

Arbitration and Tahkim A Comparison

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The Arbitration Act does not define Arbitration. The Judicial interpretation of Arbitration is "the settlement of a dispute by the decision, not of a regular and ordinary court of law but, of one or more persons who are called arbitrators whose decision the parties agree to accept as binding whether they agree to the decision or not". [Law Term & Phrases by Sarda Muhammad Iqbal].

In Islamic Law:

Arbitration is defined

"It means, to appoint arbitrator to arbitrate in dispute between the parties". (تولية الخصمين حاكما يحكم بينهما)⁽¹⁾

It is also used in other means, knowledge, justice, etc.⁽²⁾

The definition of Arbitration & Tahkim likewise the same there is no controversy.

We look now at some Sections & see which Sections are in controversy with Islamic law.

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S.2 of Arbitration Act says:

"Arbitration agreement" means a written agreement to Submit present or future differences to arbitration, whether An Arbitrator is named herein or not.

This definition is mentioned three essential elements as well as three conditions:

- 1) That it must be a written agreement
- 2) They are agreed upon it.
- 3) Valid submission by parties or their authorized agents to arbitrator to arbitrate.

In Islamic Law:

These essential elements differ from conditions of Tahkim First I will write essential elements then I will write the conditions

Essential elements of Tahkim:

According to Ahnaf: they are two "Offer & Acceptance". it means a word, which denotes to Tahkim with the acceptance of other persons ⁶³.

According to Malikiyah, Shafia & Hanabila They are three "Parties Arbitrator or Arbitrators and Dispute"

These are the essential elements of Tahkim in Islamic Law ⁶⁴:

Condition of Tahkim in Islamic Law:

In Islamic Law there are three types of conditions, the first one relates to the parties, the second relates to Arbitrator and the third relates to dispute.

The Conditions that Relate to the parties are as under:

- 1) They must be adult, so the minor cannot appoint a arbitrator.
- 2) They must not be insane.⁽⁵⁾

Conditions that relates to arbitrator:

- 1) He must be a competent Person because he is an arbitrator so he is a like judge
- 2) He must be competent to testify at the time when he is pronouncing the award.⁽⁶⁾

Author of Adab-ul-qazi writes that the arbitrator must be an adult, sane justice, mufti & alim who knows the Shariah very well.⁽⁷⁾

Conditions that relate to dispute:

The jurists say:

- 1) It must be a financial matter. Or
- 2) It must be a right of individuals.⁽⁸⁾
- 3) It does not allow in criminal cases. However, there are different opinions of Jurists the detail of which I will write after wards.

The above details show that the essential elements and the conditions in Islamic Law & Arbitration are different and Islamic Law is more comprehensive than Arbitration Law.

S.2 refers also arbitration is allowed in all contracts, which are between the parties.

Then S.7 of Arbitration Act lays down:

"Where it is provided by a term in a contract to which an insolvent is a party that any deference arising there out or in connection therewith shall be referred to arbitration, the said term shall if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such differences."

So, it is allowed in disputes, which are related to insolvency.

Then, S.21 lays down:

"Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced to apply in writing to the court for an order of reference."

It shows that arbitration is allowed in civil matters because in criminal cases arbitration is not allowed.

Then, S.46 lays down:

"The provisions of this Act, except sub-section (1) of section 6 and

section 7, 12,36,and 37, shall apply to every arbitration under any other enactment for the time being enforce. as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in sofar as this Act is inconsistent with that other enactment or with any rules made hereunder."

As such:

- 1) Contract act 1872 (S.260 to 265).
- 2) Companies ordinance 1984 (A.283)
- 3) Co-operative societies Act 1925 [s.43 (2) (b)].
- 4) Electricity Act, 1910 (S.52).
- 5) Industrial relations ordinance, 1969 (31).
- 6) Land Acquisition Act, 1984 (Ss.11, 12,18 & 26).
- 7) Insolvency (Karachi Division) Act, 1909 (S.52).
- 8) Provincial Insolvency Act, 1920 (S.52).
- 9) Railway Act, 1980 (Ss.46, 46-A, 46-B and 48).
- 10) Religious Endowments Act, 1863 (Ss16&17).
- 11) Trusts Act, 1882(S20).

So, the above mentioned could be arbitrated under Arbitration Act, in all contracts, in disputes which relates to insolvency, in civil cases and in every arbitration under any other enactment for the time being enforced.

In Islamic Law:

There are different opinions among the jurists.

According to **Imam Abu Hanifa**: arbitration is allowed in following cases,

- 1) All financial matters. Or
- 2) All rights of individuals. Or
- 3) All matters relate to contract of marriage. Or
- 4) Dissolution of marriage. Or
- 5) Right of pre-emption. Or
- 6) Retribution. (Qisas) Or
- 7) Qazaf.etc.⁽⁹⁾

According to **Malikiah**: arbitration is allowed in following matters.

- 1) All financial matters. Or
- 2) Matters, which are relating to sell & purchase. Or
- 3) Arsh. Or
- 4) Severance or abscission of hand & lag. Or
- 5) Matters relate to debts. Or⁽¹⁰⁾

According to **Shafiah**: arbitration is allowed in all financial matters only.⁽¹¹⁾

According to **Hanabila**: arbitration is allowed in following matters,

- 1) All financial matters. Or
- 2) Matters relate to contract of marriage. Or

- 3) Dissolution of marriage. Or
- 4) Retribution [Qisas]. Or
- 5) Had. Or
- 6) Matters relate to debts.⁽¹²⁾

So, the above-mentioned cases can be decided by Tahkim in Islamic Law.

Afterwards Section 5 lays down:

"The authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the court, unless a contrary intention is expressed in the arbitration agreement."

It means when the arbitrator or arbitrators have been appointed by the parties or their recognized agents, then they can not have a right to remove him or them unless they receive previous permission of the court for his removal.

According to Section 11, parties can write an application to the court for his removal. S.11 lays down:

"Ss (1), The court, may on the application of any party to reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.

Ss(2), The court may remove an arbitrator or umpire who has misconduct himself or the proceeding."

Therefore, the court may remove the arbitrator or an umpire on the following grounds as they are mentioned in the above section.

- 1) The arbitrator has failed to use reasonable ground for making an award.
- 2) When he has misconducted.

According to the Law, the arbitrator can be removed with the leave of the court, when his appointment was made by the consent of the parties. Otherwise, he cannot be removed by the parties themselves.

In Islamic Law:

There are three grounds for removal of arbitrator:

- 1) Displacement or Removal by the party, every party has a right to remove the arbitrator before granting the award because the party gave him the power to decide the matter between them, so they can remove him also, as like a governor [حاكم] who can be removed at any time by a king [سلطان]

The second thing is that the consent of the parties is an essential element for making the award, when one party removes him; the arbitrator has lost the consent of that party.

- 2) Expiration of time: if the time has been mentioned in arbitration agreement, after the expiration of that time any award of the arbitrator is void.
- 3) Loss of competency to testify: when the arbitrator is not competent

to testify, then he cannot pronounce the award. e.g. he apostate the Islam or he became blinded.etc.⁽¹³⁾

S.6 of Arbitration Act lays down:

- 1) An Arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall, in such even be enforceable by or against the legal representative of the deceased.
- 2) The authority of an arbitrator shall not be revoked by the death of any party by whom, he was appointed him.

So, authority of arbitrator will remain after the death of any party, it shall not be revoked by the death of any one.

In Islamic Law:

Arbitrator will be removed automatically by the death of any party; he shall not exercise his power after the death of any one.

The reason is that the parties who appointed the arbitrator, they assigned the power to him to arbitrate. They agreed upon his award, therefore, they were bound to obey his decision but when one of them is dead, the agreement becomes void by the death. Their legal representatives are not bound to obey his award because they neither appoint him nor assign the power to arbitrate. Their consent does not exist which is the basic element for it.

So, either they will appoint him by new agreement or they remove him and appoint some other person as an arbitrator.

It is also possible that there will be no dispute between the legal representatives, which was existed between their ancestors.⁽¹⁴⁾

S.15 of Arbitration Act lays down:

"The court may by order modify or correct an award:

- a) Where it appears that part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or
- b) Where the award is imperfect in form, or contains any obviqus error which can be amended without effecting such decision; or
- c) Where the awad contains clerical mistake or an error arising from an accidental slip or omission."

So, a plea can be taken against the award of arbitrator by the party if he does not agree upon it. The court considers the plea and order to modify or correct the necessary changes if it found one of the following wrongs:

- 1) That part of the award is upon a matter, which was not referred to arbitrate.
- 2) That award was imperfect in nature.
- 3) That award was contained some clerical mistake.

Then, S.16 lays down:

"The court may from time to time remit the award or any matter referred to arbitrations or umpire for reconsideration upon such term as it thinks fit:

- a) Where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter can not be separated without affecting the determination of the matters referred; or
- b) Where the award is so indefinite as to incapable of execution; or
- c) Where an objection to the legality of the award is apparent upon the face of it.

So, court remits the award if one of the following things is found:

- a) Where the award was not determined the matter which was referred to arbitration, or determined any matter which was not referred to arbitrate.
- b) The award cannot be executed.
- c) Where the legal objection was raised.

Then S.19 lays down:

"Where an award has become void under S.S (3) of S.16 or has been set side. The may by order supersed the reference and shall thereupon order that the arbitration agreement cease to have effect with

respect to the difference referred."

That Sec Gives a right to the court to set aside the award, if one of the reasons was found which are laid down in S.30.They are as under:

- a) An arbitrator or umpire has misconduct ed;
- b) Award had been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid under S.35;
- c) Award has been improperly procured or is otherwise invalid.

So, the court has three options when it receives any plea or appeal against the award;

- a) Power to set aside the award.
- b) Power to modify the award.
- c) Power to remit the award. As it has been mentioned in above detail.

In Islamic Law:

When arbitrator has announced award, then each of them has a right to take plea, if they do not agree with award. The judge or qazi has two options:

- 1) To execute that award, if the award was made according to his opinion [Mazhab or school of thought]
- 2) To set aside if it was against his opinion [Mazhab or school of thought].

Imam Malik says: the qazi [judge] has no right to set aside the

arbitrator's award unless it was against Quran and Sunnah or Ijma or against the justice.⁽¹⁶⁾

S.33 lays down:

"Any party to an arbitration agreement or any person claiming under him desiring to challenge the existing or validity of an arbitration agreement or an award or to have the effect of either determined, shall apply to the court and the court shall decide the question on affidavits."

According to that section, when an arbitration agreement has been made between the parties, then they do not have a right to retreat or revoke the agreement without the sanction of the court, if the court gives the permission then the party retreat from the agreement.

In Islamic law:

Majority of jurists say that the arbitration agreement is an agreed contract between the parties, so every party has a right to revoke or retreat before the announcement of an award, but they can not retreat after announcement of the award.

Jurists further say: award which was awarded by arbitrator is same to the order of the judge [Qazi] and his order can not be revoked, even after his termination, his order is final and binding upon the parties. The same situation is with the arbitrator, so his award is binding upon the parties and cannot be revoked.⁽¹⁷⁾

Conclusion:

The above details show that the sections 6,5,11,15,16,19 and 33 of Arbitration Act are totally in controversy with Islamic Law.

While Sections 2, 7, 21, 46 and 46 are not totally in controversy with Islamic Law but rather different. In other words, Tahkim in Islamic Law is more comprehensive than Arbitration Act.

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