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Expert Analysis

Potential Pitfalls in Arbitrating Religious Disputes

By Barry Black and Christopher Byrnes

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Disputes are almost inevitable when operating any organization, secular or religious. Partners or senior executives might disagree over the strategic direction of the organization. An organization could have a contractual dispute with a vendor or customer. A terminated employee may wish to file suit against the organization to challenge the termination.

It is widely believed that arbitration confers certain advantages over traditional litigation in resolving these disputes. Generally speaking, arbitration gives the parties more flexibility—the parties can agree upon a uniquely qualified neutral arbitrator, the applicable procedural rules, the arbitration's venue, and even the timeframe for the process.

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Arbitration is often, but certainly not always, faster than going to court because the parties can jointly set convenient deadlines (rather than be subject to statutory or court deadlines), and there is generally less in the way of pre-trial discovery in arbitration. Organizations eager to protect sensitive, proprietary, or personal information, or just to avoid a public relations nightmare, can typically keep the proceedings private and confidential.

While the parties may need to pay the arbitrator a fee, this fee could pale in comparison to the costs of lengthy discovery and trial. Finally, arbitral decisions are typically final and binding with limited routes for appeal or review, giving each party clear expectations about going forward after the dispute is resolved.

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In reality, however, these assumptions frequently fall short, particularly with religious organizations.

It is true that some churches and religious individuals are compelled by religious doctrine to arbitrate their disputes and to litigate only as a last-resort option. Even in circumstances where litigation is permitted,

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the potential benefits of arbitration can be enticing.

Yet one should not be blind to the potential pitfalls. This column will examine potential downsides to the arbitration of religious disputes and will propose an alternative hybrid dispute resolution model.

Free Arbitration May Equal Trouble

Religious organizations may be tempted to avail themselves of cost-free arbitration, such as the type provided by religious denominations or associational bodies to constituent churches and their members. Other times a well-meaning member of the congregation may step forward to volunteer such services in the event of a dispute. The use of such free arbitration comes with its own costs.

For example, these arbitration processes are often slow. Volunteer arbitrators may lack arbitration experience, or the expertise needed to fully resolve a particular issue. Free arbitrators may make mistakes along the way that leave the process vulnerable to unfair outcomes.

Religious organizations may find themselves leaning heavily on counsel during these disputes to fill any gaps left by free arbitrators. In those cases, the savings in a free arbitrator may be outweighed by massive attorney's fees.

It is important to note that, since religious organizations are subject to unique rules of governance, *see* Barry Black and Christopher Byrnes, *Balancing Mission, Permanence, and Flexibility in a Church's Governing Documents*, New York Law Journal (Dec. 4, 2024), even seasoned judges may find themselves uninformed in these principles and rules that can seem counterintuitive. This is likely to be an even greater problem with a volunteer arbitrator. Buyer beware—you get what you pay for.

Arbitration May Be Unpredictable

Because arbitrators have substantial discretion in applying procedural rules and substantive law, and appeals of arbitral awards are rarely successful, some litigants feel insecure with arbitration. They would rather take their chances with a proper court, well-defined procedure, and appellate options.

But religious organizations should remain mindful that secular courts cannot solve every dispute. That is the heart of the ecclesiastical abstention doctrine—the First Amendment to the Constitution of the United States forbids courts from interfering with or determining religious disputes. Under this age-old doctrine as developed by the United States Supreme Court, courts are prohibited not only from deciding doctrinal questions but also from interfering in a church's internal governance.

This doctrine leaves seemingly little room for civil authorities to decide a substantial number of disputes involving a religious organization. And the line that separates those cases within a secular court's jurisdiction and those outside of it is often unclear. From wrongful termination claims to membership disputes, courts hesitate to become involved.

Even the U.S. Supreme Court has expressly left doors ajar. For example, in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012), the Court held that "requiring a church to accept or retain an unwanted minister" by compelling compliance with anti-discrimination statutes violates the First Amendment's Free Exercise and Establishment Clauses.

Yet, said the court, "[t]oday we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers." *Id.* at 196.

Thus, while arbitration may seem risky, secular courts are no sure bet when it comes to disputes involving religious organizations.

The Risk of Abstention

What happens when a court abstains? How does the dispute get resolved? In *Matter of Congregation Yetev Lev D'Satmar, Inc. v. Kahana*, 9 N.Y.3d 282 (2007), the Court of Appeals concluded that New York's courts could not decide a church governance dispute between rival boards on neutral principles of law because tangential religious issues undergirded the governance dispute.

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But the dissent raised an important point: "when a case is non-justiciable it means the wrong committed, if there is one, cannot be remedied anywhere. Whichever side happens to be the defendant in the case will win." *Id.* at 288-89. This dilemma is very real. Every plaintiff whose case is dismissed because the court abstains ends up with no recourse.

New Jersey's Appellate Division took a similar position in *Hardwick v. First Baptist Church*, 524 A.2d 1298 (N.J. Super. Ct. App. Div. 1987), a case in which the trial court dismissed the complaint as nonjusticiable because the case turned on religious doctrine. Like the dissent in *Congregation Yetev Lev*, the court took a position of pristine clarity:

> If the parties cannot resolve this procedural problem, the court must unavoidably determine the necessary issues before it, after an appropriate adversary proceeding. The court would then be forced to determine the religious issues as factual matters established by lay testimony and expert proof concerning the practices and doctrine of the congregation. We reiterate, however, that the principle of abstention in such matters renders this choice a poor substitute for the non-judicial resolution of any religious issues in the case . . . [W]e find that there must be a resolution of the corporate rights of the parties . . ..

Id. at 1302-03. In short, while courts might prefer to abstain, they must also recognize that doing so may unfairly leave an aggrieved party with no resolution. And that is a result that violates other constitutional and moral notions of fairness and justice.

The Need for Clarity

In order to be enforceable, an arbitration agreement needs to establish parameters, rules, and procedures with basic clarity. Ministers or church boards often create arbitration policies or agreements in haste, driven by well-intentioned but ill-informed volunteer efforts. But courts may hold such arbitration agreements unenforceable.

In *Dean v. Harvestime Tabernacle United Pentecostal Church Intl.*, 913 N.Y.S.2d 707 (2d. Dept. 2010), the Second Department held that "a party will not be compelled to arbitrate absent a clear, explicit, and unequivocal agreement to do so." *Id.* at 708.

Specifically, the court held that the arbitration clause at issue was overly broad in that it encompassed "any dispute, claim, demand [or] disagreement, of any kind or nature," and vague in that it furnished "no direction as to just how, or before whom, one might attempt to resolve a dispute 'in accordance with Matthew 18.'" *Id.*

The court seemed particularly troubled by the provision's failure "to establish

whether the type of dispute to be arbitrated is limited to either temporal or spiritual disputes or extends to both." The court therefore concluded that "the provision is so unclear and equivocal as to be unenforceable." *Id.*

Ministers, and others subject to a church's arbitration policies, often forego negotiating details or specific parameters concerning arbitration upon the commencement of a contractual relationship. Arbitration agreements are not a take-it-or-leave-it proposition; they can and should be negotiated.

For example, where the process is not spelled out with particularized detail, terms may be proposed to promote fairness and efficiency, such as limiting discovery and motion practice, and ensuring that every aspect of the proceedings should be overseen and approved by the arbitrator(s). This not only helps assure enforceability but can save a party countless thousands of dollars.

A Hybrid Approach

Because of the potential problems associated with arbitration, it may be wisest to adopt an approach involving both litigation and arbitration. By default, the agreement would call for litigation of all secular disputes.

In ecclesiastical disputes where a court abstains, or where the parties agree that the court is likely to abstain, the matter would be submitted to arbitration. This approach spreads the risk, in that it provides both the stability of litigation and arbitration's assurance that the dispute will be resolved.

Clergy-congregation employment agreements commonly contain arbitration clauses. These clauses often call for the use of arbitral tribunals offered as a complimentary service by a related church association. The parties, particularly the minister, are relieved to know that any dispute would be resolved cost-free.

Sadly, they later learn the hard way that the process is no magic bullet. The long, sloppy, often unfair, or even biased process is virtually unappealable, and legal representation can be costly.

On the other hand, if the agreement contains no arbitration provision, then the minister may end up with abstention and dismissal—and no ultimate resolution. The hybrid approach offers balance and security.

Conclusion

Disputes are unavoidable in organizational life, and religious organizations are not exempt from this reality. Religious organizations are made up of imperfect human beings and operate in the secular world with other imperfect human beings. They work with vendors who may not fully provide the services for which they were contracted.

Employees who feel they were wrongly terminated may threaten suit. Factions within the congregation may disagree on theology and how to use church property. Arbitration may seem like an attractive option to resolve these disputes—the process can draw on the religious organization's values in a way that secular courts cannot, and it can work to restore harmony in the religious community rather than pick winners or losers.

But arbitration is not risk-free, and parties may find themselves in court. Even then, the courts may try to stay out of the matter based on First Amendment concerns. It therefore behooves a religious organization to make arbitration available, *at least* for instances in which civil courts would abstain. A hybrid model to dispute resolution recognizes that both litigation and arbitration are available to resolve differences.