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לע"נ הרב יחיאל מיכל בן ר' משה אהרן אורליאן

CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

BUYING INTEREST-BEARING LOANS

Mr. Goldsmith was a wealthy man. One of his gentile business acquaintances, Mr. Garcia, owned a finance company.

Mr. Garcia approached Mr. Goldsmith. "I'd like to borrow $400,000 from you for a financing I'm currently negotiating," he said. "I'm also open to selling you some of my current interest-bearing loans."

"I'm willing to consider granting you a loan, if the terms are favorable," replied Mr. Goldsmith. "Regarding your current loans, send me details and I will review them."

The two worked out mutually acceptable terms for the $400,000 loan.

Mr. Garcia sent records of five loans that he offered to sell. Mr. Goldsmith noticed that one of them was to Mr. Cohen, clearly a Jewish name. He considered Mr. Garcia's price for the loans and calculated that they would be profitable. However, he wondered whether there was an issue of *ribbis* in purchasing the loan of Mr. Cohen.

"What's the problem?" someone asked. "Mr. Garcia lent him the money, and was allowed to charge interest. You're not lending to Mr. Cohen; you're just buying the loan from Mr. Garcia!"

However, another person said: "I don't think that it's allowed, since you're benefiting from the interest that Mr. Cohen pays."

"Furthermore, I'm not even sure you can provide Mr. Garcia the $400,000 loan, since he has Jewish clients," that person added. "Ultimately, you are benefiting through him from the interest that the Jewish clients pay!"

"That makes no sense!" replied the first person. "Who cares what Mr. Garcia does with the money that you lend him? You are not lending to his Jewish clients; you're lending only to him!"

Mr. Goldsmith decided to consult Rabbi Dayan, and asked:

"Am I allowed to lend Mr. Garcia money to finance his loans to Jewish clients? Am I allowed to buy from Mr. Garcia the interest-bearing loan to Mr. Cohen?"

"A Jew is allowed to borrow from a gentile with interest, and, conversely, charge interest when lending to him," replied Rabbi Dayan. "It is even permissible to lend with interest to a gentile, who will subsequently – of his own initiative – lend the money with interest to another Jew, provided that there is no direct liability or responsibility between the two Jews" (*Y.D.* 168:5; *Shach* 168:5).

"However, if a non-Jew lent money to a Jew with interest and subsequently transfers the

DID YOU KNOW?

Many businesses can restructure their employee contracts to avoid Shabbos concerns without the need for a Heter Mechira.

Ask your Rav or email ask@businesshalacha.com for guidance and solutions.

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לע"נ ר' שלמה ב"ר ברוך וזוג' מרת רייכלה בת החבר יעקב הלוי ע"ה ווייל

CONFOUNDING CONTRACT CLAUSE

Q: I have noticed that in many contracts prepared according to *Halachah*, there's a line that states: "This document was effected and finalized concurrently herewith according to Jewish Law by formal *Kinyan Agav Sudar*…. The *kinyan* was made in a duly constituted Jewish Court of Law…."

Do I truly need to make this *kinyan* in the presence of a *beis din*? And if I don't, why does it say that in the contract?

A. At BHI we receive this *she'eilah* frequently. The brief answer is that just writing this sentence is generally enough to render the clauses in the contract binding even without making the actual *kinyan*, as we will explain.

Let's begin with the question of why this line appears in contracts.

A party to a contract often agrees to fulfill a certain obligation under certain conditions, or to pay a fine if a certain obligation is not met.

Such a clause, called an *asmachta*, is considered problematic in *Halachah* because we assume that the signees don't truly mean to obligate themselves to pay conditional fines or follow through on conditional clauses; they agree to include those clauses only because they think that the conditions under which they will have to fulfill those clauses will not materialize (*Shulchan Aruch, C.M.* 207:2, 9). In order to force the two parties to fulfill all the clauses, they must do something to negate the issue of *asmachta*.

The *Gemara* (*Nedarim* 27b) states that a *kinyan* made in a *beis din chashuv* (i.e., a *beis din* of three *dayanim* who are well-versed in the *halachos* of *asmachta*; *Rema* 207:16) negates the issue of *asmachta*, because the act of making the *kinyan* in such a manner ensures that both sides sincerely obligate themselves to all clauses, even conditional ones.

The *Rishonim* established that if a contract *states* that such a *kinyan* was made in a *beis din chashuv*, then even if it wasn't *actually* so, it is still binding,

CASE FILE

debt to another Jew, Rama rules based on Rashba that if the Jewish borrower pays the non-Jew, who in turn pays the Jewish buyer – it is permitted. However, the Jewish borrower may not pay the Jewish buyer directly" (*Rama, Y.D.* 168:10).

"Taz (*Y.D.* 168:12) explains that the Rashba allowed paying via the non-Jew only if the non-Jew did not fully sell the loan, but rather borrowed from the other Jew and committed the first loan as a kind of collateral until he repays.

"However, if he fully sold the loan, so that the Jewish buyer can irrevocably collect directly from the Jewish borrower, Taz writes that it is prohibited for the Jewish buyer to collect interest, *mid'Rabbanan*, even if given via the non-Jew, since the Jewish buyer is now considered the lender" (*Chavos Daas*, *Chiddushim* 168:[20]).

"Nonetheless, Taz writes that if interest already accrued to the non-Jew, a Jew may buy the loan from him with the current accrued interest, and even accept it directly from the Jewish borrower. *Shach*, in *Nekudos Hakesef*, does not allow accepting it directly, but many *Acharonim* concur with the Taz" (*Bris Yehuda* 31:10; *Toras Ribbis* 24:1; *The Laws of Ribbis*, 12:15-17, 13:45-47).

"Thus," concluded Rabbi Dayan, "you may lend Mr. Garcia money to finance loans to Jewish clients, but buying the loan of Mr. Cohen would not allow you to collect future interest."

Verdict: If a non-Jew sells an interest-bearing loan of a Jew to a Jewish buyer, the buyer can collect the accrued interest even directly from the Jewish borrower, but may not collect future interest when the Jewish borrower is now liable directly to him.

MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS
Mechilah (Forgoing) #15
No Claim

לע"נ ר' יחיאל מיכל ב"ר חיים וזוג' חי' בת ר' שמואל חיים ע"ה

Q: My creditor said that he will not claim the debt from me. Do I still owe him or is this considered mechilah?

A: There appears to be a dispute regarding this. Some authorities write that the debtor merely committed not to claim the debt from you, but he did not cancel it, and you still owe him. At best, this is like an extension of the loan, so that if the creditor subsequently claimed the debt, against his commitment, you must pay him. Others write that "I have no claim against you" is considered *mechilah* (Rabbi Akiva Eiger, *C.M.* 241:2; *Pischei Choshen*, *Halvaah* 12:[7]).

However, some resolve this seeming dispute by distinguishing between a future tense: "...will not claim," which does not indicate *mechilah* of the debt itself, and a present tense: "...have no claim," which indicates *mechilah* (*Divrei Geonim* 57:10; *Minchas Pittim, C.M.* 241:2).

Regardless, if the creditor says that he forgoes the claim, that certainly is considered *mechilah* of the debt itself (*C.M.* 43:27).

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because *hodaas baal din k'me'ah eidim dami* – an acknowledgment by a party to obligate oneself is equivalent to testimony of a hundred witnesses (ibid. 207:15). In other words, when someone acknowledges that such a *kinyan* was made in a *beis din chashuv*, he is obligating himself even if there is an *asmachta* (*Sma* ibid. 42).

There appears to be a disagreement among the *poskim* as to how to explain this *halachah*.

From some *Kadmonim* (*Nachlas Shivah* 22 and 25, see *Shu"t Radvaz* 4:1288; *Ba'eir Heiteiv, C.M.* 129:16) it appears that writing that a *kinyan* was performed in front of a *beis din chashuv* indicates the signee's sincere intention to commit to all clauses, even conditional ones. This is evident from the language these *kadmonim* drafted for contracts, which states:: "The contract is empowered '*k'ilu*' (as though) it (i.e., the *kinyan*) was made in a *beis din chashuv*."

Those words imply that although a *kinyan* wasn't actually made in a *beis din chashuv*, the signees to the contract obligate themselves to fulfill all the clauses as though a *kinyan* was made in a *beis din chashuv*, which is enough to indicate a sincere commitment.

Other *poskim* explain that the reason this clause works is that the signees know that *beis din* will accept his acknowledgment that a *kinyan* was made in a *beis din chashuv*. They therefore commit to fulfilling all clauses in the contract, even conditional ones. According to this approach, the terminology of *k'ilu* would not work; the contract should read that a *kinyan* was actually made in a *beis din chashuv* (see *Shu"t Ra'anach* 66, who writes that if a contract states that a *kinyan* was made ke*bifnei beis din chashuv* it would not be a commitment to fulfill *asmachta* clauses).

The contract should therefore state that the *kinyan* was made in a *beis din chashuv*, or that it was done *b'ofen hamo'il* (in an effective manner), which means that it was made in a *beis din chashuv*. One does not have to worry that he is signing to a lie (*Tosafos Bava Basra* 44b, s.v. *Delo; Bi'urei Hagri"p, Asei* 22, p. 158a; and *Derech Emunah, Hilchos Maaser Sheini,* p. 330; but *cf. Me'iri* and *Maharshal, Gittin* 13b, *and Pnei Yehoshua Kiddushin* 26b), because he is simply writing that he is obligating himself through his *hodaah* (see *Tosafos*, *Bava Metzia* 12b, s.v. *Kosvin*; but cf. *Shu"t Chasam Sofer, Even Ha'ezer* 147 and *Shu"t Minchas Yitzchak* 8:141, who rule that one is only allowed to sign to this falsehood if there is a great need. Nevertheless, throughout the generations, *poskim* agreed to phrase this statement as if an actual *kinyan* was made before a *beis din chashuv*).

We must emphasize that having the words "*delo k'asmachta* – without an *asmachta*" in a contract does not work if in reality there are conditional clauses or fines (*Shulchan Aruch C.M.* 207:18 and *Sma* 51). The only times those words do help is when there is no full *asmachta* (ibid. 113:1, and *Derishah* 4, and see *Ketzos Hachoshen* 12:3). We therefore require the phrase declaring that it was done in a fashion that is not an *asmachta*, because that acknowledges that the *kinyan* was made in a *beis din chashuv*, which is as valid as testimony of a hundred witnesses (*Taz* 207:18).

For questions on monetary matters, arbitrations, legal documents, wills, ribbis, & Shabbos, Please contact our confidential hotline at 877.845.8455 or ask@businesshalacha.com