

BUSINESS WEEKLY

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HaRav Chaim Kohn, shlita



Restoring the Primacy of Choshen Mishpat

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STORY LINE

by Rabbi Meir Orlan

Halacha Writer for the Business Halacha Institute

Loan Conversion

Jonathan Feldman needed \$30,000 cash for his business. The banks were limiting the credit they would issue him, though, and were also asking for more interest than he wanted to pay.

Instead, Jonathan tried to raise the cash from relatives and close friends. His cousin Ezra was willing to help him out and invest in the business.

"I'd like 4% return on the money annually," said Ezra. "Can you do that?"

"Reasonable enough," said Jonathan. "We'll call it an investment, though, not a loan, so that there will not be a prohibition of ribbis (interest)."

They drafted a document stating: "Ezra Feldman is investing \$30,000 in Jonathan Feldman's business, and will receive 4% profit annually. After two years, either party can terminate the agreement with 60 days' notice,

and the \$30,000 will be returned to Ezra."

Ezra gave Jonathan a check for \$30,000 and took a signed copy of the agreement.

Two months afterwards, Ezra had occasion to speak with his local Rav about the agreement.

"We made sure to structure it as an investment, not a loan," Ezra said. "Am I right that there is no prohibition of ribbis in such a case?"

"Your arrangement has some of the crucial aspects of a heter iska," replied his Rav, "but your arrangement doesn't eliminate the prohibition of ribbis. Although you called it an investment, the money is still considered halachically a loan, and the profit, therefore, is considered interest."

"Why is that?" asked Ezra.

"The agreement stipulates that at the termination of the agreement, the \$30,000 will be

returned in full, regardless of the financial state of the business," explained his Rav. "Absolute liability of the recipient to return the full amount of the investment is tantamount to a loan, in which the borrower carries absolute liability to return the principal. Thus the purported 'profit' is considered interest on a loan and is prohibited (see Y.D. 177:1; Shach, Y.D. 177:1)."

"How is this different from a heter iska?" asked Ezra.

"A heter iska leaves, in theory, a small window of risk for the investor if the business should fail," answered the Rav. "Jonathan, however, accepted full liability to return the principal."

"What should I do now?" asked Ezra. "Can we simply agree verbally that the investment should now be in accordance with heter iska?"

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Email Exemption

I borrowed a large sum of money from a friend, and when payment was due, my financial situation was worse than it was when I took the loan. I sent him an e-mail asking if we could settle, and we agreed via e-mail on a settlement. The lender now wants to renege on our agreement and renegotiate the settled amount.

Q: Is a settlement agreement via e-mail binding?

A: An agreement reached by e-mail certainly does not constitute a kinyan; it is nothing more than proof that an agreement between two parties was reached. However, since a kinyan (proprietary act obligating two parties to honor a verbal agreement) is not necessary to forgo a claim ("mechilah," C.M. 12:8), an e-mail could serve as proof that a settlement agreement was reached between a lender and a borrower.

What requires confirmation is whether the

language used in the agreement constitutes a mechilah (forgiving or nullifying the loan) or not. If the lender offered, for example, "I will forgive 25% of the loan if you pay the other 75%," the lender has not yet forgiven part of the loan; he merely agreed that he will forgive 25% of the loan upon receipt of 75% of the loan (Mishpetei Shmuel 66, cited in Divrei Geonim 57:9).

Similarly, if a lender informs the borrower that if he performs a particular act he will for-

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"It would be best to consult Rabbi Dayan on this," said his Rav. "I'll give you his number." Ezra called Rabbi Dayan. "I invested money in my cousin's business in a manner considered a prohibited loan," he said. "Can we convert it into an iska agreement? Does he have to return the money? Can we agree verbally? Do we need to draft a heter iska document?"

"Returning the money and starting over as an iska agreement would certainly work," answered Rabbi Dayan, "but it is not necessary to do that (see Nesivos, Chiddushim 176:5)."

"Can we just make a verbal statement?" asked Ezra.

"A verbal agreement of heter iska would suffice initially, but now that the money has already been given as a regular loan, it is insufficient," answered Rabbi Dayan. "Rema cites from the Mordechai that a person who received a loan cannot convert it to an iska investment through

a verbal agreement alone. The money is still considered a loan (C.M. 176:1; Shach, Y.D. 177:15, 41)."

"What if we draft and sign a heter iska document?" asked Ezra. "That's not just a verbal agreement, it's a document!"

"That would suffice, since this expresses clear sincerity in the agreement," explained Rabbi Dayan. "Alternatively, the investor and recipient can make a kinyan sudar that the investment will now be in accordance with the rules of heter iska. Some recommend doing both, drafting a heter iska and making a kinyan (Dagul Me'revava, Y.D. 177:19; Bris Yehudah 35:5[19])."

"Does this work retroactively?" asked Ezra. "What about the two months that have passed?" "Restructuring the loan as an iska agreement only takes effect for the future," concluded Rabbi Dayan, "but it does not allow taking ribbis for previous time (Bris Yehudah 40:23)."

give the loan, it is not forgiven until the borrower performs that act; until then the lender may retract his agreement (Be'er Heitiv, C.M. 120:1).

Even if the parties made a kinyan on the agreement, according to many authorities, it is not binding since it is a kinyan devarim — a proprietary act on something intangible (i.e. the lender has not yet "forgiven" so the borrower has not yet "acquired" anything). A kinyan that one will (at some point in the future) give something or will forgive a right is not effective (Taz 203:1 cited by Nesivos: Chiddushim 12:13; cf. Sema 12:20).

If the agreement calls for the lender to forgive some of the loan on condition (al menas) that the borrower pay him a certain amount, the mechilah is effective immediately on condition that the borrower pay the agreed amount. Once the parties make this

agreement, the lender cannot change his mind (see E.H. 143:1, Toras Gittin 143:4, and Nesivos 241:11, regarding the language that must be employed).

However, even when the agreement was that the lender will forgive in the future upon receipt of payment, which allows the lender to withdraw his agreement, the mechilah agreement is binding once the borrower pays the agreed-upon amount; the lender cannot demand any more money. This is true even if at the time of payment neither party mentioned the mechilah agreement.

Although the lender could have withdrawn the settlement agreement, once he accepted the money and did not state that he withdrew his agreement, it is assumed that he accepted the money under the conditions of the settlement agreement (Divrei Geonim 57:23).

For questions on monetary matters, arbitrations, legal documents, wills, ribbis, & Shabbos, please contact our confidential hotline at 877.845.8455 :: ASK@BUSINESSHALACHA.COM

Lost and Found #29

Q: If I left a pen or sefer in the beis medrash, or a towel in the mikveh, and saw a similar one there the following day, can I assume that it's mine and take it?

A: If you recognize the item as yours (tevias ayin), you can keep it, even if you do not have any clear siman to positively identify it. The requirement to provide simanim is only

to reclaim an aveidah from another finder (Nesivos 259:3).

If you do not necessarily recognize the item as yours, but think that it could be, some allow you to take it immediately and keep it. Others allow you to hold it but require that you wait and see if someone posts a "lost" notice.

If no one claims the item within a reasonable

time, you can assume that it is the one you lost and keep it (Pischei Choshen, Aveidah 3:18[53]; Minchas Yitzchak 3:17; Hashavas Aveidah K'halachah 11:8).

On the other hand, if you recognize that the item is not yours, you may not keep it even if you lost a comparable item. (We discussed previously what to do if your item was mistakenly taken in exchange.)

MONEY MATTERS

DID YOU KNOW?

Paying a wedding band, plumber or handyman immediately at the completion of the service is a fulfillment of numerous mitzvos d'oraysa, akin to making kiddush on Shabbos, putting on tefillin, saying krias shema, and birchas hamazon.

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