

Finding your path: Arbitration, Sharia, and the Modern Middle East

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As the Middle East grows as a hub for dispute resolution, the role of Sharia law in the legal affairs of the region is becoming an increasing cause for concern. Paul Turner, head of arbitration at Al Tamimi & Co in Dubai, and Robert Karrar-Lewsley, a senior associate at the same firm, consider its impact on arbitration and whether it gives rise to public policy defences to enforcement under the New York Convention.

What is the Sharia?

The Arabic word “Sharia” literally means “the way” or “the path”. It refers to the divine law that Islam teaches has been prescribed by God to govern human life. Muslims believe that this divine law has been revealed to different communities through various prophets throughout the ages, concluding with the Prophet Mohammad.

The divine law (Sharia) is found in two sources, the Quran and the Sunnah. The Quran is the written collection of revelations verbally communicated to the Prophet Mohammad. The word “Quran” literally means “the recitation”, and is believed by Muslims to be the direct word of God. The Sunnah consists of authenticated stories regarding the customs and practices of the Prophet Mohammad, who was divinely guided. Together these two sources constitute a basic divine law, which for the believer is immutable and absolute. The Sharia is not, however, solely concerned with law but also comprises rules regarding moral, economic, social and political issues. In fact only 350 of its estimated 6,616 verses address legal issues. Many of its provisions are unique to the time and place of revelation (7th century Arabia), while others are universal and perennial.

It is important to distinguish between Sharia law and Islamic law, because they are terms that are often mistakenly used synonymously. Islamic law includes the Sharia, but also includes the rulings of scholars and courts on the interpretation and application of the Sharia. Since the Quran and Sunnah are not self-explanatory, the role of the Islamic scholar and the courts is to interpret and develop the Sharia into a robust code of rules and principles so as to assist the wider Muslim community to live in accordance with God’s law. These rulings and laws are created using ‘fiqh’ (literally “understanding”, or jurisprudence) and “ijtihad” (legal reasoning). Unlike the Sharia, which is a “revealed” law that is divinely made, the rulings of judges and scholars are man-made and so change over time as attitudes and beliefs develop. For Sunni Muslims, who form the vast majority, the four main authoritative schools of Sunni Islamic jurisprudence are the Hanafi, Maliki, Shafi’i and the Hanbali, all named after their respective founders and established as far back as the 10th century.

All this means that, although the Sharia is static and unchanging, Islamic law is dynamic – it alters as each generation interprets the Sharia. Many centuries of scholarly and judicial debate regarding the interpretation and application of the Sharia have given rise to competing schools of thought: including modernist, traditionalist and fundamentalist schools. To give an example of how Islamic law interprets and develops the Sharia, at the time the Quran was revealed slavery was an everyday part of life in Arabia (as it was in most parts of the world). Accordingly there are many verses in the Quran, as well as stories of the Prophet, that address slavery and how slaves are to be treated. Although the Quran recommends that slaves be freed, it does not expressly forbid slavery. However not even the most fundamentalist or traditional Muslim advocates that slavery be made lawful, and indeed the consensus amongst scholars today is that slavery is contrary to the Sharia.

Thus Muslims are not the passive recipients of divine knowledge they are sometimes portrayed to be, but

are participants in a debate as to what the Sharia consists of and how it is to be applied – with ideas developing over time and differing from one country to another. The amorphous nature of Sharia law can be difficult to appreciate as one often reads that a product is “Sharia-compliant”, or that a state applies “Sharia law”. In fact, the term Sharia no more denotes a cohesive, codified law than the term “natural law” does.

The role of Sharia in national laws in the Middle East today

Given the origin of the Sharia it should be of no surprise that, in many Muslim states, it is explicitly referred to in their constitutions as a primary source of law. It is often applied through three gateways. Taking the UAE as an example, the first gateway is the constitution, which states at Article 7 that the Sharia shall be “a main source of legislation” (although not the source of legislation, as it is in some other states). Secondly, the Sharia is to be applied where legislation is silent (this rule is found in Article 1 of the UAE Civil Code). The third gateway is that when interpreting the law, the courts are to take notice of Islamic jurisprudence (fiqh). This is found in Article 2 of the UAE Civil Code.

However, people should not be misled into believing that lawyers and judges in the Middle East are constantly referring to the Quran and reviewing it for applicable legal provisions, before moving on to the national statutes. The Sharia really acts as a kind of common law, and its influence on national laws varies widely between states. In some countries the national laws are heavily influenced by former colonial regimes and so are similar to European legal systems, whereas in other states the influence of the Sharia is more apparent. At one end of the spectrum is Turkey, which has an almost exclusively Muslim population but removed Sharia from its legal system in order to produce a secular state. At the other end, Saudi Arabia has a constitution that states (at Article 1) that the Quran and the Sunnah are the country’s constitution. In Egypt, Sharia is the source of legislation, but the country does not adopt Sharia’s criminal provisions and has a modernised family law. Each country therefore needs to be considered separately.

The Sharia and arbitration

Arbitration, in some form, has been practised in Arabia for thousands of years. In pre-Islamic Arabia, tribes would settle disputes by referring them to a neutral third party who was considered trustworthy and respectable. This form of dispute resolution was subsequently recognised and confirmed by Islam, and there are stories regarding the Prophet Mohammad being asked to act as an arbitrator due to his personal qualities both before and after becoming a prophet. Arbitration is also referred to and promoted in the Quran, most explicitly at verse 4:35, which states that “If you fear dissension between a married couple, send forth an arbiter from his family and an arbiter from her family. If they desire reconciliation, God will bring them together”. The Quran and the Sunnah repeatedly stress the benefits of settling disputes quickly and discreetly, and at a time when courts did not exist the arbitral process was the only means of achieving this.

The process in those days was, however, quite different to what we consider arbitration to be today. It was often more akin to conciliation, with the arbitrator liaising between the parties to find a solution to a dispute rather than the parties formally presenting their case before the arbitrator, who would then decide the matter on the application of the law. Further, arbitrators were often considered to be the representative of the party that had nominated them, and were not always required to act in a neutral and impartial manner. The award rendered was binding but not enforceable (there being no courts), so to ensure compliance parties would be asked to provide security before any decision was made.

Nonetheless, history shows that arbitration is not a process alien to or incompatible with the Sharia. On the contrary, it is specifically recommended by it and all the four main schools of Islamic thought endorse it, although their approaches are different. For example in the Hanafi school, arbitration is closely connected with conciliation and the award is considered as having less force than a court judgment. In contrast, in the Hanbali school (which is considered the most conservative of the four main schools) an award is just as binding as a court judgment, and the arbitrator must be as qualified as a judge. This is another illustration

of how, although the Sharia law remains the same, its interpretation and application can vary widely and change over time.

Broadly speaking, the Sharia rules on arbitration are not unusual to modern practitioners. All four main schools agree that there must be a dispute, and that there must be an agreement by the parties to submit the dispute to the arbitrator; they also agree that all commercial matters can be arbitrated. It has been said that Sharia does not allow parties to agree to arbitrate future disputes, but this does not prevent conventional arbitral agreements being used in the Middle East, including in Saudi Arabia where such clauses are explicitly allowed under Article 1 of the Arbitration Law. Similarly, in Islamic jurisprudence there is much debate as to whether an arbitral award is binding, but in practical terms all Middle Eastern states accept that they are. Finally, under traditional Sharia principles, the arbitrator must be a male Muslim, but Saudi Arabia is the only country in the Muslim world to enforce this rule.

In practice, arbitration proceedings are not greatly influenced by the Sharia, and those who wish to undertake an arbitration in a Muslim country will only need to consider the arbitration law in that country. Many countries have undergone modernising reforms in recent years, and modern arbitration laws can be found in many Middle Eastern states, such as Bahrain, Dubai, and Qatar.

Sharia and public policy

The main concern raised regarding Sharia is that it may make it difficult to enforce arbitral awards in the region because there is always the risk that the award will be deemed non-compliant with a Sharia principle (such as the rule against interest), and so be found to be contrary to public policy and unenforceable. Although it is generally the case that Muslim states will consider non-compliance with (their understanding of) the Sharia a breach of public policy (as stated explicitly in Article 3 of the UAE Civil Code, for example), in practice these fears are largely unfounded.

With the exception of Iraq, Yemen, Libya and Sudan, all the Middle Eastern and Muslim countries are signatories to the New York Convention. Many, furthermore, have acceded to it without making any reservations (in contrast to the US, the UK and France). Under Article V(2)(b) of the convention it is open to all signatory states to refuse to enforce a foreign arbitral award on the basis that the award is contrary to the state's public policy – a provision that can be applied inconsistently because of the lack of definition of 'public policy', and because the concept is interpreted differently from country to country. On occasions this has led to awards being refused for unforeseen reasons. For example, an award was refused enforcement by the Chinese courts in the 1970s on the basis that it related to the performance of heavy metal music in China, which at that time was considered to be contrary to social and public interests. It is unlikely that this would be the case today.

Given the flexibility with which the Sharia is applied in the national laws of modern Muslim states, there is no basis for believing that it will cause problems when it comes to the enforcement of awards. Those states that are supportive of arbitration will be slow to set aside an award on the grounds of public policy (either because of an infringement of Sharia law or otherwise), whereas those that are more wary of the process may look to the Sharia for a pretext to refuse enforcement. The dominant issue for practitioners, then, is not whether a particular state applies the Sharia, but its attitude to arbitration.

Practitioners must accept that the enforcement of foreign arbitral awards will never be a certainty in the Middle East, just as it will never be a certainty in any region. There will always be occasions where the public policy exception will be used because the award violates a state's basic notions of morality and justice, even if they have a well-established pro-arbitration policy. For example, in the 1998 case of *Soleimany v Soleimany*, the English courts refused to enforce an award that arose from a contract relating to an illegal operation to smuggle rugs out of Iran. Under the applicable law (Jewish law) the illegality did not impede the claim, but the English courts found that it was against the public policy of England for an illegal contract to be enforced.

Furthermore, domestic awards must comply with domestic laws to be enforced at the seat, and this is so in

the Middle East as in other parts of the world. Those unfamiliar with the region need therefore to seek advice from local practitioners to avoid falling foul of local practices. For example, the Dubai courts have ruled that if an arbitral award is not signed by the arbitrators on every page (or if the signed page containing the award does not also contain part of the reasoning) then the award will not be enforced. This is because, under UAE law, an award simply does not exist unless the arbitrator has signed it to evidence both the award and the reasoning (whereas in England, for example, the award simply needs to be signed).

Finally, there is a common assumption that, because interest is forbidden under Sharia law, awards granting interest will not be enforced in Muslim countries. This is not the case. Although it is commonly accepted that Sharia forbids interest, the great majority of Muslim states have legalised it, and only a few continue to forbid it. The UAE courts, for example, have stated that the charging of interest is in the public interest and so permissible, even though it is contrary to Sharia law. Even in those states that continue to ban interest, such as Saudi Arabia, the rest of the award will be enforced, assuming it can be severed from that part which relates to interest.

The usual questions

The mere fact that a country enforces Sharia in some form, or ostensibly gives it prominence, should not concern arbitration practitioners. Indeed its impact on their arbitration is likely to be no more a matter of consideration than the impact of Christian values on an arbitration in Western Europe. When considering whether to conduct an arbitration in a Muslim country, or assessing how easy it may be to enforce an award, practitioners should instead focus on the usual questions. Does the country have a modern arbitration law? Does it have courts that are arbitration-friendly, efficient, and generally permit enforcement? Is there any case law relating to the question of whether an award might be set aside for public policy – and if so do the courts construe this concept widely or narrowly? Only local counsel will be able to give reliable answers to these questions – we recommend practitioners seek advice at an early stage, or they risk overlooking one of the most diverse and dynamic commercial regions in the world.

Cases referenced

Soleimany v Soleimany [1999] QB 785.

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