

# ZABLA Panels and Courts

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## ZABLA ARBITRATION PANELS – THE IDEAL AND THE REAL

Much has been written about the potential benefits and pitfalls of convening an ad hoc “ZABLA” panel whereby each litigant chooses one *dayan* (Jewish law judge), known as a *borer* (rabbinic arbitrator) and the two *borerim* in turn select a third *dayan*, typically referred to as the *shalish* (literally, “third”), to round out the rabbinic panel.<sup>2</sup> In the time of the Talmud, a ZABLA was considered an effective mechanism for dispute resolution since each party would be comfortable with at least one of the judges on the panel, thus ensuring an acceptable decision.<sup>3</sup>

In one sense, a ZABLA is not so different from a standard model of arbitration routinely employed by the American Arbitration Association, whereby parties agree that each party will select a preferred arbitrator (either from a pool of arbitrators of a particular arbitral organization or otherwise), and then have the two selected arbitrators choose a third impartial arbitrator to round out the panel.<sup>4</sup>

However, as pointed out by Jewish law commentators throughout the generations, including the Rosh<sup>5</sup> and the Pischei Teshuva<sup>6</sup>, ZABLAs have unfortunately become subject to various abuses and violations of Jewish law, including (a) the selection of *borerim* who essentially serve as zealous advocates on behalf of the party who selected them—as opposed to impartial jurists—in violation of the Jewish law mandate to judge a case impartially;<sup>7</sup> (b) ex-parte conversations between one of

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<sup>2</sup> See, e.g., Rabbi Shlomo Weissmann, *What to Do When You and Your Adversary Can't Agree On a Beit Din*, JEWISHPRUDENCE (January 2020), available at <https://bethdin.org/what-to-do-when-you-and-your-adversary-cant-agree-on-a-beit-din/>; Rabbi Itamar Rosensweig, *Published Procedural Letter: ZABLA Panels*, JEWISHPRUDENCE (February 2020), available at <https://bethdin.org/published-procedural-letter-zabla-panels/>.

<sup>3</sup> See *Choshen Mishpat* 13:1 (R. Yosef Karo, 1488-1575).

<sup>4</sup> See American Arbitration Association, *Streamlined Three-Arbitrator Panel Option*. Published in 2017, this option seeks to reduce costs by restricting the participation of three arbitrators to the final adjudication of the case, as opposed to the procedural motions earlier in the case, which may be handled by a single arbitrator.

<sup>5</sup> *Rosh, Sanbedrin* 3:2 (Rabbeinu Asher ben Yechiel, 1250-1327) (raising the first concern discussed in the text).

<sup>6</sup> *Pischei Teshuva, Choshen Mishpat* 13:3 (R. Tzvi Hirsh Eisenstadt, 1815-1868) (raising all three concerns discussed in the text).

<sup>7</sup> See *Tur, Choshen Mishpat* 13 (Rabbi Jacob ben Asher, 1269-1343), who also raises this issue in the name of his father (the Rosh), and then cites the Ramah (R. Meir Abulafia, 1170-1244) as

the litigants and the arbitrator whom he or she selected, in violation of the Jewish law mandate for a judge not to hear the claims of one side without the other side present;<sup>8</sup> and (c) payments rendered “on the side” by the litigant to the arbitrator whom he or she has selected, which violate the prohibition of accepting a bribe to adjudicate a case.<sup>9</sup> It is a common complaint of contemporary authorities that many ZABLA panels today are conducted in a fashion that implicate the concerns raised by these earlier commentators.

Nonetheless, ZABLA is not an inherently pernicious dispute resolution device. If done correctly, it can result in what the Talmud describes as “*din emes l’amito*” – the most just and judicious decision.<sup>10</sup> The Rosh notes that, notwithstanding the requirement of impartiality, it is perfectly legitimate for a *borer* to ensure that any possible Jewish law arguments that may support the side who selected him be fully explored and considered.<sup>11</sup> So long as the *borer* maintains the objectivity to decide against that side even after exploring all such arguments, the process is sound.

In addition, when parties are unable to agree upon a particular Beth Din institution or panel either in a pre-dispute arbitration clause in a contract or when adjudicating the case (if there is no pre-dispute arbitration clause), the ZABLA mechanism provides a default option for such parties to submit their dispute for resolution under Beth Din auspices, pursuant to Jewish law. Indeed, Jewish law authorities note that if there is no officially accepted Beth Din institution in a particular city, either party to a dispute has the right to insist upon convening a ZABLA panel that is conducted according to the pertinent precepts of Jewish law.<sup>12</sup>

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expressing a dissenting view which he repudiates. However, the Beis Yosef (R. Yosef Karo) writes that the Ramah could also be read in a fashion which is consistent with the view of the Rosh.

<sup>8</sup> See *Choshen Mishpat* 17:5. Although the *Aruch Hasbulchan*, *Choshen Mishpat* 13:4 (R. Yechezkel Michel Epstein, 1829-1908), citing this practice, suggests that nowadays when ex-parte communications have become commonplace in ZABLA proceedings, there may be an implied waiver by both parties to permit them, such waiver is certainly not effective when one of the parties does not agree to it. In any event, a format in contravention of strict Jewish law is clearly not ideal. See 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> בורר/הערות-ברישי-פרק-זה.

<sup>9</sup> See *Pischei Teshuva*, *supra* note 6, and the extensive discussion in Rabbi Willig's article, *supra* note 8, in which he notes that paying a *borer* for hours devoted to ex parte consultation would be particularly problematic.

<sup>10</sup> *Sanhedrin* 23a.

<sup>11</sup> *Rosh*, *supra* note 5.

<sup>12</sup> See, e.g., *Pischei Teshuva*, *Choshen Mishpat* 2:2; *Igros Moshe*, *Choshen Mishpat* 2:3 (R. Moshe Feinstein, 1895-1986). Alternatively, if each party prefers a different Beth Din in the city, the two rabbinical courts can convene together a joint tribunal, which works as an alternative form of

## ENSURING A PROPER ZABLA PROCESS

Nowadays, the best way for parties to ensure a legitimate ZABLA panel is to submit a dispute to the adjudication of a respected Beth Din, and to stipulate that each party will have the right to select one of the recognized *dayanim* on the roster of that Beth Din, and that the two *dayanim* will then sit with a third recognized *dayan* from that Beth Din. Alternatively, if the parties cannot agree upon a Beth Din to oversee the process, and each party prefers a different Beth Din, the parties can arrange for each Beth Din of their choosing to provide a borer, and for the two *borerim* to select the third *dayan* (the *shalish*), who will also be from a respected Beth Din.

In either of these configurations (namely, a ZABLA confined to recognized *dayanim* of a particular Beth Din, or two trusted *Batei Din* choosing the *borerim* from their own regular roster of *dayanim*), the chosen *borerim* can presumably be trusted to comply with the usual laws applicable to those who sit as a *dayan* for that Beth Din, including the requirement to be impartial, untainted and not have a conflict of interest. Nevertheless, the best way to avoid the vagaries of contemporary ZABLA proceedings, which typically do not operate under the aegis of an established Beth Din, is for the parties to agree upon a mutually respected Beth Din to adjudicate their dispute in an impartial and objective fashion.

It should also be noted that although ZABLA does require the impartiality of all three arbitrators, a *borer* is not disqualified by virtue of being an “*obeiv*,” a casual friend of the party who has selected him, unlike in a regular Beth Din proceeding. While an “*obeiv gamur*,” a really good friend, would be disqualified, as would a person with a genuine conflict of interest, a *borer* could be a person who has a generally favorable sense of the person who has selected him.<sup>13</sup> Nonetheless, as noted by the Rosh,<sup>14</sup> it would be improper for a *borer* to act as a zealous advocate on behalf of one side. It is for this reason that the Beth Din of America does not require one side to participate in a ZABLA when the other side has chosen someone who

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a ZABLA panel. See *Nesivos Hamishpat (Biurim)*, *Choshen Mishpat* 14:3. See also Section II, *infra*.

<sup>13</sup> *Rema*, *Choshen Mishpat* 7:7 (R. Moshe Isserles, 1530-1572).

<sup>14</sup> *Rosh*, *supra* note 5.

typically serves as a *to'en* (a rabbinic advocate), since it can be presumed that the *borer* will serve as an advocate rather than as a neutral arbitrator.<sup>15</sup>

#### DRAFTING AN EFFECTIVE ZABLA PROVISION – AVOIDING THE *PAL V. PAL* PROBLEM

A sample ZABLA provision in a contract reads as follows:

“Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by binding arbitration by a Beth Din (rabbinical arbitration panel) panel, consisting of a first *dayan* (arbitrator) appointed by the claimant, a second *dayan* appointed by the respondent, and a third *dayan* appointed by the first two *dayanim* (arbitrators) selected by the parties, and judgment upon the award rendered by such Beth Din panel may be entered in any secular court having jurisdiction thereof. Within two (2) weeks after the initial notice has been sent by claimant appointing the first *dayan*, the respondent shall submit the name of the second *dayan*, and these two *dayanaim* shall select the third *dayan* within thirty (30) days thereafter. The parties shall present their case before these three *dayanim*, constituting the Beth Din panel, within fifteen (15) days after the appointment of the Beth Din panel, and the Beth Din panel shall render a decision on the dispute within thirty (30) days after the hearing. Any selection of *dayanim* pursuant to this provision shall be in writing with notice to the other party and to the relevant arbitrators who have been selected at the time of any such notice, and shall include a citation of this provision. Unless otherwise agreed in writing by the parties, the internal rules and procedures of such Beth Din panel, which shall be consistent with the procedural requirements of the [State] arbitration statutes, shall be determined by the third *dayan*. In no event shall any dispute between the parties arising out of or relating to this contract be subject to any dispute resolution procedure except as explicitly set forth in this section, including, without limitation, the filing of any action, complaint or proceeding in any federal, state or local court.”

This standard language, although very extensive, may not always be sufficient to ensure enforceability of the provision. One of the challenges of convening a

<sup>15</sup> See also *Pischei Teshuva*, *supra* note 6, who also quotes his ancestor the *Panim Meiros* as recommending that communities establish a rule against having even a casual friend (*obeiv*) as a *borer* based on similar considerations.

ZABLA panel is that the two *borerim* cannot always agree on the identity of the *shalish*, the third *dayan*. In addition, one of the sides may stall on the selection of a *borer*. When the parties have already entered into an agreement, such as the one described above, in which they have agreed to a ZABLA type process, the question arises as to the degree to which a court will become involved in ensuring the enforcement of the arbitration provision.

Typically, when the parties have selected a clearly defined Beth Din, such as the Beth Din of America, to adjudicate their dispute, a court will in fact order arbitration before that Beth Din.<sup>16</sup> However, in the case of a ZABLA, convening the panel of *dayanim* depends upon the selection of specific individuals. With respect to a secular arbitration panel, a court will fill in the missing arbitrator when the parties are unable or unwilling to do so.<sup>17</sup> But in the context of a rabbinical tribunal, it is questionable whether a court may be actively involved in selecting specific *dayanim*, especially when the parties have not agreed upon even an existing roster of potential *dayanim*.

Although one could argue that a court would simply be enforcing the agreement of the parties, the New York appellate court (Second Department) in a majority decision in *Pal v. Pal*<sup>18</sup> ruled that a court has “no authority” to “convene a rabbinical tribunal,” and accordingly struck down a lower court order to appoint a specific religious court judge to sit on a ZABLA panel when the husband had failed to select a *borer* for a proceeding with respect to the wife’s request for a *get* (Jewish divorce). Thus, at least under the *Pal v. Pal* decision in New York, one of the pitfalls of the ZABLA process is that the ability to enforce the ZABLA provision depends very much on the good faith of the parties in convening the ZABLA panel in the first place.

Still, *Pal v. Pal* may not be dispositive. The New York court (First Department) in *Davis v. Melnicke*<sup>19</sup> held, based on CPLR §7504, that when parties had entered into a contract stipulating that any dispute would be subject to a resolution through

<sup>16</sup> See *Avitzur v. Avitzur*, 58 N.Y.2d 108 (1983); *Friedman v. Friedman*, 34 A.D.3d 418 (N.Y. App. Div. 2d Dept. 2006).

<sup>17</sup> See NY CPLR §7504 (“Court appointment of arbitrator”) which states: “If the arbitration agreement does not provide for a method of appointment of an arbitrator, or if the agreed method fails or for any reason is not followed, or if an arbitrator fails to act and his successor has not been appointed, the court, on application of a party, shall appoint an arbitrator.”

<sup>18</sup> *Pal v. Pal*, 45 A.D.2d 738 (N.Y. App. Div. 2d Dept. 1974).

<sup>19</sup> *Davis v. Melnicke*, 2005 N.Y. Slip Op 30407 (N.Y. Sup. Ct. 2005).

ZABLA,<sup>20</sup> and each of the parties had selected a rabbinic arbitrator, but the two arbitrators could not agree on a third rabbinic arbitrator, the court had the power to appoint the third rabbinic arbitrator. Although this lower court decision was not officially published, the court decision was subsequently upheld in a published decision by the appellate court in the case, which rejected the other party's argument that the court's actions constituted impermissible entanglement with religion "since no doctrinal issue was decided by the court and no interference with religious authority will result."<sup>21</sup>

It is difficult to predict whether a court would choose to follow the holding in *Pal v. Pal* or *Davis v. Melnicke* (although it may depend on whether the court is situated in the First Department or the Second Department of the New York court system).<sup>22</sup>

Additionally, it should go without saying that even if a court would determine that it is able as a matter of law to appoint a third arbitrator, there is a halakhic concern that a court-appointed arbitrator may not satisfy the prerequisites of Jewish law in terms of possessing the requisite credentials to serve as a *dayan*.<sup>23</sup>

Accordingly, it would seem prudent for parties to include a clause (filling in the blanks below, as appropriate) in the ZABLA provision stating something like the following:

"in the event that one party fails to choose a *dayan* within the specified time, the parties agree that the Beth Din of [ ], or Rabbi [ ], shall be empowered to appoint the *dayan* on behalf of such party. Similarly, if the two *dayanim* are not able to select a third *dayan* within the time specified herein, the Beth Din of [ ] or Rabbi [ ] shall be empowered to select the third *dayan* in order to ensure the adjudication of the dispute pursuant to this provision."

<sup>20</sup> While the parties' contract did not specifically utilize the term ZABLA, the terms of the contractual clause in question were clearly those of a ZABLA.

<sup>21</sup> *Davis v. Melnicke*, 25 A.D.3d 503 (NY App. Div. 1<sup>st</sup> Dept. 2006).

<sup>22</sup> Another possible distinction may be based on the fact that the *Pal* court dealt with a dispute about a *get* matter, which would appear to be a more rabbinical type of determination on its face, while the *Davis* court dealt with a commercial dispute. However, given the fact that the appellate court in *David* relied upon the *Avitzur* decision, *supra* note 16, which dealt with the enforcement of an arbitration provision to adjudicate a *get* dispute, it would not appear that this distinction accounts for the conflicting decisions in these cases.

<sup>23</sup> See *Rema, Choshen Mishpat* 3:4.

Such a clause would likely be enforceable even under the *Pal v. Pal* decision, because the court would not be choosing a *dayan* to serve on the panel but simply empowering someone else to make that choice in accordance with the parties' own agreement.<sup>24</sup> Furthermore, since the selection of the third arbitrator would be made by a Rabbi or Beth Din authorized by the parties, it would more clearly satisfy the requirements of Jewish law.

#### IV. CASES OF COURT INTERVENTION IN CONVENING RABBINIC PANELS

Courts may also draw a distinction between the appointment by the court of an individual rabbinic arbitrator, as in the case of *Pal v. Pal*, and the ruling by a court that the parties submit to an unspecified Beth Din tribunal, including a ZABLA tribunal, based on a contract between the parties which stipulates that the parties submit any dispute to a Beth Din, but does not specify the Beth Din.

In one such case, where a synagogue's bylaws specified that any dispute relating to the internal affairs of the synagogue be adjudicated before "a Beth Din of Orthodox Rabbis," the District of Columbia Court of Appeals ruled<sup>25</sup> that one party to the dispute could compel the other party to appear before "a" Beth Din to resolve the dispute, even though the contract did not identify a specific Beth Din. The Court concluded that the term "Beth Din" was sufficiently clear and well-known to the parties, as set forth in the synagogue bylaws, that enforcement of this provision was simply an application of "neutral principles of law" that did not necessitate an ecclesiastical determination that would run afoul of Establishment Clause constitutional considerations. This decision did not implicate the holding in the *Pal v. Pal* case, because the court did not directly convene the rabbinical tribunal.

In an even more sweeping decision, a New York appellate court recently ruled in *In re Silberman v. Farkas*<sup>26</sup> that when parties had stipulated in their partnership agreement that they would arbitrate any disputes between them "before a

<sup>24</sup> It is noteworthy that in the *Pal* case, as noted by Judge Martuscello in his lengthy dissent, the parties' own contractual stipulation gave authority to the court to appoint a rabbinic arbitrator in the event that the parties could not reach an agreement on their own, and yet even this provision was struck down by the court (the *Davis* case also contained such a provision). However, the concern about a court not convening a rabbinical tribunal would not appear to be pertinent when a third party is empowered to make the appointment.

<sup>25</sup> *Meshel v. Ohev Sholom*, 869 A.2d 243 (D.C. 2005).

<sup>26</sup> *In re Silberman v. Farkas*, 114 N.Y.S.3d 407 (N.Y. App. Div. 2d Dept. 2020).

Rabbinical court within the Jewish community,” and then were unable to agree upon a particular rabbinical court, the lower court had erred in directing them to arbitrate their dispute in front of the American Arbitration Association. Rather, the court, pursuant to NY CPLR §7504, remitted the matter to the lower court “to appoint a rabbinical court as the arbitrator of the parties’ dispute if the parties cannot agree to the selection of an arbitrator.”<sup>27</sup>

Finally, the court in *Tal Tours v. Goldstein*<sup>28</sup> ruled that the defendant’s stated wish to submit to a ZABLA<sup>29</sup> pursuant to a summons by the Beth Din of America, constituted a valid option under Section 2 of the rules and procedures of the Beth Din.<sup>30</sup> Therefore, the court concluded that the party’s verbal agreement before the court “to resolve this matter through proceedings under the auspices of the BDA” must be understood in that spirit. Accordingly, the court ruled that the defendant was not obligated to submit to the jurisdiction of the Beth Din of America per se, but rather to a ZABLA proceeding pursuant to the rules and procedures of the Beth Din of America, according to which the plaintiff was obligated to select a *dayan* within a thirty-day period, after which the *dayan* selected by the plaintiff and the *dayan* previously selected by the defendant would designate the third *dayan*.

## V. OTHER ZABLA ISSUES

Even when a Beth Din institution is tasked with convening a ZABLA, there are various areas of dispute from the perspective of Jewish law regarding the rules of doing so. One point of contention is whether the parties need to consent to the choice of the *shalish*, or whether the choice of this third *dayan* is solely at the discretion of the two *borerim*. According to the letter of Jewish law, the *shalish* can be

<sup>27</sup> *In re Silberman v. Farkas*, 114 N.Y.S.3d 407 (N.Y. App. Div. 2d Dept. 2020).

<sup>28</sup> *Tal Tours v. Goldstein*, 2005 NY Slip Op 51626 (Sup. Ct., Nassau County).

<sup>29</sup> The court actually employed the term “*Zebbla*,” consistent with the spelling used in the text of the Rules and Procedures of the Beth Din of America.

<sup>30</sup> Section 2 of the Beth Din of America’s Rules and Procedures states, in relevant part, “[s]hould a person receiving an invitation (*hazmana*) not wish to participate in these proceedings, and wishes to avoid the issuance of a *shtar seruv* (see paragraph [i]) one of three responses must be forthcoming from that party: (1) That party wishes to proceed to arbitration in an alternative bet din recognized by the Av Beth Din and this case is not one in which the Beth Din of America was the pre-agreed forum for dispute resolution by the parties; (2) That party wishes to resolve the dispute through the procedure by which each side chooses an arbitrator, and the two chosen arbitrators agree on a third party (referred to as *zebla* in Jewish law), and this case is not one in which the Beth Din of America was the pre-agreed forum for dispute resolution by the parties; ....” See Beth Din of America, *Rules and Procedures*, available at <https://bethdin.org/rules>.



selected by the two *borerim* even without consent of both sides.<sup>31</sup> Although many have the custom to elicit the consent of the parties with respect to the *shalish*<sup>32</sup> this cannot be insisted upon later on in the proceeding when such a practice was not made a prerequisite to the selection of the ZABLA panel in the arbitration agreement.<sup>33</sup>

This lack of party prerogative over the choice of the *shalish* can become relevant when the Beth Din needs to determine whether a ZABLA has been properly convened as a matter of Jewish law. For example, consider a case where the parties sign an arbitration agreement which specifies that any dispute will be submitted to a ZABLA. However, the parties also insert language in the arbitration clause that specifies that the case will revert to the jurisdiction of a certain Beth Din if the ZABLA cannot be successfully convened. Subsequently, the parties choose two *borerim*, and the two *borerim* agree upon a *shalish*, but then one of the original two *borerim* withdraws and is replaced by a substitute *borer*, who does not object to the previous selection of the *shalish*. The party who selected the initial *borer* now argues that a valid ZABLA panel was not formed, since the new *borer* did not participate in the choice of the original *shalish*, whom that party did not endorse. It would seem that in such a case the proper halakhic ruling to be followed by a Beth Din is that since the two initial *borerim* had agreed upon the appointment of the *shalish*, and the substitute *borer* also indicated satisfaction with their original choice, the ZABLA panel was validly convened and thus has jurisdiction to adjudicate the case.

## VI. CONCLUSION

Based on all of the concerns described herein, parties entering into a dispute resolution clause or arbitration agreement which stipulates for a ZABLA proceeding should bear in mind the following considerations: (a) it is best to stipulate that the ZABLA be under the auspices and direction of a respected Beth Din (or network of respected *Batei Din*),<sup>34</sup> in order to prevent potential violations of Jewish law

<sup>31</sup> See *Choshen Mishpat* 13:1.

<sup>32</sup> See R. Avrohom Derbarmdikar, *Seder Hadin* 3:2.

<sup>33</sup> R. Derbarmdikar, *supra* note 32, at 3:30.

<sup>34</sup> See, e.g., Rabbi J. David Bleich, *The Bet Din – an Institution Whose Time Has Returned*, CONTEMPORARY HALAKHIC PROBLEMS IV (1992), 15–16, who argues for the establishment of a centralized national Beth Din which would include “establishing a fairly large roster of *dayyanim* and permitting litigants to use a limited form of the *zabla* system, i.e. the system under which each

regarding the impartiality and integrity of the ZABLA; (b) in the event of an impasse, there should be a designation of a specific Beth Din or rabbinic authority to fill any vacancy, especially since the standard arbitration rule that a court normally fills any arbitration vacancy cannot be confidently relied upon with respect to a Beth Din tribunal; and (c) despite the potential benefits of a properly convened ZABLA, the parties would be well advised to consider submission to a regular Beth Din process before a respected and established institutional Bet Din in order to avoid the vagaries of the ZABLA process from the perspective of Jewish law and to ensure the smooth enforceability of the arbitration agreement under secular law.

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litigant chooses one member of the tribunal. Litigants might be permitted to designate the members of the Bet Din that would hear their case but would be limited in being able to select a panel of *dayyanim* only from among the designated list of members of the national Bet Din.” In a footnote, the author attributes the idea of putting together such a roster of *dayanim* to Rav Yaakov Kamenetsky (1891-1986), who had suggested it to Rabbi Bleich in the context of convening a ZABLA Bet Din for antenuptial agreements in order “to avoid the procrastination that unfortunately develops” in selecting members of a ZABLA.