What to Do When You and Your Adversary Can’t Agree on a Beit Din

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Ideally, parties to a dispute would agree to litigate at an established and reputable beit din. The beit din would then empanel a group of expert dayanim (arbitrators) to hear the case. Practically, however, the din torah process can get stalled when parties fail to agree on a beit din—when each party rejects the other’s proposed forum. As we explained elsewhere, a beit din generally does not have jurisdiction to decide a case until it is accepted by both parties through an arbitration agreement.

Zabla Panels

If the parties cannot agree on an established beit din, Jewish law provides for the formation of an ad hoc “zabla” panel. Zabla (זבל”א) is an acronym for zeh borer lo echad (lit. each party selects one arbitrator), which captures how the panel is formed: Each party selects one arbitrator (sometimes referred to as a borer). The two arbitrators then choose a third member to complete the panel (sometimes referred to as the shalish).

If the case proceeds before a zabla panel, each chosen borer has a heightened responsibility to consider the perspective of the party that chose him. But ultimately the dayanim on a zabla panel should function as impartial arbitrators and decide the case exclusively on its merits.

Zabla Problems

In practice, zabla panels can be problematic because litigants and borerim (pl. of borer) have approached zabla cases with the view that the borer should function as...
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a full advocate for the party that chose him. This creates a host of halakhic problems and is the reason why poskim have discouraged zablas. For example, Jewish law prohibits ex parte communication between arbitrators and litigants. Yet borerim have sometimes engaged in private communications with the litigants who selected them. Similarly, Jewish law prohibits arbitrators from taking money from individual litigants. Yet borerim have sometimes even taken side payments in the form of consultation fees from the litigants who hired them.

In addition to these halakhic problems, zabla proceedings can be very costly. Borerim who sit on zabla panels often charge hourly rates higher than rates charged for proceedings overseen by established battei din. Zabla panels have also been criticized because they are used as stalling mechanisms. A litigant can stall the din torah process by picking a borer of ill-repute, knowing that a competent dayan would refuse to sit with him.

Because of these problems, a din torah arranged by an established, reputable beit din is always preferable to a zabla proceeding. The best way to head off a forum dispute—and zabla proceeding—is to include in your contracts a pre-dispute arbitration provision that specifies an established and reputable beit din.

ENSURING PROCEDURAL FAIRNESS IN A ZABLAL

If you find yourself in a forum dispute such that you and your adversary cannot agree on a beit din, there are some steps that you can take to enhance the fairness of a zabla proceeding.

One option is to arrange for the zabla to take place under the auspices and rules of an established beit din. The Beth Din of America has successfully conducted

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6 Shulchan Arukh, Chosben Mishpat 17:5.
7 See Shut Panim Me’irot and Pitchei Teshuvah, supra note 5. But see Arukh Hasbulchan, Chosben Mishpat 13:4, who justifies this practice on the basis of an implicit waiver. Rabbi Mordechai Willig, supra note 5, raises several concerns regarding the Arukh Hasbulchan’s justification. In addition, the Arukh Hasbulchan’s ruling should be qualified for those many cases where parties do not wish to allow such communications, and wish instead to follow the strict integrity of the halakha.
8 Shulchan Arukh, Chosben Mishpat 9. The Shulchan Arukh (9:5) provides that if the dayanim are to be compensated by the parties directly, the parties must bear the costs evenly, and Shakh (9:6) requires that each party must make the payment in the presence of his adversary.
9 See Shut Panim Me’irot, Pitchei Teshuvah, and Rabbi Mordechai Willig, supra note 5.
such proceedings under its rules and procedures, often with panels staffed by a dayan appointed by the Beth Din of America, a dayan from the defendant’s chosen beit din, and a third dayan mutually agreed upon by the two battei din. When a defendant responds to a hazmana sent by the Beth Din of America by opting to appear before a different beit din, the Beth Din of America will sometimes contact that beit din to establish a joint panel overseen by one or both of the battei din, and present that option to the parties.

If you cannot arrange for a zabla under the auspices of an established beit din, it is a good idea to insist that each side choose a borer who regularly serves as a dayan at a reputable beit din. Furthermore, at the outset of any zabla proceeding, it is important to have a clear conversation among the parties and dayanim regarding procedural issues such as ex parte communication and payment arrangements for the panel. Expectations should be clearly set forth in the shtar berurin that will govern the zabla proceeding, specifying that each borer will arbitrate impartially, that ex parte communications will be prohibited, and the like. As a way of ensuring fairness in zabla proceedings and avoiding various abuses, the Beth Din of America will not allow a defendant to respond to a hazmana by selecting a to'en (rabbinic advocate) as their borer for a zabla. This policy is based on a presumption that a borer who regularly functions as a to'en will serve as an advocate for the party that hired him, not as an impartial dayan.

**Conclusion**

Zabla proceedings can be halakhically problematic, costly, and procedurally inefficient. A din torah arranged by an established beit din is almost always preferable to a zabla. It is therefore best to preempt a forum dispute by including a pre-dispute arbitration clause in your contracts, designating an established beit din as the arbitration forum for your dispute.

If you did not do that and you find yourself locked in a forum dispute, it is

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13 See *Nesivos Hamishpat* (Biurim), *Choshen Mishpat* 14:3.
14 Sections 2(e) and 2(f) of the Beth Din of America’s *Rules and Procedures* provide that the Av Beth Din is entrusted with the authority to determine who is and is not authorized by Jewish law to serve as a selected arbitrator in a case. Accordingly, the Av Beth Din’s opinion is dispositive with respect to these determinations, even if a particular litigant does not share the same opinions of the application of Jewish law. See Beth Din of America, *Rules and Procedures*, available at https://bethdin.org/rules.
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important to take steps to ensure the fairness and integrity of a zabla. These steps include attempting to arrange for the zabla to take place under the auspices of an established beit din and its rules; ensuring that only dayanim who regularly function at reputable batei din will serve as borerim on your zabla; and laying down clear rules and procedures that will govern the zabla proceedings.