CLM 2019 Annual Conference
March 13-15, 2019
Orlando, Florida

A Rabbi, Priest, and Iman Walk into a Bar: Alternative Judicial Forums for Resolution

I. Evolution of Religious Arbitration in America

An investigation by The New York Times found that companies have used the clauses to create an alternate system of justice. Americans are being forced out of court and into arbitration for everything from botched home renovations to medical malpractice.

By adding a religious component to their arbitration clauses, companies are taking the privatization of justice a step further. Proponents of religious arbitration said the process allowed people of faith to work out problems using shared values, achieving not just a settlement but often reconciliation.

The rise of religious arbitration appears to be a result of three phenomena that together are changing aspects of American society. The first is the rise of arbitrations generally. Over the last 25 years, more parties, from credit card companies to law firms are opting out of the traditional court system in favor of private resolution of disputes. This has brought about renewed interest in the question of whether expanding arbitration law is generally a good idea in areas as diverse as family law, religious law, employment law, class actions, and securities law. It has further engendered discussion about the values and virtues of allowing members of secular societies and subjects of secular legal systems to choose both different forums and different legal systems to resolve their civil disputes.

Second, almost all of the more conservative religious communities (Evangelical Christianity, Catholicism, Orthodox Judaism, Islam, to name just a few) feel that they are at the margins of American law, and are seeking to opt out where possible from vast amounts of civil law, particularly family law. To some extent this is about same-sex marriage, but it has been a significant issue since no-fault divorce was introduced many years earlier.

A third trend is now occurring because many religious communities are forming their own arbitration tribunals to resolve disputes within their own communities. This article explores the

Error! Unknown document property name.
Error! Unknown document property name.

rise and methodology of these religious tribunals and their impact with the non-secular American court systems.

II. Overview of Different Tribunal Resolution Processes

A. Sharia Tribunal or Rabbinical Courts

Literally a "house of law," the *beit din* (also called *beis din* or *beth din*) is a Jewish court of law. The country's most prominent rabbinical courts, the Beth Din of America (BDA), was founded in 1960 to provide a more effective adjudicative forum for Jews committed to living in accordance with Jewish law (*halakha*) in a secular American legal and social context. The BDA provides a national network of Jewish law courts that function as fully legal, halakha-compliant arbitration panels marked by expedience and affordability.

As important for followers of Sharia law in developing their own religious court system, it was to also significant for them to construct a religious tribunal whose decisions would be regularly upheld by secular courts. Courts, in considering whether to uphold a religious tribunal's decision will review: (1) The validity and scope of the arbitration agreement between the parties, (2) Whether the arbitral proceedings observed proper procedures and due process, and (3) Whether the resulting decision is irrational or void as to public policy. These criteria help to guaranty the validity and fairness of the religious tribunal in juxtaposition with its secular counterpart.

As an initial matter, litigants who come before the BDA are required to sign a binding arbitration agreement that provides a broad outline of the BDA's arbitration procedures. By signing this form, litigants agree to give the BDA's resolution to their dispute legal consequence. More importantly, the form serves as a contract between litigants themselves and the BDA, imposing reciprocal obligations on each to conduct themselves in accordance with the Rules.

Rather than explain the substance of Jewish law, the BDA crafted rules and procedures that explain what litigants can expect from the arbitration process itself: ie., discovery, admissibility of evidence, how to challenge members of the arbitration panel due to bias, and so on. Written in "lawyers' English," the Rules lay out a formal arbitration process that is largely recognizable to reviewing judges ensconced in American civil procedure. For example, the Rules prohibit ex parte communications between litigants and arbitrators, enable litigants' representation by counsel, and establish a formal fee schedule in advance of arbitration

Litigants might come before the BDA in two circumstances: (1) they are parties to a contract with an arbitration provision that specifies the BDA as the designated arbitral forum or (2) a party to an existing dispute may indicate his preference for religious arbitration and invite the opposing party to resolve the matter before the BDA. In the first instance, failure to submit a dispute to the BDA can result in default judgment or (less frequently) in the issuance of a *shtar*

seruv, a document publicizing the recalcitrant party's noncompliance and granting the compliant party permission to seek recourse in secular court. In the second instance, unless the parties had previously agreed to submit disputes to arbitration by the BDA, the opposing party is not obligated to accept this forum and may suggest an alternative. So long as the alternative is deemed a suitable forum under Jewish law (including another *beth din* or a mutually agreed upon third party), the BDA will simply withdraw. If both parties agree to arbitrate their dispute before the BDA, they move on to the discovery phase.

Also mirroring the civil litigation process is the hearing itself, which is recorded and subsequently available for transcription. Parties are permitted to open a hearing with a statement clarifying the relevant issues, after which the complaining party presents its claims, witnesses, and evidence. The BDA permits and, in fact, demands that parties offer such evidence as each desires and that "the BDA may deem necessary to an understanding and determination of the dispute." Should the BDA require additional testimony to supplement its understanding of a case, such testimony is sought in the presence of the parties and is subject to appropriate rebuttal. Following the complaining party's presentation, the defending party has an opportunity to present its own defenses, witnesses, and evidence.

Once a hearing has commenced, the parties and their attorneys are not permitted to communicate with the dayanim other than to communicate through the Director of the BDA. When each party acknowledges that it has no further evidence or witnesses to present, the BDA declares proceedings closed

While Jewish law did not offer an appellate process like the American secular court system since Arbitration was limited to a hearing, the Rules now permit a party to petition the BDA for review of an award within twenty (20) days from the award being delivered to the party.

Civil courts will most often enforce the decisions of Batei Din. It is sound civil public policy to encourage such arbitration. However, the civil courts will enforce a Beit Din ruling only if the Beit Din adhered to the civil rules for arbitration. For example, a civil court will not enforce a Beit Din ruling if the Beit Din did not permit each litigant to be represented by a licensed attorney of their choice. For this and other reasons, litigants are often represented in Beit Din by attorneys, even though the Mishnah and Gemara hardly ever describe the presence of lawyers in a Beit Din.

B. Christian Arbitration (Institute for Christian Conciliation)

Christian arbitration has attracted less media attention than religious tribunals of other religions. The largest Christian arbitration service in US is Peacemaker Ministries. Through its affiliate, the Institute for Christian Conciliation, it offers non-binding conciliation and mediation services. If these efforts fail, then the organization will preside over a legally binding arbitration.

Error! Unknown document property name.
Error! Unknown document property name.

Any one of these services above may involve the use of Biblical scripture as a guide to decision-making. The professed aim of the religious procedure is to “glorify God by helping people to resolve disputes” Peacemaker Ministries conducts about 100 “conciliations” each year and it has certified about 150 conciliators around the country who each perform conciliations. Some of these dispute resolutions actually end up in secular court system.

C. Tribal Judicial System

Today there are more than 250 tribal courts exercising adjudicatory jurisdiction over Indian reservation-based transactions and tribal members. The civil powers of tribal courts extend to "consensual relations" with nonmembers and non-Indians, including contractual relations. Such consensual relations would include a tribal contract that contains a mediation or arbitration clause subject to enforcement in the tribal court. In most cases it may be difficult to ascertain the legal and procedural terrain going forward.

Tribal statutes, rules, and common law are not readily accessible via the usual means, and in some cases custom and tradition may apply—although this is not the case in arm's-length dealings with nonmembers who insist upon the application of state or uniform laws in their contract. In any case, the tribal court process is likely to be unclear to the uninitiated.

1. Tribal Sovereign Immunity

The tribal party will initially move to dismiss any enforcement action by claiming that the tribal sovereign is immune from suit. The U.S. federal government, as trustee for the tribes, supports the concept of tribal sovereign immunity in federal litigation, and the concept has applied to tribal activities both on and off the reservation, to contracts involving commercial purposes as well as to contracts involving governmental purposes, and in cases involving both tribes and sub-entities of tribes.

Tribes may also waive their sovereign immunity in tribal statutes, in tribal agency policy and procedures manuals, in tribal contracts, or other instruments. The U.S. Supreme Court in *C&L Enters. v. Citizen Band of Potawatomi Indian Tribe of Okla*., 532 U.S. 411 (2001), for example, held that a tribe that entered into a contract with an arbitration clause waived its immunity from suit.

There are two means by which the nontribal party may get past the tribal sovereign immunity hurdle. First, although the "express and unequivocal" requirement is always asserted as a bar to a claim of sovereign immunity based on a close reading of the tribal statute, tribal judges do not have to follow the federal common law to find waiver. Consequently a tribal judge may be persuaded to find waiver where fair dealings or fair process cannot be achieved otherwise, for example, in effecting tribal employee grievance procedures.

A number of tribes have also incorporated the provisions of the Indian Civil Rights Act, 25 U.S.C 1301 et seq., into their statutory law, which may be interpreted as a waiver to ensure procedural due process. Tribal judges are also likely to consider well-argued claims that custom and tradition require fair dealings and fair process.

Second, the U.S. Supreme Court in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), has held that there is an exception to the tribal sovereign immunity bar to litigation where suits are properly framed against a tribal official. However, relief is generally limited in tribal court to where a tribal official is sued for acting beyond the scope of his or her authority and to declaratory and injunctive relief. A tribal court order requiring continuing or prospective payments may be argued to qualify as "injunctive relief" as opposed to prohibited "damages" (for example, where the tribal council has preauthorized payment of tribal employee payroll).

2. What Law Is Applicable?

While there are a growing number of tribal statutes and court rules governing the enforcement of mediation settlements and/or arbitration awards, it is not the norm.
Tribes that do have applicable rules and provisions tend to locate them in their tribal court or judicial code, court rules, or in a stand-alone peacemaker, traditional dispute resolution, or alternative dispute resolution code.

They may also appear in employment-related codes. Most alternative dispute resolution schemes are court-annexed with varying degrees of coercive mechanisms backing the traditional or hybrid mediation systems or Western-styled arbitration. Tribal schemes tend not to be as developed as their state counterparts, which may include mechanisms such as the shifting of attorney fees and costs, contempt, denial of a trial de novo, and/or dismissal of a lawsuit. Tribal schemes tend to authorize their tribal courts to enforce settlements or awards, either by equating them with a court order or by requiring a tribal judge to incorporate them into a judgment. One tribe subjected awards to judicial review of the arbitrator's factual findings requiring a showing of substantial evidence and de novo review for his law findings, but this does not appear to have been followed by other tribes.

Where tribal statutory provisions do set out a specific process, it should be respected and followed with the same diligence afforded state or federal process. Nonmember and non-Indian parties that attempt to follow tribal law in good faith will fare better in tribal court. Lawyers that make an effort to find, know, and argue tribal law will also fare better—and on the flip side avoid sanctions for arguing foreign law, absent a tribal rule allowing it, in tribal court. To obtain applicable tribal law, contact the tribal court clerk's office or the tribal secretary's office. Many tribes are also starting to post their constitutions, statutes, and common law on publicly accessible tribal Web sites.

Error! Unknown document property name.

Because tribal leaders and judges tend to view mediation and arbitration as similar to traditional authority dispute resolution processes, they are inclined to enforce settlements and awards as a matter of public policy. In the absence of tribal statutory or rule-based enforcement mechanisms, in the case of mediation, tribal courts are likely to treat a written, mediated agreement in one of two ways, depending upon the nature of the parties. In mediations between family and community members, tribal judges are likely to view a mediated settlement as incorporating tailored, quasi-tort principles, specifying the elements of specific duties owed and possibly the remedies in case of breach. In all other mediations, tribal judges are likely to view a mediated settlement like a contract and to generally apply basic rules of contract law. For example, a tribal court would look to identify, at least, the presence of an offer and acceptance of that offer, and mutual assent (on all essential material terms), and consideration. The court would also consider whether the parties possessed the requisite authority to enter into the agreement and whether the written agreement is definite in its essential terms. Given the purposes and nature of the mediation process, the terms of the agreement are likely to be liberally construed where the intent of the parties can be discerned as set out in the agreement.

III. Enforcement Issues

In general, courts have ruled that religious arbitration proceedings are enforceable in civil courts. In *Prescott v Northlake Christion School,* 141 F. App'x 263 (5th Cir. 2005) the Fifth Circuit upheld a Christian arbitration clause between an elementary school and a teacher alleging discrimination and breach of contract. The court noted that the scope of the civil courts to review the arbitration award was extremely limited.

Few courts have intervened, holding the terms of the arbitration details to be binding to the contract signed by both parties. Some judges are reluctant to risk infringing the First Amendment rights of religious groups, according to a review of court decisions and interviews with lawyers. Some plaintiffs counter that it is their First Amendment rights being infringed because they must unwillingly participate in what amounts to religious activity.

In *Encore Productions v. Promise Keepers,* the plaintiff, Encore, was a provider of meeting services, and the defendant was a Christian organization that conducted "meetings and conferences for men" in venues throughout the United States. The contract between the parties stipulated that"[a]ny claim or dispute arising from or related to this Agreement shall be settled by mediation and, if necessary, legally binding arbitration, in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation."

When the agreement between the parties broke down, the plaintiff sued in district court for breach of contract, and the defendant moved to dismiss, citing the arbitration clause. In response, the plaintiff challenged the validity of the contractual provision for Christian arbitration services. The court rejected the plaintiff's claims. It first noted the religious question doctrine, but held that it could avoid adjudicating religious matters by using "neutral principles,"

as laid down by the Court in *Jones v. Wolf*. These neutral principles were "secular legal rules whose application to religious parties or disputes do not entail theological or religious evaluations." It then observed that it had only "marginal review" over the decisions of religious arbitral tribunals, citing Presbyterian Church. An agreement to arbitrate, the court held, was a secular contractual matter— and not a question of religious doctrine. Therefore, the parties should arbitrate, and any problems arising out of the arbitration could be reviewed in court later.

Some lawyers and plaintiffs said that for some groups, religious arbitration may have less to do with honoring a set of beliefs than with controlling legal outcomes. Some religious organizations stand by the process until they lose, at which point they turn to the secular courts to overturn faith-based judgments, according to interviews and court records.

Both religious communities and courts need to ensure that the protections the law has put in place make implementation a fair and unbiased process.

Another concern is realized by entering into these non-traditional resolution alternatives whether an insured has negatively impacted her coverage provided under the applicable policies. Certain policies might exclude coverage if an insured unilaterally agreed to implement non-traditional resolution alternatives. It is imperative that brokers, underwriters and claims professionals understand the potential issues that may arise given this trend toward religious arbitrations.