

COMMON HALACHIC ISSUES



LEGAL CONTRACTS

*Adapted from a shiur by Rabbi Ari Marburger
at the H3 Halacha Summit*

December 18, 2019

Common Halachic Issues *in* Legal Contracts

Adapted from a shiur by Rabbi Ari Marburger at the H3 Halacha Summit

Questions or comments can be sent to the author at am@shtaros.com

Legal contracts are often long and technical documents that are designed to protect against any conceivable contingency. People will often expend substantial legal fees to review the document's legal and economic implications. Yet, one area often overlooked is Halacha. There are numerous clauses commonly found in legal agreements that may violate Halacha, and being aware of these issues can prevent a person from unwittingly signing such a document. The following is a summary of the most common halachic contractual issues, along with a some practical suggestions.

RIBBIS

Late penalty fees. While a one-time penalty is permitted in a lease or sale agreement, a recurring fee is prohibited Ribbis. Thus, a lease or retainer agreement that contains a late payment penalty of one percent per month would be prohibited. However, if the penalty is a one-time fee that is assessed, such as a fifty-dollar fee if rent is not paid on time, it would be permitted.

Capital Calls. Many operating agreements have clauses requiring all partners to contribute their pro-rata share of capital, and in the event one partner defaults, the others may advance the funds as an interest-bearing loan. If the Partners are Jewish, this is a potential Ribbis concern. Note that according to the Igros Moshe, loans that do not have any personal liability are not subject to Ribbis. Capital call provisions typically are only collected from the defaulting partner's membership interest, which would be permitted if one follows the opinion of the Igros Moshe.

Terms. Many sales contracts contain terms that payment is due in thirty/sixty days, and if paid within ten days, a discount will be applied. According to many Poskim, such arrangements violate Ribbis since the customer is effectively being charged a fee for retaining the funds for the term period. Although it is worded as a discount for prompt payment, the net effect is the same as charging interest. If the buyer is a corporate entity and has no personal liability for the purchase, the

abovementioned leniency of the Igros Moshe may apply.

Guarantor: Guaranteeing an interest-bearing loan between a Gentile bank and a Jew may be a Ribbis concern, and a Rav should be consulted. This is especially prevalent among partners, when a key principal executes a personal guarantee on a loan and is indemnified by the other partners. Heter Iska. Loans and seller financing require a Heter Iska if both parties are Jewish. While many lenders today are cooperative and will execute a Heter Iska upon request, it is critical to raise the issue early in the process before signing any agreements. Raising the issue at the closing table does not give the lender time to become familiar with the Heter Iska, and it is unlikely for them to sign it under pressure.

———— SHABBOS ————

Instructing a Gentile to perform Melacha on Shabbos violates Amira L'akum, even if the Gentile is an independent subcontractor. A contract with a call center that requires that all calls be answered 24/7 is effectively forcing the company to answer calls on your behalf on Shabbos and Yom Tov, and would be prohibited. Security, maintenance, and snow removal contracts are other examples where this concern arises, and a Rav should be consulted with to properly structure such arrangements.

———— CHOICE OF LAW/VENUE ————

Litigating a dispute between Jews in a civil court violates the prohibition of Arkaos. It is appropriate to incorporate an arbitration clause into contracts to ensure that in the event of a dispute, it will be properly adjudicated in a Bais Din. It is advisable to identify a specific Bais Din in the clause- this enables the Parties to choose in advance a Bais Din they have confidence in, and prevents either party from trying to 'game the system' and finding a Bais Din they believe will be more receptive to their position.

———— ENFORCEABILITY ————

Halacha has numerous technical requirements for contracts, and many civil contracts do not conform with these requirements. While most contracts can be upheld because of the concepts of Minhag, Situmta, and Dina Dmalchusa, it is advisable to add an Agreement Validation clause to contracts between Jews to increase its enforceability in Bais Din. A sample clause is included below.

Agreement Validation:

The Parties hereby admit and confess (with the same effect as if verified by the testimony of 100 valid witnesses) that this Agreement was effected and finalized concurrently herewith according to Jewish Law by formal Kinyan Agav Sudar and/or other appropriate Kinyanim, and were stated and intended to be effective immediately (at the time of the Kinyan), all in full accordance with all requisite procedures set out in the Code of Jewish Law (the "Code") and with use of an object valid to effect a Kinyan sudar. The kinyan was made in a duly constituted Jewish Court of Law (Bais Din Chashuv) in accordance with each of the varying procedures required by all of the various Jewish Halachic authorities, so that all Jewish Halachic authorities deem the covenants, waivers, and acquisitions valid, without any Asmachta (as defined in the Code) claim of invalidation and without any other claim of invalidation. In addition, the conditions referred to in this Agreement are and were all set in the manner used by Bnei Gad and Bnei Reuven and in accordance with all other requirements that are set out in the Code for the valid and binding setting of conditions. The Kinyan was made for each transfer separately so that the invalidation of one transfer shall not affect the validity of any other transfers. The Parties accept as conclusive and binding the position of any Jewish Halachic authority, even if in the minority or otherwise not generally accepted, that most broadly supports the validity and enforceability of this Agreement and its implied intent.~~~

The parties admit that the intent and interpretation of this agreement is in a manner consistent with the requirements of halachah, and the transactions were effected in a manner that do not constitute a Kinyan Dvorim or Ayn Bo Mamash. Specifically, all obligations were accepted as a Hischayvus, and the parties became a Kablan in regards to any required acts. All this was effected with a valid Kinyan.~~~

Any portion of the Agreement that violate the laws of Ribbis shall be structured as a Heter Iska in accordance with the Sefer Bris Yehuda.~~~

The Parties are agreeing to all provisions of this Agreement knowingly and willingly and without duress or pressure. The Parties, irrevocably and without time limit, void any declaration of disclaimer (including any declaration of disclaimer that purports to disclaim the voiding effect of this paragraph, ad infinitum) that they may ever have made regarding this Agreement, and they represent and warrant that they did not make or purport to make any such declaration of disclaimer. The Parties hereby irrevocably void and waive any defense or counterclaim that could void or impair or in any way limit the validity and enforceability of this Agreement.~~~

This Agreement is intended to be, and is, binding, consistent with the binding nature of all agreements, documents, obligations, and acquisitions that are properly effected in a Jewish Court of Law in accordance with the laws and rules established by Rabbinical authorities. THIS IS ALL VALID AND IN GOOD STANDING.