

Powers of Arbitrators in the Implementation of Arbitral Awards

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ABSTRACT

Specialists in law and jurisprudence as well as businessmen have realized the serious consequences of arbitration. Indeed, the legal nature of arbitral awards has become as one of the argumentative issues among jurists and legislators. Arbitration nowadays is an essential means for settling disputes that may arise among people. Laws have been legislated to organize relationships within a society. Similarly, judicial judgments are utilized to resolve conflicts that could occur among the members of a community. It is therefore quite necessary to clearly identify the authenticity of arbitral awards since it is of high importance for disputing parties. The limits of an arbitration panel authority is another issue to be taken into consideration. The current study concludes that arbitral awards are binding legally and legitimately to disputing parties. However, it acquires the compulsory attribute only after the court's ratification, and then it becomes an official document that can be used before judiciary.

KEY WORDS: dispute, arbitration, the court, arbitral award, judiciary

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1. Introduction

Arbitration has become nowadays a legal phenomenon for resolving disputes. In fact, this system is old and modern at the same time. It is old in its establishment, and modern in its provisions and legislations. Although the state today is responsible for settling disputes through the judicial authority, in the meantime, it has accepted arbitration as another permissible system for resolving conflicts. Accordingly, plausible laws have been enacted to regulate arbitration procedures and to ensure its integrity. As a matter of fact, disputants in general resort to arbitration instead of the judiciary due to its undeniable advantages. Unlike the judiciary, arbitration is featured with a high rate of accomplishment as well as confidentiality. These two features, which are not available with the judiciary, encourage disputing parties to resort to arbitration. Moreover, the progress achieved in sciences and technology has complicated the procedures required for settling disputes, that a judge cannot take a decision and issue a judgment without referring to experts in the field of specialty for assistance. Arbitration, on the other hand, simplifies these procedures and enables disputants to resolve their dispute in a shorter time.

The importance of our current research is derived from our attempt to focus on certain issues including the work of arbitrators, which ends up with the issuance of arbitral awards and the requirement for approval by courts to gain enforceability. Another issue is the role of arbitration in reducing pressure on courts. Furthermore, it is a fait accompli, which has led to enacting laws required for regulating procedures and processes. We should note as well that arbitration-related disputes have required the intervention of the judiciary, which is quite evident in some cases and in raising difficulties in others.

The points stated above lead us to formulating our research questions, which revolve around the extent to which an arbitral award is binding to disputing parties, and whether arbitrators can enforce arbitral awards without referring to a judge. The implications of issuing and implementing an arbitral award are also included within our inquiry.

Finally, we should note that we have adopted an inductive approach in this research, through which we theorize thematic arguments derived from reliable references to come up with specific hypotheses that in a second step we apply them on

reality by utilizing what we may call an applied approach.

2. Previous Studies

We enlist here the main studies that have already been written on the issue of arbitration. The name of the first study is "Arbitration between Spouses in Islamic Jurisprudence & in the UAE Personal Status Law". The author of this study is Dr. Muhammad Sulaiman Al-Nour. It was published in 2012, in the Journal of Legal & Legitimate Sciences, University of Sharjah. The second study is "Arbitration between spouses in Islamic Jurisprudence". The author is Hiba Ahmed Muhammad Mansour. This study was published by Al-Najah University in 2014.

We have also selected the study entitled "Enforcement of Arbitral Awards", which is written by Abdul-Rahman Abdul-Karim Al-Rashid, and it was published by the UAE University in 2018. The fourth and last study is "Judicial Surveillance on Arbitral Awards". The author is Maher Mustafa Mahmoud. It was published in 2017 in the Journal of the College of Arabic and Islamic Studies.

3. Research Plan

Our research is constituted of three main parts. The first part provides a "General Overview of Arbitration & its Importance". It incorporates several sub-sections in which we cover the definition of arbitration, its merits and defects, issuance of arbitral awards and enforcement.

The second part of the research focuses on the "Authenticity of Arbitral Awards between Law & Sharia", in which we investigate the concept of authenticity and its scope whether in Islamic Sharia or as per a legal point of view.

The third part deals with "The Arbitrator's Authority in the Enforcement of Penalty". In this part, we discuss the cases that are qualified for arbitration, and the others that are not. We explore as well the arbitrator's authority between law & jurisprudence and the implementation of arbitral awards in man-made systems.

4. General Overview of Arbitration & its Importance

Scholars have come up with different definitions of arbitration. Each scholar, indeed, has defined the term from a specific angle. For example, some of them used the parties of dispute as a starting point in their definition, while others have relied on the arbitrator himself as a core point. A third group of scholars considered the arbitrator's job to be the center of their definition. It is interesting somehow,

to find a fourth group of scholars who place their main focus on the arbitration system. However, the majority of scholars concentrate in their definition on two essential aspects: a. agreement between disputing parties; and b. arbitrators (Makhlouf, 2001).

4.1 Definition of Arbitration

According to Phillipps (1720), arbitration, of Latin origin, is "putting an end to a difference by the means of arbitrators". An arbitrator, on the other hand, is "an extraordinary judge, indifferently chosen by the mutual consent of two parties, to decide any controversy between them" (IBID). He also confirms a difference between "arbiter" and "arbitrator". While an arbiter is committed "to proceed according to law and equity," an arbitrator "is left wholly to his own discretion." (IBID).

If we refer to the Islamic legacy, we shall find similar meaning of "arbitration" and "arbitrator" to that of the Western Culture. God Almighty said in his Holy Book, "By God, they will never believe you until you judge on their disputes." (Surat Annisa'. Verse No. 65). Besides, the term "judge", being the core meaning of "arbitrator", is one of God's names. In another verse of the Holy Quran, God said, "Do I have to choose but God as a judge..." (Surat Al-An'am, Verse No. 114), and the judge is the one who is chosen to solve a dispute between two parties.

Jurists refer to arbitration as the process of appointing a person to judge between two disputing parties (Ibn Abidin, 1992). It is defined as "a contractual system in which two opponents agree on selecting an arbitrator or arbitrators to resolve a dispute that arises between them away from the ordinary judicial procedures" (Al-Aboudi, 2000). It is also known as the "Chosen Judiciary". Some jurists defined arbitration as the procedure, in which "litigants refer to one or more persons to settle a dispute between them" (Pertou, 1957). Moreover, a group of scholars (see Nasir, 2011) considers arbitration as a system of special judiciary in which litigation is settled by certain people (known as arbitrators) chosen for the job in question. In other words, the arbitration system intends to establish special justice where disputes are taken from the hands of the official judiciary to be resolved by authorized arbitrators.

Arbitration could be a mixed system, which starts with an agreement, then it becomes a procedure, and ending by a judgment (Shafiq, 1997). It has also been defined as an agreement between two parties or more to assign an arbitrator or a body of arbitrators to settle a dispute or a

number of disputes without referring to an ordinary judiciary. The decision of the arbitrator or arbitrators is obligatory to those parties (Abu Al-Aynain, 1999). Arbitration, therefore, is a process of considering a dispute with a pre-knowledge of the arbitrator that disputants are fully obliged to implement the decision issued by him (Abu Haif, 1959).

The Emirati legislator has defined arbitration as “a means regulated by law through which a decision on a certain dispute is determined by an arbitrator or a body of arbitrators. This decision is binding to the disputing parties as per an agreement” (see Article No. 01 of the Federal Law No. 06 for the year 2018, which deals with the issue of arbitration). The legislator, in his definition of arbitration. Completely agrees with what the Islamic Sharia has concluded about this issue.

We may finally conclude that arbitration is a means for an agreement to settle dispute by a person or persons chosen by the conflicting parties, and they are often know by the name “arbitrators”.

4.2 Merits and Defects of Arbitration

Most individuals prefer to present disputes that arise between them, whenever they are valid for arbitration, to an arbitrator or an arbitral tribunal, instead of resorting to the judiciary. Disputants posit that arbitration is somehow advantageous. The following are some of the most important advantages as well as defects of arbitration:

4.2.1 Merits of Arbitration

Arbitrators do not adhere to lawsuit procedures, and thus avoid the delay that often occurs in a judicial court. This can be attributed to the fact that an arbitrator is devoted to only one arbitration case, whereas the judge has to deal with many cases at the same time. Undoubtedly, fast settlement of dispute through arbitration shall minimize or eliminate any material or moral losses that might befall the disputing parties. The situation, however, will be totally different if the dispute is raised before the courts.

In addition, settling the dispute could require very specific technical expertise that might not be available at the courts. Thus, if we submit the dispute to an experienced arbitrator, we shall save time to the litigants. If the dispute is raised before a court, then it needs first to authorize an expert, who, in turn, has to study the aspects of the dispute before he can give his final decision. Such procedures certainly require more time.

There is no doubt that all the procedures taken by arbitrators shall be confidential so as to

protect the reputation of the disputing parties as well as the secrets of their transactions. We should also note that an arbitrator plays a positive role in mitigating the negative effect of the dispute since the arbitrator is the choice of both disputing parties. Furthermore, arbitration system help in reducing the burden on the judiciary, and thus, judges gain more time to deal with the disputes already presented to them, and meanwhile the State's expenditures will be reduced as well.

Unlike the formality and complications of judiciary, arbitration is featured with simple procedures. However, recently, people have started to accomplish contracts and transactions through the internet, investing amounts that exceed billions of dollars. Accordingly, disputes among the businessmen who invest through the internet are somehow expected. The most appropriate way for solving the disputes that arise from these transactions is arbitration. It is almost impossible to raise these disputes before the judiciary because there are no documentary papers that could be submitted as an evidence for the concluded contracts.

Authorizing arbitration by the State is a sign of appreciation and an acknowledgment of its advantages, meanwhile facilitating the procedures for litigants and establishing justice among people. Furthermore, such decision reflects the State's responsibility for settling disputes among people (Al-Jahni, 2009).

4.2.2 Defects of Arbitration

While raising a dispute before a court might cost little or no money at all, we can easily note that arbitration, on the contrary, cost high amounts of expenses to cover the fees of arbitrators and experts, especially in case of international disputes. On the other hand, arbitration may not have sufficient surveillance to follow up and scrutinize arbitrators' judgments at a level similar to that of a judiciary. Such insufficiency could lead to deviations and errors in determining the principles of applicable law, and therefore, it could be difficult to detect these principles and arrange the penalty as per them, especially at the beginning of arbitration and before its features are established.

A judge has more experience in the judicial work than arbitrators. Thus, they are often short of such valuable experience. Some arbitrators, indeed, may commit serious procedural errors, which result from lack of experience in the field of judiciary and resolving disputes. Subsequently, disputing parties will be negatively affected by these errors, as they

cannot make use of the guarantees provided in a judicial environment.

If arbitration is applied as per its original system, then its final judgment cannot be appealed. This could be advantageous for some cases, but meanwhile, it might involve great risk for other cases as the disputants could miss the opportunity for objecting or appealing in an attempt to remedy some of what they have lost (Mousa, 2017).

Besides, lack of confidence in the arbitrator of each opponent often leads to selecting a third one chosen by the existing arbitrators. Such procedure shall increase the cost, and if one of the disputing parties does not respond to the implementation of the arbitrators' judgment, they should, in the end, resort to the judiciary.

Finally, arbitration has become a profession of which arbitrators mainly aim to gain financial benefits, ignoring to some extent achievement of justice, or complying with the rules of Islamic Law (see <http://mylawyer1.com/new/?p=107> / on 20 / 12 / 2011).

4.3 Concept of Arbitrator & Arbitral Award

An arbitrator is a person authorized by disputing parties to settle an existing dispute between them, and he could be appointed by the court if the legislation permits him to do the above-stated task (Mousa, 2017).

Dr. Muhammad Shehata has defined the arbitrator as "a normal person who has the authority to settle a dispute according to an agreement between the disputing parties and as per the law, by a binding and enforceable judgment" (<http://mylawyer1.com/new/?p=107> / on 20 / 12 / 2011).

It is remarkable to note that the concept of "Arbitral Award" is not a judicial judgment. However, the denial of its judicial nature does not contradict with its arbitral nature or its procedural nature as a judgment. Indeed, with this feature, an arbitral award is recognized from the actions of the judiciary whether they are judgments or judicial orders.

It becomes evident hence that an arbitral award is "every final judgment, which resolves all the issues raised before an arbitration panel or it is every final decision related to the subject of dispute, or it is the decision that settles the jurisdiction issue (Hashish, 2001). Besides, the same writer (IBID) provides one of the most accurate definitions of an arbitral award. He assumes that "it is the decision issued by an arbitrator with an authority based on an arbitration agreement to settle any substantive or procedural dispute within his authorization and

specialization as specified by law or as agreed upon and it must be in a written form."

Article No. 52 of the Emirati Arbitration Law states that "an arbitral award issued as per the provisions of this law is binding for the disputing parties, and the authentic litigation is valid having the same executive power as if it were a judicial judgment, but it cannot be applied without an approval from the court" (Al-Sarhan, 2021). We should note that the Emirati legislator did not define the arbitral award.

4.4 Enforcement of an Arbitral Award

Implementation of an arbitral award issued by an arbitral tribunal represents one of the linking aspects between judiciary and arbitration (Al-T'heiw, 2002). However, the convicted party might reject to implement the arbitral award voluntarily. Here rises the issue of obtaining an order for compulsory implementation (Hindi, 2001). In general, an arbitral award is inapplicable until an implementation order is issued by the public judiciary in the country where it is intended to be applied (Al-T'heiw, 2002).

Accordingly, an ideal definition of an implementation order to an arbitral award could be as follows: "it is a procedure issued by a competent judge according to which an arbitral award whether issued by a national or foreign authority shall gain an executive power, and this order represents the meeting point between private and public judiciary (Al-Fuqqi, 2003).

4.5 Importance of Enforcing an Arbitral Award

Enforcement of arbitral awards is considered as the main criterion for the success and recognition of arbitration system, especially in resolving disputes of international category though this does not underestimate the implementation of national arbitral awards. Indeed, the arbitration system success is measured by the degree of applying its judgments. The moment of applying the arbitrator's judgment reflects indeed all the steps of the arbitration process starting with the agreement on adopting arbitration, selecting arbitrators, and so on. An arbitral award, in fact, is the real fruit of arbitration, but it remains with no value and just written statements on paper until enforcement, which is the core of the whole process, takes place (Hindi, 2001).

5 Authenticity of Arbitral Awards between Law & Sharia

The idea of authenticity is related to the judicial work no matter whether the act is issued by a judge or an arbitrator, and in both cases, the judgment

shall be fair including the true will of the law. In addition, it is precise and accurate, i.e. it resembles the legal form of judgment, and it derives its authenticity from the determination of the disputants and not from the text of the law. This authentic litigation shall prevent disputing parties from re-submitting the already settled dispute to the judiciary or to another attribution panel. Besides, they cannot discuss the pre-determined decisions except as per law (Shahata, 2011).

5.1 Concept of Authenticity & its Scope

Authentic litigation of arbitral awards has two phases: the first is related to Islamic Sharia, and the second reflects the legal point of view. We shall discuss the two phases of authenticity in the forthcoming sub-sections.

5.1.1 Authenticity of Arbitral Awards in Islamic Sharia

According to an Islamic point of view, we may assume that an authentic arbitral award is apparently valid if it is issued by an authorized arbitrator. In this case, the decision is final, i.e. no one could reject it unless such action is based on a strong evidence (Al-Astal, 1998). Authentic litigation has been defined as a description attached to the content of the judgment with the aim of restricting disputants, and it shall not be part of the litigation procedures on which the arbitral award is issued (Dawood, 2008).

The authenticity of arbitration is limited to the settled dispute as well as the disputing parties who call for arbitration. If there are more than two parties, and some of them resort to arbitration and an arbitration panel is formed, the arbitral award is authoritative for those who request the arbitration. Those who do not contribute in the arbitration procedures are not included, and supposedly, the authentic litigation does not apply to the representatives of disputants but to the disputants themselves.

As for the authenticity among jurists, the Hanafis believe that the judge appointed by the ruler has an authority over the arbitral award. If such judgment contradicts with their doctrine, he will then revoke it (this is one of the issues on which jurists dispute), but if not, he will approve it (Ibn Abidin, 1992, Al-Zayla'i, 1314). Whereas the Malikis claim that an arbitral award shall be binding to disputing parties. Moreover, if it is raised before a judge, he has no right to reject it even if it contradicts his jurisprudence. An Arbitral award can be revoked only in two cases, whenever it violates the Holy Quran,

Sunnah, or consensus, and if there is injustice in the judgment (Farhoun, 1884)

As for the Shafi'is, they have two points of view. The first posits that an arbitral award is binding only if both parties accept it. They believe that since arbitration starts with the agreement of the two litigants, it shall end with their approval too (Al-Mawardi, 1972). The second point of view says that the judge cannot reject an arbitral award except in a way that is similar to rejecting a judicial judgment. According to this view, both an arbitral law and a judicial judgment are of the same level (Al-Nuwawi, 1991).

The Hanbalis have a similar opinion to the Shafi'is (Ibn Qudama, 1968). They believe that an arbitral award is binding to the judge, and he cannot reject it except as he rejects a judicial judgment whether it matches his doctrine or violates it.

Though different in minor issues, jurists tend to converge in most of the opinions related to arbitration and arbitral awards. We may conclude, however, that almost all jurists treat an arbitral award in a way that is similar to dealing with a judicial judgment and therefore a judge cannot revoke it even if it violates his doctrine. The Hanafis are an exception to this rule, as they reject the idea that an arbitral award shall be binding to the judge. A Hanafi judge may approve an arbitral award within very strict limits, and if it contradicts his doctrine then he will revoke it.

An arbitral award becomes valid as soon as it obtains its authenticity similar to any judicial judgment. There is only one difference between an arbitral award and a judicial judgment. While the latter is executable by itself as it is issued by an official institution, the former is issued by a customary authority, which has no mode of implementation. Therefore, there shall be an authoritative body to order for implementation. Legislations, anyhow, vary from one country to another in the type of procedure required for the issuance of such order. Surveillance is also needed during the executing process (Shafiq, 1997).

5.1.2 Authenticity of Arbitral Awards from a Legal Point of View

According to the Emirati legislator, an arbitral award issued in accordance with the UAE Arbitration Law is binding to disputing parties and holding the authenticity of an adjudicated order. Besides, it shall have the same executive power of a judicial judgment as long as it is approved by the court (IBID).

6 The Arbitrator's Authority in the Enforcement of Penalty

Undoubtedly, there is a difference between the issuance of an arbitral award and its enforcement. As for the arbitral award, Jurists indeed have different opinions about it, and we shall discuss later. It is an undeniable fact that nobody can judge in the rights that God Almighty has determined. In general, the relationship between issuance and execution is a causative one, i.e. and arbitral award remains ineffective without implementation (Al-Astal, 1998).

6.1 Limits of Cases & Arbitration

Cases are of two types as per the possibility of being arbitrated or not. We shall discuss both types in the forthcoming sub-sections.

6.1.1 Cases that cannot be Arbitrated

Some cases cannot be subjected to arbitration. These cases are often identified by law. Therefore, and before announcing an arbitration agreement, disputing parties should get acquainted with the attitude of the law towards their case, whether it comes as an independent agreement by itself or as an article or clause in a contract. Most jurists confirm that arbitration is not allowed in cases related to the rights that have been determined God Almighty, such as adultery, drinking alcohol, theft and warfare (Ibn Nujaim, 1997). As for the Malikis, and as we already know, arbitration is not permissible. Nevertheless, if the arbitral award comes in accordance with the Sharia, it shall be approved for implementation, but the Sultan often warns the arbitrator not to repeat the act. Moreover, arbitration is not permitted in issues related to the public system of the State because they are within the authority of the judiciary (Al-Mawaq, 1994).

Issues that cannot be arbitrated, no arbitral award is to be implemented on them. The ruler then has no option but to establish the judgment. As for the execution, he, the ruler, has no power for such action unless he is entrusted to do it. If this the case with the ruler, then how about those who are below him in position (Al-Astal, 1998)?

6.1.2 Cases that can be arbitrated

Almost all jurists approve the possibility of leading arbitration in cases related to financial issues. If the arbitral award does agree with the law of God Almighty, then it shall be implemented and only the disputing parties have to comply with it (Ibn Maza, 2004).

6.2 The Arbitrator's Authority between Law & Jurisprudence

Arbitration aims to settle a dispute through peaceful means, i.e. proof and judgment. The Shafi'i (Al-Ansari, 2010) and Hanbalis (Al-Mardawi, 1956) believe that an arbitrator shall not be imprisoned since his aim is to prove and judge. If he is judged with some punishment, such as defamation for example, that will be below the required target, and such judgment will degrade the ruler's power and authority.

The Malikis, on the other hand, assume that an arbitrator does not have to implement the arbitral award. If he does so and executes the judgment by killing or beating, the ruler shall punish him because the implementation of an arbitral award is not part of his authority. Thus indeed, he oversteps the jurisdiction of the ruler. However, if he does not execute the arbitral award he issues, the judge could approve it, but meanwhile he shall only warn the arbitrator not to do it again (Al-Mawaq, 1994).

As for the Hanafis (Ibn Abidin, 1992) and the Hanbalis (Al-Uthaimin, 2002) in another narration, an arbitrator has the authority to enforce an arbitral award on the disputing parties, and he can imprison those who refuse to execute the judgment. An arbitrator is similar to judge. Both have the power to apply their judgments on litigants.

Finally, it should be noted that the head of the Appeal Court or who represents him when considering the request for ratification of an arbitral award and for the possibility of issuing an implementation order, he shall accept the request in question within 30 days starting from the day that follows the day of announcing the arbitral award (see Article No. 57 of the UAE Arbitration Law).

6.3 Implementation of Arbitral Awards in Man-Made Systems

The complicated nature of arbitration, which appears out of an agreement with judicial references, reveals that the main job of an arbitral panel is to resolve disputed issues submitted by arbitrators pursuant to the judicial authorities determined as per the arbitration agreement. The arbitration issue therefore is considered as part of the function of the judiciary. However, the arbitration panel is neither part of the judicial hierarchy nor a level of litigation. It is rather independent in formation and procedures. But we should note that its members are ordinary individuals with no authority for issuing orders. In other words, their judgments are unenforceable without orders issued by the judiciary to execute them (Shahata, 2011).

No doubt that the purpose of disputing parties is to implement the arbitral award. If those parties fail to execute the award voluntarily, the arbitrator shall

refer to the judicial court for enforcing the judgment after obtaining ratification.

The arbitral award does not gain authenticity until an implementation order is issued by a legally authorized judge. Without this order, an arbitral award has no executive power. The arbitrator indeed obtains his authority from the agreement of disputing parties on arbitration. As for the authenticity, it is a feature of judicial judgments only, and an arbitral award cannot have this feature before issuing an implementation order (Abul-Wafa, 1974).

We may sum up that an arbitral award cannot be executed before the approval of an appropriate court. The arbitral award as well as the arbitration documents shall be reviewed by the court to make sure that there is nothing contradictive to the judicial rules and procedures, and that everything is plausible for approval and implementation thereafter. The court shall correct any errors that can be found in the arbitral award as per the request of the concerned parties (see Articles 52 & 54 of the Jordanian Arbitration Law).

Once signed and issued, an arbitral award becomes an official document, valid only among disputant parties and similar to any judgment issued by a judiciary court. In other words, while an arbitration agreement is unenforceable in itself, the arbitral award becomes authentic after a judicial court issues an implementation order (Abul-Wafa, 1974).

Conclusions

God Almighty in the Holy Quran confirms the importance of arbitration as a means for achieving justice among people. The Almighty says, "If you judge among people, you shall judge in justice." (Surat Annisa', Verse 58). Through our investigation to the concepts of arbitration, its validity, procedures and implementation, we have come up with a number of conclusions. They are as follows. Arbitration is considered as one of the fast means for achieving justice without referring to the judiciary. An arbitral award is a judgment that is binding to disputing parties as the arbitration panel has been chosen by their own consent. There are specific issues that are not subject for arbitration, such as the rights determined by God Almighty, for instance. All jurists agree that arbitration is permissible in issues related to money and financial business. The Hanafis have permitted the arbitrator to enforce the arbitral award. They have also authorized him to imprison those who deny to implement the judgment. Originally, an arbitral award shall be executed amicably since such implementation seems to agree with the nature of arbitration. If an arbitral award is not implemented voluntarily due to deliberate delay by the convicted

party, it becomes imperative to resort to compulsory execution through the judiciary. An arbitrator is not allowed to implement an arbitral award without the consent of the disputing parties.

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