the winter of 2012. A musician hired a website designer to help sell twelve of his recordings on the internet. The musician engaged the website designer to perform three tasks – edit the recordings, post them to his website and to add e-commerce capability to his website. In testimony before the Beit Din, the musician and website designer had no disagreement about this point.

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Resolution According to Pure Din

If this case were to be resolved according to pure Din, strict Halacha, the Beit Din would obligate the musician to pay only one hundred dollars. Beit Din would not obligate him to pay any more money since there is no evidence that he owes anything above this amount. However, Beit Din would require the musician to take an oath that he owes no more than one hundred dollars (Shevuat Modeh B'Miktzat). Nonetheless, we noted in our previous issue that pure Din is rarely if ever applied in contemporary Beit Din.

Resolution According to Pesharah Kerovah L'Din

We also noted last week that Pesharah Kerovah L'Din, a blend of pure Pesharah and Din, is the preferred method of conflict resolution in Beit Din. In our fictional case, the litigants signed a Shtar Beirurin/binding arbitration agreement in which they agreed that the Beit Din should adjudicate their dispute in a manner of Pesharah Kerovah L'Din.

Many Batei Din follow Rav Kook's recommended course of how to arrive at a ruling in the manner of Pesharah Kerovah L'Din. The Beit Din first determines how to resolve the matter in accordance with pure Halacha. Then they consider the equities of the situation. In this situation, the website designed performed a considerable amount of work for the musician and thus fairness would dictate that he be paid compensated than a hundred dollars for his efforts. We reemphasize that which we noted last week, that when Dayyanim apply Pesharah Kerovah L'Din or Pesharah they are acting well within their Torah mandate and not outside the boundaries of Halachic dispute resolution.

In this case a Beit Din could apply the Halachic manner of resolving of a somewhat similar, albeit not identical, situation. The Shach (Hoshen Mishpat 333:44) and Ketzot Hahoshen (331:3) address a situation in which one hired a professional to perform a task related to his profession but did not specify the wages. Halacha assumes that professionals do not work for free unless they explicitly state that they are doing so and thus in the usual situation the professional must be compensated. However, since a wage was not specified the Shach and Ketzot rule that the employer pays only the lowest amount paid for such work in the locale in which it was performed. We cannot assume that the employer would have hired someone to work for the lowest amount paid in his area.

We must stress that the Shach and Ketzot's case is not identical to the fictional case we are presenting. In our case the parties specified a wage but disagree as to what was agreed to. Nonetheless, a Beit Din could apply this somewhat analogous case, since when there is a dispute as to the agreed wage, it is as if no wage was agreed upon. Moreover, compensating the musician in accordance with the lowest amount paid for such work in his area is far more equitable than giving him only a hundred dollars for his time, efforts and talent.

A Beit Din would have to consider in such a case as to what is the "locale" in such a situation. Such work could have been farmed out to anywhere in the world. For example, the musician could have hired people in parts of the world such as India, where they receive far lower wages than what is paid in the United States for performance of such tasks. A Beit Din would have to decide whether the payment should be the minimum paid for such work in Northern California or anywhere in the world.

A Beit Din would rule that the wage is determined by the lowest fee charged in Northern California since it is clear that musician was interested in hiring someone who resides locally and not someone who lives on the other side of the globe. There are distinct advantages to working with someone who lives nearby and it is obvious that the musician was interested in these advantages since he in fact hired someone who lives close to him.

The Beit Din in our fictional case consulted with no less than five experts and each reported that five thousand dollars was the minimal amount paid for such work in Northern California. Thus the Beit Din obligated the musician to pay five thousand dollars in accordance with a blend of Pesharah and Din. In addition, the Shevuat Modeh

B'miktzat which he is obligated to take according to strict Din, is redeemed in a reasonable and fair manner in accordance with the contemporary Beit Din practice of Pidyon Shevuah (discussed last week).

Interestingly, in our fictional situation, the musician insisted on taking a Shevuah (oath) to bolster his claim and excuse him from paying more than one hundred dollars. The Beit Din, however, declined to administer a Shevuah in accordance with contemporary practice.

Resolution According to Pure Pesharah

If the Beit Din were to have decided this issue based on pure Pesharah the Beit Din might have awarded compensation to the website designer in accordance with the average wage paid in Northern California. Thus, had the parties agreed to Pesharah the website designer would have been granted approximately another thousand dollars. Pesharah Kerovah L'Din, however, demands from the Beit Din to remain near the bounds of Din which calls for paying only the lowest wage, in a somewhat similar situation.

Lessons to Learn from the Fictional Case

Had the parties to our fictional Din Torah committed their agreement to writing, the dispute would not have emerged from their interaction. In fact, the Gemara (Bava Metzia 75b) urges loans to be issued in writing and before witnesses to avoid problems. Interestingly, a veteran Dayan, Rav Chaim Cohen, once commented that Dinei Torah usually arise amongst people who are not organized in their affairs and expose themselves ambiguity created by a lack of clarity in their business dealings. Carefully clarifying the terms of a business interaction greatly reduces the likelihood of dispute and the need for litigation.

Another lesson is that the litigants in our case should have settled their dispute amongst themselves without resorting to Beit Din resolution. The parties in our fictional case were fighting bitterly over this matter and each side hired attorneys to represent them in Beit Din. In addition, a full Beit Din of three Dayyanim was absolutely necessary in this hotly contested situation. Had the musician offered to give the website designer seven thousand five hundred dollars and had the website designer agreed to accept payment of even two thousand five hundred dollars, they would have each saved money considering the costs of their lawyers and the costs of the Dayyanim.

One wonders what psychological forces drive people to pursue litigation even though they would save money if they compromise. It is possible that the psychological mistake many people make is that they seek victory rather than fairness. However, this is usually a counterproductive activity since in most situations it is in both parties interests to settle their differences amongst themselves without having to pay lawyers and Dayyanim. One should also consider the psychological costs of the stress and time that is expended in the course of the pursuit of an intense litigation. The health benefits of settling a dispute should not be dismissed as trivial.

Conclusion

In our fictional case, the plaintiff acted correctly and went to civil court to confirm the Beit Din's award. The civil court, seeing the reasoned decision offered by the Beit Din (see our discussion of this issue in Gray Matter volume three) and recognizing its fairness, upheld the rabbinic court award. The parties learned their lessons and took care to record their business transactions in writing and sought to settle any disputes they had without resorting to litigation.