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Islamic Arbitration in Some Selected Countries

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Abstract

Arbitration has been known since the first stages of the legal thinking of mankind. It has developed throughout the urban development of mankind and has now reached the flourishing stages witnessed today both locally and internationally. The systems of ancient communities were based on the interest of power but these systems did not last long, there were instead submitted to reconciliation and arbitration. This was due to the authorities of various chiefs who realized that it was not in their own interest to use force when solving problems because force generally brought about wars. They decided to find peaceful means to settle dispute. Nations such as Greece, Rome and ancient Egyptians, use arbitration to settle commercial, financial and individual disputes. Islamic arbitration also has its roots and procedure in core sources of Islamic Law and procedure. Islamic commercial law prescribes and supports the use of arbitration in settling commercial and non-commercial disputes by people in authority. With the growth of commercial activities, both at local and international level, there have also been a growth in dispute; therefore, it is important that we study this aspect of the Law. There is an even greater need of arbitration in Nigeria to help judicial authorities in decongesting our courts and to settle dispute in an atmosphere that supports commercial friendliness and investment. And since there are special Laws guiding commercial transaction in Islam, a look at Islamic Law of arbitration will amiss. This paper, therefore, critically looks at how far the Islamic Law has gone in addressing modern commercial disputes. The paper also discuss Islamic arbitration in various countries where it is been practiced in order to show that Islamic arbitration is an international

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Law. The paper further recommends how this Law of arbitration can be improved upon everywhere around the World. In carrying out this study, Islamic countries in the Middle East, Britain, America and Nigeria would be examined to show the viability of Islamic Law

1.0 Introduction

As the world is now a global village the volume of trade among countries have increased so also has disputes and there is a need for these disputes to be resolved. Islamic arbitration law is one of the many laws which are employed in disposing of the disputes among Muslims it could be commercial or personal disputes. There has been a religious revival in the last century mostly in Europe. Islam has become one of the most widely accepted religions due to the influx of immigrants from Islamic countries such as Syria, Sudan, Libya and other war thorn countries. These Muslims have pushed for the application of Islamic law in all aspects of their lives .Since family law is one strong area where arbitration is applied then it behooves that there is more clamor from the Muslim minorities in non-Muslim states for Islamic arbitration to be implemented in their life. The acceptance of shariah as part of a country's legal system varies from place to place consequently we shall look at the application of Islamic arbitration in some selected countries.

1.1 Islamic Arbitration in the Middle East

The Middle East generally consists of the Islamic countries. Islamic arbitration has been in practice for a long time in countries such as the Saudi Arabia, United Arab Emirates, Kuwait, Qatar, and Abu Dhabi. Islamic law encourages arbitration of disputes between parties however in the area of international commercial transactions; acceptance has been slower in the Arab world. This is due to the fact that the Arab world has had negative experience in issues of arbitration with the western world. The International arbitration cases heard in Saudi Arabia[1007], Abu Dhabi[1008] and Qatar[1009] was what brought about the suspicion of the Arab world of international Arbitration. The Abu Dhabi case was the earliest record of what caused the Arab Middle East to question the fairness of arbitration to resolve disputes. The dispute involved the geographic scope of an oil concession granted by the sheikh of Abu Dhabi. In analyzing what was to be the

[1007] Saudi Arabia v. Arabian American Oil Company, 27 International Law Reports 117 (1963)
[1008] In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi, 1 International Comparative Law Quarterly 247 (April 1952); International Law Reports 144 (1951).
[1009] Ruler of Qatar v. International Marine Oil Company, Ltd., 20 International Law Reports 534 (1953).

law governing the concession, umpire Lord Asquith expressed an opinion that remains infamous to many Arab jurists: "This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.''

After this arrogant declaration of Lord Asquith[1010], he disqualified the Abu Dhabi law as the proper law governing the concession. Lord Asquith determined that the terms of the concession called for the application of principles rooted in the good sense and common practice of "civilized nations" – and although Lord Asquith determined that English Municipal Law was inapplicable as such, he determined that "some of its rules are in my view so firmly grounded in reason, as to form part of this broad body of jurisprudence". Consequently, he applied English law principles to resolve the dispute. The same thing happened in the Saudi Arabian case[1011] where it was also held that Saudi Arabian law had to be "interpreted or supplemented by general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence ;and in the Qatar case[1012] where the arbitrator held that Qatar law was the proper law to apply, but then dismissed it by stating, "I am satisfied that Qatari law does not contain any principles which would be sufficient to interpret this particular contract."[1013] One shared characteristic of the Abu Dhabi, Qatar and ARAMCO arbitrations was the arbiter's reliance not on domestic law but rather "general principles of law", rooted in the laws of Western jurisdictions. This provides an historical backdrop against which international arbitration often is still viewed in some parts of the Arab Middle East. As a result, even today many in the Arab world reject international arbitration as a 'Western' (and hence unfair) system for dispute resolution.[1014]

[1010] Cyril Asquith was a Baron of Bishop stone, (1951-1954).He was a lord of justice of Appeal and Lord of Appeal in Ordinary 1951 -1954.
[1011] Saudi Arabia v. Arabian American Oil Company, 27 International Law Reports 117 (1963).
[1012] 6 Ruler of Qatar v. International Marine Oil Company, Ltd., 20 International Law Reports 534 (1953).
[1013] Howard, S. Arbitration and the Arab Middle East: Some thoughts from a commercial lawyer. A paper presented to the Chicago International Dispute Resolution Association ("CIDRA") at its meeting on 22 September 2009.
[1014] Howard ,Op cit Pg 54

During the 1960s and early 1970s, many Arab countries remained deeply suspicious of international arbitration. In 1963, for example, following its loss in the Aramco arbitration, the Saudi Arabian Council of Ministers issued a decree generally prohibiting (except in "exceptional cases") arbitration of any dispute to which the government or any ministry or government agency was a party. Similarly in 1970, the Libyan government also took measures to undercut the effectiveness of international arbitration including a law that rendered void any clause in a Libyan government contract providing for arbitration of disputes. Shortly thereafter, the Libyan government announced the nationalization of properties belonging to three oil companies, and Libya refused to participate in the subsequent arbitral proceedings that were initiated by those oil companies.[1015] Despite this history, however, much of the Arab World has more recently begun to embrace the institutions and infrastructure of international arbitration. The only qualification is that whatever form of arbitration to be applied in most of the eastern country must conform to the shariah as well as the public policy of the Arab country which it is being heard.[1016] As a result, Saudi courts and other Middle East countries often refused to recognize and enforce foreign arbitral awards while reviewing them for compliance with Sharia. This made other international countries perceive them as an arbitration 'unfriendly' jurisdiction until the new Laws were enacted.[1017]

The new Saudi Arabian Arbitration Law is based on the UNCITRAL Model Law on International Commercial Arbitration (the 'Model Law'). The Model Law has been used as the basis for the arbitration law of nearly seventy countries. It reflects a consensus on key aspects of international arbitration practice that has been accepted by states of all regions and from different legal and economic systems of the world. UNCITRAL encourages states to make as few changes as possible when incorporating the Model Law into their legal systems, which has resulted in many states using the Model Law verbatim in their legislation. Saudi Arabia has not done this.

[1015] As earlier cited Abu Dhabi, Qatar and ARAMCO cases.

[1016] The Riyadh Convention states in Article 30(a) that any of its signatory states may refuse the recognition and enforcement of arbitral awards that are contrary to the provisions of the 'Muslim Shari'ah, its Constitution, or its public policy or good morals.' The same goes for s Saudi Arabian Arbitration Law (2012) herein after cited as the new Saudi Arabian Law.

[1017] Decree No. M/34 dated 24 Jumada 1433H, corresponding to 16 April 2012G.On 8 June 2012 the law was published in the official gazette, UmAl-Qura. In accordance with Article 58 of the New Arbitration Law, the law came into force 30 days after the date of its publication, which was 19 Sha'baan 1433H corresponding to 9 July 2012G and Royal Decree No. M/53 dated 13 Sha'baan 1433H, corresponding to 3 July 2012G. The Enforcement Law was published in the official gazette, Um Al-Qura in Issue No. 4425, Year 90, 13 Shawal 1433H, corresponding to 31 August 2012G.

The Kingdom has used the Model Law as its starting point. It then made significant changes to address issues of concern to it, in particular by repeatedly requiring the arbitration process to not 'violate Shari'ah as practiced in the Kingdom. Article 10(2) of the New Arbitration Law does not allow Government entities to use arbitration except when approved by the Prime Minister, unless there is a special law approved by the Council of Ministers allowing that on a regular basis. At least thirteen Arab countries have now acceded to the New York Convention, Qatar and the United Arab Emirates as well as Saudi Arabia. In addition, Arab countries are parties to many of the bilateral and multilateral investment treaties that provide protection of foreign investments and require arbitration of disputes over such investments.

1.2 Islamic Arbitration in Britain

As early as 1627, there were said to be nearly forty Muslims living here in London working as tailors, shoemakers, button makers and one even as a solicitor.[1018] There is some evidence of Ottoman Muslims travelling to England from the end of the sixteenth century. A merchant named Ahmet Efendi, accompanied by a certain Niqula, were believed to be the first Turks to arrive in England. A Turkish bath, opened in 1679, also testifies to the presence of Turks in London at that time. Indeed, from the early nineteenth century onwards, Indian Muslims started to visit Britain in larger numbers due to their work as sailors on the Turkish ships. The first relatively permanent Muslim populations were established in Manchester, Cardiff, Liverpool, South Shields, and the East End of London. Apart from the afore-mentioned sailors, these Muslims included merchants, itinerant entertainers, servants, princes, students and a sprinkling from the professional classes. The vast majority was in some way connected with the British Empire and so came from the colonies or protected territories, such as British India, the Aden hinterland, British Somaliland, Malaya, and the Yemen.[1019]

It is not news that the numbers of Muslims in Britain has increased significantly in the past decade especially due to the influx of migrants because of this the Muslims in Britain have gradually been able to get the society to acknowledge their Islamic status as well as their right to apply Islamic law in some aspects of their relationships. Presently, Sharia law is not formally

[1018]Khizar Humayun Ansari, The Muslim Presence In Britain — Making a Positive Contribution, a paper delivered at Centre for Ethnic Minority Studies Royal Holloway, University of London Jointly convened by The East London Mosque & London Muslim Centre - 9 April 2003.
[1019]Ansari, K.H, Op cit pg. 306

included in the UK's laws; though a network of unofficial Sharia courts have developed in Muslim communities to deal with issues within Muslim families. There is also a large network of more informal Sharia tribunals, also called "councils," which are normally based around a mosque and deal with child custody issues and divorces in line with Islamic religious teaching. Their hearings are laid out like courts.

A study compiled four years ago by Civitas think-tank found more than 80 unofficial Shariah courts operating in the UK[1020] There are a few unofficial tribunals which operate under the Arbitration Act, drafted in 1996 to help settle personal disputes within Britain's diverse community. They mainly operate in commercial disputes, but can also deal with issues of domestic violence and other family disputes including battles over inheritance. Five Sharia tribunals now actively operate in London, Birmingham, Bradford, Manchester, and Nuneaton. Two courts are being planned for Glasgow and Edinburgh. Rulings of Shariah are enforceable through county and high courts in the five districts in which they operate. Many of these courts issued rulings in private familial mediation since 2005.[1021] The Arbitration Act of England[1022] allows for alternative dispute resolution by means of party consent. That is two individuals must agree to a trial by ecclesiastical law. They must also agree upon the enforcement of the decision prior to the trial. If these two conditions are met, then the State can enforce both familial and contractual arbitration verdicts based on religious law. Seeing such, the implementation aspects of Sharia may be unavoidable.

In 2004, Canada faced growing pleas from Islamic followers to recognize religious Sharia courts in the realm of civil law. The Canadian request was the first documented case study of Sharia law pushing for recognition as an official arbitrating framework in a Western state. Sharia proponents argued that in Ontario, Beth Din courts had been given jurisdiction over Jewish civil matters for nearly 100 years.[1023] Equality would mandate the same claim to religious arbitration for Muslims. However as it is in most cases of islamophobia the Canadian citizens could only see issues such as amputation of limbs, discrimination against women in issues of

[1020] Bowen, J. "Private Arrangements. Recognizing Sharia. "Boston Review.> http:bostonreview.net /BR34.2/ Bowen. php> accessed 10 April 2023
[1021] Ibid pg.20
[1022] An act of parliament in 1996 which regulates arbitration proceedings within the jurisdiction of England, Wales and Northern Ireland.
[1023] A. William, An Unjust Doctrine of Civil Arbitration: Sharia Courts in Canada and England, Stanford Journal of International Relations Vol. XI No. 2 pg.41

inheritance, stoning of adulators as what the Sharia is all about. In its double standard mode the Canadian government preferred to cancel the right to Jews in their Beth Din courts and claim that they rather every citizen live by rules equally than grant the Muslims their right to apply the shariah in their life.[1024] For the first time it seems that the principles of shariah has become enshrined in UK legal system when the law society published guidelines for drawing up documents for parties who wish to be governed by Islamic law. Such guidelines include drafting of wills.[1025] Nicholas Fluck, president of the Law Society, told The Sunday Telegraph[1026] that publishing the new guidance would promote "good practice" in applying Islamic principles in the British legal system.

1.3 Islamic Arbitration in America

Today, observant Muslims living in the United States face the challenge of developing effective and respectable religious courts as a means of fulfilling their obligation to abide by Islamic law while living in a Western, secular political, social, and legal context. On the one hand, Muslims have a religious duty to live in accordance with Islamic legal norms, which in turn necessitates the ability to order relationships and resolve disputes through religiously acceptable dispute resolution procedures rather than through the secular judicial system.[1027] On the other hand, the American Muslim community's ability to fulfill this religious imperative faces some significant obstacles. First, while historically, and in some places even today, Islamic law tribunals could enforce their own decisions, Islamic courts in the United States cannot independently implement their rulings, but must rely on the good will of disputing parties to abide by their decisions. Second, while American law maintains a legal framework that provides a means of making private arbitration rulings enforceable by the state, at present Islamic law arbitral tribunals often fail to operate within this legal framework, and thus lose the benefit of having their rulings enforced by American courts. Also, to the extent that Islamic tribunals do operate within the formal arbitration guidelines established under American law, secular judges

[1024] William ,Op cit
[1025] Ibid pg 5.
[1026] Ibid. pg.7
[1027] Grossman, M. Is this Arbitration? Religious Tribunals, Judicial Review, and Due Process, column. l. Pg169- 179. 2007 and Awad A, The True Story of Sharia in American Courts, The Nation, June 13, 2012,available at http://www.thenation.com/article/168378/true-story-sharia-american-courts#.12.

often remain wary of enforcing their decisions because they perceive Islamic arbitration as foreign, discriminatory, arbitrary, informal, closed, and secret.[1028]

Significant segments of American society maintain general distrust of Islamic law and courts, as evidenced by periodic popular outcries when American courts uphold Islamic arbitral awards and by recent attempts in some states to prohibit courts from applying or enforcing Sharia' law. There are apprehensions about "creeping Sharia," and the impending "Islamization of America" which is a result of the terrorist actions of some few misguided people in the name of Islam. This makes it politically difficult for Islamic arbitration to gain the respect it needs for its arbitral awards to be regularly and routinely upheld and enforced by American courts.[1029] If American Muslims decide to cultivate more respectable and efficacious religious law arbitration processes in the United States, they will have to look towards developing institutions that both conform to the formal legal requirements of the American arbitration framework, as well as engender understanding of and respect for Islamic law in the American legal-political community and in American society more generally.

It is worthy of note that we have noticed some double standards in the American approach to Islam. Just like the case in Britain the Jewish Beth Din in America provides the perfect example of arbitration proceedings that supplement the US court system. The Beth Din serves as an official Jewish court; an authoritative forum of Jewish law (halakhah) and its judgments are recognized worldwide. Headquartered in New York, it exists in almost every state in the US. It serves the Jewish community in the United States as a forum for obtaining Jewish divorces, confirming personal status and adjudicating commercial disputes stemming from divorce, business and community issues. The Beth Din has extensive rules and procedures structuring itself in a manner favorable to the enforceability of its decisions in the appropriate secular courts. The US secular courts view the Beth Din as valid arbitration. In addition, the US courts, in general, consider the Beth Din's decisions as binding arbitration.[1030] We wonder why the US courts cannot grant the same rights to the Muslims living there.

Stemming from the above, Muslims in the West resort, with regularity, to the local Mosques and Imams to seek Islamic mediation or arbitration in family disagreements,

[1028] Ibid pg 169

[1029] Schmitz M, Fears of 'Creeping Sharia, 'Pg 5, National Review (June 13, 2012), available at http://www.nationalreview.com/articles/302280/fears-creeping-sharia-mat-thew-schmitz.retreived 25thjuly 2015.

[1030] S. Abdul Wahid, Islamic Arbitration Courts in America & Canada? Available at http://www.hiiraan.com/op/eng/2005/dec/Prof_Abdulwahid211205.htm. Access on 25 October 2016.

inheritance, business disputes, and marriage and divorce issues. It was reported that a Muslim Imam in the Minneapolis/St Paul area, for instance, receives average 4-5 cases of this nature in a typical week.[1031] The services of the Mosques and Imams in this area are very effective and are quite instrumental in defusing or resolving disputes the only drawback is that it relies on the goodwill of parties to be enforceable except in the area of marriage.

1.4 Islamic Arbitration in Nigeria

The earliest adjudged date of arrival of Islam and the Shariah into the geographical region comprising today's Nigeria is between 1085 and 1097 CE. During the centuries that followed, Islam spread both through conquest by jihad and preaching by itinerant preachers.[1032] During the colonial era, Islamic law was regarded by the courts as forming part of customary law, and this remained so until the enactment by the Northern Nigerian government of the Native Courts Law and Moslem Court of Appeal Law, both of 1956, which introduced for the first time an explicit distinction between the Islamic law and the customary law.

Islamic Sharia law is a system of law that has been part of the Nigerian Jurisprudence before the introduction of the English common law and statutes. Arbitration has been that part of the law. The Sharia has been declared by the Nigerian courts as one of the sources of Nigeria's customary law. However the shariah differs from Nigerian customary law because it is a divine and written law and well developed due to the fact that scholars have expounded the law. The Maliki law is the most applied school of thought in Nigeria. Even the Kano state penal code categorically states that shariah law is not the same as customary law. Looking at the definition of customs under black law dictionary, it says that: "Customs are usage or practice of the people which by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject matter to which it relates. It results from a long series of customs, constantly repeated, which have, by such repetition and by uninterrupted acquiescence acquired the force of a tacit and common consent. (It is a) habitual or customary practice, more or less wide spread, which prevails within a geographical or sociological area; usage is a course of conduct based on a series of actual

[1031] Ansari, K.H., op cit. Pg 30

[1032] Ambali, A.M.A. Shari'ah: It's Relevance in the Contemporary Nigeria in Perspectives in Islamic Law and Jurisprudence: Essays in Honour of Justice (Dr.) Muritala Aremu Okunola (JCA), in Abul-Rahmon M. Oloyede, (ed.), Nigerian Association of Muslim Law Students University of Ibadan.(2001) at page 102.

occurrences. This means that shariah law is does not fit strictly into this definition because it is a law that is practiced by Muslims who are spread across Nigeria. They can be found in the Northern part, the south Western Part and some even in the Eastern parts of Nigeria presently. Formally, the enactments of the states which were carved out of the northern region of Nigeria have regarded Islamic law as part of customary law. For example, section 2 of the Katsina State High Court Law of 1991 provides that 'customary law' included Islamic Law. When Sharia Penal Code Laws were enacted in some states of the northern part of Nigeria these states retracted from the position held hitherto, and now suggests that Shariah or Islamic Law is not part of customary law[1033].In the last thirty-five years, there has been an increment of interest by Nigerians, particularly the young and educated ones of the northern and south-western parts of Nigeria which is where there are predominantly Muslims in their Islamic heritage. This interest is evident in the clamour for the wider use of the Shariah in more and more spheres of life beyond its traditional expression in worship, family relations and limited application of Shariah criminal law.

This drive has led to the flourishing of Shariah compliant commercial transactions, financial products and Halal investment options which are civil and commercial expressions of their Islamic heritage. However, like all human endeavors, these Islamic civil and commercial expressions, will naturally lead to conflicts which will require management and resolution. The natural reaction is for the Halal savvy Islamic young and upwardly mobile Muslims to seek Islamic avenues of dispute resolution, which will include not only the traditional option litigation, but also Islamic alternative dispute resolution mechanisms which tahkim (arbitration) is one of them.[1034] Furthermore, the recent approval of CBN of the introduction of Islamic Banking Products in Nigeria banks will also give rise to the need for practical application of Islamic arbitration as the need arise. It is hoped that the Nigerian lawyers will be prepared to tackle these conflicts according to the already available sharia laws.

[1033] For example, section 29(3) of the Kano State Shariah Penal Code Law 2000
[1034] 28 Ambali, Op cit pg 87

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