

THE INSTITUTION OF ARBITRATION IN ISLAM

THE INSTITUTION OF ARBITRATION IN ISLAM

THE INSTITUTION OF ARBITRATION IN ISLAM

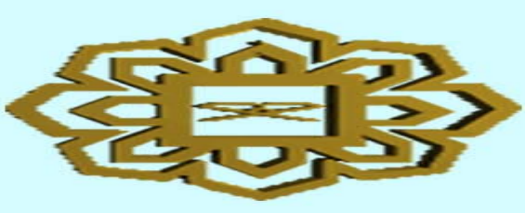
THE INSTITUTION OF ARBITRATION IN ISLAM

THE INSTITUTION OF ARBITRATION IN ISLAM

THE INSTITUTION OF ARBITRATION IN ISLAM

DECLARATION OF AUTHOR'S RIGHTS

The copyright of this thesis belongs to the author under the terms of the Copyright Act, 1987 (Act 332) Due acknowledgement must always be made of the use of any material contained in, or derived from this thesis.



International Islamic University

Kulliyah Of Laws

M.C.L. PROGRAMME (1989/1991)

Name : Abdul Razak Ibrahim
Matric No : 99155
Professor : Dr. Mohd. Zain Hj. Othman
Subject : Law of obligations
TOPIC : THE INSTITUTION OF ARBITRATION IN ISLAM

A Dissertation Presented to
The Kulliyah of Laws
International Islamic University Malaysia
In Fulfilment for the
Degree of Master of Comparative Law

DONATED TO THE LIBRARY OF
INTERNATIONAL ISLAMIC UNIVERSITY
BY

KULLIYAH OF LAWS

101.

Date Received : 28/1/92

THE INSTITUTION OF ARBITRATION IN ISLAM

TABLE OF CONTENTS

TOPIC	PAGES
1. Introduction	1
2. The Pre-Islam Period	2
3. Definition of Arbitration	5
4. Sources of Arbitration	7
5. The Scope of Arbitration	25
6. The Concept of Arbitration	29
7. Arbitration in the four schools of laws	31
8. Competency to enter into Arbitration Agreement	33
9. Capacity to enter into Arbitration Agreement	34
10. Qualifications of Arbitrators	54
11. The Appointment of Arbitrators	60
12. Formal requirement	61
13. Number of Arbitrators	63
14. Remuneration	64
15. Termination of Office	66
16. Agreement to Arbitrate	70
17. The Modern Tendency Of The Fiqh	72
18. Arbitration Clause	74
19. The Validity Of Arbitration Clause	77
20. Further views on "Condition" in Contract	84
21. Summary of views of scholars on validity of Arbitration Clause	106

22.	The proceedings	108
24.	Compromise by arbitrator under the Majalla	112
25.	Rules of Evidence and Courts Procedure	113
26.	Types of Evidence	117
27.	Basic Principles of a Fair Trial	122
28.	Qadis Intervention	125
29.	The Award	127
30.	Enforceable Effects of The Award	128
31.	Conclusion	130
32.	Bibliography	132

The Institution of Arbitration in Islam

1. Introduction

The process of arbitration in the Arab world, the birth place of Islam can be traced to ancient tribal origins. Arbitration is recognized and favoured in the Holy Quran although the Quranic concept of the process is closer to what non-Muslim lawyers would call "conciliation" (1). The validity of arbitration has been recognised and sanctioned by the Quran itself. The main Quranic verses in support of conciliation particularly and arbitration generally are ayat (verses) 9 and 10 of Surah al-Hujarat (49) which contain the famous maxim of *faslahu baina ekhvikum* (make peace between your brethren).

"If two parties among believers fall into a dispute, effect reconciliation between them; and when that party complies, reconcile them with justice and equity; verily God loves those who act with equity." (2)

Verily believers are brethren; so reconcile between your brethren; and fear God so that you get His mercy." (3)

The Quran and Sunna contain few provisions for the administration of justice and arbitration. The main stress is

(1) Gordon Jaynes - Settlement of Disputes Through Arbitration - Arab Comparative & Commercial Law - Vol. I - Graham & Trotman.

(2) Quran, Surah al-Hujarat (49) ayat (Verse) 9.

(3) Quran, Surah al-Hujarat (49) ayat (Verse) 10.

laid on conciliation, its virtues and some procedural aspects. It is hoped that this short article is able to give some insight into the doctrine of arbitration in Islam.

2. The Pre-Islam Period

Life in the desert was based on the system of personal vengeance and there was no central power which maintained order and could protect the rights of individual. The predominant opinion in the clan prevailed and the tribal order was used as a reference. Tribal justice was administered by the chief of a tribe in a shape adapted to their elementary way of life. The Arabs of the Jahiliya (pre-Islam period) also knew arbitration. The adversaries be they individuals or tribes usually settled their disputes by way of arbitration. The arbitration was decided by an agreement in which the object of the dispute as well as the name of the arbitrator or the scholar in charge of settling the dispute was appointed. Some of the well known arbitrators of these times were Akhtam Ben Saifi, Hajeb Ben Zarara, Al-Akra' Ben Habess, Rabiha Ben Makhachen, Amer Ben Al-Zanb, Al Aduani, Ghilan Ben Salma, Abdel Muttaleb Ben Hachem (4)

(4) Bulugh Al Arb (Vol. 1), Al-Midani (Vol. 1) and Al-Aghani Vol. (3) referred to by Abdul Hamid El-Ahdab in his paper entitled "The Muslim Arbitration Law" in Arab Comparative & Commercial Law - Graham & Trotman.

Arbitration was optional and left to the free choice of the parties. Arbitral awards were not legally binding. For this reason certain arbitrators required undertakings on the part of the parties in order to be sure that their award would be accepted and enforced. (5)

However in important occasions it was institutionalised with some formal characteristics. For example the awards of arbitrators appointed in the Ukaz (a fair/market place periodically held in Mecca) were customarily binding on disputants and customers. (6)

The arbitral proceedings were simple and rudimentary. However, the arbitrators deemed that a hearing of the parties was a necessary condition for the validity of the arbitration. They also deemed that each claim should be proved because the rule was the absence of obligation. Thus according to one of these arbitrators (7), the claimant must prove his claim and he who denies it must swear an oath (8). These rules were later

(5) Bulugh Al-Arb (Vol.1) Al-Aghani (Vol.2) referred to by Abdul Hamid El-Ahdab in Arab Comparative & Commercial Law - Graham & Trotman.

(6) Sayed Hassan Amin, Commercial Arbitration In Islamic And Irassian Law, Tehran, Valid Publications.

(7) Qass Ben Saida Al Ayadi referred to by Abalul Hamid El-Ahdab (supra).

(8) Al-Midani (Vol.1. p. 99) referred to by Abdul Hamid El-Ahdab (supra)

adopted by the Shari'a (9) and they are also to be found in numerous contemporary laws. The claimant must bring the proof of his claim but should he fail in bringing the proof, he may request the defendant to take oath that the claim is not true. This oath had a particular importance in the solution of disputes. Thus it was often made before the most important idol called "HABAL" which was suspended from the Qaaba. Many priests were also arbitrators in the pre-Islam era.(10).

After the rise of Islam, while the self-help system of private justice based on taqas and qisas was preserved, the Prophet of Islam (s.a.w.) disapproved of the Arabian traditional practices and procedures of tribal arbitration which had prevailed in the pre-Islamic era. Instead, the Prophet (s.a.w.) positively favoured judicial hearing by himself as the sole religious authority with universal jurisdiction.

The Quranic as well as the Prophetic references to arbitration were aimed principally at diminishing the authority of the pagan arbitrators, usually the "KAHIN" or priest of the pagan cult, who customarily acted as arbitrators. They were basically disapproved of in the Islamic era because

(9) Article 76, Medjella.

(10) As/ - Sayuti: Libab An-Nuqul Fi Ahab An Nuzul - Cited by Abdul Hamid El-Ahdab - (Supra).

they claimed supernatural powers of divination. As such those verses of the Quran which denounce the arbitral system are aimed at establishing the Prophet (s.a.w.) as the Supreme judicial authority solely qualified to interpret and explain the meaning of divine revelation (11).

3. Definition of Arbitration

It is beneficial to consider the various definitions as appended below to obtain a further insight into the subject.

Article 1790 of the Majalla defines arbitration as the voluntary submission by two litigating parties of their disputes and claims to determination by a qualified person.(12)

Arbitration is the submission by two or more parties to a third party of a dispute to be adjudicated according to Sharia. (13)

Arbitration is described in sharia texts as the spontaneous and more or less improvised, move by two or more parties in dispute to submit their case to a third party called a "hakam" or "Muhakkam" (arbitrator). The arbitrator is an ordinary man, but is required to possess all the qualifications

(11) Coulson, N.A. History of Islamic Law, Edinburgh.

(12) Majella, Translated by C.R. Tyser.

(13) M.S. Madkur, Al-Qada (cited by Samir Saleh in Commercial Arbitration in the Arab Middle East - Graham & Trotman.

of a qadi (judge). The dispute is to be determined according to Sharia both in procedure and in substance, whether or not the dispute is extra judicial or already pending before the Courts. The whole procedure is called "tankim". (14)

Syed Hassan Amin defines Arbitration in accordance with the Shi'i school of Islamic law as a voluntary procedure whereby a neutral qualified jurist is chosen in a case by opposing parties to settle their dispute according to Islamic Law. In this way, arbitration is defined in Shi'i school in the same way as by the Sunni schools that is to say, it is an agreement by the disputants to appoint a qualified person to settle their dispute by reference to Islamic law.(15)

The chosen arbitrator has a severely restricted jurisdiction in contract to the broad jurisdiction of the qadi (judge). The arbitrator is called qadi al-tahkim (arbitration judge) or qadi khas (private judge). This is the universal terminology in Arabic texts for both Sunni and Shi'i schools. The description of the arbitrator as a judge in both these terms indicates that he disposes of the case according to the same principles as an Islamic Judge.

(14) Samir Saleh - Commercial Arbitration in the Arab Middle East - Graham & Trotman.

(15) Al-Zuhaili, Wahba, al-fiqh va adillatuh (Islamic Law and its sources) Damascus: Dar-al-Fikr 1984 Vol. 6.

4. Sources of Arbitration

A. The Qur'an

The verses of the Quran relating to arbitration do not contain anything more than general prescriptions. The primary purpose of the Quran is to lay down in broad terms a way of life regulating the relationship of man with man and his relationship with God. The Quran is not a detailed book of law (16). The verses of the Quran can be summed in six points:

(i) The desirability of conciliation between husband and wife through arbitrators appointed from among their respective families:

(a) And if you fear a breach between them (husband and wife), send an arbitrator out of his family and an arbitrator out of her family; if they shall desire a conciliation, God will cause them to agree. (17)

(b) "If a wife fears, cruelty or desertion, On her husband's part, There is no blame on them, If they arrange, An amicable settlement, Between themselves; And such settlement is best: (17a)

(16) Samir Saleh - Commercial Arbitration in the Arab Middle East - Graham & Trotman.

(17) Quran, Surah 5, Nisa - Ayat 35.

(17a) Quran, Surah an Nisa - 4, Ayat 128.

(ii) The reference of disputes to the Prophet as a sign of faith and guarantee of acquiescence:

(b) "O true believers, obey God and obey the Apostle and those who are in authority among you; and if you differ in anything, refer it unto God and the Apostle, if you believe in God and the last day: this is best and fairer determination." (18)

(iii) The reference of disputes to the Prophet as a sign of faith and guarantee of acquiescence:

(a) "And by the Lord they will not have real faith until they make you judge (arbitrate) their disputes and shall not afterwards find in their own minds any resistance against what you shall determine, but shall acquiesce with submission. (19).

(iv) The necessity to judge (or arbitrate) according to the provisions of the Quran.

(a) "We have sent you down the Book (The Quran) in truth, that you may judge (arbitrate) between men as guided by God. (20)"

(18) Quran IV, Surah an-Nisaa - ayat 58.

(19) Quran IV, Surah an-Nisaa - ayat 65.

(20) Quran IV, Surah an-Nisaa - ayat 105.

(b) "So judge (arbitrate) what God has revealed and follow not their vain desires." (21)

(v) The necessity of observing strict neutrality even when relatives are involved in a dispute.

And when you pronounce (judgment) pronounce with justice even if a near relation is concerned, and fulfil the covenant of God. (22).

(a) "Allah doth command you
To render back your Trusts
To those to whom they are due;
And when ye judge
between man and man,
That ye judge with justice:
Verily how excellent
Is the teaching which He giveth you!
For Allah Is He Who heareth
And seeth all things." (23)

(iv) The option for an arbitrator to decline to arbitrate, but if he accepts office, the duty to arbitrate with due observance of the rules of fairness and justice.

(21) Quran V. 51.

(22) Quran VI - Surah al-Anam - Ayat 152.

(23) Quran IV - Surah An-Nisaa, ayat 58.

(a) "But if they come to you, either judge (arbitrate) between them or decline: and if you decline they shall not hurt you at all. But if you judge (arbitrate), judge between them with equity; for God loves those who judge with equity. (24)"

(vii) Secrecy is permissible in a delicate question of conciliating parties to a quarrel:

"In most of their secret talks
There is no good: but if
One exhorts to a deed
of charity or justice
or Conciliation between men,
(Secrecy is permissible);
To him who does this,
Seeking the good pleasure
of God, We shall soon give
a reward of the highest (value) (25)

(viii) There should be perfect fairness and justice in attempt to restore peace between quarrelling groups of believers.

(24) Quran V, Surah al-Maida - Ayat 42.

(25) Quran - Surah an-Nisa - 4: Ayat 114.

(a) "If two parties among
The Believers fall unto
A quarrel, make ye peace
Between them: But if
One of them transgresses
Beyond bounds against the other,
Then fight ye (all) against
The one that transgresses
Until it complies with
The Command of God;
But if it complies, then
Make peace between them
With justice, and be fair:
For God loves those
who are fair (and just)" (26)

(b) "The Believers are but
A single Brotherhood:
So make peace and
Reconciliation between your
two (contending) brothers;
And fear God, that ye
May receive Mercy. (27)

(26) Quran - Surah al-Hujurat 49: Ayat 9.

(27) Quran - Surah al-Hujurat 49: Ayat 10.

(B) The Sunna

(1) The Prophet (s.a.w.) himself was a practitioner of arbitration and he often acted as arbitrator between individuals and tribes to settle their ongoing disputes. By way of example, the Prophet (s.a.w.) when still in Mecca was invited by the people of Yathrib (later called Madina) to act as arbitrator in the feuds of two large Arab tribes of Aws and Khazraj with three Jewish clans. Disunity and conflict was a feature of the political life in pre-Islamic Medina. Two leading tribes of Aws and Khazraj were each other's rival, and a number of Jewish tribes holding the balance of power (28).

(2) Later on and after the Islamic State was established as an independent religious and political Muslim community in Medina, the Prophet went to arbitration against the Bani Quraiza Jewish tribe. By an earlier peace treaty, Muslim and Jewish communities had undertaken to join their military forces whenever either party was attacked by an enemy. However, in the Battle of Ahzab, the Bani Quraiza tribe did not honour their treaty obligation. After the Muslims overpowered their enemy, they attacked their previous ally. Bani Quraiza requested that the case should be arbitrated under customary law (non-Islamic law)

(28) Sayed Hassan Amin - Commercial Arbitration In Islamic And Iranian Law, pp. 50 & 51.

accepting Sa'ad ibn Mu'az as arbitrator. The arbitrator found that all male Jews in the tribe should be executed and all the females be taken as slaves. Only one single Jew by the name of Tubair was saved at the request of Sabit ibn Qais al-Insari. (29)

(3) The companion of the Prophet unanimously recognised its validity.

Following a dispute amongst them, the Caliph of the Muslims namely Omar Ben El Khattab and an ordinary man by the name of Abi Ben Kaab chose to have their dispute arbitrated by an arbitrator by the name of Zaid Ben Thabet and went to see him. When they arrived, the arbitrator, very astonished, came to greet them and asked the Caliph why he had not requested him to come to the Caliph instead the Caliph coming to him. The Caliph replied to this, that one must go to the arbitrator to consult him. The arbitrator then invited them to enter and offered a cushion to the Caliph. However, the latter refused it and said that this was the first act of bias on the part of the arbitrator.

From the foregoing it is to be deduced that the arbitrator was requested to behave like a judge in strict neutrality. The offer of a cushion to the Caliph

(29) Ibid.

constituted indeed an injustice during one stage of the proceedings.

(C) Some of the supportive sayings the Prophet (s.a.w.) as found in The Book of Peacemaking (or Reconciliation) Arabic-English Translation of Sahih Al-Bukhari Volume 3, by Dr. Muhammad Muhsin Khan are reproduced below:

(1) The Prophet Muhammad's continuous efforts to conciliate between litigants and the swift procedure of conciliation reported to have been established by Him between creditors and debtors; He is reported to have cut the claim of a creditor in half in order to reach a rapid settlement. (30)

(a) Narrated Sahih bin saad; Once the people of Quba' fought with each other till they threw stones on each other. When Allah's Apostle (s.a.w.) was informed about it, he said, "Let us go to bring about a reconciliation between them." (31)

(b) Narrated Abdullah bin Ka'b bin Malik from Ka'b bin Malik: Abdullah bin Abu Hadrat Al-Islami owed Ka'b bin Malik some money. One day the latter met the former and demanded his right, and their

(30) Samir Saleh - Commercial Arbitration In the Arab Middle East

(31) Sahih Al-Bukhari, Volume 3, Arabic-English By D. Muhammad Muhsin Khan

voices grew very loud. The Prophet (s.a.w.) passed by them and said, "O Ka'b," beckoning with his hand as if intending to say, "Deduct half the debts." So, Ka'b took half what the other owed him and remitted the other half. (32)

(2) He who makes peace between the people is not a liar.

(b) Narrated Umu Kulthum bint Uqba that she heard Allah's Apostle (s.a.w.) saying, "He who makes peace between the people by inventing good information or saying good things is not a liar." (33)

(3) Reconciliation on illegal basis are rejected.

(a) Narrated Aisha:

Allah's Apostle (s.a.w.) said, "If somebody innovates something which is not in our religion, that thing is rejected. (34)

(b) Narrated Abu Huraira and Zaid bin Khalid Al-Juhari: A bedouin came and said, "O Allah's Apostle! Judge between us according to Allah's Laws." His opponent got up and said, "He is

(32) Ibid.

(33) Ibid.

(34) Sahih Al-Bukhari - Vol. 3 - English Translation by Dr. Muhd. Muhsin Khan. 534.

right. Judge between us according to Allah's Laws." The bedouin said, "My son was a labourer working for this man, and he committed illegal sexual intercourse with his wife. The people told me that my son should be stoned to death; so in lieu of that, I paid a ransom of one hundred sheep and a slave girl to save my son. Then I asked the learned scholars, who said, "Your son has to be lashed one-hundred lashes and has to be exiled for one year."

The Prophet (s.a.w.) said, "No doubt, I will judge between you according to Allah's Laws. The slave girl and the sheep are to go back to you, and your son will get a hundred lashes and one year exile." He then addressed somebody, "O Unais! Go to the wife of this man and stone her to death." So Unais went and stoned her to death. (35)

(4) The superiority of making peace and establishing justice among the people.

(a) Narrated Abu Huraira (R.A.A.):

Allah's Apostle (s.a.w.) said, "There is a sadaqa to be given for every joint of the human body;

(35) Ibid.

and for every day on which the sun rises there is a reward of a sadaqa for the one who establishes justice among people. (36)

(5) If the Imam (i.e. the ruler) suggests a reconciliation but the defendant refuses it, he is to be judged by the evident valid law.

(a) Narrated 'Urwa bin Az-Zubair (r.a.a.): Az-Zubair told me that he quarrelled with an Ansari man who had participated in the battle of Badr in front of Allah's Apostle (s.a.w.) about a water stream which both of them used for irrigation. Allah's Apostle (s.a.w.) said to Az-Zubair, "O Zubair! Irrigate your garden first, and then let the water flow to your neighbour." The Ansari became angry and said, "O Allah's Apostle! It is because he is your cousin?" On that the complexion of Allah's Apostle (s.a.w.) changed (because of anger) and said to Az-Zubair, "Irrigate your garden and then withhold the water till it reaches the walls surrounding the palms. So Allah's Apostle (s.a.w.) gave Az-Zubair his full right. Before that Allah's Apostle (s.a.w.) had given a generous judgment beneficial for Az-

(36) Ibid.

Zubair And the Ansari, but when the Ansari irritated Allah's Apostle (s.a.w.) he gave Az-Zubair his full right according to the evident law. (37)

(6) Peace treaty with the people of Hudaibiya

(a) Narrated Al-Bara' bin Azib (r.h.a.): When Allah's Apostle (s.a.w.) concluded a peace treaty with the people of Hudaibiya, Ali bin Abu Talib (r.h.a.) wrote the document and he mentioned in it, "Muhammad, Allah's Apostle (s.a.w.)." The pagans said, "Don't write: "Muhammad Allah's Apostle," for if you were an Apostle we would not fight with you." Allah's Apostle (s.a.w.) asked Ali to rub it out, but Ali said, "I will not be the person to rub it out." Allah Apostle (s.a.w.) rubbed it out and made peace with them on the condition that the Prophet (s.a.w.) and his companions would enter Mecca and stay there for three days and that they would enter with their weapons in cases.

(38)

Samir Saleh summarised the commonly cited references in the sunna under seven categories:

(i) The distaste of the Prophet for endless litigation especially litigation of a verbose nature.

(37) Sahih Al-Bukhari, Vol. 3 - English Translation by Dr. Muhsin.

(38) Ibid.

- (ii) The Prophet Muhammad's (s.a.w.) continuous to conciliate between litigants and the swift procedure of conciliation reported to have been established by Him between creditors and debtors.
 - (iii) The stringent sanctions which would befall a litigant who did not abide by the rulings of the Prophet acting as conciliator.
 - (iv) The determination of disputes according to the rules of the Quran with no room for innovation.
 - (v) The repeated requirement that recourse should be had to the Prophet (s.a.w.) as judge (arbitrator) as a sign of faith.
 - (vi) The remuneration of the judge (arbitrator) is authorised so long as it is not excessive.
 - (vii) Finally, an important aspect of the Prophet's realistic and transcendental views on litigation (valid for arbitration) is worth quoting: "I am only a man and when you come pleading before me it may happen that one of you might be more eloquent in his pleadings, and that as a result I adjudicate in his favour according to his speech. If it so happens and I give an advantage to one
-
- (39) Samir Saleh - Commercial Arbitration In The Arab Middle East.