

Arbitration Under Islamic/Sharia Law

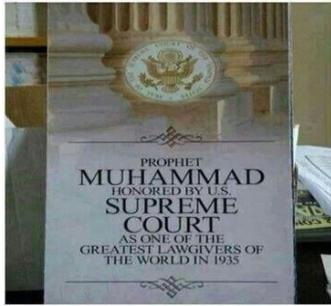
By Dr. Imad Al Jamal

International reference and recognition of justice under Islamic/Sharia Law

Introduction

"Prophet Muhammad was honored by U.S. Supreme Court as one of the greatest lawgivers of the world in 1935."

The US-based Harvard University has posted a verse of the Holy Qur'an at the entrance of its faculty of law, describing the verse as one of the greatest expressions for justice in history.



بوستر في المحكمة الدستورية العليا في الولايات
المتحدة الأمريكية مكتوب عليه : المحكمة الدستورية
العليا تكرم النبي محمد ﷺ لكونه من أعظم مصادر
القانون في العالم

Verse 135 of Sura An Nisa has been posted at a wall facing the faculty's main entrance, dedicated to the best phrases said about justice since 1930.

عَلَىٰ وَلَوْ لِبِ اللَّهِ شُهَدَاءَ بِالْقِسْطِ قَوَّامِينَ كَوْنُوا أَمْنُوا الَّذِينَ أَتَيْهَا يَا
أُولَىٰ فَإِنَّ اللَّهَ فَاقِرًا أَوْ غَنِيًّا يَكُنْ إِنْ وَالْأَقْرَبِينَ دِينَ الْوَالِدِ أَوْ أَنْفُسِكُمْ
اللَّهُ فَإِنَّ تَعْرِضُوا أَوْ تَلُؤُوا وَإِنْ تَعَدَّلُوا أَنْ الْهَوَىٰ تَتَّبِعُوا فَلَا بِيَهْمَا
”خَبِيرًا تَعْمَلُونَ بِمَا كَانُ“.

The full English Translation of this verse as taken from Dr. Khan and Dr. Al-Hilali's book "Interpretation of the Meanings of The Noble Qur'an in The English Language" is as follows:

"O you who believe! Stand out firmly for justice, as witnesses to Allah, even though it be against yourselves, or your parents, or your kin, be he rich or poor, Allah is a Better Protector to both (than you). So follow not the lusts (of your hearts), lest you avoid justice; and if you distort your witness or refuse to give it, verily, Allah is Ever Well-Acquainted with what you do."

General

In the Middle Ages, and even before, when merchants fell into dispute in connection with their trade, they would often refer it to another merchant of high esteem for his decision and the disputing parties would agree to abide by his decision. They needed quick simple justice with readily understandable procedures. The customs of merchants developed over the years into legal rules.

Eventually, the practice of arbitration was given a statutory basis. In England, Parliament passed the first Arbitration Act in 1698 and the last Arbitration Act in 1996.

Basis of law

In the United Kingdom, the system of law used is the common law; this must be distinguished from the civil law which is operated on the continent of Europe and in many other countries throughout the world.

In both systems, the statutes of the country concerned are central to the legal system. In Britain, these statutes are known as Acts of Parliament, whereas in civil law countries they are known as the codes, for example the civil code or the criminal code.

Common law relies heavily on precedents which are the previous reported decisions of the higher courts. Civil law does not rely on precedent in the same way. Thus the House of Lords' decisions are binding on all courts and tribunals – this is the law of “precedent”, or previous higher court decisions being binding on lower courts.

The law of arbitration is no different. It is controlled and influenced by the current Arbitration Act but also by an enormous body of precedent, history and cases.

In addition to the above, Islamic Law/Sharia, which was the pioneer in arbitration is well recognized in many parts of the world including the West in its validity and importance for 1435 years.

Applicable Principles of Law

Civil Law

Civil law is the predominant legal system in the world today. The original difference between common law and civil law was that the common law developed through custom and practise, beginning before there were any written laws and continuing to be applied by courts after there were written laws, whereas civil law developed out of the Roman law of Justinian's Corpus Juris Civilis.

The civil law, over time, became codified as droit coutumier or customary law that were in effect "statutory like" local compilations of legal principles recognised as normative.

The Napoleonic Code

The Napoleonic Code known originally as the Code Civil des Francais is the French Civil Code, established under Napoleon I in 1804 and originally drafted by four jurists.

Sharia – Islamic Law

While most countries utilize either arbitration under the common law or civil law there is a third body of law which is applicable to arbitration/dispute resolution and is prevalent in countries such as Saudi Arabia, Egypt, Iran and the Middle East.

History

Historically Sharia or Shari'ah is the body of Islamic law and the legal framework in Muslim legal systems which deals with aspects of both business law and contract law. Some Islamic scholars accept as the body of precedent and legal theory established before nineteenth century, while other scholars view Sharia as a changing body and include Islamic legal theory from the contemporary period.

Before Islam, the Arabs resolved their disputes without the use of any formal court system. This was done either through arbitration or through conciliation and was administered through tribal chiefs or other respected tribal elders. The resolution of disputes during this period relied on the parties' first coming to an agreement as to the extent to which any resolution of their disputes would be binding upon them.

The coming of Islam brought with it the development of a legal system known as Sharia, which in effect recognised and upheld the earlier dispute resolution procedures. The ability to settle disputes amicably is seen in Sharia. Dispute resolution techniques, notably arbitration, are seen in all four sources of Sharia.

This totality of Sharia is based upon the Quran (Koran): Sunna (the acts and sayings of the Prophet Mohamed (pbuh)); Idjma (the consensus of opinion – which is similar to the concept of "common law") and Qiyas (which is reasoning by analogy).

Whether dispute resolution is binding or not, is of course still dependent upon the intent of the parties and this can be determined best if the parties at the inception have an agreement as to whether any dispute resolution decision is final and binding upon them.

Thus agreements for such dispute resolution methods as arbitration could be made binding, or even for Dispute Board decisions. Conciliation, similar to mediation, is permitted under Islamic Law in civil, commercial, family and other matters as long as it does 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. Again, this method of dispute resolution is also dependent upon the agreement of the parties to its being held as binding or not.

Sharia does not give detailed rules on any form of dispute resolution. The Quran sets out general principles, which govern individuals and, like in Common Law countries, it is the jurists who are responsible for expanding and clarifying various aspects as necessary.

The interpretations of the Quran, known as the "Ijtihad", is where the Islamic jurists give their elaborations and deductions as needed by society and it is this area of Sharia which governs in matters such as dispute resolution.

It is important to note that there are four major doctrinal schools of Islamic Sharia, each with a slightly different view on dispute resolution in particular dealing with arbitration and conciliation. Both of these principles are also part of the Dispute Board adjudication process and as such become part of this discussion.

Hanafi Islamic Sharia

Hanafi Islamic Sharia places a great deal of emphasis on the agreement of the parties in the settlement of disputes ie, through arbitration, and finds that arbitration is similar to conciliation and that an arbitrator acts as the agent of the parties who have appointed him.

Under this school of thought any award of an arbitrator is not the same as a court judgment but rather similar to conciliation between the parties.

However, the scholars that developed this school of Sharia law feel that the parties must accept the award made, in an arbitration, if the parties have agreed in writing to be bound by the award.

Shafi Islamic Sharia

Under the principles of Shafi Islamic Sharia, dispute resolution methods such as arbitration are a legal practice, whether or not there is a judge in place where the dispute has arisen. The difference here is that arbitrators are held to be at a level below that of judges because an arbitrator can be removed at any time prior to his issuing any award.

Hanbali Islamic Sharia

Hanbali Islamic Sharia is of the position that awards have the same stature and are as binding as a court's judgment. Here the one making an award must have the same qualifications as a judge and as such any awards made by an arbitrator are binding.

Maliki Islamic Sharia

Maliki Islamic Sharia accepts 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. The Maliki also feel whoever is acting as the dispute resolver, such as an arbitrator, cannot be revoked after the commencement of the arbitration proceedings.

All of these Schools of Islamic Sharia Law base their rules on the use of an agreement which confers the powers upon the dispute resolver to make a binding decision as well as the full consent of all of the parties.

Interestingly, whether or not any such agreement is to be written or oral is not decided by any school in Sharia. In the leading case between the Caliph "Ali Ben Abi Taleb" and "Muawya Bin Abi Sofian", the two parties agreed to appoint two arbitrators in a 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.

In this dispute the parties used arbitration to settle the dispute, but the arbitration clause was not effective. Here the issue arose as to whether under Sharia a "**future**" dispute could be referred to arbitration or only disputes that come into being. All four schools of thought only dealt with disputes that were **already in existence** and not with disputes that had **not yet occurred**.

Resorting to the International Islamic Centre for Reconciliation & Arbitration (IICRA) for arbitration

A) For disputes that may arise in the **future**, the IICRA advises that parties include following provision in the agreement:

If any dispute arising between the parties out of the formation, performance, interpretation, nullification, termination or invalidation of this agreement (contract) or arising therefore or related thereto, the dispute shall be referred to an arbitrator or arbitration panel constituted of uneven number of arbitrators for a final and binding decision in accordance with the rules and procedures specified in the statute of the International Islamic Centre for Reconciliation and Arbitration (IICRA).

B) As for the **disputes that have actually rose** while the agreement had no such provision as that given above in paragraph (A) or had no provision for arbitration through any other entity, the IICRA suggests that the parties in the dispute may conclude an agreement containing the following phrase:

“A disagreement/ dispute arose between the two parties concerning (the nature and content of the disagreement is to be mentioned in brief). In an attempt to reach a settlement the parties hereby agree that the dispute shall be referred for arbitration for the purpose of issuing a final and binding ruling thereon in accordance with the rules and procedures of the International Islamic Centre for Reconciliation and Arbitration (IICRA).”

For further information on IICRA arbitration rules and regulations please refer to the following link: www.iicra.com

UAE Perspective

UAE’s arbitration laws are contained in the UAE Civil Procedure Code (Articles 203 to 218). Except for the Dubai Chamber of Commerce and Industry and the ESCA relevant regulations, this law governs arbitration proceedings today in the UAE.

Dubai International Financial Centre (DIFC) arbitration rules are based on English common law principles.

International Islamic Centre for Reconciliation & Arbitration (IICRA) is based on Islamic justice principles with heavy reliance on UNCITRAL rules and regulations with minor amendments.

Probably the UAE and Dubai are the only places in the world whereby civil, common and Islamic laws are accepted and practiced.

Applicable Law

Sharia applies when parties **choose** in a contract (Article 19(1) of the UAE Civil Cod provides that governing law as agreed between the parties shall apply to a dispute).

Where parties have selected a forum for arbitration in the UAE, but have not clearly selected an applicable law, arbitrator should pass judgment according to UAE laws.

Under UAE law, a judge should pass judgment in an Islamic case according to Sharia (Article 1 of the UAE Civil Code provides if no provision in law “he must pass judgment according to the Islamic Sharia...”).

Article 28 of the UAE Civil Code provides “The law of United Arab Emirates shall be applied if it is impossible to prove the existence of an applicable law or to determine its effect.”

UAE law in an Islamic transaction would apply Sharia principles where existing law is silent.

Dubai as the centre of International Commercial Arbitration in Islamic finance dispute resolution

Thanks to the various Sharia compliant products introduced to the market, e.g. Sukouk, Tawarruq, Ijarah Muntahiya Be-attamaluk, Istisna’a, etc., Islamic Finance has become a significant method of financing major infrastructure projects.

Traditional methods of resolving disputes involving Islamic Finance is to recourse to state courts.

This method has its own challenges.

Challenges of court litigation

- a) Legislative Vacuum: No substantive law regulating Islamic Finance. Courts rely on the few precedents established by the Supreme Courts, and recommendations of the Int’l Islamic Fiqh Academy (subsidiary of the Organization of the Islamic Conference).
- b) No specific bench dealing with Islamic Finance, along with its related complexities.
- c) Lack of specialized Islamic Finance experts listed before the courts.

Arbitration is the solution

- a) Choice of selecting arbitrator qualified and recognized in Islamic Finance, who can undertake profound analysis of the matter.

- b) Choice of applicable laws, or recommendations of the Int'l Islamic Fiqh Academy, or any substantive rules.
- c) No need for an expert to educate the Tribunal about the various Sharia compliant finance products.

NB: Suitable for corporate Islamic Finance disputes of significant value.

Challenges of arbitration

- a) Lack of a modern arbitration law: In spite of the tremendous growth in arbitration we still operate under a chapter on arbitration in the Civil Procedures Code (draft Arbitration Law is in line with the UNCITRAL model arbitration law, and is quite progressive).
- b) Judiciary's resistant approach to the arbitration process, leading to various court interventions, setting aside many arbitration awards.
- c) Issuance from time to time of adverse court decisions, undermining the confidence of international businesses.

Encouraging development

- a) Increasing awareness of the important role of arbitration among the judiciary, leading to issuance of many encouraging and supportive court decisions in favor of arbitration.
- b) UAE joining the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
- c) Increasing recognition of the role of arbitration institutions by the judiciary.
- d) Increasing number of efficient arbitration institutions such as DIAC, ADCCAC, DIFC-LCIA, IICRA, etc., leading to an increase in the number of arbitration cases (exceeding a thousand cases), as well as the value of the claims in dispute (exceeding billions of Dirhams).
- e) Emergence of competent arbitrators in the country with the highest international standards, be they expatriates or nationals, and some of whom are accredited before leading international arbitration centers such as ICC and LCIA.

Recommendation

In spite of the growing role of arbitration in the region generally and in UAE particularly, and the active role of the arbitration centres, which have become among the fastest growing arbitration centres in the world, we are still suffering from absence of a modern arbitration law.

I take the opportunity from this platform to appeal for:

- a) Acceleration of the enactment of a modern arbitration law.
- b) Encouragement and support to the various arbitration institutions, and in particular IICRA as a natural forum for resolving Islamic Finance disputes.

Conclusion

Notwithstanding the challenges facing arbitration in the UAE, UAE and Dubai in particular, can still be the hub of arbitration for Islamic Finance disputes, due to:

- Efficient arbitration centers;
- Availability of highly qualified, and multi-lingual arbitrators;
- An efficient judicial system that disposes disputes relating to arbitration relatively quickly; and
- Excellent logistics support, and advanced infrastructure facilities, air links, hotels, efficient communication systems, ease of travel regulations, tax free environment.

All of these advantages will be further enhanced with the promulgation of the arbitration law.

References (books, lectures and weblinks)

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- <http://oddfuttos.blogspot.ae/2014/02/quranic-verse-adorn-wall-of-harvard.html>
- Verse "135" of Sura An Nisa from the Holy Qur'an and its full English translation from Dr. Khan and Dr. Al-Hilal's book *'Interpretation of the Meanings of The Noble Qur'an in The English Language.'*
- <http://www.iicra.com>
- *'Arbitration Under UAE Law: Towards A Modern Legal Framework?'* lecture by Karim J. Nassif, Habib Al Mulla & Co.
- *'Important Considerations for Islamic Arbitrations Including from a UAE Perspective'* lecture by Oliver Agha, Agha & Co., A Sharia Compliant Law Practice.
- *'Dubai as the Center of International Commercial Arbitration in Islamic Finance Dispute Resolution'* lecture by Ali Al Aidarous International Legal Practice.

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Worked as an expert, claims consultant and Certified Arbitrator with Abu Dhabi Commercial and Arbitration Centre (ADCCAC), as well as Dubai International Arbitration Centre (DIAC) in addition to various international arbitration cases.

Knowledge and practice of contractual claims, alternative dispute resolutions and procedures as well as adjudication, mediation, arbitration and litigation in the construction, real estate and related industries.

Contracts preparation and negotiations in the construction and real estate industries in connection with clients, consultants, contractors, subcontractors and suppliers as well as joint ventures, lease and agency agreements.

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