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ב"ר משה גרוסמן זצ"ל
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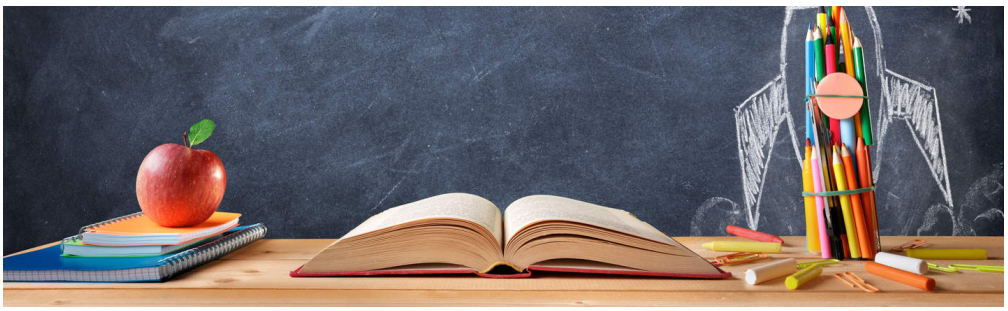

FORESEEN CIRCUMSTANCES: IF THE CONTRACT CONTEMPLATED THE CLOSURE

What happens to tuition if the agreement provided for pandemics?

Adapted from the writings of Dayan Yitzhak Grossman

The previous installment in this series focused on the rule that an employee is generally not entitled to compensation for work he does not perform, even if he was prevented from doing so by circumstances beyond his control. Implicit in the discussion of that rule by the *Rishonim*, however, is that this is merely the default, but it may be stipulated that the employee is to paid regardless.[1]

School enrollment agreements sometimes include the provision that they will not refund tuition paid in the event that the school is closed because of force majeure events, and they may even explicitly enumerate "epidemic" and "pandemic," e.g.:

> The School's duties and obligations under this Contract shall be suspended immediately without notice during all periods that the School is closed because of force majeure events including, but not limited to, any fire, act of G-d, weather disaster, war, governmental action, act of terrorism, epidemic, pandemic, or any other event beyond the School's control. If such an event occurs, the School's duties and obligations in this Contract will be postponed until such time as the School, in its sole discretion, may safely reopen. In the event

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1 See the Rishonim cited in our discussion in the previous installment of the case where the employer paid his employee in advance. I have long wondered why such a stipulation is not an asmachta. In a case of davar ha'aveid for the employee, it would not be an asmachta because it is lo gazim, but it seems that the stipulation is generally valid, even in cases that are not davar ha'aveid. I have been unable to locate any discussion of this question, but perhaps because the employer is not accepting a new obligation in the event of an oness, but merely extending his obligation to pay compensation to that situation, it is not considered asmachta.

The Bais Havaad on the Parsha
Bring the Parsha to Life!

Excerpted and adapted from a shiur by Dayan Yosef Greenwald

PARSHAS EMOR

OPPORTUNITY COSTS

The Gemara (*Pesachim* 3b) relates that the Chachamim praised Rabbi Yehuda ben Beseira for his ability to prevent a non-Jew in Yerushalayim from eating the *korban pesach* while he himself was in Netzivin. Tosafos asks, why was Rabbi Yehuda ben Beseira not in Yerushalayim to fulfill the mitzvah of *aliya l'regel*? Tosafos answers that perhaps he was too old or too weak, or maybe he did not own land, which is required for the mitzvah to apply.

The Minchas Chinuch (Mitzvah 5 #13) wonders why Tosafos focuses only on the missing mitzvah of *aliya l'regel* and not *korban pesach*, from which one isn't exempted by not owning land. He suggests that one is not obligated in *korban pesach* until the time of its offering on the fourteenth of Nisan, and if at that time he is too far (*b'derech rechokah*) and therefore exempt, he has done no wrong, though he has

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The Case of the Fleeting Flat

Q The two-year rental agreement I signed with my landlord ended some time ago. The standard practice is that when that happens, the arrangement continues until either party terminates it with 30 days' notice.

My landlord has a cousin who was visiting this country when the world shut down and is now unable to fly home. I was recently given 30 days to leave so that the cousin can move in.

Under normal circumstances, 30 days gives both parties ample time to find alternate arrangements.

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that the School cannot reopen due to an event under this clause, the School is under no obligation to refund any portion of the tuition paid.[2]

Some force majeure clauses go even further, relieving the school of the obligation to waive even unpaid tuition:

> In the event the School is closed for a period of time or must deliver coursework remotely due to an event under this clause, Parent agrees the School is under no obligation to cancel, waive, or refund any portion of tuition that is owed or paid to VCS.[3]

Force majeure clauses like these that explicitly mention epidemics and pandemics should definitely be binding. With regard to clauses that contain terms like "force majeure" and "act of G-d" but do not expressly mention epidemics and pandemics, it might be argued that pandemics such as the current one were heretofore inconceivable in twenty-first century First World countries, so they would not be included in a general provision discussing force majeure events, per the Gemara's rule that the acceptance of responsibility for circumstances beyond one's control (*oness*) does not include circumstances that are uncommon (*lo sh'chiach*).[4] The Rambam derives from this rule the general principle that with any contractual clause, we evaluate the intent behind it, and we construe it as covering only those circumstances that we judge that the stipulator had in mind.[5] Accordingly, in real-world scenarios there is considerable debate among *poskim* about how broadly to construe contractual clauses that do not specifically mention particular sets of unusual circumstances. For example, the sixteenth-century Turkish *poskim* penned numerous responsa considering whether shipping-insurance contracts that mention then-common risks such as shipwreck and piracy should be extended to cover much less common occurrences, including: a mutiny by the crew,[6] a storm that forced the ship to dock at a port where the cargo was confiscated by the authorities because the ship had been used to smuggle arms,[7] and a storm that caused the crew to jettison the mast in order to save the ship, and the ship's owner then compelled the clients to share in the cost of the damage.[8]

Even in the absence of any stipulation covering school closings, if there exists a prevailing custom (*minhag*) regarding tuition obligations in such circumstances, it would override the default halacha, as per the fundamental principle applying throughout civil law, and particularly in contractual relationships, that "the *minhag* nullifies the halacha."[9] In order to qualify as a *minhag*, however, the circumstances in question must be "common" and "occur numerous times."[10] This is obviously not the case for the coronavirus pandemic, but the question would be this: Do we view the pandemic as merely one particular example, if an extraordinary one, of a school closure due to *oness*, and therefore governed by a *minhag*—should one exist—covering school closures? Or do we see it as something fundamentally different from the ordinary circumstances that force school closings, and therefore not governed by any *minhag* but only by the default halacha and any contractual stipulation.

May all such clauses soon become moot.

2 Sayre School Enrollment and Financial Contract, 2016-2017 academic year. Very similar language appears in the Alexander Montessori School enrollment contract.

3 Valley Christian Schools Enrollment Contract Provisions

4 Gittin 73a. See Tosafos there s.v. eisivei.

5 Hilchos Mechirah 19:6, codified in Shulchan Aruch C.M. 225:3.

6 Shu"t Maharashdam C.M. #100; Shu"t Maharam Alshich #60; Shu"t R' Betzalel Ashkenazi #28.

7 Maharashdam #33; Shu"t Divrei Rivos #81.

8 Maharashdam #220.

9 Yerushalmi Bava Metzia 27b.

10 Rama C.M. 331:1, based on Shu"t Rivash #475.

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HARAV CHAIM WEG

But COVID-19 has put off current tenants' moving plans and made property owners hesitant to show apartments, so I don't feel it's enough time. Am I entitled to more?

A We learn in Bava Metzia 101b that the amount of notice a landlord must give his tenant to terminate a month-to-month lease varies, by season and by city size, between 30 days and a year. (The determining factor is how long would be enough to find a new place.) This halacha is codified in Shulchan Aruch (C.M. 312). Although the custom today is to give 30 days without regard to season or population—because in our day that is generally sufficient—you may have a legitimate claim in Bais Din that the current market resembles those cases in Bava Metzia where more time is indicated.

Note that in monetary halacha, the claimant bears the burden of proof. Absent such proof, the party in possession of the item or funds under dispute, the *muchzak*, retains possession. In landlord-tenant disputes, the landlord is generally considered to be in possession of a tenant-occupied apartment. Therefore, if it is unclear whether your assessment of the current rental market is correct, The Bais Din will likely consider the landlord to be the *muchzak* and ask you to vacate the property.

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not fulfilled a *mitzvas asei*. One only receives the *kareis* penalty if he neglects to bring the *korban* (see *Bamidbar* 9:13) while nearby.

Perhaps we can explain as follows: One who does not perform a *mitzvas asei* has missed an amazing opportunity, but he isn't punished. *Kareis*, too, is only incurred when one actively violates certain negative mitzvos, not just for missing an opportunity. The only exceptions to this are *bris mila* and *korban pesach*, where nonperformance is *hafaras bris*, breaking one's covenant with Hashem. But only if one is in Yerushalayim on 14 Nisan and fails to bring the *korban* is he reckoned that way.