

# Arbitration Under the Islamic Sharia

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## ABSTRACT OF THE PAPER:

In modern history, arbitration is considered one of the most important means for the settlement of commercial disputes, particularly the disputes of international trade and investment. Arbitration (tahkim) is recognised by Islamic Law (Sharia) as a method for the settlement of disputes. It has been provided for and recognized by the four sources of Sharia; the Koran; Sunna (the acts and sayings of the Prophet Mohamed (peace be upon him)); Idjma' (consensus of opinion) and Qiyas (reasoning by analogy). Arbitration has been also used as a means for resolving disputes by the companions of the Prophet (peace be upon him). The permissibility of arbitration is unquestioned by the main four Islamic Schools; Maliki; Hanbali; Hanafi and Shafi. The field of settlement of disputes is one of the richest areas of different opinions of the different Schools of Islamic Law. The purpose here is to discuss the concept of arbitration under Islamic Law. This paper will introduce and underline the different opinions ranging from the conservative one to the modern and liberal trends in this field.

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## 2. Arbitration in the Pre-Islamic Period

It goes without saying that arbitration is a deeply-rooted historical means used to settle different disputes, and it predates the state judiciary, or even the state itself.<sup>[4]</sup> The Arabs, before Islam, as well as several other ancient communities knew and used arbitration as a method for the settlement of disputes.

Resort to arbitration in the pre-Islamic period was optional and left to the free choice of the parties. It relied on tribal justice administered by the chief of the tribe and trustworthy individuals instead of an organised judicial justice. Likewise, arbitral awards were not legally binding unless there was an agreement between the parties to this extent. In that period there were no specific rules to limit the arbitrable subjects. The arbitral proceedings were simple and rudimentary. The arbitrator when hearing the dispute does not abide by any certain procedures, except for a number of certain procedures such as the obligation to hear the disputing parties on equal bases and the respect of the customary rules when examining the proofs presented by the parties.

### **3. The Concept of Arbitration In Islamic Law**

When Islam came it recognised and confirmed the pre-Islamic method of settling disputes with some modification. The validity of arbitration has been recognised by the four sources of Sharia; the Koran; Sunna (the acts and sayings of the Prophet Mohamed (peace be upon him)); Idjma' (consensus of opinion) and Qiyas (reasoning by analogy).<sup>[5]</sup> However, there was a debate between classical Muslim jurists over the concept of arbitration.<sup>[6]</sup> According to one view, arbitration is a form of conciliation, close to 'amiable composition', which is not binding on the parties.<sup>[7]</sup> Those favouring this view hold that the arbitrator's decision is neither binding nor final, unless it is accepted by the parties. Thus arbitration does not have any jurisdictional nature, but close to conciliation. Proponents of this view supported their view by the following verse from the Koran:

"If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from her's; if they both wish for peace, Allâh will cause their reconciliation. Indeed Allâh is Ever All Knower, Well Acquainted with all things"<sup>[8]</sup>

The second view is that Sharia knew arbitration in its modern sense. This view is based on the following verse from the Koran:

"Verily! Allâh commands that you should render back the trusts to those, to whom they are due; and that when you judge between men, you judge with justice".<sup>[9]</sup>

To them if one is authorized to judge, one is authorized to make judgements with a binding decision.

It should be noted that one of the elements that participated in the confusion and misunderstanding as to the difference between arbitration and conciliation in Islam between some scholars, is that Islamic Law used the word "*HAKAM*" to define different meanings.<sup>[10]</sup> The word refers in its strict sense to a person who is 'authorized' in a specific mission. Accordingly, the word can be used in its broad sense to refer to an authorized person to dispose of rights, to settle differences between the disputants by suggesting settlement or helping them to reach it, or by issuing a binding decision to settle their dispute.<sup>[11]</sup> The agreement of the parties determines the type of the authorization in each case. As a result of the differences between scholars in understanding the meaning of the word in its terminological sense in Islamic Law, some writers thought that Islamic Law knew only two types of arbitrations, arbitration that leads to binding decisions, and arbitration leads to non-binding decisions. The careful and thorough study proves that Islamic law knew the difference between conciliation<sup>[12]</sup> (that ends with a non binding decision) and arbitration that leads to binding decisions.<sup>[13]</sup> Conciliation is permitted under Islamic Law in civil, commercial, family and other matters as long as they do not permit acts against God's commands or the matter settled by conciliation falls in the ambit of rights of God, i.e., crimes and their sanctions.<sup>[14]</sup>

The issue to be clarified here is that detailed arbitration rules are not to be sought in the express terms of the Koran. The Koran laid down the general rule as mentioned above and it is the duty of the qualified Muslim jurists to elaborate and develop it in accordance to the needs of the community within the general framework of Islam. It is important to note here that the area governed by strict, detailed and very clear rules in Sharia is relatively limited and mostly related to religious practices such as praying, fasting...etc. A great part of the area of relationship between the members of the society in different fields is governed by the so-called *Ijtihad*, i.e., interpretations, elaborations and deductions in accordance with need of the society within the general framework of Islam by the qualified jurists. This what Sharia scholars did in first centuries and what contemporary scholars should do.

#### **4. Arbitration Under the Four Major Islamic Schools**

Although arbitration is recognised by all sources of Sharia, it did not receive close attention in the doctrinal writings of the four major Islamic Schools. This might be attributed to the fact that Islamic Judiciary was sufficient and developed enough to provide suitable solutions to all

types of problems which arose from the social life of that time. Although arbitration is recognised by the four major Islamic Schools as a substitute for the ordinary courts, every School insists on a certain theme on this subject. This part of this paper tries to focus briefly on what each School holds as to arbitration.

#### **4.1 The Hanafi School**

The scholars of this school emphasize the contractual nature of arbitration and hold that arbitration is legally close to agencies and conciliation. They hold that an arbitrator acts as an agent on behalf of a disputant who had appointed him. The Hanfi School stress the close connection between arbitration and conciliation. Thus, to them an arbitral award which closer to conciliation than to a court judgement, is of lesser force than a court judgement. Nevertheless, under this school the disputing party cannot be relived from being obligated to abide by the award because the agreement to resort to arbitration binds the parties like any other contract.

#### **4.2 The Shafi School**

According to the Shafi School arbitration is a legal practice, whether or not there is a judge in the place where the dispute has arisen.[\[15\]](#) However, according to this school, the position of arbitrators is inferior to that of judges since arbitrators under this School are liable to be revoked up to the time of the issuance of the award.

#### **4.3 The Hanbali School**

Under the Hanbali School, a decision made by the arbitrator has the same binding nature as a court's judgement. Thus the award made by an arbitrator (who must have the same qualifications as a judge) is imposed upon both of the parties who chose him.[\[16\]](#)

#### **4.4 The Maliki School**

The Malikis have a great trust in arbitration that they accept that one of the parties can be chosen as an arbitrator by the other disputing party. This is explained by the fact that one relies upon the conscience of the other party.[\[17\]](#) Unlike the other three schools, this School stresses that an arbitrator cannot be revoked after the commencement of the arbitration proceedings.

### **5. The Main Features of Arbitration Under Islamic Law**

In order to understand the concept of arbitration under Islamic Law, the main features of arbitration should be considered.

### 5.1 The Arbitration Agreement

According to the authorities of all Schools of Islamic Law the arbitration agreement is the principal basis for conferring upon the arbitrators the power to issue binding decisions.<sup>[18]</sup> The use of arbitration as a method for the settlement of dispute under Islamic Law depends upon the full and valid consent of the parties.

Whether the arbitration agreement should be in writing or oral is not discussed by any school in Sharia. However, in the leading case between the Caliph "Ali Ben Abi Taleb" (the fourth rightly guided Caliph) and "Muawya Bin Abi Sofian", the two parties agreed to appoint two arbitrators in written deed which stated the names of the arbitrators, the time limit for making the award, the applicable law and the place of issue of the award.<sup>[19]</sup> In this dispute the parties used arbitration to settle their dispute, but the arbitration clause was not effective.<sup>[20]</sup> The question which may arise in this respect is whether arbitration clause, which refers future disputes to arbitration, is valid under Islamic Sharia. The doctrinal writings of the four Sharia Schools deal with the use of arbitration in existing disputes. Therefore, the doctrinal writings of the scholars of the Sharia Schools are silent about arbitration clauses, which refer future dispute to arbitration. This issue has been a subject of controversy among some classical scholars of Sharia. Whatever the case is, ignorance of Sharia in early times does not mean that arbitration clauses are prohibited. According to the principle of freedom of contracts under Islamic Sharia, parties are free to include any clause in their contract as long as it does not permit acts against God's commands, such as the incorporation of 'interest' (Riba) clauses. Arbitration clauses were ignored by the early Muslim scholars because of the fact that the commercial conditions at that time did not require the use of such clauses. It has to be born in mind that the answers given by Islamic Law to arbitration problems have been given before the commercial and economic evolution had reached today's stage. However, they are not unalterable and do not constitute an exception to the universal rule that '*the law must change over the times*'. Indeed, Sharia is not static and rigid and it is only bound by the Koran, Sunna, Idjma' and Qiyas (analogy).<sup>[21]</sup> Arbitration clauses are necessary to the contract, especially in international contracts and they are beneficial to both parties as they enable the justice to be done more quickly. Furthermore, since arbitration clauses are not contrary to public policy; (namely do not permit acts against God's commands), they should be considered valid under Sharia.

A division of opinion between the authorities of Sharia prevails over whether the consent of the parties to go to arbitration would be required only at the time of the agreement or should the consent continue until the issuance of the award by the arbitrator(s). Some classical Muslim jurists question the binding force of arbitration agreement.<sup>[22]</sup> To them, arbitration agreements are revocable options rather than contractual undertakings.<sup>[23]</sup> This idea was incorporated in Al-Majala which was some codification including the rules of arbitration to be applied in the Ottoman Empire.<sup>[24]</sup>

This view has been challenged by contemporary Muslim scholars. According to them, this view is, obsolete, superficial and ill-founded.<sup>[25]</sup> The modern trend in Islamic law is to consider the arbitration agreement binding upon the parties once it has been entered into. Parties would also be bound by the decision of the arbitrator(s). Authorities on the subject proved that this view is the direct application of the general principles in Islamic Law. It is the direct application of the Koran when it states "...and fulfil every agreement, for every engagement..."<sup>[26]</sup> This meaning was stressed by the Prophet Mohamed in a famous Saying; he said, "Believers should honour their engagements...". It may be concluded that the view that receives mostly full approval and application in the legal profession is that arbitration agreements are binding and no party is permitted to withdraw from any agreement he concluded with others by his own free and valid will.

Finally, as to the formalities of arbitration procedures relating to the place of arbitration as appointment of arbitrators the Koran is silent. Accordingly, they are within the discretionary powers of the parties.

## **5.2 Arbitrators**

Once the disputing parties have agreed to resolve their dispute by arbitration, they should reach an agreement on the appointment of the arbitrator(s). The parties may specify the arbitrator(s) by name or they may define the arbitrator(s) by certain position without specifying the name. If the parties agree on arbitration but did not appoint the arbitrator(s), the arbitration may not take place. The four schools of Islamic Sharia are silent on the possibility of appointing arbitrators by a third party. However, there is nothing under the Sharia prohibits the appointment of the arbitrator(s) by a third party. Thus it is left to the entire freedom of the contracting parties to decide whether they want the appointment to be made by a third party or not.

According to the four Islamic Law Schools, there are no restrictions on the number of arbitrators. The matter is left to the parties to arbitration agreement to appoint one or more arbitrators and the number may be odd or even. However, if each party appoint an arbitrator, and the two arbitrators authorized to appoint a third arbitrator, the majority rule may be applied if the parties give their consent to that.

As an arbitrator is deemed under the four Sharia Schools to exercise a judicial function, he must have the same qualifications as a judge. This qualification can be summarized as follows.

The arbitrator must possess the foregoing qualifications continuously from the date of the commencement of the arbitration until the rendering of the award.[\[30\]](#)

As to the revocability of arbitrators by one of the parties, the Maliki School prohibits revocation after the procedure has started. The Shafi and Hanafi schools permit the revocation of arbitrators at any time before rendering the award. However, the view that receives mostly full approval and appreciation in the legal profession is the view of the Maliki School, which provides that the appointment of an arbitrator is irrevocable after the commencement of the procedure except by mutual agreement of the disputing parties. This view seems to be the most appropriate because it meets the requirements of international business community.

### **5.3 The Applicable Law**

In disputes where one party is a non-Muslim, choosing a non-Islamic legal system is recognised by the Maliki, Shafi and Hanbali Schools as valid. Furthermore, several Muslim countries became parties to the New York Convention and by doing so, they approve the delocalisation of arbitration agreements.[\[31\]](#) However, recourse to a non-Islamic legal system is valid as long as the rules to be applied on the contract do not violate express provisions of Koran or Sunna.[\[32\]](#)

### **5.4 Arbitrability According to Islamic Law**

According to the four Schools of Islamic Sharia arbitration is not authorized in matters relating to the "Rights of God".[\[33\]](#) The said area is quite large, covering criminal law as well as patrimonial rights. The Koran also excludes certain subjects such as guardianship on orphans, which must obligatorily be referred to courts of law. This area resembles the area of public policy in modern laws. Apart from the subjects excluded above, any other dispute should be

just as capable of being resolved by arbitration as by a national court. Accordingly, disputes arising out of commercial transactions are arbitrable.

### **5.5 The Arbitral Award and its Enforcement**

According to the Maliki, Hanbali, Hanafi and the majority of the "Shafi'is"[\[34\]](#) an arbitral award is as enforceable as a judge's judgement. However, the intervention of a judge is necessary, as the arbitrator has no authority with respect to enforcement of arbitral awards. The Maliki, Hanafi, Hanbali and the majority of Shafi'is stress that the judge who has been required to enforce an arbitral award, cannot deny the enforcement simply because it does not conform to his opinion. Thus according to Sharia Law an arbitral award has a jurisdictional character and it is binding and enforceable. Moreover, a judge when enforcing an arbitral award is not authorized to review the merits of the disputes or the arbitrator's reasoning. The judge's duty is limited to examining some formal matters, such as the existence of a valid arbitration agreement and whether the award deals with the disputes subject matter. However, a judge may set aside an arbitral award if it is inconsistent with Shari's public policy[\[35\]](#) or if the award contains a flagrant error or injustice. It should be noted that the judge's power to set aside an arbitral award on the latter grounds is not a second level of jurisdiction but a form of supervision over the award.[\[36\]](#)

As to the enforcement of foreign arbitral awards, the attitude of Sharia is dependant on the bilateral and international conventions to which the party states are committed. Moreover, the Muslim judge may set aside a foreign award or refuse enforcement if the award violates the general spirit of Sharia and/or its sources (Koran and Sunna).

### **6. Conclusion**

This paper dealt with specific issues of arbitration in Islamic Law. It may be concluded that the different Schools of Islamic Law produced an immense wealth of different opinions and not any of these opinions violates the express provisions of the Koran or Sunna. In each subject of this field alternatives and solutions are available and Moslems are permitted to adopt whatever they may be convinced of these different opinions. This gives Islamic law the capacity to develop and adapt itself to the exigencies of time and place.

The concept of arbitration is not a Koranic one but a pre-Islamic concept authorised by Islam. Islamic Law knew the difference between arbitration and conciliation. The arbitration agreement is the principal basis for conferring upon the arbitrators the power to issue binding



decisions. The modern trends in Islamic Law is that arbitration agreements are binding upon their parties and no party is permitted to withdraw from any agreement he concluded with others by his own free and valid will. As to the debate over the issue of arbitration clauses, it may be concluded from the aforementioned that arbitration clauses are recognised as valid under Islamic since they do not permit what is prohibited by the Islamic Sharia. As to the selection of arbitrators, recent trends in Islamic Law would put no restrictions on the selection of arbitrators based on religion or sex. Further, the Koran is silent as to the place of arbitration, the procedure, the time limit, the applicable rules, remuneration and appointment of arbitrators. This is within the discretionary power of the parties to decide.

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[\[1\]](#) The holy Koran provides for arbitration on several occasions. The Koran says: "If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from

his family and the other from her's; if they both wish for peace, Allâh will cause their reconciliation. Indeed Allâh is Ever All Knower, Well Acquainted with all things", The Holy Koran: 4: 35. The other verse of the Koran that in support of arbitration is as follows: "But no, by your Lord, they can have no Faith, until they make you (O Muhammad SAW) judge in all disputes between them, and find in themselves no resistance against your decisions, and accept (them) with full submission".

[2] Prophet Mohamed (peace be upon him) recognised and practiced arbitration. He appointed arbitrators and accepted their decisions. He also acted as arbitrators in several occasions to resolve disputes arising between individuals and tribes. He acted as an arbitrator in the dispute between several Arab tribes regarding which of them will have the honour of lifting and placing the Black Stone after rebuilding the Kaaba. He put the Black Stone in his outer garment and judged that every tribe chooses a representative and that all the representatives carry the garment together to the place of the Stone. He also chose arbitration to settle the dispute between himself and Bani Anbar.

[3] The leading case where arbitration used by the companions of the Prophet (pbuh) is the famous political case between the Caliph "Ali Ben Abi Taleb" (the fourth rightly guided Caliph) and "Muawya Bin Abi Sofian" (the governor of Assham which is Syria, Lebanon, Palestine and Jordan). Muawya had refused to recognised Ali Bin Abi Taleb 's right to the Caliphate. The dispute led to a civil war between the two parties. During the fighting, Muawya Bin Abi Sofian demanded the settlement of their dispute through arbitration. Ali Bin Abi Taleb accepted that and each party appointed his arbitrator. The two arbitrators were to decide who would be the Caliph. The two arbitrators were nominated in the arbitration agreement document and drafted arbitration agreement specifying the dispute. The procedure, duration of the arbitration, place of arbitration and the applicable law were fixed in the arbitration document.

[4] See H. M. Fathy, "Arbitration According to Islamic Law (*Sharia*)" (2000) 1 Arab Arb. J. at p. 31.

[5] *Supra* notes 1 & 2.

[6] This division of opinion between Islamic Law scholars over the concept of arbitration mainly because resort to arbitration by "Caliph Ali Ben Abi Taleb" in his dispute with "Muawya Bin Abi Sofian" (the governor of Syria), was opposed by the Khawarege (the people who opposed the resort to arbitration by Ali Bin Abi Taleb). On the other hand, it has to be

mentioned that Western Law systems (English Law and different European Laws) had the same controversy accompanied the evolution of arbitration. For further details on this issue see Abdul Hamid El-Ahdab, *Arbitration With the Arab Countries*, (The Hague: Kluwer Law International, 1999) at p.16.

[7] Abdul Hamid El-Ahdab, *Arbitration With the Arab Countries*, (The Hague: Kluwer Law International, 1999) at p. 16.

[8] The Holy Koran: 4: 35.

[9] The Holy Koran: 4:58.

[10] M. I. Abul-Enein, "Liberal Trends in Islamic Law (Shari a) on Peaceful Settlement of Disputes" (2000) 2 J. Arab Arb. at p. 2.

[11] *Ibid*, at p. 2.

[12] The holy Koran provides for conciliation and the verse in support of conciliation reads: " And if a woman fears cruelty or desertion on her husband's part, there is no sin on them both if they make terms of peace between themselves; and making peace is better. And human inner-selves are swayed by greed. But if you do good and keep away from evil, verily, Allâh is Ever Well Acquainted with what you do", the holy Koran 4:128. The Prophet (Pbuh) said that conciliation is permitted and it is more rewarding than fasting, praying and offering charity.

[13] It is worth mentioning here that Islamic law did not know the difference between conciliation and mediation. Common Law lawyers have the same understanding as to this issue, they consider conciliation and mediation as one technique. On the other hand, Civil Law lawyers have different understanding as to the different between conciliation and mediation. They consider them as distinct subjects.

[14] Conciliation according to Islamic law is a separate subject, and it is out of the scope of this paper. The purpose of mentioning this issue here is to show that Islam knew the difference between the two subjects.

[15] Samir Saleh, *Commercial Arbitration in the Arab Middle East: A Study in Sharia and Statute Law*, (London: Graham & Tortman, 1984), at p. 22.

[16] Abdul Hamid El-Ahdab, *supra* not 10, at p. 19

[17] See Samir Saleh, *supra* note 15, at 21; Abdul Hamid El-Ahdab, *supra* not 1, at p.21

[18] M. I. Abul-Enein, *supra* note 10, at 5.

[19] Walied, El-Malik, *Mineral Investment Under the Sharia Law*, (London: Graham & Tortman 1993) at p. 127.

[20] Although the two arbitrators in this case pegged to differ and each arbitrator hold a different view, this arbitration constituted an important historical instance of Islamic law of arbitration. For further details on this issue see S. Mahamassani, *International In the Light of Islamic Doctrine*, (Académie de Droit International. Recueil des cours, 1967) at p. 272

[21] Abdul Hamid El-Ahdab, *supra* note 7, at p. 19.

[22] The Hanfi, Sahfie and Hanbali schools give each party the right to withdraw his consent for arbitration at any time. For further details on this issue see, Al-Mawardi, Abu Al-Hassan, *Adab al-Qadi*, (Cairo: Saadah Publication 1327H) at p.383

[23] Abdul Hamid El-Ahdab, *supra* note 7, at p. 24.

[24] Article 1848.

[25] Abdul Razak Al-Sanhury, *Masader Al-Haq*, Vol. 1, (Cairo: Dar Al-Nahza Al-Arbia, 1968) at p. 80.

[26] Under Maliki School once parties have agreed on arbitration, they are bound by their agreement and would not be permitted to withdraw from arbitration agreement. Unlike other schools, it requires the consent of the parties to arbitrate only at the time of the agreement.

[27] The jurists who held the view that arbitrators must be male base their exclusion on the Koranic verse: "Men are the protectors and maintainers of women, because Allâh has made one of them to excel the other", The Koran 4: 34.

[28] These are the minimum qualifications required in arbitrators and there are other qualifications relating to the technical skills of arbitrators, it is not possible to state them all in such paper, because of the space available.

[29] Mohamed Hoshan, Euro-Arab Arbitration Conference – Tunisia, (London: Lloyd's of London Press LTD, 1987), at p. 24.

[30] Samir Saleh, *supra* note 15, at p. 42.

[32] Prophet Mohammed (pbuh) in a well known case in the Islamic history called "Banu Quraydah" accepted the application of customary and Mosaic law instead of Islamic law.

[33] Samir Saleh, *supra* note 15, at p. 47.

[34] According to the minority of Shafi School the arbitral award cannot be binding and enforceable unless it is accepted by all parties. To them the binding force of an arbitral award is derived from the arbitration agreement, the consent of the parties to this agreement is crucial for the enforcement of the award.

[35] The concept of public policy in Islamic Law is based on the respect of the general spirit of the Sharia and its sources (the Koran and the Sunna) and on the principle that individuals must respect their clauses, unless they forbid what is authorized and authorize what is forbidden.

[36] Abdul Hamid El-Ahdab, *supra* note 7,