Arbitration

By George H. Friedman

Rabbinical Arbitration

The recent Court of Appeals decision in *Avitzur v. Avitzur*,[1] which found enforceable a husband's agreement to appear before a rabbinical arbitration board, has focused attention on the role of this form of nonjudicial dispute resolution. This article will examine some of the more recent cases dealing with agreements to arbitrate before rabbinical boards of arbitration.

Although not fashioned as a ruling on a petition to compel arbitration under Section 7503(a) of the CPLR,[2] the four-to-three decision in *Avitzur* addressed the validity of an agreement to appear before a rabbinical board of arbitration. The case involved a Jewish couple who had already received a civil divorce. At the time of their marriage, the husband and wife had executed a Jewish marriage contract, known as a "Ketubah." Under the terms of the Ketubah, the couple agreed to:

"Recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary or its duly appointed representative, as having authority . . . to summon either party at the request of the other in order to enable the party so requesting, to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime."[3]

Following their civil divorce, the wife sought to obtain a Jewish divorce decree, known as a "get," by summoning her husband to appear before a Beth Din. The wife in such circumstances is known as an "aguna" and, while free to remarry in a civil context, is unable to remarry under Jewish law until a get is received. The husband in this case refused to appear. The wife, thereafter, brought an action seeking: (1) declaratory relief to the effect that the Ketubah constituted a marital contract, and (2) an order compelling the husband's specific performance of his agreement to appear before the Beth Din.

Agreement Enforced

While Special Term denied the husband's motion to dismiss on separation of church and state grounds, the Appellate Division modified, granting the husband's motion. The Court of Appeals, in examining the motion to dismiss, found no problem in reversing the Appellate Division. Drawing an analogy to antenuptial agreements to arbitrate, the court viewed the wife's case as one seeking "to enforce an agreement made by the [husband] to appear before and accept the decision of a designated tribunal."[4] Citing *Bowmer v. Bowmer*,[5] and *Hirsch v. Hirsch*,[6] two prior Court of Appeals decisions, the court noted that, "an agreement to refer a matter concerning marriage to arbitration suffers no inherent invalidity."[7] Thus, the Ketubah was entitled to the same enforcement as any other civil agreement to submit disputes to a nonjudicial forum, at least insofar as enforcement would not violate law or public policy.

Turning to the public policy issue, the court went on to find that the present case could be decided solely upon application of natural, rather than religious, principles of contract law, and therefore posed no church and state problems. While portions of the Ketubah might not be judicially cognizable, this would not prevent enforcement of the portion of the document in which the parties agreed to refer disputes to the Beth Din.

The Beth Din and CPLR Article 75.

The concept of a Beth Din, or Jewish Court of Law, has been with us for thousands of years.[8] In the United States, the Beth Din has functioned within the framework of a board of arbitration. In principle, therefore, an agreement to appear before a Beth Din is subject to the provisions of Article 75 of the CPLR, governing arbitrations. This issue was addressed in *Mikel v. Scharf*,[9] a decision ultimately affirmed by the Second Department.

A landlord-tenant dispute had arisen between the parties, all of whom were orthodox Jews. The petitioner subsequently instituted a rabbinical arbitration proceeding, as is customary among this group. The respondents initially refused to appear on the grounds that they had no knowledge of the petitioner, but later consented to make a "special appearance" before the arbitration board which would be limited solely to the question of whether there had in fact been a business relationship between the parties which would support the commencement of a rabbinical arbitration proceeding. A "mediation note," which is analogous to an agreement to arbitrate, was executed by the parties. The dispute referred to in the note, however, was limited to the question of whether the arbitration board, in fact, should have been commenced.

Following the conclusion of the proceedings, an award was rendered finding that the board had jurisdiction, and also directing the respondent to pay the petitioner a lump sum of money, with additional monthly payments to be made in the future.

Arbitrator Exceeded Authority

The respondent opposed the petitioner's motion to confirm the award in Supreme Court, Kings County, on several grounds, one of which was that the arbitration board had acted in excess of its authority. Although the court noted that rabbinical boards are an acceptable means of resolving disputes in the state of New York, it refused to confirm the board's award, finding that the arbitrators had exceeded their authority within the meaning of CPLR Section 7511(b)(1)(iii), by directing the payment of damages.

"The respondents made it graphically clear that they understood the mediation note or arbitration agreement to limit the scope of the 'dispute' on a jurisdictional issue and not on the merits of the claim . . . The jurisdictional issue was thus limited by the intent and agreement of the parties."

A determination on the merits of the claim was outside the scope of the agreement and the power of the arbitrators. The court also found an additional independent basis for refusal to enforce the award, that being the board's refusal to permit the respondent to have advice of counsel during the arbitration proceeding. Although certain procedural rights in arbitration may be waived, the right to counsel is not waivable in arbitration. The board's exclusion of the respondent's counsel from the arbitration proceedings was a denial of his rights under the state constitution, as well as a violation of Section 7506(d) of the CPLR.

"Respondents' participation without counsel, after receiving the [board's] warning to appear alone, did not have a negative effect on their inherent right to legal representation, the deprivation of which is sufficient to vitiate the award," the court found.

The Appellate Division later affirmed, finding that the rabbinical arbitration board was required to follow Article 75 procedure.

Landlord-Tenant Case

The use of a Beth Din for resolving a landlord-tenant dispute was discussed in *Ganzburg v. Sklarz*,[10] a Housing Court case. The parties had agreed in writing to submit to a Beth Din, a controversy involving a loan made by the tenant to the landlord, and to abide by the body's determination. The Beth Din ruled that the landlord owed the tenant some $33,000, which was to be repaid by the landlord's permitting the tenant to live in her apartment "rent-free" for a period of ten years. The Beth Din retained jurisdiction for the purpose of periodically adjusting the value of the apartment.

More than a year after the issuance of the award, the petitioner, wife of the purported landlord, brought actions for nonpayment of rent against the tenant, maintaining that she (the wife) was the actual owner of the building and was not bound by the arbitration award since she had not signed the submission to arbitrate. The court, however, found that it had no jurisdiction over the dispute and dismissed the case.

The written agreement to submit

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the controversy to arbitration clearly brought the case within the ambit of CPLR Section 7501, the court held. Although the petitioner claimed that she was not bound by her husband's act of signing the submission agreement, the court found that her participation in the proceedings before the Beth Din, coupled with the failure of her or her husband to attack the award within the statutory time limit, precluded her from "collectively attack[ing] a valid arbitration award through the vehicle of a summary proceeding in this court."

Notwithstanding that it was not bound by Jewish Law, the court found reference to it to be helpful:

"The Shulchan Oruch makes it very clear that . . . the rental income from property owned by either [spouse] is marital property that may be used to satisfy the debts of the couple or either . . . ."

Estate Not Arbitrable

The *Avitzur* court made reference to not enforcing agreements to appear before a Beth Din, where enforcement of such an agreement would be contrary to public policy. This particular issue arose in a 1981 Second Department case called *Matter of Berger*.[11] In this case, the decedent had written a purported will, which ultimately concerned his sons and sons-in-law. A dispute arose over the interpretation of the will, and the parties agreed to submit the matter to a rabbinical arbitration tribunal. The arbitration board ultimately issued an award which had the effect of distributing the decedent's estate.

Supreme Court, Kings County, denied a petition to confirm the award, and granted a cross motion to vacate the award. The Appellate Division affirmed, finding that confirmation of the award was properly denied because "the distribution of a decedent's estate is precluded from submission to arbitration on the ground of public policy."

Conclusion

Viewing *Avitzur* and prior decisions addressing the question of rabbinical arbitration, two conclusions emerge. First, as long as enforcement of the arbitration agreement will not contravene public policy, the courts will enforce agreements to arbitrate before a rabbinical arbitration board, or a Beth Din. Second, arbitrations conducted in this state by rabbinical arbitration boards would appear to be governed by the procedures set forth in Article 75 of the CPLR.

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(1) — NY2d —, NYLJ, Feb. 17, 1983, p. 4, col. 1 (Ct. App.).

(2) Section 7503 of the CPLR states in part: "A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate . . . ."

(3) Avitzur, supra note 1, at p. 4, col. 1.

(4) Id. at p. 4, col. 2.

(5) 50 NY2d 288, 406 NE2d 760, 428 NYS2d 902 (1980).

(6) 37 NY2d 312, 333 NE2d 358, 372 NYS2d 71 (1975). For a review of recent cases on marital arbitration in New York, see G. Friedman, Resolving Disputes in Domestic Relations, NYLJ, May 13, 1983, p. 1, col. 1.

(7) Avitzur, supra note 1, at p. 4, col. 3.

(8) For a detailed examination of the history and development of the Beth Din, see F. Fishkin, The Beth Din as an Arbitration Model, 84(6) Case & Comment 50 (1979).

(9) 105 Misc2d 548, 432 NYS2d 602 (Kings Cty. 1980), aff'd 85 AD2d 604, 444 NYS2d 690 (2d Dept. 1981).

(10) NYLJ, Jan. 31, 1980, p. 11, col. 4 (Civ. Ct. NY Cty.).

(11) 81 AD2d 584, 437 NYS2d 690 (2d Dept. 1981).

This column, which is a regular feature of the *Law Journal*, is prepared by members of the American Arbitration Association. George H. Friedman is Director of the New York Office of the AAA and formerly was Editor of Court Decisions. He is a member of the New York and New Jersey Bars.