

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.²

ZABLA PANELS

If the parties cannot agree on an established *beit din*, Jewish law provides for the formation of an ad hoc “*zabla*” panel.³ *Zabla* (זבל"א) is an acronym for *zeh borer lo ehad* (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.⁴ But ultimately the *dayanim* on a *zabla* panel should function as impartial arbitrators and decide the case exclusively on its merits.⁵

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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² See Rabbi Yona Reiss, *Jewish Law, Civil Procedure: A Comparative Study*, JOURNAL OF THE BETH DIN OF AMERICA 1 (2012), 18–19, available at <https://bethdin.org/wp-content/uploads/2019/07/Jewish-Law-Civil-Procedure-A-Comparative-Study-by-Rabbi-Yona-Reiss.pdf>.

³ *Shulchan Arukh*, *Choshen Mishpat* 13:1.

⁴ *Rosh*, *Sanhedrin* 3:2; *Tur*, *Choshen Mishpat* 13:8; *Arukh Hashulchan*, *Choshen Mishpat* 13:3.

⁵ *Rosh* and *Tur*, *supra* note 4; *Shut Panim Me'erot* 2:159; *Pitchei Teshuvah*, *Choshen Mishpat* 13:3; Rabbi Mordechai Willig, *Ha'arot be-Reish Perek Zeh Borer, Beit Yitzchak* 36 (2004), 17–21, available at <https://www.yutorah.org/lectures/lecture.cfm/727296/rabbi-mordechai-i-willig/הנהגות-בורר-פרק-הערות-ברייתא-פרק>. See also Rabbi Yona Reiss, *The Torah-u-Madda Mandate for Beth Din in Today's World*, JOURNAL OF THE BETH DIN OF AMERICA 2 (2014), 24–25, available at <https://bethdin.org/wp-content/uploads/2019/07/The-Torah-u-Madda-Mandate-for-Beth-Din-in-Todays-World-by-Rabbi-Yona-Reiss.pdf>.

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*.⁶ For example, Jewish law prohibits *ex parte* communication between arbitrators and litigants.⁷ Yet *borerim* have sometimes engaged in private communications with the litigants who selected them.⁸ Similarly, Jewish law prohibits arbitrators from taking money from individual litigants.⁹ Yet *borerim* have sometimes even taken side payments in the form of consultation fees from the litigants who hired them.¹⁰

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*.¹¹

ENSURING PROCEDURAL FAIRNESS IN A ZABLA

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

⁶ *Shulchan Arukh, Choshen Mishpat* 17:5.

⁷ See *Shut Panim Me'erot* and *Pitchei Teshuvah*, *supra* note 5. But see *Arukh Hasbulchan, Choshen 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, Choshen 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'erot, Pitchei Teshuvah*, and Rabbi Mordechai Willig, *supra* note 5.

¹⁰ See, e.g., *Rema, Choshen Mishpat* 13:1.

¹¹ See Beth Din of America, *Sample Arbitration Provision*, available at <https://bethdin.org/wp-content/uploads/2018/07/Contractual-Arbitration-Provision.pdf>.

such proceedings under its rules and procedures,¹² 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 *batei 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 *batei din*, and present that option to the parties.¹³

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*.¹⁴ 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

¹² See Beth Din of America, *Rules and Procedures*, available at <https://bethdin.org/rules>.

¹³ See *Nesivos Hamishpat (Biurim)*, *Chosben 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.