

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

The Seventh Conference of the Assembly of Muslim
Jurists in America

Convened in Kuwait

Dhu al-Qaadah 23-26 1431 A.H.

October 31-November 3 2010

All praise be to Allah and may peace and blessings be upon the Messenger of Allah and his family, companions and those who followed them

During the dates of Dhu al-Qaadah 23-26, 1430 A.H. (corresponding to October 31 to November 3 2010) under the auspices of the Ministry of Religious Endowments and Islamic Affairs of the Government of Kuwait, AMJA was able to hold its seven conference with the title “Arbitration and its Shareeah and Legal Requirements.” Beneficial and comprehensive discussions were held over four days on this topic as presented by the leading members and experts of AMJA. These discussions ended in the following resolutions:

Arbitration and Its Shareeah Parameters

Arbitration is the process of two disputants deciding upon a judge or arbitrator to decide an issue between them. This could take place after some conflict has occurred or it could take place at the initiation of an agreement between the two parties. It is a practice that is affirmed in the Quran, Sunnah and Consensus.

Arbitration is similar to legal judgments (*qadhaa*), agency/representation (*wakaalah*) and reconciliations (*sulh*) in that all of them are means to resolve dispute and fulfill rights

The Difference between Arbitration and a Legal Judgment

A legal judgment and arbitration differ in the following ways:

- The authority of the judge is general while the authority of the arbitrator is restricted to the particular issues of dispute that the two disputants have brought to the arbitrator.
- The source of the authority or the appointer of the judge is the Muslim ruler, if there is one, or the people of authority among the Muslims in the absence of a ruler. However, the arbitrator is simply appointed by the two parties who are in dispute.
- It is obligatory for everyone called by the judge to respond, even if one does not like to have the matter judged by the judge. However, it is not obligatory to respond to a call to arbitration. Arbitration only takes place if the parties involved are pleased with referring to it.
- The judge may appoint someone in his place while that cannot be done by the arbitrator except with the consent of the disputing parties.
- The arbitrator’s judgment is not binding in the same sense as the judge of the land. In the case of the arbitrator, his judgement will be restricted by what the contesting parties are willing to accept based on the mandate given to the arbitrator and only if it does not conflict with the shareeah.

The Difference between Arbitration and Agency/Representation (*Wakaalah*)

- Arbitration differs from agency in that the agent is working on the behalf of his client while the arbitrator is working to establish rights, regardless of whether it is to the benefit of the party that chose him or the benefit of his opponent.

The Difference between Arbitration and Reconciliation (*Sulh*)

Arbitration differs from reconciliation in the following issues:

- Arbitration differs from reconciliation in that reconciliation does not require the presenting of evidence and claims. Instead, it is sufficient for each party to compromise on some or all of their claims. Reconciliation is the peaceful ending of a dispute in exchange for some material or usufruct gain, dropping of a debt or right or other considerations, done gratis or with an exchange of considerations.
- The one carrying out the reconciliation need not be chosen by the two parties. Instead, he could have voluntarily offered his services.
- Attempts should be made to redress the dispute among the parties as part of the arbitration process and if that is not possible then they resort to reconciliation.

The Advantages of Arbitration

- It is a method by which the Shareeah can be implemented in nations that do not rule by the Shareeah.
- Usually, it is much quicker and less expensive than solving one's disputes through the courts.
- It can be a way of avoiding enmity and hatred as arbitration allows for the choice of one who is an expert and experienced in the area of the dispute.

The Ruling of Arbitration

- It is obligatory on individual Muslims to rule according to the Shareeah regarding their disputes. If they are not able to redress their issues, it is obligatory upon them to accept the decisions of the arbitrators and to willingly and obediently implement their decisions.
- It is a communal obligation upon the Muslims to have people qualified to be arbitrators if that is the only means to avoid ruling by something other than the Shareeah.

The Domain of Arbitration

- Arbitration is allowed in any issue other than those for which there is a statutory criminal punishment (*hudood*). Muslim minorities should observe what is the upper limit granted to them by their nations, abiding by Allah's command, "Obey Allah to the best of your ability."

The Different Types of Arbitration

- Arbitration can be divided into a chosen arbitration as a result of the will of the two disputing parties or mandatory arbitration wherein a judge has required the parties to turn to arbitration. In the latter case, the arbitration is simply an extension of the judge's ruling over the parties.
- Arbitration can also be divided into it being carried out by an official, government-recognized body of arbitrators who specialize in this field or carried

out by individuals who have been simply selected at the approval of the disputing parties or by a local authority.

- Arbitration can also be divided into a third way, between international arbitration where a country or many countries are in dispute with other nations and domestic arbitration related to disputants within one nation.

The Components of Arbitration

- The essential components of an arbitration are the two disputing parties, arbitrator, locus of the dispute and formulation of the contract of arbitration.
- The disputants must be legally capable.
- The arbitrator must be righteous and knowledgeable of fiqh and guided by the views of experts or an expert in the field of dispute. If he does not have knowledge of fiqh, he should consult with those who do have that knowledge.
- The subject matter of the arbitration can be wealth, rights to usufruct and other rights.
- The components authorizing the arbitration are offer and acceptance by the two disputants. This could be done verbally or in writing, in a manner in which it would have legal authority in the local area of the two disputants.
- The arbitration is suspended if one of the disputants leaves the session, unless it is clear to the arbitrator that his absence is unexcused. In that case, the arbitrator may proceed in his absence and declare his ruling.
- The death of either disputant or the loss of legal capacity of either disputant would bring an end to the arbitration, unless all claims and evidence had been presented, in which case the arbitrator can still render his decision although one of the parties has died or lost his legal capacity.
- It is permissible for the arbitrator to receive a salary for his services, which he takes equally from the two disputants.
- It is permissible, in a financial dispute, that the compensation of the arbitrator be a portion of what is settled between the two disputants.
- The wages are whatever the two disputants agree upon. However, if the case is dissolved after the arbitrator began his process, he has the right to a representative wage for the time he worked.
- It is commendable for an Islamic center or organization to procure the wages from the disputants and deliver it to the arbitrator to protect the integrity and respect of the arbitrator.
- It is not allowed for the arbitrator to decide on a discretionary punishment while the Shareeah has prescribed a determined, *hadd* punishment.
- The same principles apply to the arbitrator as applies to a judge. His ruling will be void if he rules on something beyond the case that is brought to him. This is because his authority is restricted to the issues of dispute presented to him. Similarly, his ruling will be void if he makes a ruling that is actually the right of only a judge, if his judgment contradicts the conditions laid out by the disputants or if the arbitrator himself loses his legal capacity.

Arbitral Proceedings

It is best for the arbitration to follow these procedures:

- Before the proceedings, the disputants should record their acceptance of the proceedings and their intention to abide by its decisions. This document should be witnessed and legally recorded in accordance with local regulations.
- The arbitrator should inform the disputants of the place and time of the arbitration.
- The disputants should submit their evidence and documents that support their claims.
- The arbitrator should listen to experts and witnesses. He must identify the issue in dispute and request from the disputants their demands in writing before beginning the process of settling their claims.
- The minutes of the meetings and statements of the disputants should be recorded for each session.
- It is permissible for the arbitrator to be simply one person or more. However, it is best for them to be an odd number, so that in case of difference of opinion there will be a deciding vote.

The Duration of the Arbitration

- The arbitration should take place over an appropriate time period. There is no need to limit the duration unless this is laid down by the disputants and is agreed upon. In that case, the arbitrator must abide by that time limit to the best of his ability. If the arbitrator fails to come to a conclusion within the agreed upon time limit, he can request the disputants to extend the time period.
- The time period allotted for the arbitration cannot be extended unless the disputants agree to it. If they do not agree, it would be permissible for either of them to take their case to someone else or to another method of resolution.

Recommendations

- AMJA recommends that all Muslims who enter into contracts have within their contracts a clause stating that in case of dispute over the locus of the contract or any article of the contract that their issues are to be resolved by arbitration and in accordance with the Islamic Shareeah. They should name an organization that they trust to handle those issues and agree on the details that may be brought to an arbitrator.
- AMJA also recommends that trustworthy institutions made up of Muslim jurists, lawyers and experts be established to train and develop arbitrators as well as to arbitrate cases and analyze the issues of dispute in arbitration cases.
- AMJA also recommends that the culture of arbitration should be spread and that Muslims should come to learn about its importance, especially in non-Muslim lands. And may Allah guide us to what is best.

Issues of Maintenance and Custody

- The *mabtootah* is the woman who has had a final, irrevocable divorce after completing the three divorces.
- The *mabtootah* has a right to maintenance and housing during her waiting period until she gives birth if she were pregnant. If she were not pregnant, she would have a right to maintenance and housing if she did not have wealth to support herself or to pay a customary rent.
- The *mutah* is wealth that a husband gives to his wife due to their separation as a result of divorce or for similar reasons due to the harms that she may face as a divorcee.
- The *mutah* is obligatory for every divorce that takes place before consummation and when a dower had not been agreed upon. If a dower had been agreed upon, it is recommended to also give the wife a *mutah* in addition to half of her dower.
- The *mutah* is obligatory to be given to any divorced woman after consummation if the dower had been agreed upon and the separation was not due to causes on her part.
- The amount of the *mutah* would be determined by the economic condition of the one who is giving it, whether he is poor or rich.
- Custody refers to looking after an individual who cannot live independently and to raise that individual in what that is best for him or her.
- The mother has the right to custody. Her right of custody extends until the child reaches seven years old.
- Custody has been instituted for the benefit of the child. The arbitrator or judge determines the welfare of the child from the age of seven to fifteen, which includes the possibility of allowing the child to choose between the parents, putting the child with one of the parents or putting him with someone other than them, depending on what is in the interest of the child.
- If the mother who has the right of custody travels, it does not affect her custodial rights unless she travels to another land with the intention of living there and the distance between the two lands is so great that the guardian (father) would have to travel to that other land simply to see his child or if the journey is not safe or if the new land is a place of trials and strife, regardless of whether it be in the same country or another country.
- When the custodial rights are lost due to such a travel, the right of custody transfers to the next in line for the right of custody as long as that person is resident and not in a distant land as well.
- It is the right of the parent who does not have custodial rights to object to the traveling of the custody holder due to any travel that would qualify for the loss of custodial rights.
- It is the right of the parent who does not have custodial rights to visit the child while the child is with the custodial parent or in an appropriate place for the parent to see the child, as long as the Islamic parameters of such a visit are met.
- The Shareeah etiquettes of visiting the child in the custodial parent's house include:

- The [visiting parent] should not meet in private with the divorced spouse with the custodial rights, nor should they have lengthy conversations or stay in that residence for a long period of time.
- The appropriate time should be chosen for such a visit or that time could be what is customarily accepted.
- He must seek permission to enter before entering into the house.
- The visit must not bring about any harm to the child.
- The child must not face any experience from either parent that would make them unhappy with the other parent while the parents themselves must work together to educate and raise the child and protect his religion and character, such that he will be dutiful to them.
- It is acceptable to take into consideration and abide by what the society determines the proper way to arrange such visits, as long as there is no contradiction of any Shareeah rulings.
- In case of separation of the parents, the child is deserving of his maintenance [from his father] that would include what is sufficient of food, drink, clothing, housing, wages for taking care of the child if so needed, expenses for schooling and medical expenses, according to what the guardian can afford and in accordance with what would be considered customary in society.
- It is not prohibited to apply the standards set by the law of the society with respect to the level of maintenance as long as it takes care of the aforementioned aspects.