

Agreement Validation Clause Halachic Deals & Documents: Part III

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WHAT IS AN AGREEMENT VALIDATION CLAUSE:

An Agreement Validation is a clause written into a *shtar* that stipulates how the parties will deal with certain issues that may come up. It is very important to have an Agreement Validation written into a *shtar*, or even written as a separate document, as this will help avoid many problems and confusion later on.

There are numerous helpful components that can be included in an Agreement Validation; however, in this shiur we will focus on one integral component – *Kabalas Daas Yachid*.

WHAT IS KABALAS DAAS YACHID?

Most readers are probably aware that there is a rule in *Choshen Mishpat* known as “*Hamotzi meichavero alav haraya*.” The one with the disputed item or money in his possession has the upper hand, and the one trying to usurp the item or money from him has the burden of proving his case.

Over the generations of exile, a big problem has arisen as a result of this rule. Thousands of *sefarim* have been written and tens of thousands of *teshuvos* have been penned that deal with just about any and every possible *din Torah*. There are scores of disagreements regarding many cases. In many, if not most disputes, there exists a minority of Poskim who disagree with the majority view. What this means is that in many

cases, the *muchzak* can utilize a process known as *kim li* which would allow him to claim that he believes the halacha is like the Poskim who side with him, even if they are a minority. Since he is the *muchzak*, he can retain the money because it cannot be proven that he is wrong.

It goes without saying that this leads to much frustration from the other party, and can even lead to situations where the other party grabs the item before the *din Torah* because he wants to become the *muchzak* and gain the upper hand. In short, much chaos and confusion can ensue due to the huge amount of leverage a *muchzak* has.

To counter this problem, the concept of *Kabalas Daas Yachid* was developed. This idea is based on a Mishnah in *Sanhedrin* that says that two parties in a dispute can say that they agree to do whatever “my father says”, meaning they can choose any individual, even if he is not a *Dayan*, and accept to follow whatever he rules. In the same vein, when two parties accept a *Kabalas Daas Yachid* as part of an Agreement Validation, they are declaring that they will both abide by whichever individual *Posek* upholds and supports the intent of the contract the most. (This usually means that what is in a contract is meant to be carried out, and using loopholes is not part of the intent of the contract. Once this agreement has been accepted, neither side can present an obscure opinion as proof of their claim, as they both must abide by the opinion that is most supportive of the *shtar's* intent.

PUTTING KABALAS DAAS YACHID INTO PRACTICE:

Does *Kabalas Daas Yachid* have any limitations, or is it unbreachable?

The following Din Torah showcases an instance where even such an agreement may not be able to withstand certain halachic and practical issues.

A businessman was involved in buying and selling artistic pieces. He discovered that he had a unique talent for producing these types of artistic products and wanted to move into actual manufacturing. To this end, he recruited investors to back him financially in his objective of buying a building, renovating it, and receiving zoning from the city to turn it into a manufacturing plant.

He did purchase the building and received what he thought were the necessary variances; however, he later discovered that he had received some bad advice. The city official who told him he had the variances he needed to turn the building into a manufacturing site was mistaken, and he, in fact, did not have the correct zoning. His business was shut down by the city and he was left broke and on the verge of bankruptcy.

He now came up with a new plan to save himself financially and help his investors not lose all of their investment. He decided to close his manufacturing business and open a new business venture. He procured a large investor for his new business, who agreed to provide a large sum in exchange for 50% of the business. He then told his old investors that he would give them small shares in the new business as their payback for their investment.

The old investors were quite upset and reminded him that the partnership agreement they had signed with him obligated him to manage the business for 10 years. They said that this translates to mean that he has no right to dissolve the first business until the 10 years are up. Furthermore, the agreement contained an agreement validation clause to reinforce the intent of the agreement.

IS THE BUSINESSMAN CONSIDERED A PO'EL?

There is a halacha that a *po'el*, an employee who is paid to work for a specific period of time, may back

out of his commitment at any time. This is because the verse tells us that we are slaves to Hashem and not to any man. If a *po'el* would be unable to leave a job, he would be akin to a slave; therefore, he must be permitted to back out whenever he wants.

Accordingly, it would seem that even though this individual committed to managing the business for ten years, he still must be allowed to back out. However, there is one opinion in the Poskim that rules that a *po'el* may not back out if he signed a contract and made a *kinyan*. In our story, the contract had *Kabalas Daas Yachid* in it. Consequently, both sides had already implicitly agreed to abide by the ruling that the businessman may not back out for ten years, according to the opinion that a *po'el* cannot leave a job in the middle when there is a contract and a *kinyan*. Thus, the individual would seemingly be stuck managing the first business for ten years, as he must abide by the *Kabalas Daas Yachid* clause.

THE LIMITATIONS OF KABALAS DAAS YACHID:

Some *teshuva sefarim* seem to say that *Kabalas Daas Yachid*'s power is almost unlimited. These *sefarim* rule that *Kabalas Daas Yachid* would work even to create a transaction where, according to the normative opinion, there was no transaction at all.

Two Examples

- **Bereirah:** A classic case of *bereirah* would be when someone sells his friend a cow, without specifying which cow he is selling him; instead, he says that he is selling him whichever cow comes out of the barn first. The majority of Poskim say that such a sale is not valid, as it is necessary to know what one is buying at the time of the sale for it to be a proper sale. A minority opinion disagrees and says the sale is valid. These *teshuva sefarim* say that *Kabalas Daas Yachid* will make the sale valid, even though according to the majority opinion this would not be a sale at all. According to them, *Kabalas Daas Yachid* not only works to determine the terms of a transaction; it can even create a transaction. In the case of *bereirah*, without *Kabalas Daas Yachid* there would be no transaction at all according to most opinions, but *Kabalas Daas Yachid* has the power to validate an

act that was otherwise non-valid.

- **Davar Shelo Bah L'olam:** when someone is owed money and says he wants to transfer the debt to charity. Since he hasn't yet collected the debt, most Poskim rule that he cannot donate something he does not have to *tzedakah*. There is a minority opinion that disagrees and says that one can donate an outstanding debt to charity. Even though ruling like these Poskim would be validating a transaction, rather than altering an existing transaction, these Poskim rule that *Kabalas Daas Yachid* can be used. However, the Sefer Zecher L'Avrohom disagrees and says that *Kabalas Daas Yachid* will not work to create a transaction that only exists according to a minority opinion. He discusses the rule that one cannot purchase an item that is a "*davar shelo bah l'olam*", something which does not yet exist, and says that even though there is an opinion that such a sale can be made, *Kabalas Daas Yachid* will not be effective to validate a transaction where one does not exist according to the majority view.

It would seem that according to the Poskim who rule that *Kabalas Daas Yachid* can create a transaction, the deal obligating the businessman to manage the business for ten years would be valid, while according to the Zecher L'Avrohom it would not be valid. The businessman can, therefore, say that he sides with the Zecher L'Avrohom and is not obligated to work for them for the next ten years.

It is very possible that even the Poskim who say that *Kabalas Daas Yachid* can create a transaction,

would agree in our story. This is because the logic behind the concept of *Kabalas Daas Yachid* is that it is akin to "*hoda'as baal din*", an admission by the obligating party. When the parties agree to abide by whatever one Posek says, they are each in effect saying that if the Posek rules against them, they will concede and admit they owe the money. Similarly, in the case of *bereirah*, the seller is admitting with the *Kabalas Daas Yachid* that the cow that comes out of the barn belongs to the buyer. Likewise, the lender who transfers the debt to charity is admitting that the money should go to *tzedakah*. It is unimportant if the halachic reasoning of *bereirah* or transferring something that is not in one's possession is sufficient to change the ownership of the item, as the owner is simply declaring that it is not his, and we believe him without delving too deeply into the matter.

However, this may only be true when it is conceivable in some way for the transaction to be real. Because it is certainly possible that the cow belongs to the other party and the money belongs to *tzedakah*, therefore when the seller or lender admits this is so, his *hoda'ah* is enough for us to believe him. In our story, obligating the businessman to work for ten years is simply not possible according to most Poskim. According to the majority view, it is always forbidden to obligate a *po'el* to work for a long period of time, so there is no way that *hodaas baal din* would be able to accomplish the impossible.

Based on this reasoning, the *bais din* ruled that the businessman is not bound by the clause that he must manage the first business for ten years.

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