What has Sharia got to do with Arbitration

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Arbitration and Sharia

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With 1.6 Billion Muslims around the world and US$1.8 Trillion in Islamic funds plus at least another US$2.5 Trillion in none interest bearing bank accounts with annual growth of approx 15%, the subject of Arbitration in Islamic disputes is of materially lucrative as well as morally important.¹

**Issues facing Sharia Arbitration**

Although not intended, but parties to Arbitration are concerned about the possibility of awards that may be of questionable decisiveness or irregular (corrupt) environment and would like to be able to appeal such awards to trustworthy arbitrators of a superior standing tribunal. ²

For cultural differences as well as misconceptions due in large to the influence of Sharia based local laws and the complicated enforcement schemes, many foreign investors have been reluctant to seat their arbitrations in countries that apply Sharia or to attach themselves to a contract with a ‘Sharia Arbitration’ clause.

International investors’ unfamiliarity with foreign legislations and in most cases a mixture of both, find statutory systems in the “Western” hemisphere more trustworthy and engaging than local legislations in countries such as in the Middle East, West African Muslim Countries and Far East Asia although the concept of Arbitration is very similar in most cases.³

**Principles of Sharia Arbitration**

The principle of any agreement is "Contract” and within it is the independent clause of Arbitration, which the jurists apply in deriving both the structure and content of the dispute clause.

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³ Lovells, Client: *Dispute Resolution in the Middle East: Arbitration and Enforcement, (Lovells 2006)*
Those are the same principles that form the contract law in Sharia, just as they formed the Greek and ancient Egyptian contract law before them and Roman and Civil Law principles of contract law after them.

The construction of Contract Law on the basis of these principles is evidenced in the conditions of substantive law which furnish the criteria between void and valid manifestations in Muslim Law and Sharia jurisprudence and is supposed to be reflected upon the public policy and civil law that oversees the performance of awards in countries adopting Sharia as National Law.⁴

_Tahkim_ (Arbitration) has been practiced in the Middle East since early tribal days and even before days of Islam. Today an Arab, whether Jewish, Christian or Muslim, is conscious of the fact that a case in court is actually a dispute between two adversaries whereas in the case of arbitration it is a dispute between brothers.⁵

This clear distinction makes arbitration harmonize with a Muslim’s psychological makeup which is infused with sentimentalism and which is more at home with a spirit of peace, good will and conciliatory brotherhood⁶.

On the other hand, this differentiation makes arbitration as a method of settling disputes more effective on national soil which provides appropriate surroundings for the acceptance, strengthening and popularizing of this form of dispute resolution and infusing spiritual as well as non-poachable respect for it.⁷

On the other hand it is fair to mention that some philosophies as well as short sighted political views of some national judicial systems, that

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⁴ National Thermal Power v. The Singer Corp., XVIII YB Com. Arb. 403, 1993
⁵ Shaikh Abdullah Bin Khalid Al Khalifa, Bahrain’s former minister of justice and Islamic affairs reflecting on the applicability of arbitration to the Middle Eastern mentality.
⁶ Lovells, _Client Note: Project Dispute Resolution in the Middle East: arbitration and enforcement_, at p. 1 (Lovells 2006).
attempted to help the evolvement of ADR’s nationally, are not necessarily addressing the needs of prospects to arbitration nor are these efforts directly beneficial to uniformity and/or solid solutions to international arbitration.  

Just like any other non-Sharia Arbitration procedure, 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.

**The Arbitrators**

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 rendering the award.

As to the revocability of arbitrators by one of the parties, the Maliki School prohibits revocation after the procedure has started. The Shafei 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 Maleki School, which provides that the appointment of an arbitrator is irrevocable after the

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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.

**So, can the Arbitrator be a woman?**

Omar, the third Khalipha in Islam after Prophet Muhammad, actually appointed a female judge. Today, across the various Muslim countries, there are female judges in almost every Muslim country except in Saudi Arabia. There are about 70 female Iraqi judges, 10 female judges in the UAE, 20 in Egypt female judges and Arbitrators, Nigeria recently appointed the first female Chief Justice in Africa as well as it has one of the largest National Associations of Women Judges; with more in other Muslim Countries including Indonesia and Malaysia.

Given that there is no specific prohibition against a female judge and that most Muslim countries now have female judges, the position that a woman is not allowed to sit as an arbitrator because there were no female judges at the time of the Prophet is somehow illogical.

**Enforceability of Awards under Sharia**

The key difference between arbitration and adjudication is the internationally binding aspect of enforceability of arbitration awards. The guarantee of the enforceability of an arbitral award is the raison d’être for parties to enter into an arbitration agreement. Obstacles lead to risks for parties to a contract who believe that in the event of an unfulfilled contract a just financial remedy compensating them for their losses is enforceable.

To attempt to dispel these notions, many Muslim countries have begun to reform and modernize their arbitration laws and practice. These initiatives have ranged from the adoption of the familiar United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration in the countries of Bahrain, Iran, Jordan, Oman,
Egypt and Tunisia to the adoption of Western arbitration models in Qatar and Lebanon.

In addition, the number of arbitral institutions in the region is growing, allowing for the more effective administration of local arbitrations by experienced personnel backed by recognized rules and modern resources.\(^9\) Well-established organizations such as CIRCICA and DIAC (Dubai International Arbitration Centre) have been supplemented with the recent openings of the International Arbitration and Conciliation Centre in Qatar and the DIFC-LCIA Arbitration Centre in Dubai\(^10\), Cairo Regional Centre for International Commercial Arbitration (CRCICA) in Egypt, RCICAL in Nigeria\(^11\), etc.,

Increased interest in the arbitration conferences and training programs held by these organizations demonstrates the region’s efforts to meet the needs of foreign investors and to conform to the standards of the international arbitration community. For example Bahrain Chamber of Dispute Resolution partnered with the American Arbitration Association to launch the (BCDR-AAA) under the new legislation which guarantees that disputes heard at the BCDR-AAA will not be subject to challenge in Bahrain, provided the parties agree to be bound by the outcome.

These are some of the attempts by Muslim countries to address potential risk and remove current barriers to enforceability of international awards.

Let’s face it, whether a party has obtained an arbitration award in a foreign or domestic arbitration award, in practice, the enforcement procedures under most of the Muslim countries procedural laws are often unpredictable and time-consuming.

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\(^9\) See Jagusch & Kwan, supra note 6.
\(^10\) In 2008 the Dubai International Financial Centre (DIFC) enacted a comprehensive and jurisdictionally inclusive new arbitration law; additionally, the partnership between DIFC and the London Court of International Arbitration creating the DIFC – LCIA Arbitration Centre.
\(^11\) The Regional Centre for International Commercial Arbitration – Lagos (http://www.rcicalagos.org/about.html)
One major difficulty is the interpretation of public policy by Muslim jurists. Harmonisation is the principal way to reduce such risks of unenforceable awards. Conflicts between customary and civil law principles with Sharia need to be addressed and resolved.

The 2004 case of International Bechtel Co. Ltd. v. Department of Civil Aviation of the Government of Dubai serves as a prime example. In Bechtel, an arbitration award rendered in favor of the claimant in Dubai was set aside by the Dubai Court of Cessation, on the ground that the arbitrator had failed to swear witnesses in the manner prescribed by UAE law for court hearings. In the wake of decisions like Bechtel, one UAE practitioner explains, "[t]he fear is that when an arbitration award is issued, it will be struck down by the courts – for one reason or the other."13

How applicable is Sharia?
The question then arises – does the law in an Islamic country ever deviate from the Sharia? The answer is “Yes”, and all the time. Interest rates for example, interest is prohibited in Islam. However, in almost every single Arab country there is a clause in the commercial code that says interest is to be calculated and has been awarded in commercial transactions.

There are judgments from Abu Dhabi’s Court of Cassation, Egyptian Commercial Court and many more, where the law that provides for interest has been challenged on the basis that it is not constitutional and the court refutes it, refusing to apply Sharia as dry Sharia, on the basis that as a judge one is confined to applying the law and therefore interest can be awarded.

13 Sona Nambiar, Common law needed as UAE sees spurt in arbitration, Emirates Business 24/7, September 9, 2009; http://www.zawya.com/story.cfm/sidZAWYA20090909041615/Rise%20In%20Arbitration
Thus although Sharia finds its way into the law, the judge and arbitrators are applying codified law, including issues to which some people object. For example, if one looks at the law in Egypt or Jordan under the law of arbitration, arbitrators will be appointed without reference to religion or gender. It is a dead issue, already determined and today there are no more instances of somebody standing up and disputing whether a female arbitrator can be appointed or not. There is no prohibition in the jurisprudence; except that the arbitrator should have the qualification of a judge (we already discussed the story of Omar appointing a female judge).

The law of the land today determines these issues. Some of the national law is sourced from the original Islamic principles of Sharia and so these principles have become embodied in the law of the country. This means that if you file an application before the courts or arbitral Tribunal in a contemporary Islamic state, where factually, countries like Saudi Arabia, where anything that falls outside Sharia is considered as outside public policy and shall be treated as against religion and tradition upon which public policy and social morals and interests are built, today in modern Arabia, arguments based on some Sharia jurisprudence that existed before may be irrelevant unless the judge is directed to a particular article within the national law.¹⁴

The use of custom in Islam is time honored and as legally binding as it is in customary English common law.”¹⁵

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¹⁴ J. Makdisi, Legal Logic and Equity in Islamic Law. American Journal of Comparative Law, 33
¹⁵ Fortier, C.Y., Forward, in Hunter M., Marriot, A., Veeder, V.V., (Eds), The Internationalisation of International Arbitration LCIA Centenary Conference, Graham & Trotman Limited, at p. vi., “In business, especially, people crave certainty. Certainty demands rules. Rules derive from principles. Practice, as well as reason, has a hand in shaping principles. And commercial practice in a global economy will increasingly tend to reflect conditions concerns and expectations that are common, that is, transnational rather than purely local. This is not to say that particular contexts do not require particular rules.”
In fact, not only is custom honored in English law but it has historically been the essential ingredient to harmonization of Great Britain Laws with its international trading partners. This task was taken over by English Courts and English Judges, creating precedents for harmonisation.

For example, one of the aims of English judges who developed contract law was to make principles of trading law similar to, or at least compatible with laws of other nations with whom England traded with.”¹⁶ Harmonisation requires integrating tools which are naturally and structurally found in Sharia interpretations. Ijtihad (researchable interpretation) as well as public policy customs (Orf)¹⁷ are deeply rooted in the Islamic Jurisprudence code.¹⁸ Analysis of these three tools demonstrates they are common to traditional arbitration practices and are capable of being employed to justify the expansion of arbitral competence and increasing arbitral award enforcement in Sharia applied contracts.

Globalisation cannot be ignored and it existed at the time of the founding of Islam through the spread of Muslim armies halfway into Europe and as far East as China as much as it exists at our present time. Sharia law, if interpreted properly, can provide tools applicable to our modern age and will allow appropriate jurisprudence addressing modern globalisation problems.

Sharia law, to its followers is divinely inspired, and as such, its interpretation is not left to the personal opinion of the jurist or the arbitral tribunal, but rather to interpretation of the reasons behind the rule and how to

¹⁶ De Zylva, Martin Odams and Harrison, Reziya. In the introduction (the Editors), International Commercial Arbitration.
¹⁷ Prominent scholars refer to verse 7:199 in the Quran as the basis for sanctioning Orf.
appropriately apply it. In this context, Sharia is not created but pre-existing and adjudication requires simply using known facts as the starting point from which to draw inferences or conclusions about a Sharia ruling.

**Is the key in Harmonisation only?**

IJtihad needs to continue to be a living part of Islamic jurisprudence and Sharia law. The ability of judges in Islam to extract principles of law from cases by discovering the law which is the same process by which general principles of law have been extracted from cases by precedent in the Common law tradition. However, in reality judges deal only with matters relating to their legal jurisdictions and are only concerned with their own laws; following one code of law that addresses both the procedure of the trial as well as the substance of the dispute.

On the other hand, a single regulatory framework can give rise to a *Unified Arbitration Law*, through a modified UNCITRAL Model law or a completely re-structured module law, if it can incorporate and balance the general principles of law extracted from the three legal systems (Civil, Common and Sharia) and integrate them into a unified code of rules that would ensure best practices and global enforceability of arbitration awards with lower foreign investment risks.\(^\text{19}\)

Only by understanding Sharia principles and its divine value to one or both parties of an agreement, can harmonisation be achieved.

Empowered arbitral tribunals with full jurisdiction to decide on questions of public policy in view of a globally accepted comprehensive model law; would

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\(^\text{19}\) Mary B. Ayad, Fourth International Law Conference on Legal, Security and Privacy Issues in IT Law (LSPI) and the Third International Law and Trade Conference (ILTC), November 3-5, 2009, in Sliema, Malta.
lower risks to foreign investors and increase confidence in International Commercial Arbitration.