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*Sulh*¹: A Crucial Part of Islamic Arbitration

Aseel Al-Ramahi*

Abstract: Arbitration and amicable settlement (*sulh*) have a long history within Arab and Islamic societies and have their roots in pre-Islamic Arabia. Sulh is the preferred result and process in any form of dispute resolution. Further, arbitration is favoured to adjudication in Islamic jurisprudence. In tribal and Islamic cultures, the overarching objective in conflict settlement is collectivity. Group solidarity is explored in this paper and its effect on dispute resolution is examined. The paper looks at the differences between East and West and shows that the Eastern party has an intrinsic community and a collective attitude to conflict whereas the Western party is individually minded and procedurally orientated, thus causing friction between the two sides. The distinctions between them relate to the perceptions of conflict, the formation of procedure and the status and function of the third party intervener. International commercial arbitration is sufficiently equipped to accommodate those two norms if it is used effectively.

INTRODUCTION

‘To pursue a lawsuit is to gamble on victory. To elect conciliation is to seek fairness. Victories undermine relationships. Fairness strengthens them. Those who build for the long term would do well to choose conciliation’

Honourable Eliot Richardson, in a publication of the Euro-Arab Arbitration System

The normative foundations of contractual relationships and dispute resolution mechanisms in the East differ substantially from those underpinning the

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¹ Amicable Settlement.

international commercial arbitration model. Thus, if the foreign investor and counsel fail to comprehend the religious and cultural underpinnings supporting commercial arbitration in the Islamic Middle East, they may well find themselves in a dispute resolution system that is partially inaccessible, and laden with ambiguity and uncertainty.

Business relations in the Arab world are not matters only governed by the general principles of law and of contract in a world apart from home and family. They are a segment of the whole web of friendship, kinship obligations, and personal relations that support a particular way of life. Due process of law, sanctity of contract, and free enterprise based on purely individual rights never became the sacred trinitities that they became in the West. Whereas, westerners know the primacy of law, the Arabs know the primacy of interpersonal relationships. Arab commercial relationships are “relational” in the same sense that western commercial relationships are “legal.” Thus, leading to the paradox that the West has conceptions of discreet bounded notions of contract whereas the Arabs have fluid and multi layered notions of the same.

Dispute resolutions in the Middle East are guided with an overarching principle of collective interests of the family, the tribe, the community and the country. The Arab’s Islamic and tribal history places collective interest as the highest principle in a hierarchy of values in both dispute resolution and everyday dealings. The maintenance of relationships and the restoration of harmony is a duty on all members of the group as well as the third party intervener, whether he be a judge (*a qadi*), an arbitrator (*a hakim*) or a conciliator. Therefore, collective interests and *sulh* (amicable settlement) are the cores of any dispute resolution system in Islam in order to maintain the ties of family, brotherhood, and community.

The Middle East is influenced by the textual language and interpretation of both the Koran and the *Sunna*. This is because Islam is not just a religion, it is a way of life. *Din*—the Arabic word for religion, ‘. . . encompasses theology, scripture, politics, morality, law, justice, and all other aspects of life relating to the thoughts or actions of men . . . it is not that religion dominates the life of a faithful Moslem, but that religion . . . is his life.’² A distinct feature of Islam is the codified set of rules and regulations that regulate and control society in its behavioural aspects as well as in its relations towards the state. Islam includes a just economic order, a well balanced social organisation and codes of civil and criminal laws. The fundamentals of *Sharia* (Islamic law) contain two parts; first rules governing *ibadat* (devotion of rituals) which are legislated by God and explained by the Prophet, and second rules which govern, for example, civil transactions and state affairs.

The focus of this paper is ‘the duty to reconcile’ imposed on all Muslims. *Sulh* is a settlement grounded upon compromise negotiated by the disputants themselves or with the help of a third party. In Islam, it is ethically and religiously

² D.S. Roberts, *Islam: A Westerner’s Guide-From Business and the Law to Social Customs and Family Life* (London: Hamlyn, 1981) 67-68.

the superior way for disputants faced with conflict. *Sulh* is also a duty on any person who is adjudicating between the conflicting parties, whether a judge (*qadi*) or an arbitrator (*hakam*). *Sulh* is a legal instrument intended not only for the purpose of private conciliation among individuals and groups in lieu of litigation; it is also the procedural option that could be resorted to by a *qadi* within the context of his courtroom or a *hakam* in his conference room. Thus, *Sulh* is part of every dispute resolution mechanism in Islam.

This paper also traces the validity of arbitration in *Sharia* and clarifies its conciliatory nature. Arbitration is defined in *Sharia* as ‘two parties choosing a judge to resolve their dispute and their claim. Traditionally, the differences between arbitration and formal dispute resolution through judiciary... is the parties themselves select the arbitrator and ... the parties themselves must voluntarily accept and obey the decision of the arbitrator’³. Like a judge, an arbitrator in Islam imposes his will on the parties based on the arguments presented before him, *Sharia* and its principles.

In the last section of this chapter, the Islamic collective and conciliatory form of arbitration is contrasted with the individual culture of the West and its dispute resolution. In many ways, the international commercial arbitration model is distinguishable from the norms of the Middle Eastern dispute resolution, which will be explore later in this paper.

PRE-ISLAMIC *SULH* AND ARBITRATION

The Arabian Peninsula was populated by tribes who claimed descent from a common ancestor. It was to the tribe as a whole that individual’s owed allegiance and it was from the tribe that protection of interests was obtained. The tribe was bound by a body of unwritten rules, which had evolved along with the historical growth of the tribe itself as a manifestation of its spirit and character. No one had the legislative power to interfere with this system and there was an absence of any official organisation for the administration of the law. Enforcement of the law was generally the responsibility of the private individual who had suffered injury. Tribal justice was administered by the chief of the tribe in a form adapted to their way of life which used arbitration and conciliation extensively.⁴ Tribal law is built upon two basic principles: (1) the principle of collective responsibility; and (2) the principle of retribution or compensation. The objective of tribal law is not merely to punish the offender but to restore the equilibrium between the offending and the offended families and tribes.⁵

³ H. Mahassini, ‘General Principles of Islamic Law relating to International commercial arbitration’ (1992) 3(1) *The ICC International Court of Arbitration Bulletin*, Special Supplement, 21, 23.

⁴ *ibid* 31.

⁵ R. Patai, *The Kingdom of Jordan* (Princeton, NJ: Princeton University Press, 1958).

Sulh, or conciliation and peacemaking, is a practice that predated Islam. Within the framework of tribal Arab society, chieftains (*sheikhs*), soothsayers and healers (*kubhān*), and influential noblemen played an indispensable role as arbiters in all disputes within the tribe or between rival tribes. The authority and stature of those men served as sanctions for their verdicts.⁶ The decision of the *bakam* was final but not legally enforceable. It was an authoritative statement as to what the customary law was or should be and later of Islamic principles. In fact, Schacht refers to a *bakam* in such situations as ‘a lawmaker, an authoritative expounder of the normative legal custom or sunna.’⁷ The main objective of these third parties was conciliation and the maintenance of harmony. Some arbitrators would go to a great extent to produce the necessary compensation or inducement out of their own pockets in order to persuade the feuding parties to agree to a *sulh*.⁸

The sons of the tribes were socialised to refer to their leaders in order to help them resolve disputes. This was built into their attitudes from an early age. The youngster referred to his father to resolve problems between him and his family or relatives. Thus, the father was his *wasta*⁹ or mediator between him and his relatives. As the child got older, he starts to refer also to the elders in his family whether they are uncles or cousins, thus everyone is used to helping each other. At times of crisis, everyone rallies round their tribal son. Tribesmen are familiar with what is considered to be arbitration- *wasta*; the arbitration of the father for his sons, in addition the relatives and also the *sheikh* for the members of his tribe. Usually, only when disputes are complex and serious do the tribal members refer to their *sheikh*.

“*Wasta*” means, literally *the middle* and is associated with the verb *yatawassat*, to steer parties towards a middle point or compromise. *Wasta* refers to both the act and the person who mediates or intercedes.¹⁰ *Wasta* is an institution and a part of Arab society since its creation. Its tribal origins centered around an intermediary role that is associated with prevention of retaliation in inter-personal or inter-group conflict.¹¹

The effectiveness of tribal mechanisms in containing disputes can be attributed to a ‘complex system of special customs and regulatory procedures within each group’¹². The concept of collective responsibility, extending either to the tribe as a whole or to the tribesman’s extended family up to five generations removed (*khamisa*), which offered all individuals a measure of protection. However, collective responsibility is a two edged sword. On the one hand, it could

⁶ M. Hamidullah, ‘Administration of Justice in Early Islam’ (1937) 11 *Islamic Culture* 163.

⁷ J. Schacht, *An Introduction To Islamic Law* (Oxford: The Clarendon Press, 1964) 8.

⁸ A. El-Tayib, ‘The Ode (Qasidah)’, in *The Cambridge History of Arabic Literature: Arabic literature to the End of the Umayyad Period* (Cambridge: Cambridge University Press, 1983).

⁹ Both the well-connected, personal intermediary-intervener and the process of intermediation-intervention.

¹⁰ R. B. Cunningham & Y. K. Sarayrah, *Wasta: The Hidden Forces in Middle Eastern Society* (London: Praeger, 1993) 1.

¹¹ A. Al-Ramahi, ‘Wasta in Jordan: A Distinct Feature of (and Benefit for) Middle Eastern Society’ (2008) *Arab Law Quarterly* 22(1) 35

¹² A.S.S. Owidi, ‘Bedouin Justice in Jordan: The Customary Legal System of the Tribes and its Integration into the Framework of State Polity from 1921 onwards’, Ph.D., University of Cambridge, 1982, 40.

potentially turn a conflict between two individuals into a war between two families or tribes and on the other hand, the knowledge that a person's actions might drag the whole tribe into a bloody conflict could also restrain individuals. When a crime is committed, collective responsibility facilitates quick settlement, as the culprit's entire tribe are liable to pay compensation to the victim's family. Compensation, in cash or in kind, is the chief means of settling disputes, hence the existence of elaborate protocols of compensation. Third parties stood to gain much in terms of prestige if their intervention and *wasta* led to the settlement of a dispute.

An individual's life is considered to be an element of the collective life; thus, the individual and the collective are considered to be one of the same. Therefore, any attack on the individual is considered to be an attack on the group and vice versa. If an individual injures another then the offender's whole tribe is held responsible. When the offended tribes claim their compensation or revenge they direct their claims against the offender's tribe as a whole, not just the individual. The payment of compensation is treated as if from the whole of the offender's tribe and is usually paid from the resources of the relatives of the offender. This responsibility parallels the responsibility of the offended tribe to seek revenge. Hence, any member of the offended tribe can discharge this responsibility by killing any member of the offender's tribe not just the offender himself. All are collectively responsible for the punishment, revenge or compensation of any member of the tribe. All are jointly and severally liable for the compensation, punishment or revenge.

A *hakam* would be chosen for his personal qualities, for his reputation, for example if he belonged to a family famous for their competence in deciding disputes or for his supernatural powers. A popular choice being the *kahin*, a priest of a pagan cult who claimed supernatural powers of divination. This claim was often tested by the parties beforehand by making him divine a secret. The parties agreed on the choice of arbitrator, the cause of action, and the question, which they were to submit to him. All of which will be recorded. If the *hakam* agreed to act, each party had to provide a security, in the form of either property or hostages, as a guarantee that they would abide by his decisions. The decision of the *hakam*, which was final, was not an enforceable judgement but rather a statement of right on a disputed point.¹³ Hence, the need for execution to be guaranteed by security. The enforcement of an arbitral award depends entirely on the arbitrator's respectability and stature within society. Arbitrators used persuasive means to ensure that an award was complied with by the parties, including making an award easy to follow and convincing the offender that he had committed a wrong.¹⁴

The arbitral proceedings were an effective means of resolving disputes and ensuring harmony between conflicting parties. The arbitrators insisted that the parties attend the hearing which was a necessary condition for the validity of the

¹³A. Ahdab, *Arbitration with the Arab Countries* (Boston: Kluwer Law International, 1999) 11.

¹⁴*Kitab al-Aghani*, Bulaq, 1285, vols. II, 164.

arbitration. The process of arbitration relied upon the claimant proving his case and the respondent basing his defence on his oath.¹⁵ If a claimant did not prove his case then he could ask the respondent to swear an oath denying the claim. If the respondent did so then the claim would fail. The tribes before Islam declared their oath before the statute of Hobeil (an idol) that stood in the *Kabeel* in Mecca.

The Prophet Mohammad was chosen as an arbitrator before he became a prophet due to his honesty and trustworthiness and sometimes he was referred to as a *kahin*. One of the most famous disputes during that time was in relation to the black stone. This was a dispute between the *sheikhs* of Mecca over the placing of a holy black stone¹⁶. There was fierce disagreement between the tribes as to who will have the honour of choosing the position of the stone. They could not resolve this so they asked Mohammad to find them a solution. He took his *abaeh* (robe) and placed the black stone in the middle of it. Then, asked each *sheikh* to hold a side of his *abaeh* and told them together they can all place the holy stone in whatever place they agree on collectively which resolved the dispute.

In some areas of the Arab world, dispute resolution was relatively structured and permanent. According to Coulson, 'the general picture of primitive customary tribal law of Arabia in the sixth century requires some qualification'¹⁷. Mecca, for example, was a flourishing centre of trade which had a rudimentary system of legal administration with public arbitrators appointed that applied some sort of commercial law. While the Medina was an agricultural area with some elementary forms of land tenure which also had a basic justice administration. However, in both these cities, the sole basis of law lay in its recognition of established customary practice.¹⁸ The adherence to customs continued within Islam. *Al urf wal adab* is a rule that allows the reference to customs and established practices as a legitimate source of law, as long as, they do not contradict with *Sharia*. *Urf* or custom is of particular significance in our context as many of the rules of international commercial arbitration have evolved to the level of custom and some now form part of the law.¹⁹

Many of the rules of conduct practiced before Islam continued to be honoured after the rise of Islam especially customs relating to personal honour, hospitality and courage. The Prophet also encouraged such values as kindness, mercy and justice, which developed the earlier customs and practices of the region. The Prophet's moral teachings are summed up in a Tradition ascribed to him, in which he declared that he was 'sent to further the principles of good character'²⁰. Thus, many of the positive tribal customs were incorporated into Islamic teaching and jurisprudence.

¹⁵ The Medjella of Legal Provisions, s.76.

¹⁶ The black stone have become a holy stone in Islam.

¹⁷ N.J. Coulson, *A History of Islamic Law* (Edinburgh: University Press, 1964) 10.

¹⁸ *ibid*.

¹⁹ M. C. Bassiouni and G. M. Badr, 'The Shari'ah: Sources, Interpretation, and Rule Making' 1 UCLA J. Islamic & Near E. L. 135.

²⁰ J.A. Bellamy, 'The Makarim al-Akhlaq by Ibn Abi-Dunya' (1963) LIII *Muslim World* 100, 119.

THE ISLAMIC RELIGION

After the advent of Islam in the sixth century, the Arabian Peninsula became the geographical base for the Islamic state, ruled by the Prophet Mohammad and his successors, the *Caliphates Rashdeen*²¹. There are two main sources of Islamic law-*Sharia*: Koran that God revealed to Mohammad who is considered to be God's final Prophet and *Sunna* which is the words and deeds of Mohammad. There are also three secondary sources of *Sharia*; *Ijma*, *Qiyas* and *Ijtihad* which will be explained in detail below.

Islam is a religion originating from the teachings of Mohammad of the Koran and the *Sunna*. The Koran contains 114 *suwar* (chapters) and 6616 *ayat* (verses) and 77,934 words which cover virtually all aspects of life and society. Mohammad as the Prophet became the ruler and lawgiver of a new Islamic society first in Mecca and then in the Medina in A.D. 622. When Mohammad acted as a judge in his community, he acted in the function of *hakam*. Mohammad attached great importance to being appointed by the believers as a *hakam* in their disputes as it renewed their belief in him as a prophet and as a person. Therefore, as long as Mohammad was alive he was regarded as the ideal person to settle disputes between believers through conciliation.

The *Sunna* is the term used to refer to the normative behaviour, decisions, actions, and tacit approvals and disapprovals of the Prophet. The *Sunna* was heard, witnessed, memorized, recorded, and transmitted from generation to generation (as the Arabs had a great oral tradition).²² The *Sunna* is the second source of Islamic law after the Koran. The Muslim nation follows the Prophet and learns from him until today. The *Sunna* was compiled into collections according to the recorder's name and referred to as *hadith*.²³ By the third century, there were six recognised groups of hadith which are considered to be accurate among the Muslims: al Bukhari (256/870), Muslim (251/865), Abu Da'ud (275/888), al Tirmidhi (279/892), al Nasa'i (303/915), Ibn Majah (273/886), with the first two collections being more respected.²⁴ The authenticity attributed to these collections was based on the scrutiny of references and crosschecking of witnesses employed by the respective collectors as well as the *isnad* (credibility of the chain of authorities attesting to the accuracy of a particular tradition).²⁵ These *hadiths* are an important part of *Sharia* and thus Muslims' lives.

The companions of the Prophet would first consult the Koran, and then the *Sunna* before deciding on any problem or issue in accordance with this *aye*:

²¹ Rashid means "wise": those who immediately succeeded the Prophet.

²² n 16 above, 141.

²³ I. Faruqi and L. Faruqi, *The Cultural Atlas of Islam* (New York: MacMillan Publishing, 1986) 114.

²⁴ n 16 above, 141.

²⁵ F. Kutty, 'The Shari' a Factor in International Commercial Arbitration' Osgoode Hall Law School, University of York, 17 April 2006.

‘O you who believe! obey Allah and obey the Apostle and those in authority from among you; then if you quarrel about anything, refer it to Allah and the Apostle, if you believe in Allah and the last day; this is better and very good in the end.’²⁶

This process is followed by Muslims until our present times. If these two primary sources were silent then they resort to extrapolating and deducing from the first principles gleaned from the two divinely inspired sources of Koran and *Sunna*. In aid of Muslims of the time and the future, the second *Caliphate* of Islam, Umar ibn al-Khatt’ab, instituted the body of legal opinions of the Prophet’s companions as a tertiary source that could be consulted by later jurists- *fuqaha*.²⁷ It is clear that Islamic law has three distinguishable facets, namely revelation (the Koran and the *Sunna* which is also considered inspired), interpretation and application. The early Muslim jurists and scholars set out to canonize the *Sunna* and develop the *fiqh* to systematize the development of the law.²⁸ Thus, a distinction must be made between *Sharia* and many of the technical legal rules derived from the Koran and *Sunna* through *fiqh*.²⁹ A *faqih*³⁰, or jurist derive these rules and thus his decision is not eternal but open to re-interpretation in the light of, *inter alia* new social, economic, educational and political circumstances and needs.³¹

IJMA, QIYAS AND IJTIHAD

The doctrines of the different sects of Islam produced an immense wealth of differing opinions ranging from extreme conservative opinions to the most liberal ones, however, none of those opinions could contradict with the Koran and the *Sunna*. Muslims could adhere and apply any of these opinions to their daily lives. The field of settlement of disputes is one of the richest fields of differing opinions between the sects of Islamic law.

It is important to note that the areas governed by strict, detailed and clear rules in Islam are relatively limited and are mostly related to religious practices such as praying and fasting. The relationship between members of society in different fields including dispute resolution is governed by general principles interpreted and explained by the three secondary sources of Islamic law; *Ijma*, *Qiyas* and *Ijtihad*.

The *qiyas* is reasoning by analogy to solve a new legal problem. The *Ijtihad* is defined as the intellectual effort by a *mujtahid* (one who is qualified to do *ijtihad*, a

²⁶ Verse 59 in *Sura Nisa* (Women).

²⁷ n 20 above, 275.

²⁸ M. H. Kamali, ‘Source, Nature and Objectives of Shariah’ 33 *Islamic Quarterly* 211, 212.

²⁹ *ibid*, 212.

³⁰ A *Faqih* means a jurist; an expert in the field of law, who possesses outstanding knowledge of revealed sources and methodology, and the intelligence to make use of the basic sources through independent reasoning and the principles provided by the Shari’a.’

³¹ A. G. Muslim, ‘Islamic Laws in Historical Perspective: An Investigation Into Problems and Principles in the Field of Islamization’ 31 *Islamic Quarterly* 69.

jurist consult) in deriving rules consistent with the first principles of Islam. *Ijtihad* could refer to the use of *qiyas* to extend a rule or independently taking account of the *maqasid al shariah* (the higher purposes or objectives of the *Sharia*). To carry out these techniques it was imperative that jurists, 'be familiar with the broad purposes of the Law, so that when choices are to be made they will be able to choose interpretations which accord with the spirit of the Law.'³²

In *Sharia*, *al-khayr al-'am* (general good) is an overarching principle which is implied in the Koran. It is intended to promote the public welfare of believers; and guide men to do good and to avoid evil. More specifically, *Sharia* is designed to protect the *maslaha* (public interest), since man is not always aware of what is good for him and his people,³³ only God knows that which is in the best interest of all. Consequently, another principle of *Sharia* is the collective interests of the believers as a whole; the interests of the individual are protected only in so far as they do not come into conflict with the general interest. Another principle of *Sharia* is *makarim al-akhlaq* (good character) and believers are commanded by God to observe these principles in good faith.³⁴ And to educate individuals to inspire faith and instil the qualities of trustworthiness and righteousness and establish *adl* (justice) which is one of the major themes of the Koran³⁵

In principle, the *Sharia* permits legal rules to be changed and modified in accordance with changing circumstances. The justification for *qiyas* and *ijtihad* is found in the Koran and the *Sunna*. As evidence of his support for *Ijma*, Akaddaf cites the Prophet Mohammad, '[m]y nation will not agree unanimously in error.'³⁶ *Ijma* or consensus of the community is a third source of Islamic law. Once a fresh *ijtihad* or *qiyas* has been reached and a consensus develops around it (ratification by the community) then it becomes part of the corpus jurist of Islamic law. Khaliq describes that *qiyas* are often used to apply Islamic principles to the modern era.³⁷

THE FOUR MAJOR SCHOOLS OF SHARIA

The major schools of Islamic jurisprudence represent various regional and doctoral approaches to solving legal questions at the beginning of the first two

³² B. Weiss, 'Interpretation in Islamic Law: The Theory of Ijtihad' (1978) 26 *American Journal of Comparative Law* 210, 212.

³³ 'Fighting is enjoined on you, and h is an object of dislike to you; and it may be that you dislike a thing while it is good for you, and it may be that you love a thing while it is evil for you, and Allah knows, while you do not know.' Verse 216 in Sura Albara (Cow).

³⁴ 'O my son! keep up prayer and enjoin the good and forbid the evil, and bear patiently that which befalls you; surely these acts require courage' Verse 17 in Sura Lokman (Name of Prophet) and 'O you who believe! avoid most of suspicion, for surely suspicion in some cases is a sin, and do not spy nor let some of you backbite others. Does one of you like to eat the flesh of his dead brother? But you abhor it; and be careful of (your duty to) Allah, surely Allah is Oft-returning (to mercy), Merciful.' Verse 11 in Sura Alhojrat (The Chambers).

³⁵ There are at least 53 instances where the Koran commands *adl*.

³⁶ F. Akaddaf, 'Application Of The United Nations Convention on Contracts For The International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?' (2001) 13 *Pace Int'L L. Rev.* 1, 18.

³⁷ U. Khaliq, 'Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated by the Shari'ah' (1995) 2 *Buff. Jour. Int'L L.* 1 8.

centuries of Islam. All Islamic scholars accept that the Koran and the *Sunna* are the main sources of *Sharia* and thus, whatever is stated within them must be followed by Muslims. The primary differences between the schools lie in the circumstances in which their doctrines use the three techniques of interpretation described above.

‘The great jurists of Islam --Shafi’i, Abu Hanifah, Malik and Ahmad ibn Hanbal -- all understood the compound term *usul al fiqh* -not as the general principles of Islamic law, but the first principles of Islamic understanding of life and reality ...The *faqih*s of the classical period were real encyclopedists, masters of practically all the disciplines from literature and law to astronomy and medicine. They were themselves professional men who knew Islam not only as law...’³⁸

Numerous schools of jurisprudence developed and began along geographical lines, in Medina and Kufa (Iraq), but later evolved around individual scholars or jurists.³⁹ The four schools of *Sunna* jurisprudence are named after the respective founders: the Hanafi School (Abu Hanifah. d.767), the Maliki School (Malik ibn Anas, d.795), the Shafi’i School (d.819), and the Hanbali School (d.855).⁴⁰ Each developed its own scholarship by interpreting the Koran and *Sunna* using three techniques; *ijtihad*, *ijma* and *qiyas* in relation to many areas of Muslim life including dispute resolution.

DUTY TO RECONCILE (*SULH*) IN ISLAM

Collectivity ‘has a special sanctity attached to it in Islam’⁴¹ that resulted in a duty being imposed on any person who has been chosen to resolve a dispute between parties to try to reconcile them first and foremost. The Koran encourages parties to use *sulh* in order to resolve their disputes: ‘reconciliation between them, and reconciliation is better’⁴² and in another aye ‘If two parties among the Believers fall into a quarrel, make ye peace between them . . . make peace between them with justice, and be fair: For God loves those who are fair and just.’⁴³ The Prophet Mohammad also insisted on *sulh* and said it was more rewarding than fasting, praying and offering charity. The Prophet encouraged compromise and mediated

³⁸ I. Faruqi, ‘Islamization of Knowledge: Problems, Principles and Prospective’ in *Islam: Sources and Purpose of Knowledge* (Herndon, Virginia: International Institute of Islamic Thought, 1988) 34.

³⁹ *ibid* 62.

⁴⁰ G. Makdisi, ‘Legal History of Islamic Law and The English Common Law: Origins and Metamorphoses’ 34 *Cleveland State Law Review* 3, 6.

⁴¹ A. K. Brohi, ‘The Nature of Islamic Law and the Concept of Human Rights’ in Human Rights in Islam, Report of a Seminar organized by the International Commission of Jurists, University of Kuwait and the Union of Arab Lawyers (Geneva: International Commission of Jurists, 1980) 48.

⁴² Verse 128 *Sura Nisa (Women)*.

⁴³ Verse 9 in *Sura AlHujurat (The Chambers)*.

both public disputes, such as those between fighting clan members, and private ones, including those between his Companions and their creditors. Further, a well-known *hadith* of the Prophet warns:

You bring me lawsuits to decide, and perhaps one of you is more skilled in presenting his plea than the other and so I judge in his favour according to what I hear. He to whom I give in judgment something that is his brother's right, let him not take it, for I but give him a piece of the Fire.⁴⁴

Sulh was the method preferred by the Prophet, who made it plain that he was sceptical of judicial proceedings, which were devised by man and therefore fallible. Parties who won their cases by dint of eloquence at the expense of truth were threatened with direst sanctions.⁴⁵ Thus, the trial process is not regarded as an ultimate truth-finding mechanism that will lead to substantive justice. It can be tainted and subverted by the imperfect nature of man, therefore, it should be avoided when possible.

A report in the *Musannaf* of al-San'ani attributed to Umar ibn al-Khatt'ab, the second *caliphate* of Islam, to be unequivocally critical of adjudication: 'Dispel the disputants until they settle amicably with one another (*yastalatu*); for truly adjudication leads to rancor.⁴⁶ Molla Khusrew (d. 885/1480), the author of the *Durar al-Hukkam fi Sharh Ghurar al-Ahkam*, an important legal treatise for scholars and judges since the fifteenth century, states in his introduction to his chapter on adjudication that it follows the chapter on *sulh* because '[Adjudication] is needed [only] when there is no *sulh* between two litigants'⁴⁷. However, an arbitrator or judge cannot turn the parties away if they cannot be reconciled. This was dealt by the Umar ibn al-Khatt'ab who was reported to have directed in his letters to his representatives in the different parts of the Muslim Empire: 'And strive for conciliation so long as the rendering of judgment does not become evident to you.'⁴⁸

Al-Shafi states that he prefers it if a judge commands disputants to attempt *sulh* and extricates himself from his judicial duties for one or two days to facilitate their conciliation. However, if they disagree, he cannot turn them away and should instead proceed to adjudicate between them. Al-Shafi warns the judge against judging if the decision is not plain to him, for it amounts to oppression. The judge has the burden of ascertaining exactly where judgment should lie, no matter how

⁴⁴ M. ibn Anas (d. 179/795), *al-Muwattā* (Beirut: Dār al-Gharb al-Islāmī, 1996) vol. 2 under Kitāb al-Aqdiya [Book of Judgments] (2103).

⁴⁵ A. Othman, 'And Amicable Settlement Is Best': *Sulh* and Dispute Resolution in Islamic Law' (2007) 21 *Arab Law Quarterly* 64.

⁴⁶ 'Raddū-l-khusūm hattā yastalahū, fa-inna-l-qadā yūriḥ al-daghā'in', 8 (15304): 303-4; Ibn Abi Shayba, *al-Musannaf* 7 (2938): 213-14.

⁴⁷ 'Awrada-hu bada-l-sulh li-anna-hu inna-mā yuhtāj ilay-hi idhā lam yakun bayna-lmutakhāsimayn Sulh, Mehmed ibn Farāmurz ibn Ali (Egypt: al-Matbaa al-Wahabiyya, 1264/1877) 497.

⁴⁸ n 42 above.

long it takes.⁴⁹ His follower al-Qassī (d. 335/946-947) claims that if there is an *ijma* that a judge can delay judging if he desires *sulh*, but this must be with the consent of the parties. Al-Shirazi (d. 476/1063) goes a little further and says that even if the judge knows which way judgment should be given, it is still recommended (*mustaba*) that he command them to attempt a *sulh*. Once they fail, he is not to try again to persuade them, for judgment is obligatory (*al-hukm laẓīm*) in such cases, and postponing it without the consent of the entitled party is not allowed. Ibn Hajar al-Asqalānī (d. 852/1449) agrees, saying that the majority of jurists prefer that a judge steer parties in the direction of *sulh* even if it is clear how he should judge the case.⁵⁰

Ibn Farhūn emphasised that judges should apply *sulh* when faced with certain types of disputants and cases, namely when (1) the parties have a kinship with one another, (2) they are people of virtue and good standing in society, (3) there is risk of increased hostility between them, and (4) the nature of the case is such that it is difficult for the judge to decide. The implication is that the judge need not feel compelled to consider *sulh* otherwise. In general, the sources of Islamic law reveal that *sulh* is central to an Islamic legal system, and that judgment by judicial fiat is not the superior method for dispute resolution and *sulh* should be attempted and encouraged whenever reasonable to do so.

SULH IN ARBITRATION

Sharia has not completely separated *sulh* and arbitration. Many of the Koranic authority and *hadiths* supporting arbitration could also be used as authority for *sulh*. The Koran and the *Sunna* have approved arbitration in the form of a third person chosen by the parties to resolve their disputes either through conciliation or adjudication. However, the differences between the two are also recognised. Arbitration, in Islam, differs from *sulh* in three respects: namely, first, in *sulh* an amicable settlement may be reached between the parties with or without the involvement of others, whereas in arbitration the appointment of a third party is indispensable. However, the disputing parties in *sulh*, also have the option to use an arbitrator in order to work towards a settlement. Thus, arbitration can be one of the means of *sulh*. Second, the agreement of *sulh* is not binding unless it has taken place before the court, whereas arbitration, according to the majority of jurists, is binding without court intervention. And third, *sulh* can only be resorted to if the dispute has already occurred, i.e., *sulh* cannot address a prospective dispute, whereas arbitration can address both existing and prospective disputes.

⁴⁹ Muhammad ibn al-Shafi, al-Umm (Beirut: Dār al-Kutub al-ʿIlmiyya, 1993) 6:312.

⁵⁰ Ibrāhīm ibn Alī al-Shirāzī, al-Muhadhdhab (Beirut: Dār al-Kutub al-ʿIlmiyya, 1995) 3:404; Ibn Hajar al-Asqalānī, Fatḥh al-Bārī fi Sharḥ Ṣaḥīḥ al-Bukhārī (Riyadh: Dār al-Salām, 2000) vol. 5 (2706) 378.

KORAN

Arbitration was approved by the Koran and referred to in a number of *ayat* (verses) as an acceptable dispute resolution mechanism. For example,

and if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind. Lo! Allah is ever Knower, Aware.⁵¹

Also, this *aye*,

Surely Allah commands you to make over trusts to their owners and that when you judge between people you judge with justice; surely Allah admonishes you with what is excellent; surely Allah is Seeing, Hearing.⁵²

The first *aya* confirms that arbitration must be used to resolve dispute between married couples before divorce is granted. It outlines the need for two arbitrators (one from each side). The second *aya* from the Koran imposes a duty on any person who judges a case and apportions blame between parties to do so fairly and justly. This *aye* authorises those who judge to make decisions that are binding.⁵³ These *ayat* could also be interpreted to impose *sulh* between conflicting parties. Either way, the main aim of arbitration is to ensure that disputes between Muslims are resolved amicably and justly.

There are two schools of thought regarding the nature of arbitration which will be dealt with in detail below. The first one is arbitration through conciliation (*sulh*) and the second is binding arbitration. The *ayat* have been interpreted to support both schools, leaving the choice to the parties and making arbitration a voluntary process, unlike other obligatory rules in the Koran. This shows the flexible and evolutionary nature of *Sharia* which allows the parties to choose and adapt the process to suit them and their dispute.

SUNNA

Prophet Mohammad developed the *Sunna* through teaching people and tribes of the Arabian Peninsula. He tried to develop a climate where the Islamic nation resolved their disputes peacefully and without resorting to violence. Prophet Mohammad recognised that any case that could be resolved by conciliatory arbitration should be as this is better for the community.⁵⁴ Schacht contended '[t]he arbitrators applied and at the same time developed the sunna; it was the

⁵¹ Verse 35 in *Sura Nisa* (Women).

⁵² Verse 58 in *Sura Nisa* (Women).

⁵³ n 10 above, 17.

⁵⁴ n 20 above, 114.

sunna with the force of public opinion behind it, which had in the first place insisted on the procedure of negotiation and arbitration.⁵⁵ Arbitration continued as a dispute resolution practice in the Mohammad and post-Mohammad eras. In fact, for a Muslim, 'arbitration carries with it no better imprimatur than that given to it by the Prophet himself'.⁵⁶

Mohammad advised both Muslims and non-Muslims to refer their disputes to arbitration. One of the first non-Muslims that followed this advice was the tribe of Bani Kornata.⁵⁷ Mohammad acted both as an arbitrator and as a party who accepted the decision of an arbitrator. Another example of the use of arbitration during the Prophet's time was a clause in the Treaty of Medina, the first treaty entered by the Muslim community, signed in 622 A.D. between Muslims, Non-Muslim, Arabs and Jews which called for disputes to be resolved by arbitration.⁵⁸

The Sunni schools of *fiqh* have found the *hakam's* decision to be binding like a contract or akin to a judgement of the court. Even though the arbitral award maybe weaker in comparison to a judgement, according to some schools of *fiqh*, this does not release the parties from following it, according to the rules of *Sharia*. Thus, an arbitral award is binding in the same way as a contract. According to *Sharia*, a contract is divine in nature, and there is a sacred duty to uphold one's agreements:

O you who believe fulfil any contracts [that you make]... Fulfil God's agreement once you have pledged to do so, and do not break any oaths once they have been sworn to. You have set God up as a Surety for yourselves.⁵⁹

This special position of contracts is best summed up by the Islamic maxim *Al Aqd Shari'at al muta'agqidin* which essentially states, '[t]he contract is the Shari'a or sacred law of the parties'.⁶⁰ This makes it abundantly clear that contractual relationships are viewed strictly under *Sharia*. Indeed, all contractual obligations must be specifically performed, unless they contravene *Sharia*, including arbitral awards or *sulh* during the arbitration process or otherwise.⁶¹

The Koran and the *Sunna* confirmed the validity of arbitration but the difficulty that arose was in the characteristics of implementation. Therefore, the four schools of *Sharia* explained the process of arbitration which obliges each Muslim within each school to follow its teachings.

⁵⁵ n 6 above, 8.

⁵⁶ A.J. Gemmell, 'Commercial Arbitration in the Islamic Middle East' (2006) 5 *Santa Clara Journal of International Law* 169, 173.

⁵⁷ *Libyan Am. Oil Co. (LAMCO) v Libyan Arab Republic* (Apr. 12, 1977), 20 I.L.M., 1 (1981).

⁵⁸ n 10 above, 12.

⁵⁹ The Fatawa of Ibn Taymiya, III, 326.

⁶⁰ M. C. Bassiouni, *The Islamic Criminal Justice System* (London: Oceana Publications, 1982) 10.

⁶¹ S. H. Amin, *Commercial Law of Iran* (Tehran: Vahid Publications, 1986).

HANAFI SCHOOL

The Hanafi School confirmed that according to the Koran, *Sunna*, *Ijma* and *Qiyas*, arbitration is a legitimate dispute resolution process because it serves an important social need and it simplifies disputes. It is also less complex than the courts.⁶² The scholars in this school emphasised the contractual nature of arbitration and stated that it is binding like any other contract. Some scholars argued that an arbitrator has the same duties as a judge but others considered the arbitrator to be closer to an agent or conciliator.⁶³

SHAFI SCHOOL

According to this school, it is permitted for the parties to choose an ordinary person that does not possess any of the judge's qualities to resolve the dispute, whether or not there is a judge available in the place where the dispute arose.⁶⁴ The scholars within this school confirmed the validity of arbitration by giving an example from history that shows Muslims referring disputes to the *Caliphate* Umar ibn al-Khatt'ab who acted as an arbitrator on many occasions. It is pointed out that an arbitrator is inferior to a judge as the arbitrator could be removed at any time by the parties before an award is rendered.⁶⁵

MALIKI SCHOOL

This school placed arbitration as one of the highest forms of dispute resolution. It contended that an arbitrator decides a case based on his conscience therefore, it allowed one of the disputing parties to be appointed as an arbitrator if he was chosen by the other party.⁶⁶ Unlike the other three schools, this School stresses that an arbitrator cannot be revoked after the commencement of arbitration proceedings. An arbitration award is binding on the parties except if a judge declares it to be flagrantly unjust.

HANIBALI SCHOOL

The scholars of this doctrine hold that the decision of the arbitrator has the same binding nature as a court judgment. Therefore, an arbitrator must have the same qualification as a judge and must be chosen by the parties.⁶⁷

⁶² n 22 above.

⁶³ *ibid*.

⁶⁴ Al Mawardi, *Adab Al Kadi*, T. II, 382.

⁶⁵ *ibid*, 385.

⁶⁶ n 10 above, 19.

⁶⁷ *ibid*, 20.

THE MEDJELLA OF LEGAL PROVISIONS

The “Medjella” of the Legal Provisions’ (the Medjella), the first codification of *Sharia* under the Ottoman Empire, confirmed the conciliatory nature of arbitration. Its articles were drafted and derived from the science of *fiqh* (academic writings and case law) relating to civil acts and the prevailing opinion of the Hanafi⁶⁸ doctrine. There was a whole section in the Medjella dedicated to arbitration. The main provisions reflected the contractual nature of arbitration which is closer to conciliation and compromise than to court judgements. Juries of the Medjella explained that an arbitral award is inferior to a court judgment, thus, a judge is authorised to invalidate an award if it is against his principles whereas he is obliged to enforce a judgment given by another judge.⁶⁹ However, this does not refrain the parties from enforcing *sulh* between them, thus making it binding between the parties just like a contract.

The duty of an arbitrator closely resembles an agent authorised by the parties to obtain a conciliation order. This principle was outlined by two provisions in the Medjella. According to the first provision⁷⁰, ‘should the parties have authorised the arbitrators...to conciliate them, the agreement of the arbitrators is deemed to be a compromise...which the parties must accept’ as if they had compromised themselves’. According to the second provision⁷¹ ‘if a third party settles a dispute without having been entrusted with this mission by the parties, and if the latter accept his settlement, the award shall be enforced by application of Article 1453’ according to which ‘ratification equivalent to agency’.⁷² Consequently, unlike a judgement, an award requires the agreement of the parties and thus, a judge could annul an arbitration award if he saw fit but cannot annul a judgement.

According to the Medjella, the concept of arbitration could be used to settle disputes in a way that resembles conciliation. Article 1850 of the Medjella stated ‘legally appointed arbitrators may validly reconcile the parties if the latter have conferred on them that power’. Therefore, if each of the parties has given powers to one of the arbitrators to reconcile them and the arbitrators terminate the case by a settlement, the parties may not reject the arrangement.⁷³ The technique proposed by Article 1850 enables each party to appoint its “arbitrator” and the two arbitrators thus appointed are in turn authorised to settle the dispute by means of conciliation - *sulh*.

Muslim scholars have all agreed upon the legal principle of arbitration, although they have formulated different opinions in relation to the definition of arbitration and the scope of its application. According to the first view, arbitration is a type of non-compulsory conciliation, however, the second thesis sees

⁶⁸ A Sunni school of jurisprudence.

⁶⁹ A. Haedar, *Dorar Albokam fe Sbarah Majalet Albokam*, Judgements within the Provisions of the Medjella.

⁷⁰ The Medjella of Legal Provisions, s.1844.

⁷¹ The Medjella of Legal Provisions, s.1847.

⁷² The Medjella of Legal Provisions, s. 1853.

⁷³ Code Civil Ottoman - Trad. Démétrius Nocolaides 1881.

arbitration as similar to judgments, fair and binding on the parties. Either way, the validity of arbitration is unequivocal in Islam and the duty to reconcile the parties is imposed on anyone resolving disputes between Muslims.

A Muslim arbitrator has a duty of conciliation and a moral obligation to clarify the facts, establish the truth and find the appropriate principles of *Sharia* to be applied. Islamic law allows the parties to confer upon the arbitrators the power to settle their disputes by a binding decision according to rules agreed upon or what the arbitrators consider just and fair.

Consequently, the word *hakam* has been given different meanings. The word can be used in its broad sense to refer to an authorised person to dispose of rights, to settle differences between different persons by suggesting settlement or helping them to reach it, or by issuing a binding decision to settle the dispute. The agreement of the parties defines the type of authorization in each case⁷⁴. It is noteworthy that even though the word *hakam* may refer to the conciliator or the arbitrator, Islamic law recognised the difference between the two. The word *hakam* refers in its strict sense to a person who is 'authorised' in a specific mission.⁷⁵ Islamic law commands an arbitrator to try to reconcile the parties first before making a decision on their dispute. Islamic parties place themselves entirely in the hands of a person whom they know, respect and believe to be capable of helping them out of the deadlock.⁷⁶ The overarching characteristic of any arbitrator whether he is trying to reconcile the parties or make a decision is to do so with neutrality and justice.

EAST COLLECTIVISM v WEST INDIVIDUALISM

Despite the rapid social and cultural changes wrought by modernisation, the cultural profiles of Arab-Islamic societies still differ profoundly from those of Western societies. Although, pastoral nomadism has declined rapidly in favour of village- and city- based modes of social life, nomadic peoples and their traditions have nonetheless left a deep imprint on Middle Eastern culture, society, and politics.⁷⁷ Urban professional classes have indeed emerged, yet the peoples of the Middle East have not yet disposed of loyal attachment to families and distinctive rituals of hospitality and conflict mediation. Nor have they dispensed with their flexible and effective kin-based collectivities, such as the lineage and the tribe,

⁷⁴ M.I.M. Aboul-Enein, 'Liberal Trends in Islamic Law (Sharia) on Peaceful Settlement of Disputes' (2000) 2 J. Arab Arb. 3.

⁷⁵ *ibid.*

⁷⁶ G. E. Irani and N.C. Funk, 'Rituals of Reconciliation: Arab-Islamic Perspectives' (1998) 20(4) *Arab Studies Quarterly* 1, 4.

⁷⁷ D. Eickelman, *The Middle East and Central Asia: An Anthropological Approach* (New York: Prentice Hall, 1997).

which until quite recently performed most of the social, economic, and political functions of communities in the absence of centralized state governments.⁷⁸

Even today, the institutions of the state do not always penetrate deeply into society, and “private” justice is often administered through informal networks in which local political and/or religious leaders determine the outcome of feuds between clans or conflicts between individuals. Communal religious and ethnic identity remains strong forces in social life, as do patron-client relationships and patterns of patriarchal authority.⁷⁹ Group solidarity, traditional religious precepts, and norms concerning honour and shame retain their place in Middle Eastern society.

Antaki⁸⁰ distinguishes two models of dispute resolution mechanisms. The first is intuitive and informal and the second is cognitive and formal. He argues that East subscribes to the former and the West to the later model. Western approaches to reconciliation concentrates on the individual. The individual in the East is enmeshed within his own group or tribe. It is not just business relations that need to be maintained in the Arab world, family and society connections as a whole need to be promoted and protected which is more likely to occur through *sulh* rather than adjudication.

The penetration of this tribal heritage and religious underpinning into the commercial world within the Middle East has created a gap between the Arabs way of doing business and that in the West. It is quite clear that the co-existence of these two rationalities is potentially problematic. The differences are not just in the general landscape but in the detail and perceptions in relation to specific matters. For example, Irani argues that conflict from a western perspective is considered to have a positive dimension, ‘acting as a catharsis to redefine relationships between individuals, groups and nations and makes it easier to find adequate settlement or possible solutions’.⁸¹ Whereas conflict in the East is considered to be negative, threatening and destructive to the normative order and needs to be settled quickly or be avoided. These two views of conflict are sufficiently dissimilar to substantiate the argument that each side has a very different starting point when it comes to understanding conflict and consequently, conflict resolution.

Western societies today strongly privilege individualism, thus, social pressures and relationships do not operate as influential factors in dispute resolution. Parties are committed to the process as a result of legally binding procedures or because the process serves their individual interests. Conflict is not necessarily seen as a

⁷⁸ L.E. King-Irani, ‘Kinship, Class and Ethnicity: Strategies for Survival in the Contemporary Middle East’ in D. Greener, (ed.) *Understanding the Contemporary Middle East* (Boulder: Lynne Rienner, 1999).

⁷⁹ H. Sharabi, *Neopatriarchy: A theory of Distorted Change in Arab Society* (New York: Oxford University Press, 1988).

⁸⁰ N. Antaki, ‘Cultural Diversity and ADR Practices in the World’ in Goldsmith, Ingen-Housz and Pointon (eds.), *ADR in Business: Practice and Issues Across Countries and Cultures* (The Netherlands: Kluwer Law International, 2006) 266.

⁸¹ G. E. Irani, ‘Islamic Mediation: Techniques for Middle East Conflicts’ *Middle East Review of International Affairs* 3(2) (June) 1.

negative interaction that should be avoided. The western model calls for a direct method of interaction and communication. Also, in the western model any intrusion of emotions and values is perceived as an obstacle to reaching an agreement.

By contrast, conflict resolution in the Middle East aims to restore order. Even though a dispute might begin between two individuals or two families, it soon involves the entire community or clan. The initiation and implementation of any intervention is based on the social norms and customs of the society. These social codes operate as a pressuring tool to reach and implement an agreement between two parties. Bargaining moves are conducted on the basis of preserving the social values, norms and customs. Future relationships are very crucial elements in settling disputes in the Arab-Islamic context. Priority is given to people and relationships over task and structures. Face to face bargaining or negotiation could be perceived by the parties as antagonising the situation or as a humiliating act for the victim.

One of the deepest contrasts between western and Middle Eastern dispute resolution lies in the nature of the third party intervener. In the Middle East, the third party is a leader who lives in the community and has high status and brings considerable knowledge of events, the character of the dispute and the disputants. In the western case, third parties are usually strangers to the dispute. They lack the closeness and connectivity to the disputants. Such distance is appreciated and encouraged in a western context. The Middle Eastern intervener advocates settlement that accords notions of justice as accepted in the society and enforces social norms. Western settlement aims at achieving lasting agreements.

The creditability of the third party in the Arab-Islamic context is based on kinship connections, religious merits and knowledge of customs and community. In the western case credibility is based on training, professional degrees and experience. In the Arab context, emotions are relevant in dispute resolution, in contrast to the western intervener who is expected to detach himself from the disputants and be committed purely to the process itself.

There is no denying that the East and West disputing landscapes are different. The very concept of conflict as well as resolution is unaligned. The striking collective nature of the eastern world when contrasted with the purely individualistic phenomena of the West sets these two worlds apart. This is explained by the cultural heritage of the Middle East, which is tribal and Islamic in nature.

While the western third party relies on a secular idiom, guidelines from a specialised field and personal experience, the Arab-Islamic process depends on explicit references to religious ideals, sacred texts, stories, and moral exemplars, as well as to local history and custom. Western conflict resolution aims to satisfy individuals, interests and needs through a fair deal that is sealed by a formal, written agreement. In contrast, the Arab-Islamic process prioritises relational issues, such as restoring harmony and solidarity and restoring the dignity and prestige of individuals and groups. Far more is at stake than the interests of

individuals; disputing families and lineage groups solicit the intervention of prominent individuals to prevent the escalation of the conflict and the disruption of communal symbiosis. The process is therefore completed with a powerful ritual that seals a settlement and reconciliation with handshakes and a collective meal.

INTERNATIONAL COMMERCIAL ARBITRATION IN THE MIDDLE EAST

‘Arbitration will become the natural justice in business communities inside and outside the Arab world. Nowadays, complicated transactions take place and there is substantial inward and outward investment, which means that we need to find a good forum for resolving disputes’

Professor A. S. El-Kosheri⁸²

The Middle East is both a major area for foreign investment in the current economic environment and has become recently an investor in foreign markets. The US alone invests in the excess of 120 billion US Dollars in the region and at the end of 2007, Gulf Cooperation Council Sovereign Wealth Funds had over 1 trillion US Dollars to invest internationally.⁸³ Due to growing trade and an increase in international transactions, arbitration has become the chosen forum for dispute resolution for the world’s trading nations as well as the Arab countries in international commerce. Ahdab agrees, ‘[a]rbitration...can serve, as well as possible, the economy of our world, which has become a small village’.⁸⁴

It is noteworthy that arbitration in the Middle East is influenced by Islamic traditions.⁸⁵ Consequently, given the growing calls for a return to the *Sharia*⁸⁶ and increase in global interdependence, religious considerations, play a vital role in the acceptance and successful functioning of international commercial arbitration in this region. *Sharia* is not only a source of law in the Middle East but it also informs cultural, economic and political life there. As Professor Ballantyne notes, ‘even where the shari’a is not applied in current practice, there could be a reversion to it in any particular case...Without doubt, a knowledge of the shari’a will become

⁸² ‘Arbitration in the Arab World’ (2008) 25(2) *Journal of International Arbitration* 203, 209.

⁸³ McKinsey suggests that GCC private foreign assets are between \$735-880 billion, with Saudi Arabia accounting for half of this total. Petrodollars: Fuelling Global Capital Markets. http://www.mckinsey.com/mgi/reports/pdfs/The_New_Power_Brokers/MGI_New_Power_Brokers_chapter_2.pdf.

⁸⁴ n 10 above, 5.

⁸⁵ C. Mallat, ‘Commercial Law in the Middle East: Between Classical Transactions and Modern Business’ (2000) 48(1) *American Journal of Comparative Law* 81.

⁸⁶ N. Majeed, ‘Good Faith and Due Process: Lessons from the Shari’ ah’ (2004) 20(1) *Arbitration International*, 97.

increasingly important for practitioners...⁸⁷ as it an important part of the hearts and minds of the Arabs and the Muslims generally.

In the mind of an Arab party, counsel or arbitrator, lies a rich layer of *Sharia*.⁸⁸ Saleh argues that ‘there is still a body of uncodified shari’a tenets that may remain influential, mainly with regard to behaviour of the parties and arbitrators, even though they are not embodied in a modern piece of legislation’⁸⁹. The lawyer-scholar must accept and internalise the fact that history and religion are the keys to understanding commercial arbitration in this part of the world. Islamic law pervades the commercial world, as well as a Muslim’s way of life.

Cultural difference and the long present hierarchies of the colonial world engender a generalised suspicion towards western contractors – who may appear to charge too much or to have done too little – on the part of Middle Eastern parties. Somehow, such conflict brings with it feelings of colonisation, victimisation and inferiority. There is sometimes a feeling of revenge. The negative feelings seem to be worst when the arbitration is conducted under International Chamber of Commerce (ICC) Arbitration Rules with its huge fees that may easily cripple some of the richest businesses in the Middle East.

Certain Arab economic operators advocate that renunciation of national courts cannot signify accepting a new allegiance to an arbitration board composed in the majority of foreigners. ‘Although certain Arab parties consent, although unwillingly, to insert an arbitration clause in contracts binding them to foreign parties, it is in the conviction that arbitration cannot be terminated by sentences in terms they would not accept. When they discover that such is not the case, they are extremely disappointed’⁹⁰. However, it is not difficult to see from the history of the region that the use of arbitration for settlement of disputes, particularly commercial disputes, are deeply rooted in Arab customs and traditions and have long been implemented in practice.⁹¹ As it was outlined above, Islamic jurisprudence prefers conciliation and arbitration to adjudication.

Commercial arbitration was born from the wisdom of trading people in order to maximise efficiency and minimise risks and costs. Disputes are unavoidable in any human society. And dispute resolution is an instinctive function of the society itself. Every society on earth, past and present has devised a variety of mechanisms for dispute resolution. Today’s litigation and conciliation culture are the products of such human activity. There have been many factors which have affected the formation of a particular mechanism of dispute resolution, they are tangible, intangible, historical, social, economic, political and religious. International

⁸⁷ M. Ballantyne, ‘Book Review of Commercial Arbitration in the Arab Middle East: A Study in Shari’a and Statute Law’ (1989) 4(3) *Arbitration International* 269.

⁸⁸ S. Saleh, *Commercial Arbitration in the Arab Middle East: Shari’a, Lebanon, Syria and Egypt* (Oxford: Hart publishing, 2006).

⁸⁹ *ibid*, 5.

⁹⁰ F. Kemicha, ‘The Approach to Mediation in the Arab World’, WIPO Arbitration and Mediation Centre, <http://arbitrator.wipo.int/events/conferences/1996/kemicha.html>.

⁹¹ S. Al-Hejailan, ‘Mediation as a Means for Amicable Settlement of Disputes in Arab Countries’, WIPO Conference on Mediation, Geneva, 29 March 1996, online: WIPO Arbitration and Mediation Centre, <http://arbitrator.wipo.int/events/conferences/1996/jailan.html>.

commercial arbitration is also under the influence of all these factors but some more than others.

Arbitration is a product of culture. All participants bring with them their own cultural understanding of many concepts such as party appointed arbitrator-neutrality, procedure – civil v common law. On one side are parties who, coming from areas of the world with different socio-cultural backgrounds, assisted often by counsel of diverse legal formation, have diverging views as to the conduct of the proceeding and the powers reserved to them as compared to those reserved to the arbitrator. On the other side, there is the presence of one or more personalities, the arbitrators, each having his or her own background and legal formation and who may not always be subsumed in the somewhat abused distinction between ‘common law’ and ‘civil law’ jurists.⁹² This means that style and soul of arbitration is directly reliant upon its actors.

International commercial arbitration finds itself at the very centre of conflicting understandings and historic bitterness engendered in a colonial context. This situation is compounded by the contrast between western commercial interests’ quest for certainty and predictability of outcomes and the Arabic focus on sustaining relations and a culture of seeking pragmatic solutions to conflict.

The institution of international arbitration originally was designed purposefully to avoid any preordained notion of how differences between parties from different nations or legal traditions should be addressed and resolved. This design seems not to work well in practice. Also, the New York Convention provides a legal framework for international commercial arbitration that offers three features critical to the potential accommodation of non-western traditions and expectations in international commercial relationships. The first, the virtually complete autonomy of parties to international commercial transactions to design dispute resolution procedures and mechanisms unconstrained by the peculiarities of national laws and practices. The second, the assurance that arbitral awards rendered pursuant to those procedures and mechanisms will be reliably recognised and enforced in virtually all of the world’s major trading nations. The third feature, is critical to the accommodation of non-Western traditions and expectations, is the increasingly unfettered autonomy of parties to international commercial transactions to freely designate whatever law or decisional rule they wish to apply to their dispute, to the exclusion of otherwise applicable law. In combination, these three features of international commercial legal practice offer the potential of new paradigms of dispute resolution capable of respecting and accommodating the traditions and practices of non-western participants in international commercial transactions, consistent with the success of the transactions for all parties.

⁹² P. Bernardini ‘The Role of the International Arbitrator’ (2004) 20(2) *Arbitration International* 113, 113.

Arbitration and other forms of alternative dispute resolutions is viewed by many in the East⁹³ as a false western panacea, a programme imposed from outside and thus insensitive to indigenous problems, needs and political processes of the region. George Irani contends,

There is a need to fathom the deep cultural, social and religious roots that underlie the way Arabs behave when it comes to conflict reduction and reconciliation... Issues such as the importance of patrilineal families; the question of ethnicity; the relevance of identity; the nature of tribal and clan solidarity; the key role of patron-client relationships; and the salience of norms concerning honour and shame need to be explored in their geographical and socio-cultural context⁹⁴.

Antaki promotes a form of dispute resolution that he says is a hybrid system that combines the best of arbitration and conciliation, serving the international commercial community most effectively. He describes the person that is conducting the procedure as 'a neutral third party, acts sometimes as a mediator and sometimes as an arbitrator without being overly concerned with the traditionally narrow legal descriptions. Here, the third party's personal qualities are more important than the formal nature of his actions.'⁹⁵ The A in ADR, Antaki argues, has become appropriate dispute resolution disregarding the purity of the procedure but concentrating more on the effectiveness of the results which maybe the solution to the hostility between East and West and a more effective and efficient dispute resolution mechanism for the whole world. Both parties from the West and East need to recognise and respect the fact that they start their dispute resolution processes from different points and have differing objectives. The eastern culture is based on relationships and the western culture is based on individuals. The middle ground between the two is a viable option in the realm of international commercial arbitration as it is a mechanism designed with parties' autonomy at its core. Unfortunately, what is missing is the willingness to compromise on both sides.

⁹³ M. Abu-Nimer, 'Conflict Resolution in an Islamic Context: Some Conceptual Questions' (1996) 21(1) *Peace and Change* 22.

⁹⁴ n 78 above.

⁹⁵ n 77 above, 271.