by Prophet Muhammad and his companions, arbitration was a successful and flexible dispute settlement mechanism. Arbitration at that time can be divided into two main sections: general arbitration and arbitration in political disputes.[41] The general arbitration did not lose the voluntary character that it had during the pre-Islamic age; even Prophet Muhammad preferred to resolve disputes by proposing an amicable settlement (*sulh*) rather than by imposing a judgment on unwilling parties; however, a decision can be imposed if the parties do not accept the proposed settlement. This latter type of dispute settlement has been reported in the following Hadeeth:

> An Ansari man quarrelled with Azzubair in the presence of the Prophet about the Harrah Canals which were used for irrigating the date-palms. The Ansari man said to Azzubair, "Let the water pass", but Azzubair refused to do so. So, the case was brought before the Prophet who said to Azzubair, "O′ Zubair! Irrigate (your land) and then let the water pass to your neighbour." On that the Ansari got angry and said to the Prophet, "Is it because he [i.e., Zubair] is your cousin?" On that the colour of the face of Prophet changed (because of anger) and he said, "O′ Zubair! Irrigate (your land) and then withhold the water till it reaches the walls between the pits round the trees." Zubair said, "By Allah, I think that the following verse was revealed on this incident: But no, by your Lord they can have No faith until they make you judge in all disputes between them."[42]

Arbitration in war had a different character and applied in different circumstances from modern arbitration. It referred to the settlement of political and military disputes inside and outside the territory of the state, between the state and other states, or between the state and individuals who have military power. Shortly after the foundation of Islam, the treaty of Medina of AD 662, which was a security pact among the city's Muslims, non-Muslim Arabs and Jews, included an arbitration clause. The clause provided that in the case of a dispute between the inhabitants of the city with regard to a political matter, the dispute should be settled through arbitration by Prophet Muhammad personally or, subject to the approval of the parties, by an arbitrator appointed by Prophet Muhammad.[43] In accordance with the treaty of Medina, Prophet Muhammad resorted to arbitration in his dispute with the Jewish tribe Banu Qurayza.[44] With regard to that incident, the Jews agreed to name Muhammad as a sole arbitrator on the condition that he referred the decision of the case to another Muslim named Sa′ad ibn Moazz, who had once been an ally of the Jews. Even after Sa′ad rendered his decision, Muhammad formally ratified

41 Supra n. 28, Saleh, p. 17.

42 Supra n. 37, Albukhari, Chapter 40, No. 548.

43 Supra n. 7, Ibn Hisham, 'The Treaty of Medina'.

44 C. Brower and J. Sharpe, 'International Commercial Arbitration and the Islamic World: The Third Phase', *American Journal of International Law*, 97 (2003), pp. 643–56.

it, saying that it was in accordance with his own opinion.[45] The procedure of the latter case was described by Sayen (1987) as follows:

> This is evidence that if the parties submit to the judgment of a certain man and he refers judgment to a third person with their acceptance, then that is lawful. He should not refer judgment to third persons without their acceptance because Sa′ad, between the arms of the Prophet, took from them the oath that they would accept his judgement, and the prophet did not object to that. This is because people have different opinion regarding the law and this is a judgment that requires an opinion. So their acceptance for the judgement of one person is not acceptance of the judgment of another, and if he refers judgment to some one else without their consent and he judges in a certain way, then that judgment should not be enforced unless the first hakam approves it after he learns of it. Then it should be enforced because his approval gives it the same status as if he made it himself and because the judgment was in accordance with his opinion and they had accepted that.[46]

As mentioned above in the case of family dispute arbitration, the two appointed arbitrators have to agree on the judgment. This method was used in the well-known incident of *Tahkeem*, between Ali the fourth Caliphate and Mu′awiyah the governor of Syria in the year AD 659. This arbitration was an effort to stop the civil war that erupted as an impact of the assassination of the third Islamic Caliphate Othman, lasting for more than two years. The dispute was submitted to arbitration by written agreement; 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 issuing the award.[47] The arbitrators had been given full power to determine the dispute; however, the provision of the applicable law provided that the decision should be based on the Quran and the Sunna. The two arbitrators agreed in private that both claimants be deposed and a new Caliphate be chosen by a general election. Ali's arbitrator announced the decision first; however, when Mu′awiyah's arbitrator followed, he said that he agreed that Ali should be deposed but affirmed Mu′awiyah's claim to the Caliphate.[48] The award was easily set aside on the grounds of violating the Quran and the Sunna.

The above incident shows the main features of a political arbitration during the first few decades of the life of Islam. When looking at the story, as narrated by different historians, in comparison with modern arbitration agreements, it can be said that both agreements share many characteristics:

45 See, generally, supra n. 40, Sayen.
46 Ibid.
47 Supra n. 2, Alqurashi.
48 Supra n. 40, Sayen, p. 229.

- defining the disputing parties precisely by name, place of residence and occupation;
- identifying the precise issue of the dispute;
- including the choice of the arbitrator(s);
- taking the form of a written contract;
- determining a deadline for issuing the final award;
- determining the applicable law in the arbitration proceedings;
- determining the seat of the arbitration;
- defining the supervisory authority;
- determining the authority responsible for the execution of the final award; and
- determining the terms of reference of the arbitral tribunal.

A few decades after this incident, Islamic jurisprudence started to develop through the understanding of Shari′a texts covering various areas of law. Arbitration received a good deal of attention as a supplementary mechanism to the official litigation, as will be seen later on. The questions of what Islamic jurisprudence is and how it evolved and developed, as well as the question of whether it can accommodate modern commercial practices, will be answered in the following chapter before proceeding to examine arbitration rules under the different schools of jurisprudence.

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Chapter 3
Arbitration in the Fully Developed Islamic Law

By the end of the ninth century, fiqh and Sunna literature started to develop and take the form that we have nowadays. Scholars realized the importance of arbitration as an alternative for litigation and an essential step in the procedure of solving family disputes. This chapter analyses the arbitration rules under Shari′a as the base for the current arbitration rules in Saudi Arabia and many other Muslim countries. The chapter will start by showing the difference between arbitration and litigation. After that arbitration will be defined and then the chapter will compare the arbitration rules under the four schools of fiqh. The comparison will cover most of the important aspects of arbitration under Shari′a, from the arbitration agreement to the enforcement of the final arbitral award.

The Difference between Arbitration and Litigation

The Islamic law of arbitration regulates all arbitration proceedings. Some scholars do not distinguish between arbitration and litigation at all, describing arbitration as litigation, while others give arbitration many of the features of litigation, as will be seen below. Before examining arbitration regulation under classical Islamic law, the difference between arbitration and litigation should be clarified. According to different fiqh sources, there are six main differences between arbitration and litigation, which are as follows:

- Unlike litigation, the submission of a case to arbitration needs the disputants' acceptance.[1]
- The arbitrator's jurisdiction does not exceed to any issue other than the stipulated case in the arbitration agreement. Meanwhile, the judge has the authority to adjudicate in any case brought before him without the requirement of a prior agreement.[2]
- An arbitrator has no authority to make an injunction on any party other than the parties to the dispute.

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1 Z. Ibn Nujaim, *Albahr Alraeq Sharh Kanz Aldaqaek* (2nd edn., Dar Alma′refah, 1993), Vol. 7, p. 27.

2 M. Alatasi, *Sharh Almjallah* (1st edn., Maktabah Haqqaniyah, 1949), article 1842.

- An arbitral award against a guardian of an incapacitated person is not valid if it provides for any damage against his interest unless approved by a judge.
- Unlike a judge, an arbitrator has the authority to deal with disputes even if one of the parties domiciles in another country.
- Unlike court judgments, arbitral awards can be enforced extraterritorially.[3]

The Differences between Judge and Arbitrator

There are some differences between a judge and an arbitrator, even in the opinions of the scholars who consider arbitration as a form of litigation, give arbitrators the same authority as court judges and give the arbitral award the same power as a court decision. First of all, an arbitrator does not have immunity; if it is proved that he is corrupt, he will be punished like any ordinary man. An arbitrator's witness summons is not compulsory and witnesses are not obliged to attend. This is explained by some classical jurists as follows: 'An arbitrator cannot force someone to attend the hearing either as a witness, expert or as a party to the dispute.'

An arbitrator does not have the authority to imprison anyone, because that would encroach on the competence of the court. An arbitrator cannot refer the dispute to another arbitrator without the approval of all the parties to the dispute. An arbitrator does not have the power to enforce an award and his duty ends by issuing the final arbitral award. Finally, an arbitrator cannot change his decision after issuing the award; if he does, the latter award is void.[4]

Definition of Arbitration

Although arbitration is recognized by all sources of Shari′a, it does not receive exclusive attention in the treatises and doctrinal literature of the four schools of fiqh, for the reason that many scholars deal with arbitration as a branch of litigation. Reference to arbitration is often made in chapters dealing with the administration of justice 'Al-Qada'. This might also be owing to the fact that the Islamic judiciary was sufficient and flexible enough to provide suitable solutions to all types of problems arising from social life during that time.[5] There are many different definitions for arbitration under the Islamic fiqh; each definition gives arbitration a different scope and even a different nature from the others. It is difficult to find a comprehensive definition for arbitration in the classical Shari′a texts, as each school defines it in accordance with the scope that it gives to arbitration. The Hanafi school defines arbitration as the process of choosing a person to settle a dispute. The Maliki school refers to arbitration in a fairly specified manner, defining it as

3 Ibid., p. 28.

4 M. Ibn Qodamah, *Almoghni* (1st edn., Hajar Publications, 1992), Vol. 14.

5 Y. Al-Samaan, *The Legal Protection of Foreign Investment in The Kingdom of Saudi Arabia* (1st edn., Dar Alandalus for Publication and Distribution, 2000), p. 248.

the process of choosing a person to settle a dispute between two or more parties. Arbitration requires both parties to agree on the arbitrator and the decision taken by the arbitrator.[6] The Shafi′e school defines it differently and does not put restrictions on the choice of arbitrator. Their definition reads as follows: 'Arbitration is the process of choosing a person among the community to judge between disputants and settle their differences.'[7] The Hanbali school defines arbitration as choosing an individual for the purpose of settling a dispute between two other parties and enforcing the judgment on them.[8]

When looking at the above-quoted definitions, we can see that the four schools define arbitration in very similar ways. It can also be seen that arbitration under Shari′a is not restricted to commercial disputes, as scholars leave room for arbitration to encompass almost all kinds of disputes. At a later stage, arbitration has been described as a spontaneous, and more or less ad hoc, move by two or more parties to a dispute to submit their case to a third party called hakam or muhakkem (arbitrator). The most comprehensive definition formulated by a modern author is: 'Arbitration is the submission by two or more parties to a third party of a dispute to be adjudicated according to Shari′a.'[9]

The Legal Status of Arbitration under Shari′a

As a general rule, the arbitrator is an ordinary man; however, the conflict here is about whether the arbitrator is required to possess all the qualifications of a judge, 'qadi', or not. The disagreement regarding the latter point led to arbitration having a different scope and characteristics. Moreover, scholars from different schools disputed over arbitration, whether it is litigation, agency, a combination of both, or a conciliation of the four main opinions, which are:

- Arbitration is litigation. This opinion was reported by the Malikies, some Shafi′es and the Hanbalies. They justified that the arbitrator adjudicates on the dispute and that is litigation. The Hanbalies added that the arbitral award is a binding judgment on all the parties.[10]
- Arbitration is an agency contract. This opinion has been reported by some Malikies. They added that the arbitrator is a private judge in a specified

6 B. Ibn Farhoun, *Tabsirat Alhokkam Fe Usul Alaqdiyah Wa Manahej Alahkam*, ed. Taha Abdulraouf Sa′ad (1st edn., Maktabat Alkolliyat Alazhariyah, 1986), Vol. 1, p. 43.

7 A. Almawardi, *Adab Alqadi* (4th edn., Dar Alani Liltiba'a Publishers, 1972), Vol. 2, p. 379.

8 Supra n. 4, Ibn Qodamah, Vol. 11, p. 843.

9 S. Saleh, *Commercial Arbitration in the Arab Middle East: Shari'a, Syria, Lebanon and Egypt* (2nd edn., Heart Publishing, 2006), p. 20.

10 Supra n. 4, Ibn Qodamah, Vol. 11, p. 484.

dispute and so needs the disputants' approval and acceptance in order to render a valid judgment.[11]

- Arbitration is conciliation. According to the Hanafies, arbitrators are appointed with the disputants' acceptance and each party can decline and deny the arbitration before the issuance of the award, exactly like conciliation.[12]
- Arbitration is a combination of litigation and agency. This is one of the Hanafies' opinions. They justified that arbitrators act on behalf of the parties and so are agents; on the other hand, the award is binding, so it is litigation.[13] This opinion is contrary to the doctrine of the impartiality of arbitrators, for the reason that arbitrators are appointed to give a fair judgment, not to act on behalf of the parties.

From these definitions, we can see that there are five main elements in any arbitration agreement under Shari′a, which are:

- the disputants, whether they are legal or natural persons with clear intentions and the full capacity to enter into the arbitration agreement;
- the arbitration agreement;
- a dispute;
- arbitrator(s); and
- applicable law.

Following the above opinions, some Hanafies emphasize the contractual nature of arbitration and compare it to contracts of agency (*wakalah*). In other words, they assume that an arbitrator acts as an agent on behalf of the disputants who appoint him. They also stress the close connection between arbitration and conciliation (*sulh*). Accordingly, an arbitral award, which is closer to conciliation than a court judgment, is of a lesser force than a court judgment, but the losing party is obligated to abide by the award because the arbitration agreement binds the parties like any other contract.

One of the interesting facts about arbitration under the Hanafi teachings is the mechanism of issuing the award. The award must be rendered unanimously, otherwise every arbitrator would be considered to have made his award separately. This would be inconsistent with the will of the disputing parties to have an award decided by the arbitrators together.[14] Under article 1847 of the Majalla, a disputant may revoke the appointment of an arbitrator at any time before the issuance of the final arbitral award, unless the appointment of the arbitrator is confirmed by a judge, because in this case the arbitrator would be regarded as the judge's representative

11 Ibid.
12 Supra n. 1, Ibn Nujaim, pp. 19–20.
13 Supra n. 2, Alatasi, article 1850.
14 Supra n. 7, Almawardi, pp. 247–59.

and therefore could not be revoked during the arbitration proceedings.[15] All these factors constitute major obstacles to arbitration as an effective method of dispute settlement and weaken arbitration as a whole.

Under the Maliki school, a disputing party can be brought to arbitration by the other disputing party in the same dispute that he is party to. The Malikies also hold an extreme position compared with other schools when dealing with some other crucial issues, such as the revocation of the appointment of the arbitrator, as the appointment of the arbitrator cannot be revoked after the commencement of arbitration proceedings.[16]

The Shafi′es consider arbitration an inferior system compared to the judiciary. This is because the appointment of the arbitrator can be revoked at any point up to the time of the issuance of the final award, which shows that an arbitrator is at a lower grade than a court judge.

The Hanbalies consider arbitration to be litigation; therefore, an arbitrator must possess the same qualifications as a court judge and arbitral awards should carry the same strength as a court judgment.[17]

The above examples of conflict among the schools can be regarded as advantages for arbitration under Shari′a, as parties can apply any opinion that belongs to any of the four schools on an equal basis without violating the law, for the reason that all the opinions are correct and the difference is merely in the interpretation of the same legal texts.

Arbitration regulations under the different schools of Islamic law, as are found in the classical treatises, are the basis of the current arbitration acts in many Muslim countries in general and in Saudi Arabia in particular. The following section examines the legal rulings on arbitration under Islamic Shari′a, from the arbitration agreement to the enforcement of the final arbitral award.

The Capacity of Parties to Enter into an Arbitration Agreement

Types of Legal Capacity

As with other types of contract, parties to an arbitration agreement should possess all the qualities of a capable personality. Such persons should also be competent enough to enter into the arbitration agreement, as well as being able to execute and accept the arbitral award. Under Shari′a, the legal capacity to enter into an arbitration agreement, *alahliyah* in Arabic, does not differ from the legal capacity to enter into any other agreement. In order to be able to enter into a contractual relationship, a party to a contract should each be capable of being defined as an

15 Supra n. 2, Alatasi, article 1847.

16 A. Saiyed, *Arbitration Rules: A Comparative Study between Shari'a, Kuwaiti and Egyptian Law* (1st edn., Aleman Publishers, 2000), pp. 46–47.

17 Ibid.

entity able to bear the legal aspects of Shari′a; able to acquire rights; able to bear obligations; and able to conduct legally effective actions and transactions.[18]

A personality can be either a natural or a legal personality. The term 'natural personality' corresponds to the living status of a human being as it starts at birth and ends at death. Nonetheless, a natural personality can be presumed a legal personality that might be present before birth or after real death.[19] A 'legal personality' is a personality presumed to exist separately from the individuals who established them but without human qualities.[20]

Alahliyah can appear in several forms depending on age and mental ability. Muslim scholars have identified two main sub-concepts of legal capacity, which are divided into five different levels, each level representing a different form of alahliyah.[21] The first sub-concept of alahliyah is ahliyat aluojoup, or the eligibility to qualify as a natural or legal person. Ahliyat aluojoup can be defined as the ability of a person to acquire rights and bear obligations. Ahliyat aluojoup has been divided into full (kamilah) and restricted (naqisah). Restricted capacity imposes limitations on a person's ability to acquire some rights and bear certain obligations. The latter level of capacity is restricted to the foetus and embryo during pregnancy, as an unborn human being has the full right to inherit.[22] Full capacity is attributed to every living human being from the moment of birth till death.

The second sub-concept of legal capacity in Islamic law is ahliyat al adaa′; the possession of ahliyat al adaa′ qualifies a person to conduct and execute his own affairs. It has also been defined as the 'ability of a person to initiate actions, the considerations of which depend on a sound mind'.[23] Ahliyat al adaa′ can be obsolete, restricted or full. Obsolete ahliyat al adaa′ was referred to by Muslim scholars as the state of non-existence of the capacity, or in'idam. Alahliyah is associated with people who have not yet reached the age of discernment, or who have reached it but for some reason cannot satisfy its requirements, such as children under the age of seven and insane people. Restricted ahliyat al adaa′ applies to persons who satisfy some of the discernment requirements but have not yet attained a sufficient level of mental and physical maturity; discerning children can be a good example.[24] Ahliyat al adaa′, mainly, concerns the presence of a

18 See, in general, M. Zahraa, 'The Legal Capacity of Women in Islamic Law', *Arab Law Quarterly*, 11 (1996), pp. 245–63.

19 See, in general, M. Zahraa, 'Negotiating Contracts in Islamic and Middle Eastern Law', *Arab Law Quarterly*, 13 (1998), pp. 265–77.

20 Supra n. 18, Zahraa, p. 253.

21 A. Alsamnani, *Rawdat Alqodat wa Tarwwq Alnajat*, ed. Salahaddin Alnahi (2nd edn., Moassasat Alrisalah, 1984), Vol. 1, p. 52.

22 Ibid., p. 56.

23 Supra n. 18, Zahraa, p. 251.

24 Shari′a scholars distinguish between the age of maturity and the age of discernment. Scholars dispute the age of maturity, as some fix it at 15 to 18, while the majority of scholars recognize maturity to be attained by physical puberty. All scholars agree on the age of seven as being the age of discernment.

sound mind, intellectual capacity and discernment. Any person who lacks one of these qualities is presumed to have a restricted ahliyat al adaa′, provided that such a person reaches the age of discernment. Any human being will be presumed to have full ahliyat al adaa′ upon reaching the age of maturity and satisfying its requirements.

It has been alleged that Islamic law does not recognize the concept of legal personality. Such a view can be generally rejected as incorrect. Although classical Muslim scholars did not apply this concept to partnerships, this fact can be explained by the social and economic conditions of their time, when partnerships generally comprised a limited number of individuals. In contrast, the concept of the legal personality is well-established under Shari′a with respect to such institutions as the public treasury, the waqf 'charitable trust', schools, hospitals and mosques, all of which are recognized as having the capacity to hold and exercise rights, and accept liability for obligations independent of their administrators. Parties to arbitration should have full capacity in order to be able to exercise their rights.[25] Alahliyah, as represented above, is only theory, as when it comes to actual application, the law summarizes Alahliyah in two main contexts only: majority and prudence. In the next few paragraphs, the requirements of majority and prudence under Shari′a as applied in Saudi Arabia will be examined.

The Legal Capacity Requirements for Natural Persons

In addition to satisfying the requirements of Shari′a contract law, a valid arbitration agreement requires the parties to the agreement to satisfy the requirements of legal capacity, i.e., to have reached a certain age and have a certain level of mental ability at the time of concluding the contract. Classical Islamic scholars tend to treat every case on its own merit, identifying the criteria according to age, sign of puberty and also on the attainment of a defect-free physical and mental maturity with which the person can reach a reliable standard in transactional matters.[26] A general legal competence to engage in legal transactions requires two basic qualifications: majority and prudence.

Majority

'Make trial of orphans until they reach the age of marriage; if then ye find sound judgment in them, release their property to them.'[27] The majority age is not exactly fixed under Shari′a law, neither by classical scholars nor today; however, the above-quoted verse indicates that it is around the age of puberty. Unlike most

25 A. Lerrick and Q. Mian, *Saudi Business and Labour Law* (2nd edn., Graham & Trotman, 1987), pp. 106–107.

26 Ibid.

27 The Quran 4: 6.