The Appointment of Arbitrators

The appointment of an arbitrator is a contractual act entered into by two or more parties involved in a judicial or extrajudicial dispute.[109] All parties should consent to the appointment of the arbitrator; there are some differences of opinion among the four schools as to whether the consent of the parties is required at the time of the appointment only or whether it should continue until the arbitrator makes his award. The appointment should be made in the arbitration agreement subject to the acceptance of the arbitrator as mentioned above.[110] The Hanafies require an arbitrator to be known to the parties to avoid uncertainty; however, if a person arbitrates between two parties, without an appointment, and they accept his award, his appointment will apply retroactively.[111] Some modern texts deny the institutional appointment under Shari′a and argue that arbitration is an independent mechanism for settling disputes and it should not fall under the influence of any official institution.[112] This argument contradicts the Quran, in which the appointment of arbitrators in family disputes should be done through the court judge as seen above.

The Number of Arbitrators

Multiple arbitrators' proceedings were unknown pre-Islam. Traditionally, arbitrators had to settle disputes alone, acting as single judges.[113] All four schools permit the parties to have more than one arbitrator; the Shafi′es permit two arbitrators; the Hanafies, the Hanbalies and the Malikies allow parties to have more than two arbitrators.[114] Some Hanbalies do not recommend the appointment of an even number of arbitrators for the sake of reaching unanimity when issuing the award. This approach was adopted by the Arbitration Act of 1983 in Saudi Arabia, which will be seen below.

Remuneration of Arbitrators and Administration Fees

The issue of judges' remuneration has been recognized by all four schools, which have recommended that a suitable remuneration be drawn from the public treasury to ensure judges' impartiality. The case is different with arbitration, though, as it is a private dispute settlement method. Under all the schools, the parties to the arbitration agreement should bear the fees of the arbitrators. The Hanbali scholar Ibn Qayem Aljaoziyah set two conditions for the arbitrator's

109 Supra n. 9, Saleh, p. 39.
110 Supra n. 16, Saiyed, pp. 38–40.
111 Supra n. 78, Al Kenain, p. 100.
112 Supra n. 9, Saleh, p. 39.
113 This effect can be seen in article 4 of the Arbitration Regulation of Saudi Arabia.
114 Supra n. 78, Al Kenain, pp. 105–106.

remuneration: first, that an arbitrator should not receive any money from the public treasury for arbitration; and second, that the money should be deposited with an impartial party before the commencement of the arbitral proceeding in order to guarantee the payment of the fees.[115] Classical Shari′a treatises do not mention anything regarding administration fees and experts' remuneration. It seems that if the arbitration agreement does not state that the parties are going to bear the administration fees, such fees should be paid by the parties.

Termination of the Office of Arbitrator

Under Shari′a, the arbitrator's appointment may end before or after the settlement of the dispute. One reason that the appointment of an arbitrator may end is the issuance of the arbitral award – this puts an end to the dispute, called 'raf' alneza′' in Arabic, as the parties to the dispute are no longer in need of the services of the arbitrators.[116] The second reason for the termination of the arbitrator's appointment is reaching a settlement outside the arbitral tribunal, which can be described as compulsory termination. Examples are reaching an amiable settlement outside the tribunal, exemption or rescheduling of debt.[117]

The appointment of an arbitrator can be terminated before reaching a settlement. The termination in this case can take the following forms:

- Disqualification of an arbitrator: losing one or more of the required qualifications of an arbitrator disqualifies him from continuing in office and annuls the arbitration and the award. The concept of the continuity of the qualifications requires an arbitrator to be qualified throughout the arbitral procedure, from the date of the arbitration agreement until the issue of the award.[118]
- The absence of the arbitrator: if the arbitrator's absence affects the parties to the dispute, they have the choice of annulling his appointment.[119]
- The expiration of the arbitrator's appointment: the parties to the dispute have the choice of appointing an arbitrator for a limited period of time. The arbitrator has no jurisdiction over the dispute after the designated date unless the parties to the arbitration extend it, which will be considered as a new appointment.[120]

115 Ibn Qayem Aljaoziyah, *Bada'I Alfawaid*, ed. Hisham Ata, Adil Adawi and Ashraf Ahmad (1st edn., Nizar Mustafa Albaz Publishers, 1996), Vol. 3, p. 146.

116 Supra n. 2, Alatasi, article 1842.

117 Supra n. 4, Ibn Qodamah, Vol. 5, p. 2.

118 Supra n. 16, Saiyed, pp. 41–42.

119 Supra n. 1, Ibn Nujaim, Vol. 7, p. 28.

120 Ibid.

- Termination by the arbitrator's death or insanity: it is obvious that an arbitrator's appointment terminates at the moment of his death or insanity.[121]
- Revocation of the arbitrator's authority: the arbitrator is not authorized to exercise his function without the continuing consent of either of the parties to the arbitration. The consent must continue until the issue of the arbitral award; however, the Malikies do not agree with this concept and consider the appointment to be irrevocable.[122] The issue of the revocability of an arbitrator's appointment of the can be summarized by saying that the parties to the dispute can terminate the appointment of the arbitrator at any time – if the arbitrator issues an award after the revocation the award will be considered void. On the other hand, if the appointment has been made through a judge (or in an institutional arbitration nowadays), the revocation must be done through a judge again.[123] If one party revokes the appointment of the arbitrator and the other denies, there are three views. Each party to the dispute has the right to revoke the appointment of the arbitrator unilaterally at any time without any limitations because the arbitrator is an agent. The revocation is permissible before the commencement of the arbitration only. Parties to the dispute cannot revoke the appointment of the arbitrator after they accept it. A party to the arbitration cannot revoke the appointment unilaterally because that might be used fraudulently by the party that see the proceeding going not in their favour.[124]
- Resignation of the arbitrator: Malikies do not accept the arbitrator's resignation after the commencement of the arbitration without the parties' approval. Other schools have various opinions; some scholars allow the arbitrator to resign at any time. If the arbitrator refuses to perform his duty, either party can revoke the appointment without any remuneration.[125]

Rules of Evidence

Evidence can be defined as anything that tends to prove or disprove a fact at issue in a legal action.[126] The law on evidence in Islamic Shari′a has not changed much over the last 10 centuries, so it is, to some extent, out of date nowadays. There is a link between the concept of evidence and the definition of plaintiff in Islamic law. A plaintiff is not just the litigant who commences the judicial or arbitral proceedings. The plaintiff is the litigant who, by issuing the claim before the judge

121 Supra n. 9, Saleh, p. 45.
122 Ibid.
123 Supra n. 2, Alatasi, article 1847.
124 Supra n. 78, Al Kenain, pp. 159–60.
125 Ibid.
126 T. Buckles, *Laws of Evidence* (1st edn., Thomson Delmar Learning, 2003), p. 15.

or the arbitrator, disrupts an apparently normal state of affairs by alleging that this state of affairs does not conform to his rights. The defendant is the party who admits or denies the plaintiff's claim. Shari′a places the burden of proof on the plaintiff, justified on two grounds: the existing situation is presumed to be the original and the normal state of affairs, and it is up to the plaintiff to establish the contrary; and a person summoned before the judge/arbitrator is presumed to be free of liability.[127]

There are six types of evidence under Shari′a. These rules are firmly set out, leaving no room for the judge/arbitrator to choose the most convincing one; all of them have the same power. Apart from family disputes, the typical procedure before any Shari′a court consists of three stages. First the plaintiff lodges the claim which should be precise in all its details. The claim can be in writing or can be verbalized at the time of the trial. At the second stage, the judge invites the defendant to answer the plaintiff's claim. At this stage, the defendant will either admit the claim, '*iqrar*', or deny it, '*nokoul*'. If the defendant denies the claim, the judge will ask the plaintiff to adduce the evidence, '*baiyenah*'. The final stage starts if the plaintiff fails to provide the court with testimonial evidence; he may administer the oath, '*yameen or qasam*'. If the defendant swears that the claim is groundless, the claim will be dismissed; however, if the defendant refuses to take the oath, the case will be decided in favour of the plaintiff.[128] This is the normal procedure applied, since the time of Prophet Muhammad until today, in all Shari′a courts anywhere in the world.

Admission – 'Iqrar'

The iqrar, or admission, is ranked at the top of the types of evidence by Shari′a scholars, as there is a rule that 'admission is the master of all types of evidence'. Iqrar has been defined as an admission on the part of a person that he owes an obligation to another person. It is disputed whether the scope of the term includes a confession, either judicial or extrajudicial, or not. A recognizable admission is one that has been made by an adl defendant provided that he is not under duress; a valid admission should be precise with regard to specific facts and circumstances in order to enable the arbitrator to issue a correct award.[129]

Oral Testimony – 'Shahadah/Baiyenah'

In Shari′a, oral testimony, or *shahadah*, is the primary means of evidence, prevailing over all other forms of evidence. The classical juridical reading of the Quranic verses privileges the oral testimony, shahadah, of two male witnesses over

127 Supra n. 9, Saleh, p. 60.

128 See, generally, supra 4, Ibn Qodamah, Vol. 14.

129 R. Peters, *Crimes and Punishment in Islamic Law* (1st edn., Cambridge University Press, 2005), p. 82.

the written deed as the primary form of legal proof in general.[130] 'The witnesses should not refuse when they are called on [to give their testimony].'[131]

The Quran gives oral testimony a sacred character and obliges witnesses to perform it as a religious duty. Moreover, Shari′a sets a strict punishment for giving a false statement with intention, ranging between seven and 75 lashes in a public place. In addition to the physical punishment, the false witness would be slandered and would lose his credibility before courts forever; in other words, his testimony would not be accepted before any court or arbitration tribunal for the rest of his life.[132] The punishment for bearing false witness was determined in principle in the following Quranic verse: 'And those who launch a charge against chaste women, and produce not four witnesses "to support their allegations" lash them with eighty stripes; and reject their evidence ever after.'[133] The interpretation of this principle in cases other than the accusation of adultery depends on the discretion of the court. The qualifications of a witness vary from one school to another; however, a witness should be a trustworthy Muslim person who has reached the age of puberty and he should not be subject to any incapacity. The testimony of non-Muslims is accepted in all subject matters except Hodoud. The four schools of fiqh require a thorough investigation of a witness's trustworthiness; if there is any doubt about it the witness will not be heard. Oral testimony is administered on the spot by the arbitrator and, according to the Hanafies, at the request of the witness. Disqualified witnesses are not allowed to participate as arbitrators in a dispute. According to the Quran, a male's testimony is equal to that of two women; the Quran states that a woman may forget an incident so the second one is needed to remind her.[134]

Oath – 'Qasam/Yameen'

According to the reported practice of Prophet Muhammad, the oath is the final step in any court proceeding. Arbitrators resort to the oath by special request from the plaintiff in cases where he is unable to adduce evidence of his rights or where his evidence is incomplete, such as when he has one male and one female witness or two females only. The qualifications of a party to be able to give a credible oath are the same as those of the witness. If the defendant takes the oath, the arbitrator may decide on the case in his favour; however, some Hanafies consider the oath to be a second-class form of evidence and allow the plaintiff to challenge the oath.[135] Scholars of other schools, however, require an additional oath to be taken by the plaintiff, subject to a request from the defendant, in case the arbitrator decides

130 O. Arabi, 'Orienting the Gaze: Marcel Morand and the Codification of Le Droit Musulman Algerien', *Journal of Islamic Studies*, 11/1 (2000), pp. 43–72.

131 The Quran 1: 282.

132 Supra n. 4, Ibn Qodamah, Vol. 14, p. 262.

133 The Quran 24: 4.

134 The Quran 1: 282.

135 Supra n. 9, Saleh, p. 64 and supra n. 4, Ibn Qodamah, p. 145.

the case in favour of the plaintiff.[136] The Quran gives the oath a sacred nature and warns parties about lying under oath as in the following Quranic verse:

> [S]urely, those who take a small price by (breaking) the covenant of Allah and their oaths, for them there is no share in the Hereafter, and Allah will neither speak to them, nor will He look towards them on the Day of Judgment, nor will He purify them. For them there is a painful punishment.[137]

A Muslim party taking the oath has to swear on the Quran; in the case of a non-Muslim party, he should swear on something sacred to him, such as the Bible for Christians and the Torah for Jews.[138]

Written Evidence

The Quran encourages parties to any contract to write it down. Classical scholars disputed whether it is a binding condition for the validity of a contract or just a recommendation. The division in opinion is owing to the understanding of the following verse, which is the longest verse in the Quran:

> O you who believe, when you contract a debt for a fixed time, write it down. And let a scribe write it down between you with fairness; nor should the scribe refuse to write as Allah has taught him, so let him write. And let him who owes the debt dictate and he should observe his duty to Allah, his Lord, and not diminish anything from it. But if he who owes the debt is unsound in understanding or weak, or [if] he is not able to dictate himself, let his guardian dictate with fairness. And call to witness from among your men two witnesses; but if there are not two men, then one man and two women from among those whom you choose to be witnesses, so that if one of the two errs, the one may remind the other. And the witnesses must not refuse when they are summoned. And be not averse to writing it whether it is small or large along with the time of its falling due. This is more equitable in the sight of Allah and makes testimony surer and the best way to keep away from doubts. But when it is ready merchandise which you give and take among yourselves from hand to hand, there is no blame on you in not writing it down. And have witnesses when you sell one to another. And let no harm be done to the scribe or to the witnesses. And if you do [it], then surely it is a transgression on your part. And keep your duty to Allah. And Allah teaches you. And Allah is Knower of all things.[139]

136 Ibid.
137 The Quran 2: 77.
138 Supra n. 4, Ibn Qodamah, p. 145.
139 The Quran 1: 282.

Presumptions – 'Qara'en'

It has been reported that Prophet Muhammad and his companions decided some cases on the basis of presumptions, or the legal method of istis′hab. The use of presumptions in giving judgments has been given a wider scope by Hanbali scholars; according to them, the refusal of the defendant to take an oath is a presumption in favour of the plaintiff. It also constitutes a presumption of ownership if a property is in possession of one of the parties for a long time with no proof to the contrary.[140]

Personal Knowledge of the Judge or Arbitrator

Giving a judgment on the basis of the judge/arbitrator's personal knowledge is prohibited in all the schools except Hanafi. Basing a judgment on the judge/arbitrator's own knowledge raises suspicion of bias and can be grounds for challenging an award. The Hanbalies leave no room for the arbitrator's own knowledge relating to the dispute, as he is totally forbidden to rely on it in rendering the award without evidence.[141]

Rules of Fair Trial

Islamic law establishes its own rules of fair trial to guarantee justice and equality. Some of these rules have been derived from the pre-Islam practices of Arabs and have been upheld by Shari′a. According to the Shari′a view, the choice of a qualified and impartial judge is the first step in achieving justice. Thus, Shari′a concentrates first on the impartiality of judges and arbitrators, governing their social lives. A judge – any official, really – is forbidden to accept gifts while he is in office from anyone with whom he did not exchange gifts before his appointment, because such an act might raise the suspicion of bias.[142] Hanafi scholars discourage judges from receiving gifts while other scholars consider any gift to a judge as a bribe.[143] Prophet Muhammad gave the prohibition of accepting gifts a religious character in the following Hadeeth:

> What is wrong with the employee whom we appoint that he returns to say, "this is for you and that is for me?" Why didn't he stay at his father's and mother's house to see whether he will be given gifts or not? By Him in Whose Hand my

140 See, in general, supra n. 4, Ibn Qodamah, Vol. 14, p. 156.
141 Ibid.
142 Supra n. 4, Ibn Qodamah, Vol. 14, p. 58.
143 Ibid., p. 59.

> life is, whoever takes anything illegally will bring it on the Day of Resurrection by carrying it over his neck.[144]

Moreover, Hanbali scholars do not allow judges to conduct business. Bribery is totally prohibited by the Quran and the Sunna; the punishment expands to cover the corrupter and the corrupted and all persons in connection with it.

The principle of the equal treatment of parties to a dispute has various forms under Shari′a. All litigants, without exception, must be granted reasonable access to the place of hearing. The procedure must be carried out with equal speed; no priority should be given except in cases where a delay might harm the litigants, such as in the case of travellers and ill people. In the course of the hearing, the judge/arbitrator should address each litigant in an equally composed tone; equality should also be reflected in the way that litigants are seated. The judge/arbitrator should not greet one litigant with undue warmth, nor engage in a personal conversation, as it might seem unjust to the other litigant.[145] If one of the parties to the dispute does not speak Arabic and the judge/arbitrator does not know his language, two translators – only one is required by the Hanafies and some Hanbalies – must attend the hearing to translate between the litigants and the judge/arbitrator. The translators should possess the characters of adalah as they will be considered as witnesses to the statements of the parties.[146]

Under Shari′a, an arbitrator is not allowed to decide a dispute without hearing all the parties and giving them the chance to present all their evidence. There are strict conditions for issuing a judgment in absentia, as such a judgment requires judicial review before its execution because the defendant might have a defence against the claim. However, according to the Malikies and some Hanbalies, a judge/arbitrator is not allowed to issue a judgment *in absentia* at all.[147]

Shari′a understands that parties have different abilities in representing their cases. Therefore, Shari′a assumes that substantive truth should prevail over procedural technicalities as embodied in the following Hadeeth:

> You people present your cases to me and some of you may be more eloquent and persuasive in presenting their argument. So, if I give some one's right to another [wrongly] because of the latter's "tricky" presentation of the case, I am really giving him a piece of fire; so he should not take it.[148]

---

144 Supra n. 53, Albukhari, Chapter 8, Hadeeth No. 162.

145 The Ministry of Justice of Saudi Arabia, *Litigation in Saudi Arabia, History, Institutions and Principles* (1st edn., The Ministry of Justice of Saudi Arabia, 1999).

146 Supra n. 4, Ibn Qodamah, Vol. 14, p. 84.

147 Ibid., Vol. 14, p. 96.

148 Supra n. 53, Albukhari, Chapter 3, Hadeeth No. 845.

This Hadeeth affects the *res judicata* aspects of a judgment/award but only to a limited extent and no more than the Western concept of retrial would affect the award.[149]

Enforcement of Arbitral Awards under Shari′a

The Nature of the Arbitral Award

The objective of an arbitral award is to settle the dispute and put an end to the conflict between the parties, known as 'raf' alneza'' in Arabic. Arbitration loses its objective of settling disputes if arbitral awards lack enforceability.[150] Despite some scholars requiring the disputants' approval, an award is enforceable and binding on the parties from the moment it becomes final and has the same effects and power as a court judgment. The arbitrator has no right to decline his award; even if he declines and issues another award in favour of the other party, the latter award will be void. No third party would be affected by the arbitral award because the arbitrator has no jurisdiction over anyone but the parties to the dispute who agreed to obey the arbitrator's decision and execute it on themselves. Hanbali scholars require ratification from a judge before enforcing any arbitral award.[151]

The Content of the Arbitral Award

The content of an arbitral award does not differ from any ordinary court judgment. The award should include a sufficient description of the merits of the dispute at issue, the findings of fact substantiated by Shari′a rules of evidence, the reasoning under usul alfiqh with references to Shari′a sources and finally the decision. An award that lacks the findings of fact under Shari′a rules of evidence or a valid reasoning according to Shari′a substantive rules will not be accepted. The arbitrators have the right to correct material errors in the award from the time of issuing the award until referring to the court for an enforcement order.[152]

Challenge of the Arbitral Award

Parties to the dispute may accept the arbitral award and execute it, or they may ask for further judicial review. Each school has its own view regarding the ability of parties to challenge the arbitral award. Maliki scholars consider arbitral awards to be unchallengeable – a judge cannot revoke an award as long as it does not

149 Supra n. 9, Saleh, pp. 70–71.

150 Supra n. 78, Al Kenain, pp. 141–45.

151 Ibid.

152 See, generally, A. Al Kenain, *Tasbeeb Alahkam Alqadaiyyah fe AlShari'a Alislamiyah* (1st edn., Al Kenain, 1999).

contradict the main sources of Shari′a, the only exception being if it entails serious prejudice. According to Hanbali scholars, an arbitral award carries the same influence as a court decision and can be revoked under the same conditions that revoke a court judgment. The Hanafies recognize the possibility of revoking an arbitral award in cases where the award is not in compliance with the appellant's mathhab, or school. However, the revocation is not mandatory; it is up to the judge, who should pay attention to the relevant circumstances when reviewing the award. The Shafi′es have two opinions with regard to the strength of the arbitral award. One gives the arbitral award the same strength as a court judgment, in which case the judge has to treat the arbitral award in the same way as any other judgment. The other view requires the parties to accept the award or reject it. In such a case, there is no challenge of the arbitral award because the award is not binding; therefore, there is no need to challenge it.[153]

Judicial Remedies

After the issuance of the arbitral award, parties who are not satisfied with the outcome have two options available to them.

Revocation

Parties to the dispute may ask for the revocation of the arbitral award. This issue takes us back to the nature of arbitration under the teachings of each school; if arbitration is similar to conciliation or to agency contract the award can be revoked on the same grounds of revoking any normal contract. If the arbitration is judicial in nature it cannot be revoked without there being an obvious error in the award or at any stage of the arbitral procedure. If the judge revokes the arbitral award, he is not obliged to decide on the case again unless he has been asked to do so by one of the parties to the dispute. On the other hand, if the judge upholds the arbitral award, his judgment will be treated as an enforcement order.[154]

Appeal

The parties to the arbitration may appeal to the arbitration panel or to the court. In this situation, the judge will revoke the arbitral award and issue a new award if he accepts the appeal.[155]

153 Supra n. 1, Ibn Nujaim, Vol. 7, p. 26; see also supra n. 4, Ibn Qodamah, Vol. 11, p. 484.

154 Supra n. 16, Saiyed, p. 74.

155 Ibid.

Miscellaneous Issues

The Seat of the Arbitration

The seat theory did not receive any attention from classical Muslim scholars because it has no affect on arbitration. None of the classical treatises mention anything with regard to the seat of arbitration; however, the seat of the arbitration is to be decided according to the parties as a clause in the arbitration agreement.

The Rights of Third Parties

Generally speaking, the effect of the arbitral award must not extend to anyone other than the parties to the dispute. If a third party has got an interest in the enforcement of the arbitral award, they can send their request to the court.[156]

The Unanimity of the Award

If the arbitration proceeds with a sole arbitrator, the problem of the conflict of opinions with regard to the final decision between the arbitrators will not exist – the task of making the award is an individual process. However, scholars agree that if multiple arbitrators fail to agree, the award will be void. An award needs to comply with the opinion of the majority of the arbitrators in order to be fair and just.

Hanbali treatises suggest that there are four methods of issuing the arbitral award if the arbitrators do not reach an agreement. First, when drafting the arbitration agreement, the number of arbitrators should be odd. Second, the assistance of an external arbitrator should be sought and the case should be decided according to his opinion, although the external arbitrator is not allowed to come up with a new opinion; his job is only to choose one of the available decisions. Third, if the arbitrators fail to issue the award, the dispute can be decided by another tribunal or by a sole arbitrator. This option may lengthen the dispute, which contradicts one of the main objectives of choosing arbitration as a swift dispute settlement mechanism. Fourth, if unanimity cannot be reached and the parties to the dispute have exhausted the above-mentioned methods, they can refer the dispute to litigation as a last resort.[157]

It has been shown that Islamic Shari′a regulates arbitration proceedings in a comprehensive way, covering all the important aspects from the formation of the arbitration agreement to the enforcement of the final arbitral award. The chapter has also shown arbitration to be a real alternative to litigation in all subject matters. Shari′a arbitration rules are not substantially different from other current rules, but they do form the basis for most arbitration regulations in most Muslim countries nowadays. Before looking at the arbitration regulations in Saudi Arabia, which are

156 Ibid.

157 Supra n. 4, Ibn Qodamah, Vol. 10, p. 546.