An Orthodox operation of religious arbitration

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In *Tayar v Feldman* [2022] FCA 1432, the Federal Court of Australia considered the enforcement of an arbitral award at the intersection of Orthodox Jewish law and the secular Commercial Arbitration Act (Victoria) 2011 and Bankruptcy Act 1966 (Cth).

The facts

Victorian Supreme Court and Court of Appeal

From 2007 to 2013 Rabbi Corey Feldman was involved in the Yeshivah Centre, Bondi, which was run by Rabbi Binchus Feldman and his son Rabbi Yosef Feldman. Mr Tayar loaned the Feldmans various sums of money for the Centre's running costs under the Orthodox Jewish practice of *Heter Isko* and worked there as an employee. All three were members of the Chabad Lubavitch movement, which is a Hasidic branch of Orthodox Judaism and requires members to comply with a code of conduct known as Halachic law.

During 2010 the parties entered a series of complex commercial transactions. Under *Heter Isko*, Mr Tayar advanced funds as an investor seeking to obtain profit investing capital rather than deriving interest from the same loan. Five pieces of land were provided as security. Mr Tayar wanted the sums repaid.

In 2013 an arbitration occurred under an agreement which included that it would convene under a Beth Din (Jewish arbitral panel) of three rabbis and under the Commercial Arbitration Act 2011 (Victoria) (**CAA**).[1] The recitals to the arbitration agreement set out:

- Disputes have arisen between the Parties concerning certain transactions between them during the period from 2007 to date, including certain loans, rents, salary payments, the ownership of properties and other matters.
- Pursuant to this Agreement, an Arbitral Panel will be appointed to determine the Disputed Matters in accordance with the processes set out in this Agreement.

1 *Tayar v Feldman* [2022] FCA 1432 at [12].

The Disputed Matters were defined in the agreement in schedule one as the statement of claim, defence and any cross-claim, filed in the arbitration.[2] However, while no such documents were provided to the arbitral panel,[3] the arbitral panel identified the claims which it determined, having heard the parties orally. The Beth Din made an award in favour of Mr Tayar for A$1.85 million under four claims.

In 2019, Mr Tayar filed an application to enforce the arbitral award in the Victoria Supreme Court, in order to preserve his position under the civil limitation laws in Victoria. Mr Tayar relied on section 35 of the CAA. The Court enforced relevant parts but not all of the Beth Din's arbitral award as the Court's recognised version of the award was rendered for A$1.5 million pursuant to the CAA. The Feldmans appealed and renewed their attempt to have the court refuse enforcement under section 36 of the CAA. There are limited grounds for setting aside an arbitral award, and the Supreme Court's decision was upheld on appeal to the Victoria Court of Appeal.

In both Courts the Feldmans argued there was no agreement in writing as to which disputes were to be submitted to arbitration; secondly, that the arbitral panel failed to give adequate reasons for the award, in contravention of the CAA. The Victorian Supreme Court and later the Court of Appeal rejected both grounds. Both found that the procedure and the three-page reasons were sufficient for the purposes of the CAA, despite the reasons being *not easy to understand*.[4] The reasons did not have to be up to the standard of court judgments. The standard would depend on the evidence, complexity, nature of the issue and finding. The reasoning should set out the parties' arguments, the principles of each finding and the conclusions.

2 At [12] and [101].
3 *Feldman v Tayar* [2021] VSCA 185 at [33].
4 *Tayar v Feldman* [2020] VSC 66 at [154]; and *Feldman v Tayar* [2021] VSCA 185 at [79].

Enforcement of an arbitral award

The case concerned the enforcement of an arbitral award in the Australian courts where the arbitration process had involved the application of Jewish Law.

The Federal Court of Australia

Mr Tayar obtained a sequestration order from the court registrar to secure repayment of moneys owed pursuant to the award. The Feldmans as judgment debtors applied to the Federal Court to review that decision. The Feldmans argued Orthodox Jewish law should have precedence over secular law. Having complied procedurally with the terms of the Bankruptcy Act (such as serving the Feldmans with a bankruptcy notice and creditor's petition), as judgment creditor, Mr Tayar had a prima facie right to the sequestration order.

The Federal Court of Australia was required to look at the order afresh. The key basis for challenge was that the Jewish bankruptcy procedure known as Mesadrin had not been applied. This procedure involves a debtor liquidating all assets beyond basic living requirements and the resulting amount is paid to the creditor. The Feldmans claimed it was an abuse of process for Mr Tayar to seek a sequestration order because he had not participated in Mesadrin under Halachic law.

Mr Tayar gave evidence that it was strictly possible to seek permission from the Beth Din to take the matter to a secular court;[5] and on a more liberal view of Jewish law the party could simply go ahead and approach the secular court to enforce the award without Halachic permission. Mr Tayar gave evidence that he always took the stricter approach.[6]

The Federal Court had a discretion to refuse a sequestration order. The Feldmans relied on section 52(b) of the Bankruptcy Act 1966 to try and show that there was sufficient cause for the Court to exercise its discretion to set aside Mr Tayar's amended creditor's petition. They variously argued, to no avail, that by taking part-payments of the judgment debt Mr Tayar had agreed to Mesadrin, was estopped from denying it and had entered a collateral contract to undertake it.

The Federal Court ruled that while the Chabad and Beth Din were voluntary,[7] the award was one made under the CAA and the bases for refusal were as for all secular judgment debts. The Mesadrin process was not obligatory:[8]

> *In other words it is apparent that while the Mesadrin process may be favoured by members of the orthodox Jewish community, it is not obligatory. There is no bar to approaching a secular court for the purposes of enforcement of an award given by a Beth Din.*

The Feldmans did not evince evidence of their solvency, to the contrary, they claimed they could not afford to pay the arbitral award. It did not assist the Feldmans' case that rather than meeting the three-month deadline to apply to refuse enforcement, they had waited six years. The matter had been argued in two courts below and the Federal Court declined to go behind the judgments obtained.

Ultimately the Federal Court of Australia found the judgment debt was enforced *in aid of Jewish law*[9] and not contrary to it, as the Beth Din was not convened to deal with enforcement of the arbitral award and secular processes were invoked.

Conclusion

A benefit of arbitration is its flexibility, including the ability to maximise party autonomy and enable non-municipal (here, religious) law to be used to govern its procedures. The challenge is to reach a balance, as flexibility of the award process should not erode the enforcement of the award. While there is freedom to choose, the inherent flexibility of arbitration should not dictate how an arbitral award is enforced. Certainty and economy of enforcement processes are essential. The case also shows that the nature of the parties' dispute does not have to be stated from the outset, for it to be a valid arbitration agreement.

The Federal Court of Australia provided a balance by finding that while there was scope for the Orthodox principles of Judaism in the arbitration process, it did not follow that all issues need to be resolved according to Jewish law.

5 *Tayar v Feldman* [2022] FCA 1432 at [103].
6 At [104].
7 At [62].
8 At [104].
9 At [63]-[64].