



Law of Arbitration

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Content

- Arbitration In Islamic Law

Introduction

- Sulh is a settlement grounded upon compromise negotiated by the disputants themselves or with the help of a third party.
- Islam encourages parties to use sulh in order to resolve their disputes:
- ‘reconciliation between them, and reconciliation is better’ Verse 128 Sura Nisa
- ‘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.’ Verse 9 in Sura AlHujurat

Sulh and Arbitration

Sulh	Arbitration
An amicable settlement may be reached between the parties with or without the involvement of others	the appointment of a third party is indispensable
the agreement of sulh is not binding	Binding
can only be resorted to if the dispute has already occurred	arbitration can address both existing and prospective disputes

Mejelle

- S 1844: ‘should the parties have authorised the arbitrators...to conciliate them, the agreement of the arbitrators is deemed to be a compromise...which the parties must accept’ as if they had compromised themselves’.
- S 1847: ‘if a third party settles a dispute without having been entrusted with this mission by the parties, and if the latter accept his settlement, the award shall be enforced’.

TAHKIM /ARBITRATION

- ✓ **Islamic law allows parties to submit to arbitration to resolve disputes relating to property / private rights matters**
- ✓ **In Quran surah 4:35 and a Hadith narrated by Ibn Hajar:
" They are 2 representatives who can only act upon consent given by the parties..."**
- ✓ **In Malaysia, Hakam is very relevant in Islamic Family Law matters
eg: S.48 of IFLA (FT)**

ROLE OF HAKAM

Hakam should:

- i) act justly in judging disputes between two parties**
- ii) advice disputing parties on the teachings of Islam**
- iii) decide the dispute submitted to him**
- iv) decide the disputes according to law**

WHO IS A HAKAM?

- an authorised person to dispose of rights, to settle differences between different persons by suggesting settlement or helping them to reach it, or by issuing a binding decision to settle the dispute
- ✓ middle man
- ✓ Representative appointed by the court to resolve serious disputes between husband and wife
- ✓ According to Fiqh dictionary, Hakam means person who has been assigned to resolve disputes between spouses

HISTORICAL BACKGROUND

- **In the pre-Islamic era, if there were disputes which led to no result, recourse was normally had to an arbitrator (hakam)**
- **Arbitrator did not belong to a particular caste and parties were free to appoint anyone whom they agreed**
- **An arbitrator was chosen for his personal qualities, reputation and usually belonged to a family famous for their competence in deciding disputes**

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- **An arbitrator were also known for his supernatural powers, commonly found in soothsayers (*kahin*)**
- **Parties had to agree not only on the choice of arbitrator, but also the cause of action which they were to submit to him**
- **If the *kahin* agreed to act, each party had to provide a security (property) as a guarantee**

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that they would abide by his decision

- **The decision of hakam was final but it was not an enforceable judgment (it was only a statement of right on a disputed point)**
- **However, it is said that the arbitral awards of the arbitrators appointed in the *ukaz* (a fair held periodically in Makkah) were customarily binding on disputants**

ARBITRATION

- **A dispute between the sheikhs of Mecca over the placing of a holy black stone**
Between Ali and Mu'awiya
- **Mu'awiya refused to submit to the caliphate of Ali which resulted into the battle of Siffin**
- **During the course of the battle, both parties wished that the matter could be settled through arbitration**
- **Each side nominated its arbitrator, Abu Musa represented Ali, Amar ibn Al-Aas represented Mu'awiya**

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- **The arbitration agreement in the document contained, place of arbitration, applicable law, rules of procedure, provision for the appointment of a substitute arbitrator if the one appointed died**

QUALIFICATIONS OF ARBITRATOR

Generally, he must possess the same qualifications as that of qadi namely:

i) sane and adult

ii) A male (Hanafis allow a woman also to act qadi in matters not involving hadd and qisas)

iii) A Muslim (Hanafis allow a non-Muslim to act as an arbitrator)

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iv) He must be intelligent, free and adil

v) He must be learned in Shariah

vi) Family members (from the husband and wife side)

Who is fit to hold the position?

- Saidina Ali wrote to Malik al Ashtar as under:
- "Select, as your chief judge from the people, one who is by far the best among them - one who is not obsessed with domestic worries, one who cannot be intimidated, one who does not err too often, one who does not turn back from the right path once he finds it, one who is not self-centered or avaricious, one who will not decide before knowing the full facts, one who will weigh with care every attendant doubt and pronounce a clear verdict. after taking everything into full consideration, one who will not grow restive over the arguments of advocates and who will examine with patience every new disclosure of fact and who will be strictly impartial in his decision, one whom flattery cannot mislead, one who does not exult over his position. But such people are scarce".

COMPARISON

Subject	English law	Islamic law
Nature of arbitration agreement	S.9(3) Arb. Act 2005 – it shall be in writing	Oral agreements are valid but preferable to be in writing
	Reference to present and future dispute	Future dispute cannot form part of arbitration agreement – uncertainty

Subject	English law	Islamic Law
Arbitration agreement – binding /non binding	Binding	Can be revoked up to the time the arbitrator has given his award/appointment has been confirmed
Qualifications of arbitrator	Freedom to the parties to choose	Must possess the same qualifications as qadi