ENFORCEABILITY OF Religious Arbitration Agreements and Awards

Arbitration is the process of settling disputes between parties by a private tribunal. Courts favor arbitration because it can provide a speedy, informal, and inexpensive alternative to litigation, and may reduce a court's docket.

While general principles of enforceability apply, novel First Amendment and public policy considerations can arise when religious forms of arbitration are used.

The court's role with regard to review of the merits of an arbitration decision is limited by statute. A court generally may vacate an award only when fraud, corruption, or denial of due process has tainted the legitimacy of the award.[1] When review is allowed, it generally will be very deferential.

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When parties agree to have their disputes settled by a religious tribunal, however, certain novel issues may arise. This article explores the enforceability of religious arbitration agreements and awards, as well as the First Amendment and public policy considerations that can arise when religious forms of arbitration are used. Before turning to these issues, it is helpful to discuss some basic principles of arbitration.

Enforceability of Arbitration Agreements

Arbitration is a voluntary process where parties agree to submit disputes to an arbitrator or a panel of arbitrators. In most circumstances, an agreement to arbitrate will be expressly stated in the contract between the parties.[2] Absent situations involving fraud, duress, or corruption, courts will generally uphold the terms of a freely negotiated arbitration agreement that explicitly and unambiguously reveals the intent of the parties to arbitrate. Parties enjoy great flexibility in that they can craft arbitration agreements that meet their needs.

Courts apply these general rules to arbitration provisions even when an arbitration proceeding is to be conducted by a religious tribunal. As New York courts have noted, "Arbitration in a religious forum has long been recognized as a valid approach to dispute resolution."[3]

Courts apply the same deferential standard of review to religious arbitration awards as they do to awards by non-religious arbitrators.

Enforceability of Arbitration Awards

Under U.S. law, arbitration awards are generally binding and enforceable. Judicial review of arbitration decisions is considered to be "among the narrowest known to law."[4] A court may vacate an arbitration award only in limited circumstances, such as when there is fraud, corruption, arbitrator misconduct, or where arbitrators exceed their power. In addition, many courts recognize the power to vacate an award when an arbitrator acts in "manifest disregard" of the law. Generally to invoke this power, the record must show that an arbitrator knew the law and explicitly disregarded it.[5] Some courts will uphold the award as long as there is any "colorable justification" for the arbitrator's conclusion.[6]

Enforceability of Awards by Religious Tribunals

Various kinds of religious tribunals exist for some purposes in most religions.[7] There are, for example, Jewish tribunals known as the Beth Din, Islamic panels, and Christian panels associated with Peacemaker Ministries' Institute for Christian Conciliation (CC Institute).

Both federal and state courts have enforced religious tribunal decisions under the Federal Arbitration Act (FAA), state statutes modeled after the Uniform Arbitration Act (UAA) and the Revised UAA completed in the year 2000. Courts apply the same deferential standard of review to religious arbitration awards as they do to awards by non-religious arbitrators. As one court noted, "[C]ivil courts have only 'marginal review' power over the decisions of arbitral bodies, secular and religious."[8]

Thus, for example, in *Prescott v. Northlake Christian School*, a federal district court in Louisiana affirmed an award issued by a single arbitrator who applied biblical law and the Rules of Procedure for Christian Conciliation. Although the 5th Circuit vacated the award on grounds that the arbitration clause was ambiguous and remanded the case to the district court for further proceedings, on a second appeal, it upheld the district court's conclusion on remand that the award should be confirmed.[9]

The *Prescott* case arose out of an employment agreement between a private religious school and an elementary school teacher. The agreement provided that, "in conformity with the biblical injunctions of 1 Corinthians 6:1-8, Matthew 5:23,24, and Matthew 18:15-20 ... any claim or dispute arising out of, or related to, this agreement or to any aspect of the employment relationship" would be referred to "biblically-based mediation" and, if unsuccessful, binding arbitration. It also specified that arbitration be conducted under the procedure for Christian Conciliation. The agreement also stated, "This contract shall be interpreted under the laws of the state of Louisiana as if jointly authored by the parties."

The school informed the elementary school principal that her contract would not be renewed, that she should leave her position and would be paid her full salary and benefits through the contract term. Instead of complying with the dispute resolution provision in her employment agreement, the principal sued the school alleging gender discrimination, sexual harassment, retaliation, and breach of her employment contract.

Based on the dispute resolution provision, the school filed a motion to stay the court proceeding and compel mediation, which the district court granted, holding that it had no jurisdiction to decide the dispute because the parties had entered into a valid dispute resolution clause and had not waived it.

After mediation failed, the parties executed a form mediation/arbitration agreement furnished by the Christian Conciliation Institute. They agreed to be governed by the Christian Conciliation rules, which referenced the Montana Uniform Arbitration Act. The parties also made a few changes to the form mediation/arbitration agreement. They added a hand-written provision stating: "No party waives appeal rights, if any, by signing this agreement."

The parties submitted their dispute to a single arbitrator. After a hearing, the arbitrator issued an award in favor of the principal, holding that the school had breached its contractual obligation to resolve its conflict in accordance with the Bible. The arbitrator awarded the principal damages for injury to reputation and future loss of income. The principal moved to confirm the award while the school moved to vacate on numerous grounds. The district court confirmed the award and denied the school's motion to vacate. It rejected the argument that the award was the result of evident partiality, corruption, or arbitrator misconduct, finding that the school cited only "unsupported assertions that fail to rise to the required level of certainty and demonstrability." The court also rejected the argument that the arbitrator should have applied Louisiana law to interpret the parties' agreements, and thereby exceeded her powers by applying biblical law, stating that the award was rationally related to the parties' agreement. The court explained that the employment contract and Christian Conciliation Institute's arbitration agreement stressed the supreme authority of the Bible in the employment relationship, and thus the parties intended to be guided by the word of the Bible.

The court also rejected the school's argument that the scope of judicial review was extended beyond what the Montana Uniform Arbitration Act allowed by the handwritten addendum to the form arbitration agreement, which stated: "No party waives appeal rights, if any, by signing this agreement"). The court found from the face of the agreement that the phrase "if any" preserved whatever appeal rights were statutorily granted under the Montana statute.

The school appealed to the 5th Circuit, arguing that (1) the handwritten addendum expanded the arbitration agreement's scope of judicial review; (2) the arbitrator erred as a matter of law in ruling that the school breached its contract with the principal and that she was entitled to damages. It also reiterated the arguments made before the district court that the arbitrator exhibited evident partiality, engaged in misconduct and exceeded her authority under the state arbitration law.

In* Prescott, *the 5th Circuit found that whether the contract was sustainable under Louisiana law was for a religious arbitrator, not for the court, because the parties "freely and knowingly" contracted to have their relationship governed by specified provisions of the Bible.

The 5th Circuit first addressed the threshold issue of which state law governed interpretation of the handwritten addendum to the arbitration agreement. It held that Louisiana law governed the substance of the agreement, while Montana arbitration law controlled the arbitration procedures.

Next, it held that whether the parties' arbitration agreement contemplated expanded judicial review could not be determined because the agreement was ambiguous. Accordingly, the appeals court remanded the case to the district court with instructions to take evidence regarding the circumstances surrounding the formation of the contract and ascertain the parties' intentions with respect to judicial review.

On remand, the district court held an evidentiary hearing and again concluded that the parties had not contractually expanded the scope of review. It ordered enforcement of the arbitrator's award for the reasons given in its previous opinion. The school appealed again.

On the second appeal, the 5th Circuit affirmed.[10] It agreed that the arbitrator's award was rationally related to the employment agreement and not contrary to any express contractual pro-

visions, either biblical or secular. In support of this conclusion the court noted: (1) The arbitrator had held that the contract did not require Louisiana law to apply to every aspect of the employment relationship; and (2) the employment contract stated the overarching principle that the parties' employment relationship and their arbitration and proceedings would be governed by biblical provisions.

Thus, the appeals court found that whether the contract was sustainable under Louisiana law was for a religious arbitrator, not for the court, because the parties "freely and knowingly contracted to have their relationship governed by specified provisions of the Bible, and the Rules of the Christian Conciliation Institute "indisputably contemplate that an arbitrator will have extremely broad discretion to fashion an appropriate remedy; and no language in the parties' contracts expresses their intent to depart from [those] Rules ...."

Promise Keepers, the district court in Colorado refused jurisdiction to settle a dispute before an arbitration proceeding took place.[12] The court held that a contract dispute between Encore, a provider of meeting organization services, and Promise Keepers, a religious association, had to be submitted to arbitration by a Christian conciliation program, consistent with the parties' agreement. The court dismissed all claims, stating, "A valid and unwaived arbitration clause deprives the court of subject matter jurisdiction until the dispute has been submitted to arbitration."

In *Meshel v. Ohev Sholom Talmud Torah*, another case on jurisdiction, members of a religious organization brought an action against a Jewish congregation seeking to enforce an agreement between the parties stipulating that a "Beth Din" should resolve disputes.[13] In holding that the Beth Din provision constituted an arbitration agreement, the court stated, "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy ... is valid, enforceable and irrevocable...."

Courts may resolve disputes involving religious organizations as long as they employ "neutral principles of law" and their decisions are not premised upon review of doctrinal matters, such as the rituals of worship or the tenets of faith.

Much as in *Prescott*, state courts have also upheld the enforceability of arbitration awards rendered by religious tribunals. In *Abd Alla v. Mourssi*, a partner in a restaurant business filed a motion in a Minnesota state court to confirm an arbitration award against his partner rendered by an Islamic arbitration committee.[11] The court stated that the losing party was "not entitled to judicial consideration unless his application to vacate was predicated on fraud, corruption, or other undue means." In affirming the court's confirmation of the award, the Minnesota Court of Appeals stated: "Arbitration awards are strongly favored and a reviewing court must exercise 'every reasonable presumption' in favor of the arbitration award's finality and validity." The court stated that there was no clear proof of corruption, fraud, or any other undue means affected the award. The simple allegation that the arbitrator spoke to a "potential buyer" did not meet the requisite standard of "clear allegation of proof" to warrant vacatur of the award.

Both federal and state courts have held that they lack jurisdiction to resolve cases on the merits where a party has refused to comply with a written agreement to submit to arbitration before a religious tribunal. In *Encore Productions, Inc. v.*

Special Considerations in Religious Arbitration

When parties designate a religious tribunal to settle disputes certain special issues may develop.

First Amendment Issues. First Amendment problems could arise if the court interferes with religious doctrines through court review of an award. The First Amendment to the U.S. Constitution contains provisions commonly called the Establishment Clause and the Free Exercise Clause. It states: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." These 16 words circumscribe the role that civil courts may play in the resolution of disputes involving religious organizations. In the words of the *Meschel* court, "the Establishment Clause precludes civil courts from resolving disputes involving religious organizations when such disputes may affect religious doctrine or church administration," while "the Free Exercise Clause requires civil courts to defer to the decisions of the highest tribunals of

hierarchical religious organizations on matters of religious doctrine, discipline, faith, and ecclesiastical rule, custom or law."[14] Thus, civil courts must decline jurisdiction in such cases and allow religious tribunals to decide these matters.

However the First Amendment does not place religious organizations above the law. Courts may resolve disputes involving religious organizations as long as they employ "neutral principles of law" and their decisions are not premised upon review of doctrinal matters, such as the rituals of worship or the tenets of faith. "Neutral principles of law" are secular legal rules the application of which does not entail theological or religious evaluations."[15]

When disputes arise as a result of an arbitration award rendered by a religious tribunal, some courts refuse to entertain the claims based on the First Amendment. In *El-Farra v. Sayyed*, an Islamic minister filed a wrongful termination suit against the Islamic center that fired him and the members of its executive committee, alleging defamation, tortious interference with contract, and breach of contract.[16] The claimant's contract provided that the Islamic center could terminate the contract through a unanimous vote of its executive committee and board of directors "on valid grounds according to Islamic jurisdiction (*Shari'a*)" upon 60-days notice to appellant. After an in-house arbitration over the minister's offensive behavior in his sermons and his interference in the center's administration, he received several warning letters, was subsequently placed on probation and then fired after an executive committee vote. The Supreme Court of Arkansas held that the trial court lacked subject matter jurisdiction to review this dispute, since "personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts."[17]

Similarly, in *Neiman Ginsburg & Mairanze v. Goldburd*, an attorney brought an action against another attorney with whom he had jointly represented a client, alleging that his reputation was injured when the defendant-attorney improperly obtained a *seruv* (a kind of contempt order) from a Jewish religious arbitration tribunal and published it to the Jewish community.[18] The Arkansas Supreme Court dismissed the action, stating: "this court has no power to review the Beth Din's determination that it was appropriate under Jewish law to issue the *seruv*." Further, the court noted, the "[p]laintiff's argument that he demanded and was entitled to a pure law determination and that a *seruv* should not have issued over his request is a purely ecclesiastical question...."

In contrast, other courts have accepted jurisdiction to hear cases either to confirm or vacate an award rendered by a religious tribunal, or to compel parties to submit to arbitration before a religious tribunal. In *Meshel*, the court stated that, even though the "underlying dispute between the parties goes to the heart of the governing structure of Ohev Sholom [a religious organization] and therefore may be beyond the jurisdiction of the court, the resolution of appellants' action to compel arbitration will not require the civil court to determine, or even address, any aspect of the parties' underlying dispute."[19] The court held that it needed only to decide whether the parties had an enforceable agreement to arbitrate and, if so, whether the underlying dispute fell within the scope of the arbitration clause. It accepted jurisdiction based on its view of the limited role a court plays when reviewing an award rendered by an arbitrator. According to the *Meshel* court, "neutral principles of law" can be used to determine whether any of the limited exceptions exist to render an award unenforceable; such review does not affect the religious aspects of the case.

The First Amendment does not place religious organizations above the law.

Public Policy. Courts have recognized certain public policy limitations on what can be arbitrated. As stated by a New York court in *In re Meisels*, "Arbitration agreements are unenforceable where substantive rights, embodied by statute, express a strong public policy which must be judicially enforced."[20] Accordingly, arbitrations of matters involving child custody, estate distributions, and criminal violations have been found to contravene public policy. Such matters cannot be resolved by arbitration, whether secular or religious. A few courts have, however, suggested that public policy limitations could apply to other matters when a religious body is designated to arbitrate the dispute.

The *Meisels* case provides an example. In this case, the grandchildren of a rabbi sought to bring a guardianship proceeding before a Beth Din. The purpose of the proceeding was to appoint a guardian for an allegedly incapacitated person and his property. The court held that this type of proceeding was not a religious matter suitable for resolution by a Beth Din. The court also noted, "A finding of capacity or incapacity by an ecclesiastical court would not be binding or enforceable in a secular court." It suggested that, because a

determination of a person's legal capacity could result in a restriction or even elimination of civil rights, public policy would bar an ecclesiastical court from determining the capacity issue.

Some courts have placed other public policy limitations on religious arbitration. For example, they have vacated awards where testimony has been categorically excluded based on gender, race, or religion.[21] Other courts have refused to confirm arbitration awards issued by a religious tribunal if flatly contrary to public policy. In *Hirsch v. Hirsch*, for example, a Beth Din court rendered an award giving joint custody of children to the parties, directed the husband to pay a certain sum of money in child support, and directed that marital property held in the wife's father's name be sold, with 50% allotted the husband.[22] On review, the court vacated the entire award on public policy grounds. The custody issue, as noted above, was not subject to arbitration; the child support award failed to comply with the Child Support Standards Act and was not in the best interests of the children. Finally, the portion of the award granting the husband proceeds from the sale of land was held to contravene public policy because it deprived the wife's father of his property without due process, since he was not a party to the arbitration.

More recently, in *Brisman v. Hebrew Academy of Five Towns and Rockaway*, a trial court vacated a Beth Din employment award granting back pay, reinstatement with tenure, and an annual salary of $100,000, because "strong and well defined policy consideration embodied in constitutional, statutory or common law prohibit ... certain relief from being granted by an arbitrator."[23] The court stated that the Beth Din ruling set a precedent that would limit the ability of private schools to hire and fire employees at will. Further, the court stated that the "the salary determination, which exceeded what co-workers earned, was "counterproductive to a harmonious and productive work environment."

Conclusion

The hallmark of arbitration is flexibility. Parties are free to select arbitrators and procedures that will best serve their dispute resolution needs.[24] Arbitration before a religious tribunal may effectively address the values and concerns of some parties. In general, courts accept religious arbitration as just one more form that arbitration may take. In very limited circumstances, however, constitutional and public policy limitations must trump the freedom to arbitrate as the parties see fit. ■

ENDNOTES

[1] See Federal Arbitration Act (FAA), 9 U.S.C. § 10; Revised Uniform Arbitration Act, § 23(a). See, e.g., *Abd Alla v. Moursi*, 680 N.W.2d 569, 573 (Minn. Ct. App. 2004).

[2] Parties may also agree to arbitrate after a dispute arises.

[3] *Tal Tours Inc. v. Goldstein*, 9 Misc. 3d 1117 (N.Y. Sup. Ct. 2005). See also *Mendel Schwimmer, UTA Satmar Boro Park v. Aron Welz, Keren Habinyan Hachudosh D'Rabeinu Yoel*, 2009 N.Y. Slip Op. 51230 (N.Y. Sup. Ct. Kings Cty. June 15, 2009) (unpublished), citing *Herzog v Oberlander*, 2008 N.Y. Slip Op. 50669, 19 Misc. 3d 1113, 2008 WL 880184 (N.Y. Sup. Ct., Kings Cty. 2008).

[4] *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269 (10th Cir. 2005).

[5] *Id.*

[6] *Telenor Mobile Communications AS v. Altimo Holdings & Investments Ltd.*, 584 F.3d 396 (2d Cir. Oct. 8, 2009).

[7] See Note, Michael C. Grossman, "Is this Arbitration? Religious Tribunals, Judicial Review, and Due Process," 107 *Colum. L. Rev.* 169, 169-70 (2007), for a description of some of these religious arbitration systems.

[8] *Encore Productions v. Promise Keepers*, 53 F. Supp. 2d 1101 (D. Colo. 1999).

[9] *Prescott v. Northlake Christian School*, 244 F. Supp. 2d 659 (E.D. La. 2002), *vacated and remanded*, 369 F.3d 491 (5th Cir. 2004), *after remand, aff'd per curiam*, July 8, 2005) *cert den*, 2005 U.S. Lexis 9263 (Dec. 12, 2005) (Unpublished opinion)

[10] *Id.* at 669.

[11] *Abd Alla*, *supra* n. 1, 680 N.W.2d at 571.

[12] *Encore Productions*, *supra* n. 8. 53 F. Supp. 2d at 1111.

[13] *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343 (D.C. 2005).

[14] *Id.* The reason is that "judicial intrusion in religious disputes can advance religion or otherwise impermissibly entangle the civil courts in ecclesiastical matters."

[15] *Encore Productions*, *supra* n. 8, 53 F. Supp. 2d at 1112.

[16] *El-Farra v. Sayyed*, 226 S.W.3d 792, 794 (Ark. 2006).

[17] *Id.* at 797 (citing *Kaufmann v. Shahan*, 707 F.2d 355 (8th Cir. 1983)).

[18] *Neiman Ginsburg & Mairanz, P.C. v. Goldburd*, 179 Misc. 2d 125, (N.Y. Sup. Ct. 1998).

[19] *Meshel*, *supra* n. 13, 869 A.2d at 354.

[20] *In re Meisels*, 10 Misc.3d 659 (N.Y. Sup. 2005).

[21] See Note, Grossman, *supra* n. 8, at 169, 195. See also *Joseph Kahan a/k/a Yosef Kahan v. Sarah Rosner a/k/a Sara Rosner et al.*, No. 2008-08484 (N.Y. App. Div. 2d Dep't Nov. 19, 2009), published in *N.Y.L.J.*, Nov. 23, 2009, p. 17, col. 3 (court denied enforcement to award in a Beth Din proceeding where a party to the award was prevented from having counsel of his choice and instead had to use counsel acceptable to the Beth Din; the court held that the waiver of the right to counsel is unwaivable).

[22] *Hirsch v. Hirsch*, 4 A.D.3d 451 (N.Y. App. Div. 4th Dept. 2004).

[23] *Brisman v. Hebrew Academy of Five Towns and Rockaway*, *No. 14160* (N.Y. Sup. Ct. Dec. 18, 2008), available at www.failedmessiah.typepad.com.

[24] See Steven C. Bennett, *Arbitration: Essential Concepts* 59 (2002).