Civil Litigation, Insurance Claims, And Halachah

A Practical Guide to Hilchos Arkaos

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Arkaos- Civil Courts

As the Jewish community has grown and become involved with increasingly sophisticated transactions, litigation involving Jewish parties has increased as well. When a dispute arises, people's natural reaction is to retain an attorney to litigate in civil court. However, there is a severe and often misunderstood Halachic prohibition against litigating in civil courts, referred to as "Arkaos". The purpose of this article is to explore the parameters of this prohibition, and to outline what steps can be taken when one finds oneself in a litigious situation. The final section of this article is dedicated to questions related to insurance litigation.

Arkaos can be especially challenging for the frum attorney. Often, doing exactly what he has been trained to do can put the frum attorney at risk of violating the prohibition against Arkaos. This article will present practical rules and guidelines to help the frum attorney avoid violating the prohibition of Arkaos. Please note that it is not the intention of this article to render a final P'sak Halachah for any specific case. In such situations, a competent Halachic authority should be consulted.

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Contents

Prohibition Against Arkaos

Litigating in civil court against another Jew[1] violates the prohibition against Arkaos[2]. As Rashi[3] explains, litigating in civil court causes a Chillul Hashem and demonstrates that one prefers a foreign set of values to Halacha. Shulchan Aruch employs unusually harsh language to describe one who violates Arkaos, stating that he is "a *rasha* and a blasphemer"[4]. One who violates the prohibition is disqualified from testifying in a Bais Din[5], cannot be counted for a Minyan[6], and should be excommunicated from the community.[7] A plaintiff may also be liable for any litigation expenses that he caused the defendant to incur.[8]

Civil Court's Verdict

Any money awarded by a civil court that exceeds what he is entitled to according to Halachah is considered stolen.[9] Nevertheless, even if the civil court's verdict will be consistent with Halachah, the litigation itself is prohibited.[10]

Mutual Consent to litigate in Arkaos

The prohibition of Arkaos applies even if both parties prefer to litigate in civil court.[11] Since the prohibition of Arkaos involves a matter of Chillul Hashem, it is not left to the parties' discretion.

Heter Arkaos

If a defendant refuses to submit to the jurisdiction of any[12] Bais Din, the other party may receive a "Heter[13] Arkaos", allowing[14] them to protect their

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[1] See section "Non-Jews" for further clarification.

[2] "ואלה המשפטים אשר תשים לפניהם". The Gemara Gittin 88b interprets לפניהם ולא לפני עכו"ם, i.e. disputes must be presented to a Bais Din and not before a civil court.

[3] Shemos 21:1

[4] Choshen Mishpat 26:1.

[5] Tashbetz tur 3:6. This would disqualify him from being a witness for a Kesubah or Chuppah as well.

[6] Kesph Hakadashim 26:1.
See however Mishnah Berurah 53:82 that seems to disagree.

[7] Choshen Mishpat 26:1.

[8] Choshen Mishpat 26:4.
However, see Bach 26 that if the defendant incurred penalties by violating a court order or by speaking inappropriately to the judge, the plaintiff would not be liable for these additional penalties since the defendant brought this damage upon himself.

[9] Tashbatz 2:290, and Tur 3:6, quoted by R' Akiva Eiger 26:1.
If the defendant was forced to defend himself in civil court, all opinions agree that the award monies are considered stolen. If the parties voluntarily agreed to litigate in Arkaos, see footnotes 26 and 39

[10] Choshen Mishpat 26:1.

[11] Choshen Mishpat 26:1, Ramban Parshas Mishpatim, Tashbetz Tur 3:6.

[12] Tumim, Nesivos Chiddushim 26 (13), Kneses Hagedola Tur 26:26 write that if the defendant is willing to accept any Bais Din, we do not issue a Heter Arkaos. This applies even if the defendant does not have the Halachic right to insist

rights in civil court[15]. Bais Din will typically summon the defendant three times to a Din Torah. If the defendant fails to respond appropriately, Bais Din will issue a Heter Arkaos.

It is important that one obtain a formal Heter Arkaos from a Bais Din[16] before litigating in court. One may not sue in civil court simply because the defendant privately stated that he will not come to a Din Torah.[17] It is advisable to obtain the Heter Arkaos in writing. According to some Poskim, a litigant who sues in civil court is presumed to have done so without a valid Heter Arkaos unless he provides valid proof to the contrary.[18]

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on his specific choice of Bais Din. However, Aruch Hashulchan 26 qualifies that if Bais Din determines that he is simply playing games and trying to avoid a Din Torah, they may issue a Heter Arkaos.

[13] Klee Chemdah (Parshas Mishpatim) questions why the severe prohibition against Arkaos is waived in this circumstance; to the extent it is a Chillul Hashem to litigate in civil court, the plaintiff should be obligated to relinquish his claim to avoid any Chilul Hashem? Some Poskim suggest that when the defendant refuses to come to a Din Torah, it is clear to all that the plaintiff has no other recourse to recover his money. As such, his actions will not be seen as a rejection of Halachah, which is the core concern of the prohibition. See footnote 54

[14] See Mahree Ben Lev 3:48 for a discussion of circumstances where Bais Din simply permits a party to initiate legal proceedings, and where Bais Din has a proactive obligation to ensure that the party recovers what they are entitled to.

[15] Choshen Mishpat 26:2. Nesivos 3 writes that Bais Din may only grant permission to litigate if they are convinced that the claim is Halachically valid. This precludes a Heter in all but the simplest of cases. Aruch Hashulchan 26:2 maintains that Bais Din should listen to the plaintiff's claims. If they seem valid, Bais Din should grant a Heter Arkaos. See, however, Imray Binah Dayanim 27, Orach Mishpat 26, Teshuvos Vhanhagos 3:441 who argue that the custom is to allow the plaintiff to litigate in civil court even if the Bais Din is unsure of the validity of the claim.

While the custom among Batey Din seems to follow the ruling of Imrey Binah, it would seem appropriate that some inquiries be made before granting a Heter Arkaos, as per Aruch Hashulchan. This allows legitimate plaintiffs to pursue their claims in court, while preventing unnecessary Chilul Hashem in the event the claim is frivolous. In addition, since many Poskim hold that the plaintiff will have an obligation to return any excess funds he collects to the defendant, it would be advisable to determine that amount before proceeding with the lawsuit.

See also Maharshag 3:127 that because of the Chilul Hashem caused by Arkaos, Bais Din will not give a Heter if the parties are litigating over trivial sums.

[16] Choshen Mishpat 26:2.

Radvaz 1:172, Orach Mishpat 26 maintain that only a *Bais Din Kavuah*, an official Bais Din of the city, may grant a Heter Arkaos. As most communities today do not have a Bais Din Kavua, it would be virtually impossible to obtain a Heter Arkaos according to these opinions.

See, however, Teshuvas HaRosh who states that if a contract contains a clause allowing the parties to litigate in civil court, one need not get a Heter Arkaos in the event the other party refuses to submit to Bais Din. The implication is that the need for a Heter Arkaos against a person who refused to come to Bais Din can be consensually waived. Logically, a Zabluh Bais Din that was mutually accepted by the parties would also have that right. In addition**,** Shevet Halvey 4:183 rules that any leading Halachic authority may grant a Heter Arkaos, and a formal Bais Din Kavuah is not required.

See also B'tzel Hachama 4:37.

[17] See Maharik 154, Divrey Chaim Chosen Mishpat 2:46, Erech Shay 388:5, who state that a Heter Arkaos is required even if the defendant privately told the plaintiff that he will not come to a Din Torah. Nevertheless, if one sues because of that refusal, the plaintiff would not be liable for the defendant's court costs.

Kneses Hagedola 14:28, Tuv Taam Vdaas 43: 261 maintain that one does not need any formal Heter Arkaos to litigate against someone who refuses to accept the jurisdiction of a Bais Din.

As a practical matter, it is difficult to verify that a counterparty will not accept Bais Din's jurisdiction unless one actually summons him to Bais Din. (Kneses Hagedola, Ne'os Desha 52) Therefore, one should send at a Hazmana from a Bais Din. If it is clear to the Bais Din that the party does not intend to accept Bais Din's jurisdiction, the Bais Din will typically grant a Heter Arkaos without delay.

[18] Maharitatz 102, Chukos Hachaim 6.

It should be noted that according to many Poskim, even when Bais Din grants a Heter Arkaos, the person is only entitled to the amount of money that a Bais Din would have awarded him. If the civil court awards him more than he is entitled to according to Halachah, the extra funds must be returned.[19] However, the defendant will be liable to reimburse[20] the plaintiff's litigation expenses.[21] This will often offset any excess award.

Collateral Damage

A Heter Arkaos will typically shield the plaintiff from Halachic liability for damage suffered by the defendant as a result of the litigation[22]. Any damage suffered by the defendant would be considered self-inflicted, and the defendant would have no claim against the plaintiff. However, a Heter Arkaos does not permit one to instigate criminal proceedings against the other party[23].

See, however, Divrey Chaim 2:46, Erech Shay 388, Mahril Diskin Psakim 14.

[19] Nesivos 26:2.

Although Bais Din will not open a case on behalf of a party that chose to litigate in Arkaos, Nesivos maintains that this does not release the prevailing party from their obligation to return any monies in excess of what they are entitled to according to Halachah. While Bais Din will not deal with the matter, a litigant has a personal obligation to determine whether he received more than he is entitled to, and to return the excess funds.

See also Marsham 1:89 and footnote 26 and 39.

It should be noted that even if the plaintiff knows that he does not have sufficient evidence to prevail in a Din Torah, if he is certain that the underlying facts would support his Halachic claim, he may keep the award. The reason is that to the extent that he knows he is right, the rules of evidence are only relevant in a Din Torah. Since the defendant, by refusing to appear before a Bais Din, lost his right to have a Bais Din resolve the matter, the plaintiff has no obligation to return funds that he know he is truly entitled to.

[20] If one litigates without a Heter Arkaos, even if the actual litigation was justified (for example, if the other party is a "Lo Tzayis Din" and the contract specifies that he may sue in court), one would not be entitled to compensation for their court costs. (Yam Shel Shlomo Bava Kama 10:14, Divrey Chaim 2:46, Igros Moshe 2:26). See, however, Erech Shay 26:4 who suggests that today, becuase it has become increasingly common for people to litigate in civil court, the defendant can be held liable for court costs even if the plaintiff did not obtain a Heter Arkaos.

Ne'os Desha 52 says that if one sues on the presumption that the other party will not come to Bais Din, the plaintiff must reimburse the defendant for the expenses he incurred. If, however, the plaintiff attempted to summon the defendant to a Din Torah and he refused to come, and the plaintiff initiated legal action without receiving a formal Heter Arkaos, neither party is liable for the other party's litigation expenses. If, however, Bais Din issues a formal Heter Arkaos, the defendant must reimburse plaintiff for his litigation expenses.

[21] *Rama* 14:5, Yam Shel Shlomo Bava Kama 10:14, Shach 14:13.

According to some Poskim, expenses are only recoverable if the party that refused to come to Bais Din is ultimately found guilty. However, if he is vindicated, he is not considered to have caused the other party a loss (Sma 14(27) based on Rivash 475). Nesivos 4 explains that this applies only to instances where the plaintiff's claim was in bad faith. However, if the claim was made in good faith, the offending party is liable for the expenses regardless of who proves to be correct, since had they complied with Halachah, there would not have been the need for the civil litigation.

[22] See Sefer Haterumos 62:1:7 who permits litigating against a debtor even though the government will impose a penalty. See also Tumas Yesharim 22, Mishpatey Shmuel 94, 114 , Divrey Chaim 2:9, Igros Moshe Chosen Mishpat 1:8, Kesef Hakadashim 26.2.

See Maharshag 3:127 who states that the reason a Heter Arkaos is needed from a Bais Din is to give the Bais Din the opportunity to determine how to minimize damage to the defendant while protecting the plaintiff's interests.

[23] The goal of the Heter is to protect the plaintiff's interests and to enable him to collect what is due. It is not a license to 'settle the score' by trying to incriminate the other party. A party that maliciously provides the courts with

Retracting a Heter Arkaos; Petitioning a Bais Din After Losing in Civil Court

If the offending party recognizes their error during[24] the litigation and agrees to submit to a Din Torah, Bais Din will typically retract[25] the Heter Arkaos.[26] However, once the civil court issues a ruling[27], according to Ashkenazi Poskim,[28] Bais Din will not reopen[29] the[30] case [31].

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incriminating evidence unrelated to the instant litigation will transgress the prohibition of Mesirah. Determining what is appropriate to introduce to the litigation can be a sensitive question, and one should consult a Rav for guidance.
It should be noted that incriminating an innocent third party would clearly not be justified under any circumstances.

[24] Erech Shay 26, Maharash Engel 3:49, Bais Yitzchok 41:2 state that this rule applies only after the civil courts issues a verdict; if the parties withdraw before the verdict, Bais Din will accept the case. Birkas Yosef (Landau) 23 adds that even if a person agreed to withdraw his case only because he believed that he would lose in civil court, Bais Din will take the case. Maharik 154 follows this approach.
As a practical matter, when a defendant initially refused to appear before a Bais Din, and then had a change of heart after being sued in civil court, Bais Din will often allow the plaintiff to delay the legal proceedings instead of dropping them completely. This helps ensure the defendant will cooperate with the Din Torah process, and avoids unnecessary delays if the defendant does not comply with the Bais Din's rulings.

[25] See also Erech Shay 386 (5) who states that if the defendant originally refused to come to a Din Torah and the plaintiff sued in court, and later the defendant agreed to come to Bais Din, the plaintiff is liable for all future litigation costs if he does not drop the civil case.

[26] Choshen Mishpat 26:1.

[27] According to many opinions, this applies only to a plaintiff who loses in civil court; if the defendant loses in civil court, he may later reopen the case in Bais Din. (Harey Bashamayim 237, Maharshag 3:127, Avney Hachoshen 26:2. Ohr Zaruah Bava Kama 1:3,4 seems to support this position)
See, however, Minchas Pitim 26 quoting Maharil Tzinz Chosen Mishpat 30.6, Maharsham 1:89 that rule that if the defendant makes no attempt to bring the matter to Bais Din, he is implicitly accepting the court's jurisdiction, and may not change his mind simply because he lost the case. See also Teshuvos Vhanhagos 3:343 who differentiates between cases where the defendant should have reasonably expected the plaintiff to respond to a Hazmana, and cases where the plaintiff could be expected to ignore a Hazmana.
If the original contract contained a "choice of law" provision, there is stronger basis to follow the court's verdict. As discussed below in the section "Choice of Law", some Poskim maintain that such agreements are valid and give the parties the rights they are entitled to under civil law. Although many authorities argue with this opinion, perhaps one may use this opinion in conjunction with the opinions that voluntarily submitting to civil court itself binds the parties to the verdict, וצ"ע לדינא
If the defendant attempted to bring the case to a Bais Din but the plaintiff refused, the defendant certainly retains his right to reopen the case.

[28] Rav Moshe Mizrachi 13 (quoted by Rav Akiva Eiger) points out that Bais Yosef argues on this Halachah, and does not quote it in Shulchan Aruch. Therefore, Sefardim, who follow the rulings of the Bais Yosef/Mechaber, would therefore not follow this ruling.

[29] Nevertheless, according to most Poskim (Lvush, Nesivos 26 (2), Erech Shay, Bais Yitzchok 41, Chavatzeles Hasharon Even Haezer 2:6 Avney Choshen 22, Even Hashoham 59, 61 (quoted by Rav Akiva Eiger),Goan, Mahriaz Enzel, Bais Yitzchok, Maharshag), if the courts award the litigant more than he would be entitled to according to Halachah, he is obligated to return the excess amount. While a Bais Din will not deal with the matter, there is a personal obligation to determine what he is Halachically entitled to and return the rest.
See, however, Birkas Yosaf, Maharsham 1:88, Minchas Pitim 26, Maral Tzinz 30, and Kesef Hakadashim 26 who argue that since the person chose to litigate in court, he is Halachically bound to its verdict and is not entitled to any refund.

[30] See also Mahasham 5:21 that the fact that a person litigated a dispute in Arkaos would not preclude him from initiating a Din Torah against the same party in Bais Din about another matter. Maharsham also permits initiating a Din Torah about related issues, provided that they were not the focus of the civil litigation.

Non-observant Counterparty

The prohibition of Arkaos applies to any dispute involving Jews, regardless of the counterparty's level of Torah observance. Even if the other party is not frum, one is not permitted to litigate against him in civil court. However, because non-Torah observant Jews will generally not agree to a Din Torah, Bais Din will typically issue a Heter Arkaos fairly quickly. Instead of waiting until the defendant ignores three summonses, many Batey Din will simply verify that the defendant is not interested in a Din Torah and then promptly issue a Heter Arkaos.[32]

Non-Jews

Theoretically, the prohibition against Arkaos applies even when the counterparty is an Akum[33]. However, because an Akum will not accept the jurisdiction of Bais Din, one may litigate in civil court. There is no need to send any summons or to obtain a formal Heter Arkaos

Testifying in Civil Court

Ramuh[34] writes that one may not volunteer[35] to testify in civil court on behalf of a Jewish plaintiff who is violating the prohibition of Arkaos. Even when the plaintiff is correct regarding the underlying matter, playing a role in the

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[31] A possible exception to this rule is when the person who initiated the legal proceedings owes other people money. In this case, the debtor may initiate a Din Torah even after losing in civil court, since his creditors need not lose out because of his refusal to accept a Bais Din. (Mahariaz Enzel 94)

[32] Teshuvos Vhanhagos 3:441, Maishiv BHalachah 12 rule that a Hazmana must be sent, but that one Hazmana is sufficient.

See also Minchas Yitzchok 9:155, Kesef Hakadashim 26:2, Vayeshev Moshe 57 that if it is very clear to the Bais Din that the defendant will not submit to their jurisdiction, they may allow the plaintiff to sue in civil court without sending any summons.

Rav Sullman (Yosher V'Tov volume 4 page 56) writes that we do not follow this ruling. However, when the dispute involves collecting an undisputed debt, Rav Sullman permits one to be lenient.

See also Tashbetz 290 quoted in the following footnote that implies that when it is clear that the party will not accept Bais Din, one need not get a Heter Arkaos.

[33] Shiltos Mishpatim, Shoftim, Tanchuma, quoted by Tashbetz 290, Tashbetz Tur 3:6, Mahariaz Enzel 4, Minchas Pitim 26:1, Ohel Yehoshua 115, Divrey Geonim 52:15.

See also Maishiv BHalachah 83 (177) that suggests that the Poskim reject Tashbetz.

See also Ohel Yehoshua 115 for a discussion about a partnership between Jews and non-Jews.

[34] Shut Ramuh 52. A witness does not violate Arkaos since he is not a litigant. He will not violate Lifnay Iver since the litigants were in civil court regardless. However, he will violate the rabbinic injunction of Mesyeah, assisting someone violating a prohibition.

See also Shaar Mishpat 26 who maintains that one should testify on behalf of the party that is right. Since the parties are in court regardless, a witness is not aiding the prohibition. As such, it is appropriate to testify to prevent the wrong party from prevailing.

[35] If one is subpoenaed to testify, there are other Halachic factors that must be taken into account, and a Rav should be consulted.

forbidden litigation is prohibited[36]. This is especially true if the testimony will cause the verdict to be different from the Halachic outcome[37].

Testifying on behalf of a defendant who was forced to defend himself in civil court is permitted.

Defending oneself in court

A person who is sued may defend himself in court without a Heter Arkaos[38]. Nevertheless, it is advisable to get a Heter Arkaos even in such circumstances.[39]

Arkaos- the attorney's role

There is a Torah prohibition of *Lifnay Iver Lo Sitein Michshol;* one may not place a stumbling block before the blind. The Sages understood this prohibition to apply to anyone who helps another Jew violate a Torah prohibition. This creates a serious problem for an attorney: May one represent a Jewish client in civil court? What are his obligations if a client is not observant?

If the attorney is defending a client who was sued without a Heter Arkaos, there is no halachic problem. His client is not violating Arkaos; he was forced into the litigation by the plaintiff, and has the Halachic right to defend himself.[40] Nevertheless, it is appropriate to try to have the litigation moved to a Bais Din[41].

If the attorney is representing the plaintiff, the appropriate behavior is to notify his client of the prohibition against Arkaos, and to try to convince him to honor his Halachic obligations. If this fails, and the client insists that he proceed with the legal action, the following principles would apply.

According to many Poskim, Lifnay Iver applies only when one's actions directly *enables* sin: But for the person's help, the sin would not occur. If, however, the person is capable of violating the prohibition without assistance (or if he would obtain the assistance of a non-Jew[42]), there is no concern of violating Lifnay Iver.

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[36] Imray Binah Dayanim 27, Erech Shay 26:1 defend the Ramuh's position by explaining that having another Jew involved in the legal proceedings increases the Chilul Hashem. Yam Shel Shlomo Bava Kama 10:23 seems to concur. See also Orach Mishpat 26 that explains that by testifying on his behalf, you are enabling him to profit from his wrongdoing, and are encouraging future violations.

[37] This is a violation of Lifney Iver since the witness is enabling him to take funds he is not Halachically entitled to.

[38] Radvaz 1:172, Imray Binah dayanim 27, Kneses Yechezkel 97, Yechaveh Daas 4:65 note.

[39] Kesef Kadashim 26:1.
See also footnote 27

[40] See previous section.

[41] To prevent the Chillul Hashem involved in Arkaos. See also footnote 27

[42] See Mishne Lmelech Halvah 4:2.

In most litigation, attorneys are fungible. There are usually other attorneys qualified[43] to handle the matter; the client does not need the assistance of one specific attorney to violate Arkaos. As such, Lifney Iver would typically not apply.

There is however, a second issue. There is a rabbinic injunction, called "Misayeah", against providing *any* form of assistance to a person violating a Torah prohibition. This applies even if your assistance is not vital to the violation. Although the sin would occur even without your help, providing assistance to a sinner is a violation of Misayeah.

There are, however, a number of limitations to this prohibition. According to some Poskim, it is limited to instances where the sin is being transgressed inadvertently. However, if the person is willfully violating the prohibition, one would not be proscribed from assisting him. While this distinction is not universally accepted, there is basis to rely upon it in case of great need, and one should consult with his Rabbi.

There is still a further issue. Shulchan Aruch writes that one who assists a Jew in violating Arkaos is put in Cherem.[44] The implication is that assisting in the violation of Arkaos is more severe than the typical Misayeah. Presumably, this is because of the profound Chillul Hashem caused by litigating in civil courts. As such, unless there is a valid Heter Arkaos, one would not be permitted to file a lawsuit on behalf of a Jewish client against another Jew.[45]

Enforcing a Psak Din

According to many Poskim, there is no need to obtain a Heter Arkaos to confirm a verdict from a Bais Din.[46]

Civil courts that are not tied to a religion

Courts historically reflected the religious beliefs of the monarchy. Litigating in such courts implied that one preferred the values of a foreign religion over Halachah; this is one of the reasons that Arkaos is treated so severely in Halachah. However, Poskim specifically apply the prohibition of Arkaos even to courts whose religious beliefs are not classified as Avoda Zareh[47],

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[43] In truth, the competency of the attorney is irrelevant. Even if you are the only attorney capable of prevailing, the prohibition of Arkaos is against the actual litigation, not the verdict. As such, provided there is another attorney who is willing to file the motion, there would be no Lifney Iver. (If, however, you are the only attorney skilled enough to obtain a larger verdict and the result will be that your client will end up with more than he is Halachically entitled to, there would be Lifney Iver on collecting the award, regardless of the Issur Arkaos.)

[44] Ramuh 26:1. See also Rivash 102

[45] Maishiv BHalachah 90 (187)

[46] Rashach 19(5)2, quoted by Kneses Hagedola 26.14, Imrey Binah Dayanim 27, Maharsham 4(5):105, Tuv Taam Vdaas 3:261, Haelef Lcha Shlomo 3, Shevet Halevy 10:263 maintain that after receiving a Psak Din, one may have it confirmed in court without a Heter Arkaos.

Igros Moshe 2:10 implies that while a heter is not required, it is nevertheless preferable to get specific permission from a Bais Din before approaching the court.

Erech Lechem 26, Orchos Hamishpatim K'lal 46, argue that one needs a Heter Arkaos to have the award enforced through civil court.

[47] Tashbetz Tur 3:6, Yachin Uboaz 2:9 apply Arkaos to (Muslim) countries that were not idol-worshippers.

and to courts that are not affiliated with any religion. Most modern judicial systems fall into this category. Although the problem of preferring another religion's values may not exist, the rejection of Halachah in favor of another set of rules is still problematic.[48]

Jewish Judges

The prohibition of Arkaos involves submitting to a foreign judicial body. It is of little consequence whether the judge presiding over the case is Jewish or not[49]. Conversely, if the parties submit to a form of arbitration that does not violate Arkaos (see the following section), according to most Poskim they may use an Akum arbitrator[50].

Alternative Dispute Resolution

The prohibition against Arkaos applies to accepting a foreign body of law. Submitting a dispute to informal arbitration that is not bound to any formal set of laws would be permitted.[51] There is also no obligation to use Dayanim to resolve a dispute. Therefore, there is nothing wrong with going to a businessman to settle a dispute instead of a Bais Din. The only restriction is that the arbitrator may not adopt any set of laws and must decide the case based only on his own sense of fairness. If a set of laws other than Halachah is being followed, it would be considered Arkaos[52].

If there is no Bais Din Available

Rashba[53] writes that if there are no qualified Dayanim available, the public should appoint a panel of laymen as 'judges', so that people should not litigate in civil court[54]. Chazon Ish[55] qualifies that this panel may not adopt any set body of

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[48] Chazon Ish Sanhedrin 15:4, Divray Malkiel 5:210, Pamoney Zahav 26, Igros Moshe 1:58, Tzizt Eliezer 11:93, and the Poskim mentioned in footnote 63 that discuss whether Maharshach is consistent with Rashba.
See also Urim 26 (4) (quoted by Nesivos Chidushim 26 (4)), Kesef Hakadashim 26:1, that the laws of Arkaos were based on 'human intellect'. The implication is that they were not religious laws, and are still considered Arkaos.
See, however, Mieri Sanhedrin 23A, Maharshach (as quoted by Baey Chayey 158) seem to accept civil courts that are based on business practice as opposed to a religious beliefs. However, Bayey Chayey, Erech Lechem 26:2, and Pri Eliyahu 3:84 severely limit the practical application of the Rashach. See also footnote 63

[49] Chazon Ish writes that it is a greater Chillul Hashem for Jewish arbitrators to ignore Halachah.

[50] Prisha 68:5, (also quoted by Nesivos 68:6 [although see Minchas Pitim Shirey Mincha 68 for an alternate explanation of Nesivos]) write that an Akum arbitrator's verdict is not binding. Prisha reasons that all arbitration is called Mishpat, which an Akum is unqualified for.
Kesef Mishne, Minchas Pitim Shirey Mincha 68 maintain that if the appropriate Kinyan was made, the Akum's verdict would be binding. This is consistent with Shach, Aruch Hashulchan and Erech Lechem 22:2.

[51] Chazon Ish Sanhedrin 15:4, Igros Moshe Chosen Mishpat 1:58, Tzitz Eliezer 11:93
See also Aruch Hashulchan 22:8 and Minchas Pitim Shirey Hamincha 66.

[52] Chazon Ish, Chukas Hachaim 6, Tzitz Eliezer 11:93, Rav Sullman, (Hayasher Vhatov volume 4 page 46).

[53] 2:290 (quoted by Bais Yosef 8)

[54] It is unclear from Rashba whether, in the absence of either a Bais Din or arbitration panel, one would violate Arkaos by litigating in civil court. See Orach Mishpat 26 Bais Yosef 5, and Chukkas Hachaim quoting Pney Moshe 2:7,

law; they can only decide the case based on their sense of fairness. If they were to institute a set of rules, they would be considered Arkaos. In addition, such panels can only be instituted with the explicit acceptance of the litigants. Any party may object and request a formal Din Torah.

Accepting Jurisdiction of Civil courts

Many contracts contain a clause that sets the venue for dispute resolution. The parties agree to litigate all disputes in a particular jurisdiction. This is essentially an agreement to violate Arkaos. There is significant debate among the Poskim as to the Halachic effect of such clauses. Sefer Hatrumos[56] writes that if the litigants would have greater rights under that particular jurisdiction than in Bais Din, the clause is valid and, under limited circumstances, the parties may litigate in civil court[57].

Most Poskim[58] disagree with this position and maintain that because it violates Halachah, the clause has no effect. The parties must litigate in Bais Din, and their rights are defined by Halachah.

Teshuvas HaRosh has an interesting approach to such clauses. Rosh maintains that such clauses are understood to mean that in the event that one of the parties refuses to submit to Bais Din[59], the other party may enforce their rights through civil court. Otherwise, the parties are bound to go to Bais Din and to follow Halachah. Although this is not the simple meaning of the clause, we interpret it in a manner that is consistent with Halachah. According to the Rosh, these clauses are perfectly acceptable, but have minimal effect.[60]

As a matter of Halachah, most Batey Din follow the ruling of the Rosh.[61] As such, one may sign a contract that specifies a civil court as the venue for

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Rivash 216, Zerah Avraham 2:12, Pree Haaretz 13, Cheshek Shlomo 26:4, Divrey Chaim 2:9, Erech Lechem 61:6, Imray Binah Dayanim 27, 10, Igros Moshe 2:15 for further discussion.

[55] Chazon Ish Sanhedrin 15:4

[56] Sefer Hatrumos 62:1;4 as quoted by Tur 26, Sma, and Nesivos Chidushim 26 (10), Mamer Kadishin 7, Bigdey Yesha 90, Chukey Mishpat 4.

[57] See Sma that explains that normally, the parties must litigate in a Bais Din, which would grant them the rights they would have in civil court. However, if Bais Din could not grant such rights (such as after Shmittah), they would allow the parties to litigate in civil court.

[58] Lvush 26:1, Taz 26, 61, Shach 22(15), Biur Hagra 61:6, Imray Binah Dayanim 27, Aruch Hashulchan 26:4, Orchos Hamishpatim 46:1, Maharsham 3:213. A simple reading of Mechaber 26:3 supports this view.

[59] Teshuvos HaRosh 18:5, quoted by Tur, Shut Ramuh 108, Yam Shel Shlomo.

[60] Yam Shel Shlomo, Bava Kamma Perek 8:65 writes that this clause allows one to bypass Bais Din and litigate in civil court if the defendant will not listen to Bais Din. In contrast, if such a clause is not inserted in the contract, the lender would be required to get permission from Bais Din to initiate legal action regardless of the defendant's behavior.

Teshuvos Ramuh 108, Aruch HaShulchan 26:5 maintain that one needs permission from Bais Din to initiate legal action even when such a clause was included in the contract.

[61] See, however, Pischey Choshen Halvah 6 (12) who implies that such clauses are problematic.

See also Lechem Rav 51, Toras Emes 62 that discuss instances where it is clear that the parties' intent was to litigate in civil court and to violate Arkaos, וצ"ע לדינא

litigation. Nevertheless, it is appropriate to incorporate a dispute resolution clause specifying that the parties will adjudicate any issues in Bais Din[62]. The reality is that it is difficult to force an uncooperative party to come to Bais Din. Specifying that all issue will be arbitrated in Bais Din ensures that neither party will be able to violate the prohibition of Arkaos.

It is also prudent to specify a specific Bais Din in the dispute resolution clause. When a dispute arises, there is often strong disagreement over which Bais Din should adjudicate the issue. The parties involved often try to ascertain which Bais Din will be most sympathetic to their claims. Choosing a Bais Din can become a difficult and time-consuming battle. Worse, an unscrupulous party may attempt to have the case tried by a corrupt ad-hoc Bais Din. Such incidents are not unheard of and can cause tremendous difficulties. This can be easily avoided by specifying a particular Bais Din in the dispute-resolution clause. When a contract is first signed, the parties generally have sufficient goodwill and trust to agree upon a specific Bais Din for dispute resolution.

Choice of Law Provisions

Contracts often have a choice of law provision. This clause specifies which laws should govern the transaction. As the clause does not discuss the venue or bind the parties to litigate in a particular civil court, it does not directly run counter to the prohibition against Arkaos. However, it involves a different Halachic question, whether one may accept to abide by civil law *if it will be litigated and enforced by Bais Din*. See footnote[63] below for a discussion of the matter.

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[62] If the counterparty insists on including a choice of law provision for civil courts, it is not technically forbidden to sign the contract. The reason is that regardless of whether the parties include such clauses in the contract, a person wishing to violate Arkaos has the legal ability to sue in civil court. The fact that it is specified in the contract may change the particular venue, but does not increase the parties' ability to litigate in Arkaos. Darkey Choshen volume 4.

[63] Maharshach 2:239 (quoted by Rav Akiva Eiger 3:1) discusses the practice of resolving disputes through an arbitration panel instead of a Din Torah. Maharshach upholds the custom, explaining that the particular industry involved would not be viable if strict Halachic principles were applied. The implication is that if there is a legitimate reason, one may accept an alternate set of laws. (See, however, Erech Lechem 26:2, Pri Eliyahu 3:84, who interpret Maharshach to mean that the arbitrators used their discretion, but did not have any set laws. This is certainly permitted as explained in section "ADR") Furthermore, Tumim 26:4 maintains that one may accept any body of law, provided one will litigate in Bais Din. See also Divray Chaim Chosen Mishpat 2:30, Tumim 26:1 discussing the practice of accepting a set of civil laws for particular transactions.

On the other hand, Teshuvos Harashba 6:254 quoted by Bais Yosef 26 writes that accepting civil laws is prohibited. Rashba implies there are two separate issues with Arkaos; 1) litigating in civil court, and 2) accepting foreign laws. The mere act of accepting such laws is itself an affront to Halachah.. Taz 26 and Chut HaShani pg 184 adopt this approach. According to these opinions, accepting civil laws would be prohibited even if the actual litigation is in a Bais Din.

Ba'ey Chayey Chosen Mishpat 158 resolves this contradiction by suggesting that Maharshach permits accepting civil laws only when engaged in commercial transactions that needs such laws. If an industry cannot survive operating under Halachic principles, it would not be a rejection of Halachah to follow the laws and rules needed to operate. However, it would be forbidden for parties to accept civil law for no apparent reason other than a preference for civil law over Halachah. An example would be accepting civil law regarding inheritance. As there is no industry that needs to be protected, accepting such laws simply because one prefers the Akum values would be prohibited.

Collecting Debt

Some Poskim maintain that using civil courts to collect an undisputed debt would not violate Arkaos[64]. They explain that the prohibition of Arkaos does not apply since this is not true litigation; it is simply the process necessary to foreclose on the assets to which the creditor is clearly entitled to. As Bais Din today does not have the ability to do so, there is no viable alternative to the civil courts, and therefore one would not violate Arkaos if one is simply collecting an undisputed debt. Even according to these authorities, it would be a Middas Chassidus to first approach Bais Din before initiating legal action.

Other Poskim[65] point out that there are many Halachos regarding collecting debts. For example, the amount of time a debtor is given to raise funds, the type of assets he is obligated to sell, and how assets should be sold, are all issues that require Halachic determination. In addition, if there are multiple creditors, a Bais Din will be needed to determine how the assets should be divided[66]. Thus, even what appears to be a simple case of collecting a debt is subject to many halachos that requires the supervision of a Bais Din. Furthermore, civil courts may impose additional fees such as interest charges,

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See Rav Grossman, (Mishkenos Haraim), and Pischey Choshen (Sechirus 4) who permit accepting the civil rules regarding multi-unit buildings. Based on the above, this is perfectly understandable. Since there are no clear Halachic guidelines regarding many of the issues that arise, and it is not practical to call every tenant to a Din Torah every time a bill needs to be divided among the units, one may accept the civil rules.

Rav Zalman Nechemia Goldberg (Yehsurun 11) takes a more permissive position. He argues that accepting civil laws is never a concern with respect to the parties' monetary obligations. Such obligations can be waived or accepted by the parties at will, even if there is no compelling need. In contrast, agreeing to accept civil laws such as rules of testimony, or inheritance. would be against Halachah and problematic. This approach can be inferred from L'vush and Ulam Hamishpat 26.

It should be noted that in instances where accepting civil law would violate Arkaos (as per Rashba), one can apply the approach Teshuvos Harosh (quoted in the previous section) and limit the clause to instances where one party refuses to accept Bais Din and the matter needs to be litigated in civil court. While this is not the simply understanding of the clause, Rosh interprets it in a manner that would not violate Halchah.

וצ"ע לדינא

This entire discussion applies only when the parties are accepting a body of foreign law. However, there is certainly nothing wrong with parties negotiating specific rights that are different from the Halachic norm. (Chut HaShani pg. 184)

(See also Chazon Ish Sanhedrin 15:4 who states that if there are no Dayanim who are proficient in Halachah, arbitrators should be appointed to arrange compromises on a case-by-case basis. They may not follow a formal set of rules, as that would be a rejection of Halachah. Rather, they must simply use their discretion to work out a fair settlement. This implies that even when justification exists, one may not accept a body of laws other than Halachah. However, it is important to note that Chazon Ish is dealing with a situation after the fact. When there is a dispute, applying a foreign set of laws to resolve the dispute would violate Halachah. In contrast, if before entering into a transaction, the parties agree to grant each other the rights and obligations as defined by civil law, it may be less problematic. Furthermore, Chazon Ish takes issue with setting up a formal panel that will empowered to resolve all disputes; private parties that voluntarily accept such laws for a particular deal, and agree that the matter be adjudicated in a Bais Din, may not have such issues.)

[64] Maharsham 1:88.

See also Emes Lyaakov Bava Kama 27 and Pney Mosh 2:57.

[65] Maharash 7:133:2, quoted by Orchos Hamishpatim 46:26

[66] Orchos Hamishpatim 46:1

court costs, or other fees that may not be Halachically appropriate. As such, a Bais Din is necessary to determine the lender's rights and a Din Torah is needed before initiating a foreclosure process. If, however, the debtor refuses to appear before a Bais Din, the Bais Din will issue a Heter Arkaos, as previously explained.

This divergence of opinions applies only to an undisputed debt. If, however, the debtor challenges the validity of the debt, then there is real litigation between the parties. Although the creditor may firmly believe that he is right, since he must now litigate to prove his position, all opinions would agree that the matter requires the involvement of a Bais Din. Thus, the only clear application of the leniency would be when the borrower admits he owes the money, has the necessary assets, but nevertheless refuses to pay.

As a practical matter of Halachah, it is appropriate to make an attempt to initiate a Din Torah to collect an undisputed debt. In the event that the counterparty tries to 'game the system' by using the Bais Din as a stalling tactic, one should consult with a Rav or Dayan who will likely permit initiating a civil foreclosure[67]. There is also basis for initiating both processes simultaneously; sending a Hazmana and at the same time beginning the foreclosure process, so that if and when the Bais Din issues a verdict in your favor, the collection process will be expedited.

Injunctive Relief

There are Halachic sources[68] that permit a person to obtain injunctive relief from civil court without the Bais Din process[69]. This dispensation applies only when 1) the litigant will suffer a loss if immediate action is not taken to protect his interests, 2) Bais Din is unable to effectively protect the litigant's interests, 3) the litigant is prepared to submit the issue to Bais Din once the injunction is granted, and 4) the injunctive relief is limited to freezing assets, as opposed to the court either confiscating assets or turning them over to the petitioner's possession.

While the custom today is to rely on this dispensation, it should be noted that it is often abused. Once one party files for an injunction, the other party may respond in kind. The litigation tends to snowball, and it becomes difficult to move the case away from the civil court and into a Bais Din. It is therefore highly recommended that one coordinate with a qualified Dayan before taking such action. Caution also needs to be exercised with respect to the information that is disclosed to the courts. Adding claims and accusations that may lead to criminal proceedings or other adverse consequences for your counterparty should not be done without consulting with a Rav.

[67] Maishiv Bhalacha 82 note 187 rules that one should send a Hazmana. If it is clear that defendant is simply trying to avoid a Din Torah, one should try to obtain a Heter Arkaos from one Rav.
[68] Mahram Mpanu 51, Igros Moshe 2:11, Teshuvos Vhanhagos 3:440.
[69] This is permitted even if one needs to file a lawsuit in order to obtain an injunction. Kneses Yecheskel 97.

Insurance claims

There is a common assumption that if a litigant has insurance[70], the rules of Arkaos are different. People involved in an automobile accident or medical malpractice situation typically do not hesitate to file a claim against their counterparty regardless of whether they are Jewish. This leads to a few important questions: 1) May one sue a Jew in order to collect from his insurance? 2) May one collect more than one is Halachcally entitled to from an insurance company? 3) If the lawsuit will cause the other party's insurance premiums to rise, is one liable for the loss?

As explained before, Arkaos applies even if both parties prefer civil court over Bais Din. However, the fact is that an insurance company would not honor the verdict of a Bais Din. Therefore, insisting that a defendant go to a Din Torah instead of litigating in civil court would effectively force him to lose his insurance coverage, which would create significant hardship. The question is whether this justifies litigating in civil court, or whether the parties have an obligation to go to Bais Din regardless of the consequences.

Arkaos applies only to litigation between Jews[71]. As such, it is certainly permitted to sue a non-Jewish insurance company directly. However, in a technical sense, this is not what usually occurs. A plaintiff must sue the person who actually caused the damage, not the insurance company. The insurance company is simply a party at interest since they will ultimately pay the award. The actual suit is against the driver or doctor that caused the damage. Thus, the litigation is technically still between a Jewish plaintiff and Jewish defendant, and would seem to be Arkaos.

As a matter of Halachah, a number of Poskim assert that despite the fact that the litigation is technically between Jews, in a practical sense everyone recognizes that the insurance company is the true target of the litigation. Accordingly, since the only way to collect from the insurance company is to sue in civil court, one is not demonstrating a rejection of Halachah or a preference for the civil court system by initiating these proceedings[72].

If the award exceeds what one is Halachically entitled to

While the above may resolve the issue of Arkaos, a second issue remains. In all likelihood, the court's verdict will exceed what the plaintiff is entitled to

[70] See also Pischey Choshen 8:1 note 65 who suggests that a public company may contractually agree to litigate in civil court, even if the company is Jewish-owned. Since all of the operations, rights, and obligations of the firm are governed by civil law, the agreement will be effective. Nevertheless, Pischey Choshen recommends offering the company the opportunity to resolve the matter in Bais Din before filing a lawsuit in civil court.

[71] See section "Akum"

[72] A number of contemporary Poskim have verbally stated this position, but there are few written Teshuvos about the matter.
See Maishiv Bhalachah 42 who permits suing an insurance company.
However, see Rav Yitzchok Zilbershtein in Yeshurun 11 that requires a Heter Arkaos.

according to Halachah. In that case, is one permitted to collect funds to which he is not Halachically entitled?

Collecting more than one is Halachically entitled to from a Jewish defendant is certainly prohibited. As Jews, Halachah defines our rights and responsibilities to other Jews, and taking more than that to which we are entitled under those rights is prohibited. However, collecting an award to which one is legally entitled from an insurance company is permitted. The insurance company has little interest in the parties' religious beliefs, and is obligated to pay any claim awarded by civil courts.

Causing Damage to the Defendant

A more complex problem is the damage caused to the defendant. If the insurance company is forced to pay out a large settlement, the defendant's insurance premiums will rise. Is it permissible to file a lawsuit that will force the defendant to pay higher insurance premiums?

This leads us to an important distinction. Chavas Yair[73] discusses a case where a powerful government official owed money to a Jew. When the debt became due, he threatened that if the Jew tried to collect the money, he would expel all of the Jews from his province. The Jews living in his province brought the creditor to a Din Torah, claiming that he would be causing them significant losses by collecting his debt. The creditor countered that the money was due to him, and if the people were afraid of the ramifications, they should pay off the debt.

Chavos Yair ruled that the creditor may collect the debt, regardless of the ramifications. A person has no obligation to sustain a loss of monies owed to him because of indirect damage that it may cause to others[74].

There is an important limitation to this ruling. It applies only when the Akum truly owes the money to the creditor, either according to Halachah or civil law. Since the creditor is entitled to the funds, he may exercise his rights regardless of the indirect consequences to others. If, however, the money is not owed and as a result of a fraudulent claim another Jew will suffer a loss, it would certainly be prohibited[75] (aside from the obvious Halachic and legal problems involved with defrauding the insurance company).

Accordingly, if the insurance company was directly liable to the plaintiff, one could initiate a claim regardless of the consequences to the defendant.

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[73] 213, see also Tosfos Bava Basra 55b, Radvaz 1:413, Nesivos 58 (4), Teshuras Shay 87, Erech Shay 162:1, 163:6. See Rav Zilberstein in Yeshurun 11

[74] The Teshuva is unclear about the effect if the loss is certain; the beginning of the Teshuva implies it would be problematic, while the end of the Teshuva seems to permit.וצ"ע

[75] Erech Shay Chosen Mishpat 162:1.
See also Bais Shlomo YD 2:58.

However, if a person exaggerates or submits a fraudulent claim, he would be responsible[76] for any losses that it causes to the defendant.

However, this argument holds true only if the insurance is directly liable to the plaintiff. However, as discussed before, this may not be factually correct. The insurance company's liability is to indemnify the defendant and has no direct responsibility to the plaintiff. This drastically changes the question. The issue becomes a question whether one may file a suit against a Jew in order to receive a 'windfall'[77] from a third party. Since the suit is to recover monies that are not Halachically owed to the plaintiff, it is questionable whether one may cause another party to suffer a loss in his quest for this gain.[78]

Degree of Halachic liability

It would seem that an important factor would be the Halachic liability of the defendant. If the defendant has significant Halachic liability for the damage, he would prefer a claim be lodged against his insurance so that he does not have to pay from his personal funds. As such, he is accepting any resulting increase in his premiums. If, however, according to Halachah the defendant has no liability, then he has no incentive to waive his rights and to allow the claim to be filed. Therefore, if the plaintiff wants to sue to collect from the insurance company, he may be liable for the resulting increase in premiums.

Other Halachic Factors

There are a number of other Halachic rationales advanced by Poskim that would justify making claims against an insurance company regardless of the consequence to the defendant. The following are some of the suggestions:

In some situations, the premiums rise because of the underlying incident. It is not the lawsuit that causes the loss; rather, it is the defendant's own behavior that is to blame. Although the insurance company may be unaware of the incident until the claim is filed, since his rates *should* rise because of the incident, filing the lawsuit may be permitted. However, it must be noted that this justification presumes that the premiums are not impacted by the verdict or lawsuit, but only by the underlying incident. This may not be correct in all instances.

Other Poskim maintain that because it is common practice to make claims against insurance, all professionals implicitly give their clients permission to make claims regardless of the impact on their rates. It is difficult to imagine

[76] Lotzays Yiday Shamayim. Since, however, it is a Grama, a Bais Din could not compel him to compensate the defendant.
[77] The award is considered a windfall to the extent that it exceeds the Halachic liability.
[78] See Maishiv B'Halachah 42 who concludes that it is appropriate to compensate the defendant for the increase in premiums.

anyone using Jewish professionals if they realized they would have limited or no recourse in the event of an incident.

In addition, many professionals are required by law or a licensing agency, to maintain insurance. In such instances, there may be an implied agreement to pay for damages according to the rules of the civil courts. Implicit in the agreement to provide professional services would be to follow the rules of insurance for damages, and the parties would be bound to such agreements.[79] Because the issue is simply a potential financial loss, it can be waived by the parties[80]. This rationale would also apply to automobile accidents. Because all drivers are required by law to maintain liability insurance, there is an implicit agreement to compensate any victim in accordance with the rules and regulations of insurance.

However, there is an important limitation to these arguments. It applies to only professional relationships or relationships that are regulated by law (driving an automobile). The argument is that by entering into a professional relationship in an industry where everyone has insurance, the parties implicitly agree to make such claims. However, a person that trips on a sidewalk and would like to sue the Jewish homeowner would not have this justification. There was no implied agreement, and causing him a loss may be "G'rama" and prohibited. In addition, this argument applies only when the defendant has adequate insurance. If the claim is above and beyond his coverage, all Poskim agree that it may not be collected unless the defendant is Halachically liable for such claims.

No-Fault insurance

Many states have no-fault insurance in which each person makes a claim against his own insurance. Such claims are certainly permitted since there is no Arkaos; submitting a claim to an insurance company does not involve civil courts. Even if one is forced to litigate, the suit is against your own insurance company and not the Jewish counterparty. The fact that your insurance company may sue his insurance company is not relevant either, since that litigation is between two non-Jewish firms. However, if you assign your claim to your insurance company, who will sue the other party personally and cause him losses greater than his Halachic liability, there is a potential issue[81].

The above is an outline of some of the issues and opinions regarding insurance claims. It is not intended to be a P'sak Halachah, and a competent Rabbi should be consulted for guidance for any particular case.

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[79] See Rav Mendel Shaffran in Yosher V'tov volume 2 page 32, Umka D'dina 3 page 67, followed by a Teshuva from Rav Zalman Nechemia Goldberg questioning this approach.

[80] In contrast, if the issue was Arkaos, it could not be waived. Therefore, one can only rely on these arguments if one accepts the original premise that there is no prohibition against Arkaos when an insurance company is involved.

[81] Rav Sullman (Yosher Vtov 4 page 57) prohibits executing such assignments for the above reason.

Letters of Approbation / הסכמות ומכתבי ברכה

From Previous works by the author

יוסף שלו' אלישיב

ירושלים

בס"ד, ו' מרחשון תשס"ח

הובא קמיה מרן עט"ר הגרי"ש אלישיב שליט"א ספרו של הרח"ג רא"ש מארבורנר שליט"א מליקוואוד שרחש לבו ללמד את אחב"י לעשות צדקה ומשפט ולבן ליבן את ההלכות השביחות בעניני מסחר (רבית וחו"מ) ואף הוסיף תירגום הרברים לשפה המדוברת במקומם.

ככר באו בשבח הספר הרבנים הגאונים יושבי על מדין – כי הכל עשה בטוטו"ד ביגיעת וחכמת התורה.

ובידכו מרן שליט"א, כי חפץ השי"ת בידו יצלח לשקוד באהלי תורה ולאפוקי שמעתתא להתחיל ספרים אחרים ולסיימם להגריל תורה ולהאדירה.

הכו"ח בהוראת מרן עט"ר שליט"א

יוסף ו. אלישיב

אשר זעליג ווייס
כגן 8
פעיה"ק ירושלם ת"ו

בס"ד

תאריך י"ג כסלו עט.

הן ראיתי את ספרו הנפלא של הרב הגאון המצוין דיין מומחה הידוע לשמו, של בלנו, הרב יורי מארגנבערג שליט"א. הגיתי ושמחתי אל לבי, שהרי זה הספר צורך השעה הוא, לבאר הלכותיו פסקותיו בסוגיות בקיאות ולתקן מוצא בשפה ברורה ונעימה בשפת האנגלית המצורכת. יפה עשה המחבר שליט"א בעומק העיון, בבהירות, בסדר נכון ובכוח טעם נכונות.

ניכר שהמחבר יגע ועמל להכיר את דרכו בתורה בהיותו יושב לפני רבות הדין בירושלים עיה"ק, וראיתיו עוקר הרים וטוחנן זה בזה כאחד הגדולים אשר בארץ.

ברכתי למחבר שליט"א שיתקבלו דבריו ברצון באזני של היכלי התורה, ויזכה להגדיל תורה ולהאדירה בשמחה ושלוה ונחת.

בברכה רבה
ומוקירו כערכו

אשר זעליג ווייס
ריש מתיבתא להוראה
"מנחת אשר"
אבד"ק ... ירושלים ת"ו

בס"ד כ"ד אדר א' תשע"ה

משה רבנו באר התורה בשבעים לשון ובמשך כל הדורות חוברו ספרים בלשון המדוברת בפי העם ומי לנו גדול מהרמב"ם שחיבר פי' המשניות וספר המצות ומורה נבוכים בלשון ערבי וכן רבנו בחיי את ספר חובת הלבבות וזה גם בספרים שמיועדים לתלמידי חכמים וגדולי ישראל וגם חיבור היד החזקה נסתפק הרמב"ם באיזה שפה לכתבו ואפי' הש"ס יסוד תורה שבע"פ חובר בלשון ארמי שהי' מדובר אז [ועי' סנהדרין ד' כ"א ע"ב שבזמן עזרא ניתנה תורה (תורה שבכתב) בכתב ארמי ולשון ארמי וכו']. וכן גדולי ישראל באשכנז חיברו עבור ההמונים ספרים ופירשו חומש ורש"י, משניות וערך יעקב בלשון אשכנז ויידיש המדוברת. דבר חשוב עשה הרה"ג ארי' מארבורגר שליט"א מלייקווד ארה"ב שחיבר בלשון אנגלית ספר הבא לבאר ולהזהיר עניני זהירות בממון שאינם ידועים להמון ולסוחרים כמו דיני צוואות איך לכתוב צוואה כדין וכן עריכת הסכמים וחוזים כדין ועני המהפך בחררה, מזוסר אמנה. בר מצרא, אובאה ומק"ט, רבית והיתר עיסקא, עובד ומעביד, שוכר ומשכיר, ערכאות ודין תורה ופשרה. ומה טוב עשה שהכניס עניני דינא דמלכותא שרבים לקו בה הן ע"י עבר ושנה והן ע"י הוראות היתר שונים ויש בזה גם משום גזל ישראל דמלכיות שלנו שותפות כל האזרחים הם וכספי המלכות הוא של כל האזרחים כולל היהודים בנוסף לחילולי השם שנעשים מגל זה וכמעט שדינם כרודפים על מעמדם שי ישראל במדינות שונות. ראיתי חלקים גדולים של הספר והוא בא במדה נכונה ובמשקל נכון לעורר על הנקודות שיש בהם שאלה [ולא ח"ו כעורכי הדיינין שמלמדין איך לרמות].

הספר בודאי יוסיף הזהרת הזהירות בדיני ממונות ויוכל לשמש כלי עזר למורי הוראה לדעת את המושגים וההגדרות בשפה המדוברת כדי לכוון את שואליהם לעשות עפ"י התורה וההלכה וע"י יתרבה הדעת וקיום ההלכה למעשה בחיי היום יום.

המברכו בברכת כהן

ישעיה מאיר הכהן שכטר

בע"ה

ארי׳ מלכיאל קוטלר
בית מדרש גבוה
לייקוואוד, נ. דז.

RABBI ARYEH MALKIEL KOTLER
BETH MEDRASH GOVOHA
LAKEWOOD, N.J. 08701

כ"ט חשון תשס"ב

באורח צדקה אהלך בתוך נתיבות משפט (משלי ח׳ כ׳) וצ״ב מאי צדקה שייך משפט וגם משפט אין צדקה (עי׳ סנהדרין ו׳) וע׳ עי׳ הגמ׳ ב׳ האומנים (ב״מ פ״ג ע״א) רבה בר בר חנה תברו ליה הנהו שקולאי חביתא דחמרא, שקל לגלימייהו אתו אמרו לרב אמר ליה הב להו גלימייהו אמר ליה דינא הכי אמר ליה אין למען תלך בדרך טובים (משלי ב׳) יהיב להו גלימייהו אמרו ליה עניי אנן וטרחינן כולה יומא וכפינן ולית לן מידי אמר ליה זיל הב אגרייהו אמר ליה דינא הכי אמר ליה אין וארחות צדיקים תשמור (שם) ע״ש הרי דנתיבות ודרך המשפט עצמה כולל בתוכה ארח של צדקה ומשפטי התורה הם חוקים ומשפטים צדיקים וארח של צדיקים, וכן מבואר בדברי חז״ל שדרך הלימוד חוץ של הדין היא ארח הצדק ונתיב שצריך שיזהר שלא להטות ימין ושמאל ועל מעשיו צריכים להיות מוזנים ושקולים על מאזני המשפט עד שנעשה דרך החיים, ושולחן ערוך הוא כל הלימוד רוין בהשקפ,

ואמרתי נמצא למעלה ידידי הרב המופלג ר׳ אריה מרבורגר שליט״א מחשובי הלומדים והתלמידים בבית מדרש גבוה אשר שם ליבו כימים ימימה בלימוד התורה בעיון הסוגיות לעומקם והקיפם. ולהוסיף שמעתא אליבא דהלכתא, ומשנן מופיע לחוש ספר יקר ונחמד בשפה המדוברת בעניני חושן משפט מורה דרך באורחות צדקה במשפט בחיי יום יום ובפרט לאנשי עסקים שנתנו לבו. בארח זו בלימוד החכמה והספרה והיתר הדרך הח׳ ו״א שלא יטו מן הנתיב ולכו כשומע באפלה עד כמה יהיה. ספר זו תועלת מרובה ללומדים ומעיינים ויה״ר שיתקבלו דבריו ויהנו ממנו רבים יפוצו מעיינותיו חוצה ויזכה לתורה ולהוסיף ברינה ובהנה להגדיל תורה ולהאדירה

אריה. מלכיאל קוטלר
בלאאמו״ר הגרש״ז זצוק״ל

RABBI CHAIM KOHN
Dayan of Khal Adas Yeshurun
Washington Heights, New York

חיים קאהן
דיין דקהל עדת ישורון
וואשינגטאן הייטס, נוא יארק

בס״ד

ב״ה

יום כ״ג תשס״ז

בחפץ לב הנני בא בשבחו של הרה״ג הנעלה, ברוך הכשרון, אברך כפשוטו וכמדרשו, הרב ר׳ ארי מרבורגר שליט״א מחשובי הלומדים בעי״ת לייקווד יע״א ודיין מצויין בבית דין מישרים דשם, וספרו שחיבר על עניני חושן משפט.

להגיד נחיצות ספרו היקר על עניני חושן משפט למעשה, הוא אך למותר, אכן ייחודיות הספר הוא שמדריך את הלומד להתנהג על פי דין תורה בסוגי המסחר הנהוגים היום. כדי להקל הקורא כתב הרב הנ״ל את ספרו בלשון המדוברת בסדר נפלא וכדי שלא יהיה כספר החתום, כתב בהערות המקורות לכל דין בקיצור נמרץ ומדוייק.

וכדי שלא יחסר המזג, דרוש דרש במקומות הנחוצים, את חוקי ומנהג המדינה, לדוגמא בדינים הנוגעים לכתיבת חוזים (קאנטראקט) כתב את הדברים הצריכים תיקון שיהיה נעשה כדין תורה. ובזה בודאי עשה מצוה גדולה, כי מלבד שיש בספר תועלת בלימוד המביא לידי מעשה, עוד יותר נעשה בזה מצות השבת אבדה למנוע הפסד ממון ועגמת נפש.

ואינני בא בזה כשר המסכים, כאשר משרה זו ממני והלאה, אלא הנני נמנה להיות שותף לדבר מצוה, לחזק את ידי הרב הנ״ל שיצליח בפעלו להרבות הלימוד והידיעה במקצוע שאדם אוכל פירותיהם בעולם הזה והקרן קיימת לו לעולם הבא.

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בס"ד

כ"ז יום לחדש שבט תשס"ז לפ"ק

ענוותו של ידידי היקר והנכבד הרב הגאון מוה"ר ארי שמעון מארבורגר שליט"א תרבני, בדרישתו כי אבוא בדברי הסכמה על ספרו הנוכחי "משפטיו לישראל". ובכן, לא אמנע הטוב מבעליו, ומקצת שבחו ייאמר בפניו, כי ביודעי ומכירי קאמינא, אשר במשך השנים שעשינו יחד בלימוד מילי דנזיקין, וביותר בתקופה הנכבדה מאז, כד הוי יתיבנא בצוותא במותב תלתא זימנין טובא, אנא סהדא דאיתמחי גברא עד מאוד במשנתו הסדורה בהאי הילכתא רבתא, ונפלאתי לחזות מקרוב במומחיותו המיוחדת לרדת לעומקא דדינא, לאסוקי שמעתתא ולהגיע לחקר דין אמת לאמיתו מתוך כשרון של התמצאות מושלמת בפרטי הדו"ד המובאים בפני הבי"ד.

ואכן, מתוך עסקו התדיר בדיני דממונא שבנ"א דשים עליהם בעקבם באין-יודעין, נתעורר הרב הנ"ל שליט"א בכוונה טהורה לחבר ספר כללי בלשון קלה וצחה, על-מנת להעיר תשומת לב הרבים להילכתא גבירתא והררי-הררים של מכשולות חמורות התלויים לפעמים אף בשערה אחת של עסקי משא-ומתן. ואם בכל דבר הלכה תמיד יש להעיר לעורר, לפקוח עין ולהזהיר הגדולים על הקטנים – וכפי שנהגו גדולי עולם זצ"ל לעמוד על המשמר ולהודיע לעם חוקי האלוקים ותורותיו – כמה יותר נחוץ כן בכל הנוגע לחלק חו"מ שבשו"ע, שבו אין ביד כל אדם "מסורת-אבות" של מנהג והנהגה, דרך ואורח-מישרים, ושלא כבהלכות שבחלקי או"ח ויו"ד שהרבה מהם כבר מושרשים בקרב הציבור ע"פ מה שראו בקודמיהם.

ואנא סהדא גם אהא דאיתמחי קמיעא, באשר בעוברי על חלק נכבד מספרו נוכחתי על עריכתו בטוטו"ד, כי מיד ה' על המחבר השכיל לפרוס ביריעתו המצומצמת מערכה נכבדה של ידיעות נרחבות בתחומים הנוגעים ביותר לחיי המעשה, באופן שהקורא ילמד להבחין ולדקדק בשאלות ובספיקות ההלכתיות השונות הכרוכות במצבים ועסקים שונים – מה שלא עלה על דעתו עד האידנא. וא"כ מה נשגב פעלו של המחבר הדגול לסקל המסילה ולהרים מכשול מדרך הרבים אשר ייאותו לאורו, ואשר בזכותם לא יבוא חטא על ידו, כמאמרם ז"ל (יומא פז.).

ועל כגון דא שנינו (תנחומא משפטים ה וכעי"ז במ"ר): "רבי אליעזר אומר, אם יש דין למטן אין דין למעלן, אם אין דין למטן יש דין למעלן. כיצד, אם יעשו התחתונים את הדין מלמטה, אין הדין נעשה מלמעלן. לפיכך אמר הקב"ה, שמרו את המשפט, שלא תגרמו לי לעשות משפט מלמעלן, שנאמר ואלה המשפטים". ובכן נוחיל נא למרום, כי חלקו של הספר דנן יהא שמור בהפיכת מידת הדין לרחמים, עד כי יגולו רחמיו יתי עלינו לגאלנו בדבר ישועה ורחמים, בב"א.

בברכה אהבה ואחווה למחבר הדגול שליט"א, שיזכה להוסיף אומץ ולהרבות חיל באסוקי שמעתתא אליבא דהלכתא, להקים עדות ביעקב ולהשים תורה בישראל, מתוך בריות גופא ונהורא מעליא, הנני ידידו השמח בגדולתו באמת ובתמים,

ישששכר דוב הכהן כהנא

ישששכר דוב הכהן כהנא

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