We live in the golden age of Halakhic research, in which the combination of the Bar Ilan CD and www.hebrewbooks.org means that it is just about never necessary to rely on citations rather than on primary sources. An advantage of this is that when past precedents seem to yield absurd results in practice, it is often possible to trace that precedent to an original misinterpretation. One common cause of such misinterpretations is seeing a position only as it is later summarized – the summarizer may have been accurate for himself as a mnemonic, but left an ambiguity for someone who had never seen the original text. Rabbi Slifkin argues that a set of such misunderstandings is responsible for the implausible halakhic measurement of an olive according to many Ashkenazic poskim. I should like to offer another possible example this week, one which has many regrettable consequences.

A common scenario in the Orthodox community is for one party in a financial dispute to suggest bringing the issue to beit din – this is a prima facie halakhic obligation when the alternative is a nonJewish court system. The second party agrees in principle, but rejects the specific beit din suggested by the first party, and instead insists on "ZABLA". This is an acronym for זה בורר לו אחד, a process in which each litigant chooses one judge and the two judges then select the third member of the panel.

What should the first party then do? Here is Rabbi Yosef Gavriel Bechhofer's advice after experience:

http://rygb.blogspot.com/2007/10/evils-of-zavla-zeh-borer-lo-echad-intro.html

Rabbi Yosef Gavriel Bechhofer

Wednesday, October 03, 2007

The Pitfalls of Zavla (Zeh Borer Lo Echad), Intro

I will be doing a series on the evils of the alternative to a formal Beis Din setting know as "Zavla" - short for "Zeh borer lo echad [v'zeh borer lo echad]" - the method of arbitration that Chazal allowed when for some reason a regular Beis Din would not do or does not exist. I was recently involved as a "dayan" in a Zavla kangaroo court (that is basically the state to which this alternative has deteriorated, it seems), as a favor to a "to'ein" who is a great tzaddik, talmid chochom and ba'al yisurim, for the first and last time, and it was an "educational" experience of the highest order. The potential for distortion and miscarriage of justice in these settings is so great, that it would seem to me less of an issur to go to "Ercha'os" [nonJewish courts] than to participate in such travesties.

Rabbi Bechhofer's words resonate with what I have been told consistently by my teachers in yeshiva and serious talmidei chalkhamim in both the Modern Orthodox and charedi worlds, and simply what I pick up in casual conversation with many orthodox laypeople – that ZABLA is simply a recipe for corruption and injustice.

Now the right to ZABLA in the absence of a fully accepted beit din with coercive jurisdiction is deeply rooted in Halakhah, such that it is very difficult for a beit din to deny the request for it. At the same time, how can a beit din tell the plaintiff to accept a process that is known for corruption? My impression is that many poskim will therefore simply tell plaintiffs that once the claim of ZABLA has been made, it becomes permitted to go to secular court.

There is a bitter irony here – according to many, the prohibition of going to non-Jewish courts is precisely to avoid giving the impression that the Torah produces inferior justice, and here we have to permit doing so because that impression is factual.

A possible solution is to seek to regulate ZABLA. Here is Rabbi Yona Reiss:
http://www.jlaw.com/Articles/divorcebeit.html
Rabbi Yona Reiss

We should note that, as an additional protection to the parties and the integrity of the process, the Beth Din of America, as a matter of policy, does not allow *toanim* [rabbinic advocates] to participate in proceedings before the Beth Din.[11] **We also discourage the use of *zabla*[12] except in limited cases whereby parties choose their *borerim* from a roster of *dayanim* who are members of the Beth Din and have been found to be trustworthy and scrupulous individuals.**

Here, similarly, are the protocols of the Beit Din of Detroit:

http://cordetroit.com/beis-din/guide-to-dinei-torah
In zabla, each side picks one judge. The two judges that were picked select a third judge together, and the three judges together form the Beis Din that will decide the case. The judges must be qualified to serve as judges. **The Beis Din of Detroit requires that both sides pick judges who regularly serve on a Beis Din, or who [are] recommended by the Beis Din.**

I have proposed similar solutions in Boston. Some rabbis have responded that

a) No Beit Din nowadays, at least in America, has the jurisdiction to restrict ZABLA, and
b) So long as the plaintiff agrees to ZABLA, he has not rejected Jewish legal processes, and therefore no Beit Din can give the plaintiff permission to sue in secular court.

In practice these arguments would mean that defendants win by default, and the Beit Din is helpless to do anything other than suggest that defendants accept a deeply problematic and perhaps corrupt arbitration panel.

The question of Beit Din's authority to restrict ZABLA coercively can be framed – somewhat too shallowly – as a question of whether there is a "beit din kavua" nowadays. Igrot Mosheh 2:3 seems to set a very high bar – being the exclusive local beit din and formal appointment by the local community or local rabbinate. He specifically says that New York therefore has no such beit din. By contrast, Shevet Halevi 8:302, 8:303, and 9:285 has a very low bar, perhaps simply being representative of the local community. It is likely not coincidence that Shevet HaLevi often expresses his deep unhappiness with the corruption that occurs in ZABLA situations, and the prohibition of participating in a ZABLA unless one is *certain* the other judges have integrity. Igrot Mosheh does not address that issue, and I wonder how he ruled in practice in such circumstances.

In practice, however, beit din has only social pressure to work with, so even a popular misperception of Rav Mosheh's position would be sufficient to prevent them from imposing limitations on ZABLA. However, beit din can release the plaintiff to sue in secular court, and defendants may have an interest in preventing that. So the presenting issue is not whether beit din can limit the ZABLA, but whether it can release the plaintiff if the defendant refuses to accept a limited ZABLA.

Here the usual countercitation is

נתיבות המשפט חידושים סימן כו ס"ק יג

(יג) "אבל אם הלוה אלם" –
ואם רוצה לציית דין רק לפני בית דין אחר, אפילו דזוטר מיניה, או לפני בית דין בעיר אחרת, ציית דינא מיקרי, ולא דיינין ליה בדין אלם. [או"ת אורים סקי"ג].

Here Netivot seems to say that willingness to go to any Jewish court is sufficient to prevent a beit din from judging the defendant to be in contempt, and absent a judgment of contempt, it should be forbidden to sue him in non-Jewish courts.

Netivot is apparently based on Urim veTumim.

אורים ותומים ס"ק יג

אהל אם הוא אלם וכו' – ואם רוצה לציית דין רק לפני ב"ד אחר אפי' דזוטרא מיניה אן לפני ב"ד בעיר אחרת ציית דינא מיקרי ולא דיינינן ליה בדין אלם
כה"ג בשם מחברים רבים

which is in turn based on Knesset HaGedolah "in the name of many authors"

כנסת הגדולה

"כל זמן שהוא ציית דינא וכו'" –
נ"ב
ומי שלא רצה לדון בעיר התובע – כל שהוא מפויס לידון בפני ב"ד, יפה ציית דינא מקרי. תומות ישרים סי' קצא
והרשד"ם ז"ל בחלק אבן העזר סי' כז כתב דאפילו להתדיין בפני ב"ד קטן מהראשון ציית דינא מקרי וכ"כ מהרי"ק ז"ל בשרש א ועיין בשרש קכד
ועיין בהר"ם מטראני ח"א סי' רפו
ובמ"ש בס"ד בטו' זה סי' כח בהגה' הטור אות פט

which seem primarily to mean Maharik

שו"ת מהרי"ק סימן א

ואף על גב שראיתי בכתב אחד שרבותינו שבאולמ"א החזיקו דבריה' של רבני וירצבור"ק אמינא דודאי לא סיימו קמייהו דחלילה להו לרבנן קשישי דליטעו בהאי מילתא שהרי אפילו תינוקות של בית רבן יודעים שאין כח ביד שום דיין להתיר ללכת בעש"ג בהיות הנתבע ציית דינא לפני רבני ישראל ומזה אין צריך אריכות כלל

who is likely based on Sefer Haterumot

ספר התרומות שער ג חלק ח

וכן מצינו בסנהדרין בתוספות של הצרפתים
שאם האחד סרבן ואינו רוצה לדון כלל, יכול מומחה יחיד לכופו לדון או שלשה הדיוטות, עד שיתרצה לדון עם חברו בב"ד,
ואם לא יתרצה יכפוהו בשוטים או בחרם או בשמתא לדון עמו בפניהם
אם אין בעיר אלא הם,
ואם יש בעיר אחרים יכפוהו לדון ולברור מי שירצה מהם,
וזהו כשאומר לא אדון עמו כלל,
אבל אם אמר זה נדון כאן וזה אומר נלך לבית הועד, אם אמר הלוה כופין אותו ודן בעירו,
וכן פירש ר"ח דבית הועד וב"ד הגדול חדא הוא ולא מצי אמר, ע"כ.

who in turn is based on Tosafot

תוספות מסכת סנהדרין דף ה עמוד א

דן אפי' יחידי –
ויכול לכוף את האדם בעל כרחו, דאי בדקבליה עילויה אפי' שאינו מומחה נמי

ומכאן דסתם ג' יכולין לדון את האדם בעל כרחו כשאינו רוצה לבא לב"ד, דהא ג' במקום יחיד מומחה קיימי

ואפי' שנים נמי דנין את האדם בעל כרחו אלא דאיקרו בית דין חצוף, דאי בדקבלו עלייהו מיירי שמואל אמאי הוי ב"ד חצוף

והא דתנן (לקמן דף כג.) זה בורר לו אחד וזה בורר לו אחד - משמע דמדעתו אין בעל כרחו לא, הני מילי כשאומר לא אדון לפני זה אלא לפני זה,

אבל אם אמר שלא יבא כלל לב"ד

או אם ה(ו)[י]ה [ה]הלווה (ו)אינו רוצה לדון כלל בעירו

כופין אותו ודנין אותו בעל כרחו.

When we finish retracing the game of telephone, I suggest that Tosafot originally discussed only the question of how to reconcile the existence of compulsory jurisdiction with the existence of ZABLA. Their solution is that compulsory jurisdiction exists only when the defendant offers an illegitimate alternative; **they do not address the question of when ZABLA is and is not a legitimate alternative, or how it might be bounded.**

This became related to the question of whether one could sue in secular court *when a contract gave you more rights under secular law than Jewish law* – you can do so only when the other party is in contempt, *so long as you have a viable and legitimate Jewish alternative*. Otherwise, one can sue only in Jewish court – although one does have the right to impose the court of correct jurisdiction on the defendant. **In other words, if ZABLA seems inappropriate, it can be prevented, but one cannot punish the defendant financially for insisting on it.**

This ruling was then misunderstood as a statement about whether one could allow suit in non-Jewish court *even when the only Jewish alternative would be ineffective*. Actually, it is the tight and obligation of a beit din chosen by the plaintiff to release him to sue in non-Jewish court whenever the available Jewish options do not promise justice. For the same reason, Jewish courts may and should release plaintiffs whenever they have signed a secularly binding agreement accepting the beit din as arbitrator and the defendant refuses to, even if the defendant promises to spend as much time as desired in beit din. The refusal to sign is compelling evidence that defendant intends to forum-shop, i.e. to require the plaintiff to sue from scratch in non-Jewish court if beit din rules against the defendant.

Bottom line: I believe that a beit din has the right to release plaintiffs to sue in non-Jewish courts when the alternative is an unregulated ZABLA, and I believe that this is in full conformity with essentially all major halakhic precedents. Furthermore, it is likely prohibited for potential judges to participate in an unregulated ZABLA unless they are so well conversant with the beit din scene that they would be able to vouch for the integrity of their judges, and for the same reason, I would suggest that it is against at least the spirt of Halakhah for a defendant to insist on an unregulated ZABLA. The exact nature of regulation is an important topic for discussion, ideally on a broad policy level but failing that in individual jurisdictions and perhaps even cases.

Shabbat shalom
Aryeh Klapper.