

Adjudication Under Civil & Shariah Laws

Sherif EL-Haggan, Doha, Qatar, 5-7 November 2012

In the name of Allah, the Most Gracious, the Most Merciful

“O you who believe! Fulfil you obligations”

Surah 5. Al-Maidah

It is my conviction that any method, including mediation, conciliation and arbitration, that leads to the fulfillment of obligations is not merely encouraged by Islamic Shariah law but made mandatory.

Adjudication & Shariah Law

Based on the above I see that Shariah does encourage resolution of disputes via different methods, mediation/conciliation, being one of them.

The same applies to arbitration that ends with a binding decision.

Adjudication is a middle of the road method between mediation and arbitration as adjudication has characteristics the two as some end with a binding but not final decision.

Adjudicability (analogous with ***arbitrability***)

I consider that same the principles relating to arbitrability under Egyptian Laws apply to ***adjudicability***.

Arbitrability According to Egyptian Law

Egyptian Arbitration Law No. 27/1994 - Arbitrability

Article 11. *“... Arbitration is not permitted in matters where compromise is not allowed.”*

Article (2). *“An arbitration is commercial within the scope of this Law if the dispute arose over a legal relationship of an economic nature, whether contractual or non-contractual. This comprises, in particular, the supply of commodities or services, commercial agencies, construction and engineering or technical know-how contracts, the granting of industrial, touristic and other licences, technology transfer, investment and development contracts, banking, insurance and transport operations, exploration and extraction of natural wealth, energy supply, the laying of gas or oil pipelines, the building of roads and tunnels, the reclamation of agricultural land, the protection of the environment and the establishment of nuclear reactors.”*

Compromise is defined in the Egyptian Civil Code as follows:

Article 551. *“A compromise cannot be made on any question touching the status of individuals or public policy, but a compromise may be made with regard to proprietary interests arising out of the status of individuals or out of a penal offence.”*

The dispute or disputes submitted to arbitrations should be arbitrable. The concept of arbitrability, relates to public policy limitations upon arbitration. In addition to matters that are in conflict with public policy, the Egyptian Law of Arbitration 27/1994 states in Article 11 that, “*Arbitration is not permitted in matters which are not amenable to compromise*“.

Article (551) of the Egyptian Civil Code stated that matters related to the personal status would not be subject to compromise. Examples of these matters are the capacity of persons, and a validity of marriage. Also all matters related to the determination of the criminal responsibility may not be subject to arbitration. The Egyptian Court of Cassation annulled an arbitration agreement which authorized the arbitrator to determine who is responsible about committing a crime (case no 562/47 decided on Dec.2, 1980). However, the compensation resulting from any illegal act may be subject to an agreement of arbitration.

Introduction

During the first half of the 19th century most of the laws related civil and commercial matters in the Arab world were mainly based on "*Majallat Al Ahkam Al Adliyah*". The *Majallah* was the first codification of the views of some jurists of the *Hanafi* Doctrine about the rules of Islamic law in civil and commercial matters.

Section (4) of the *Majallah* covered the provisions of arbitration where the contractual nature of arbitration was stressed. The award had to be issued by unanimous vote if there were more than one arbitrator.

Conciliation and Mediation According to Islamic Law

The field of settlement of disputes is one of the richest areas of different opinions of the different sects of Islamic Law. The careful and thorough study proves that Islamic law knew what is known in modern times as ADR techniques in the form of conciliation and mediation.

It also knew arbitration in its modern sense, the sense in which parties confer upon the arbitrators the power to settle their disputes by binding decisions according to agreed upon rules, or to authorize them to settle the dispute according to what they may consider as just and fair *amiable compositeur*.

Islamic law knew conciliation and mediation as viable ways and popular procedures for resolving family, civil, commercial and other disputes such as conflicts on political power, conflicts in the form of a civil war or in cases of war between two nations. They considered conciliation and mediation as one technique leading the parties to settlement (*solh*).

Conciliation in Family Disputes

Conciliation in family disputes is based on the wordings of the QURAN, *Surah Al-Nisa*, verse 35 (with reference to the disputes between husbands and wives):

"If ye fear a breach between them twain, appoint two arbiters, one from his family, and the other from hers. If they wish for peace, Allah will cause their conciliation"

The simple understanding of this Verse according to some jurists is that the two authorized persons, the one from the family of the husband and the other from the family of the wife have **no jurisdiction to issue binding decisions**.

The mission of the two authorized persons, *HAKAMs*, would be to try to settle the differences between the husband and the wife by **conciliation**. This authorization to the two persons about their mission comes directly from the above mentioned Verse. Here it is obvious also that the two "*HAKAM*" are conciliators having no power to issue binding decisions.

Some other authorities would see that each of the husband and the wife would select a person of his family. The two authorized persons here have only the jurisdiction delegated to them by the couple. Those authorities add that the Governor or the judge may not send or appoint anyone without the couple's approval. This is the opinion of IBN ABBAS and one of the opinions delivered by EL-SHAFIE. According to some opinions the couple may even select one person to conciliate and try to make peace between them.

Here the husband and the wife may confer on the (*HAKAM*) the power of conciliators, or may confer on them the power of arbitrators having the jurisdiction to issue binding decisions.

It is apparent that in all cases where the appointment is made from the couple the power of the two persons would derive from their agreement, i.e., they may appoint conciliators or arbitrators.

In the latter case they may even authorize the two arbitrators to separate them by divorce in case they fail to reach a settlement.

Thus, the elements of the jurisdiction of the "*Hakam*" and the powers conferred upon him in the agreement of the parties would give the real definition and the type of the mission in each case.

the new trend in modern writings of Islamic Law is that conciliation in family affairs between the husband and the wife is originally directed by them as parties to an agreement to conciliate, and to authorize two persons, one from each of their families to undertake this mission. No other type of conciliation can be done between them without their consent being the original parties. As stated above, the powers conferred upon the two persons by the couple define their mission and their jurisdiction.

It goes without saying that, instead of conferring upon the (*HAKAM*) the jurisdiction of conciliators, the couple may authorize them to act as arbitrators.

Conciliation in Civil, Commercial and other Matters

All Islamic schools of thought permit conciliation in civil, commercial and other matters subject to some exceptions. The *KORAN* and *SUNNA* invited conflicting parties to conciliate. *Sura al-nisa'*, verse 128, has it that "*An amicable settlement . . . is best*". Also in *SURA "HUJURAT"* verse 9 it is stated that: "*If two parties among the Believers fall into a quarrel, make ye peace between them . . . make peace between them with justice, and be fair: For God loves those who are fair and just.*"

As for the *SUNNA* the Prophet *MOHAMED* said that conciliation is permitted so long as it does not permit acts against God's commands. Moreover, the Prophet stated that conciliation leading to "*Solh*" or "settlement" is even more rewarding than fasting, praying and offering charity.

The references of the different sect in Islam did not fix any restriction on settling the disputes between the two conflicting parties if the subject matter is property, debts, sales, commercial, or civil matters. Conciliation is even permitted in conflicts on political power, or even if war breaks out between two nations.

It is worth mentioning that restrictions on conciliation were made only if the matter may not be settled by agreement between the parties because it is related to any of the rights of God. This is an area that resembles the area of public policy in modern times. This area is dominated mostly by *HODOUD*, i.e., crimes and their sanctions.

The Validity of Arbitration According to Islamic Law

Sources of Islamic Law accepted arbitration as a valid way for the settlement of disputes.

The prevailing modern trend in Islamic Law is to consider the arbitration agreement binding on the two parties until the end of the arbitration procedures. Parties also would be bound by the decision of the arbitrator(s). Authorities on the subject proved their doctrine by stating that this is the direct application of the general principles in Islamic Law. It is the direct application of the KORAN when it states in Verse No. 1 of *SURAH MAIDA* that "*O ye who believe, respect your contractual undertakings*", and in another Verse No. 34 in *Surah Isra'* which states "*..... and fulfill (every) engagement, for (every) engagement will be enquired into on the day of reckoning*". This meaning was stressed by the Prophet *MOHAMED* in several occasions. He stressed in a famous *HADITH* i.e., saying that "Believers should honor their engagements ...".

It may be concluded that the modern trends in Islamic Law 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'.

Arbitrability According to Islamic Law

Doctrines of Islam made no restrictions on the subjects that may be submitted to arbitration except if the matter is related to any rights of God. As mentioned above, this area resembles the area of "public policy" in modern laws. The said area is dominated by the crimes and sanctions. Also the *KORAN* excluded certain other subjects such as the guardianship on orphans which is to be decided by the judge. In this sense the dispute submitted to arbitration should be "arbitrable".

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The subjects that may be submitted to arbitration according to Islamic Law may include all other not excluded subjects. They may include - as mentioned above - civil and commercial Matters. They may also include the conflicts on political power.

Moreover, arbitration is accepted in Islamic Law as a viable way to settle disputes between two nations in war. Authorities on the subject depended on the case of the acceptance of the Prophet of arbitration when war broke out between Moslems and "Bani Korīza". Also, they depended on the Prophet sayings in this regard especially when he said that making peace between two conflicting parties is even more rewarding than fasting, praying and offering charity.

Conclusions

It may be concluded briefly that:

- a- Islamic Law knew the difference between conciliation that ends with a non binding decision and arbitration that leads to binding decisions. The agreement of the parties as stated above defines the jurisdiction and the powers of the conciliator or the arbitrator.
- b- Parties to an arbitration agreement are bound by their agreement and by the decisions of the arbitrator(s). The prevailing trends would not permit any party to withdraw form the arbitration procedures.
- c- Subjects submitted to conciliation or arbitration may range from family affairs, civil, commercial matters, conflicts on political powers to civil and international wars. However, these subjects should be "arbitrable". Subjects that include "rights of God" such as crimes, and sanctions may not be subject to arbitration or conciliation.
- d- The dispute to be settled by arbitration, the appointment of the arbitrators, their procedures, the place of arbitration, the time limits, the applicable rules, the way by which decisions are made may be defined in the agreement of the parties as a clear application of the principle of "Party autonomy".
- e- Recent references and trends in Islamic Law would put no restrictions on the selection of arbitrators or conciliators based on religion or gender.