HISTORY AND DEVELOPMENT OF ARBITRATION IN UZBEKISTAN

Khalilova Z.E. (Republic of Uzbekistan)

Khalilova Zebiniso Erkinovna – LLM Eur and PhD in law (University of Bremen, Germany), Senior Lecturer,
INTERNATIONAL PRIVATE LAW DEPARTMENT,
TASHKENT STATE LAW UNIVERSITY,
TASHKENT, REPUBLIC OF UZBEKISTAN

Abstract: *all religions summon to be at peace with one's neighbors and to be reconciled quickly with a rival. Unlike the history of law, the history of arbitration is not the result of development of principles or doctrines that have come from ancient times but it is a matter of free decision based on ethical or economic norms of some particular group. This article discusses historical development of the arbitration system of Uzbekistan, which has to date received only limited scholarly attention which could be considered as a plus for the existing literature.*
Keywords: *history of arbitration, Islamic arbitration, Islamic law schools, Soviet arbitration, Uzbekistan's arbitration after its independence.*

ИСТОРИЯ И РАЗВИТИЕ АРБИТРАЖА В УЗБЕКИСТАНЕ

Халилова З.Э. (Республика Узбекистан)

Халилова Зебинисо Эркиновна – LLM.Eur и PhD (Бременский университет, Германия), старший преподаватель,
кафедра международного частного права,
Ташкентский государственный юридический университет,
г. Ташкент, Республика Узбекистан

Аннотация: *все религии призывают к миру со своими соседями и к быстрому примирению с соперником. В отличие от истории права, история арбитража не является результатом развития принципов или доктрин, пришедших с древних времен, а является вопросом свободного решения, основанного на этических или экономических нормах определенной группы. В этой статье обсуждается историческое развитие арбитражной системы Узбекистана, которая на сегодняшний день получила лишь ограниченное научное внимание, что можно рассматривать как плюс для существующей литературы.*
Ключевые слова: *история арбитража, исламский арбитраж, школы исламского права, советский арбитраж, арбитраж в Узбекистане после обретения независимости.*

Arbitration is an old form of dispute resolution and one of the most important institutes of civil community in Uzbekistan. Though the term "arbitration" has largely been used lately, the basis of the mechanisms of arbitration in the territory of Uzbekistan has historical roots. The manuscript "Avesta" is considered as a first

written source in studying the history of the dispute resolution mechanisms, court and legal relations of old Uzbekistan, since it contains rich information on the governance before the formation of early state and on social, political and legal relations [1]. Several researches have shown that Avesta has criminal, family, civil, military and justice norms. Furthermore, it includes information about the conclusion of contracts between tribes and the dispute resolution processes between parties, in particular arbitration [2]. According to *Xenophon* and *Herodotus*, in important cases, the king administered justice by himself, but for the general convenience, he delegated his legal authority to the most learned and upright men of his own choice. The person thus selected to occupy the most responsible position as a guardian of equity and justice in the empire was generally past fifty, and was appointed for life, unless personal misdemeanour, in the execution of his duties, rendered him unworthy to hold the office [3].

Before Islam, arbitration was used as a method for the settlement of civil and commercial disputes by Arabs and traditionally it was the least expensive and most popular apparatus for resolving disputes among tribes in the Arabian Peninsula [4]. Enforcement of the law was generally the responsibility of the private individual who had suffered injury [5]. Within the framework of tribal Arab society, chieftains (sheikhs), soothsayers and healers (kuhhān), and influential noblemen played an indispensable role as arbiters in all disputes within the tribe or between rival tribes. Before becoming a prophet, Muhammad (may peace be upon him!) was known as an honest and wise arbiter among the non-Muslim Arab tribes. The authority and stature of arbiters (hakams) in the Pre-Islamic period served as sanctions for their verdicts [6]. The arbitration award was not enforceable if parties contested it, unless the trial chief was in a position to get it enforced; [7] the arbitral awards were not legally binding, unless there was an agreement between the parties to this extent. In that period there were no specific rules to limit the arbitral subjects. The arbitral proceedings were simple and rudimentary. The arbitrator when hearing the dispute does not abide by any certain procedures, except for a number of certain procedures such as the obligation to hear the disputing parties on equal bases and the respect of the customary rules when examining the proofs presented by the parties. The similar point regarding the arbitration process of the Zoroastrian period can be noticed in the Pre-Islamic period and after Islam, too. As stated in "*Medjella of Legal Provisions"*, the arbitration process relied upon the claimant proving his case and the respondent basing his defense on his oath [8]. To the opinions of many scholars, arbitration and dispute resolution in some areas of the Arab world, which further had a great impact on Central Asian arbitration, was relatively structured and permanent.

Bassiouni and *Badr* refer to customary practice of arbitration as a legitimate source of law if they do not contradict with Shariah law [8]. Today, a major part of the rules of international commercial arbitration has been developing gradually to the level of custom, and some of them are considered to be part of the law. The customs which were practiced in the Pre-Islamic period continued to be respected and esteemed under Islam, particularly those relating to honor, hospitality and courage in Muslim countries including Central Asian countries, while Prophet

Muhammad (may peace be upon him!) also declared that he was sent to perfect the principles of good behavior [9]. In resolving disputes, principles such as tolerance, non-violence, patience, forgiveness, peace, harmony and mercy were employed by the Prophet Muḥammad (may peace be upon him!). Thus, many of the positive tribal customs were incorporated into Islamic teaching and jurisprudence. The validity of arbitration has been recognised by the four sources of Sharia: the Koran (Quran), the Sunna (the acts and sayings of the Prophet Mohamed (may peace be upon him!)), Idjma' (consensus of opinion) and Qiyas (reasoning by analogy) [10]. 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 the resolution of disputes. It is also less complex than court procedures [11].

Although the concept of arbitration is not new to Central Asia and other Muslim countries, Islamic law scholars have different opinions on it. The scholarship on the arbitration concept argues that it has been considered as an efficient means of dealing with disputes and has long been embedded in Islamic rules for over 1,400 years. According to some scholars, arbitration is a form of conciliation, close to "amiable composition", which is not binding the parties [12]. Those favouring this view hold that the arbitrator's decision is neither binding nor final, unless it is accepted by the parties. Thus, arbitration does not have any jurisdictional nature, but is close to conciliation. In the period of Islam, as in the case of Fath Makkah (winning over Mecca) and Sulh al-Hudaybiyyah (peace treaty at Ḥudaybiyyah), disputes were resolved on the basis of conciliation [13]. The Holy Quran states: "If you fear a breach between them (the man and his wife), appoint (two) arbitrators (hakam), one from his family and an arbiter from her family. If they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All Knower, Aware with All Things."[14]. The word "reconciliation" in the above verse indicates that an arbitral award is not binding and Imam Shafi also held that arbitral awards are binding only if parties mutually agree to enforce it [15]. This verse of the Quran, as *Moussalli* noted, is an example to encourage arbitration of private conflicts [16]. The second view is that the Sharia knew arbitration in its modern sense. This view is based on the following verse from the Quran: *"Verily! Allah commands you to deliver the trusts to those, to whom they are entitled; and that when you judge between people, judge with justice. Surely, excellent is the exhortation Allah gives you. Surely, Allah is All-Hearing, All-Seeing."* [17]. *"If they come to you, judge between them or turn away from them. If you turn away from them, they can do you no harm. But if you judge, judge between them with justice. Surely, Allah loves those who do justice."* [18]. Conflicting interpretations of these verses creates misunderstandings and confusions about the binding character of an arbitration award among Islamic law scholars. A further complication is the fact that some scholars come often across with using the word "Hakam" (arbitrator) distinguishing arbitration from conciliation (sulh) [19].

After becoming a prophet, Muhammad (SAW) usually settled conflicting viewpoints by asking the opposing parties to explain their interpretations of the Qur'an, and then he either confirmed or denied the validity of their perspectives. He appointed arbitrators and accepted their decisions; he chose arbitration to settle

the dispute between himself and Bani Anbar. He also acted as an arbitrator between the Muslim community and non-Muslim people, as well as a mediator for Jewish tribes, for whom he applied Jewish law [20]. The leading case where arbitration was used by the companions of the Prophet (peace be up on him!) was the famous political case between the Caliph "Ali bin Abu Taleb" (the fourth rightly guided Caliph) and "Muawya bin Abu Sofian". Although the Quran and the Sunna confirmed the validity of arbitration, there was an issue with its implementation. Therefore, the four schools of Sharia (the Hanafi School, the Shafi'e School, the Hanbali School and the Maliki School) explained the process of arbitration which obliges each Muslim within each school to follow its teachings [21]. Minor practical differences can be noticed between these Sharia Schools regarding the interpretation of the texts of Islamic law. It should be noted that although all four Islamic schools acknowledge arbitration as a substitute for the ordinary courts and define arbitration similarly, they implement separate rules on settlement of disputes, selection of arbitrator and establishing the arbitration features and scope. According to some Islamic law scholars, despite the recognition of arbitration by all sources of Islamic law, arbitration did not reach thorough and detailed attention in the doctrinal writings of the four major Islamic Schools due to the fact that Islamic Judiciary was sufficient and developed enough to provide suitable solutions to all types of social life problems of that time.

The supporters of the ***Hanafi School*** stressed the contractual nature of arbitration and explained that arbitration is legally close to agencies and conciliation. The arbitrator acted as an agent on behalf of a disputant who had appointed him. Hanafi School's scholars acknowledge a strong relationship between arbitration and conciliation. According to them an arbitral award which is closer to conciliation than to a court judgement, is of lesser force than a court judgement. *Saleh* states that the disputing party cannot be relived from being obligated to abide by the award because the agreement to resort to arbitration binds the parties like any other contract [22]. The followers of this school spread to Central Asia, Iraq, the region of the Caucasus and the South Asian countries such as Pakistan, India and Bangladesh. Here it should be mentioned that arbitration (Tahkim), like judiciary, was focused on testimony in accordance with the doctrine of the Hanafi School. *Abdul Hamid El-Ahdab and Jalal El-Ahdab* confirm that arbitration cannot be entrusted to an unjust person while justice is a primary requirement in the Hanafi School [23]. Furthermore, the scholars of the Hanafi School as well as of the Maliki, Hanbali and Shafi Schools accentuate on the capacity of arbitrators. They have two statements relating to this matter: First, the arbitrator should be an absolute jurist; second, the arbitrator is a jurist only in issues that he settled. However, in some cases these schools authorised arbitration by an ignorant person, provided that he refers to academics and asks their advice, not to allow the award to be considered as rendered by a person who lacks the knowledge. In fact, an ignorant may not be selected as an arbitrator otherwise, the award, rendered by him would not be enforced.

According to the ***Shafi School*** arbitration is a legal practice, whether or not there is a judge in the place where the dispute has arisen. However, according to

this school, the position of arbitrators is inferior to that of judges since arbitrators under this School are liable to be revoked up to the time of the issuance of the award.

The ***Hanbali School*** specifies that an award or decision made by an arbitrator (having the same qualifications as a judge) has the same binding nature as a court judgement and it is imposed upon both of the parties who chose him. If the decision is not finalized, a disputing party is entitled to retract an arbitrator's representation. This is made possible by the fact that arbitration is considered to be similar to the power of an attorney, which the disputing party can renounce at any time.

The ***Malikis*** have a great trust in arbitration; they accept that one of the parties can be chosen as an arbitrator by the other disputing party. This is explained by the fact that one relies upon the conscience of the other party. Unlike the other three schools, this school stresses that an arbitrator cannot be revoked after the commencement of the arbitration proceedings.

The introduction of Islam into Central Asia, as *Paksoy* mentioned, went through roughly three stages: force of arms and alms; the scholastic madrasa; and Sufism. Islam had a profound impact in all spheres of political, economic, social, legal and cultural life of Central Asian people for decades. It recognized and confirmed the pre-Islamic method of settling disputes with some modification and arbitration continued to have its role in the resolution of disputes. [24]. In the 13th century Islamic law did not lose its significance by the abolishment of the Arab Caliphate by Mongols in Central Asia, but it continued to develop and became as a practiced branch of law. Though the Sharia did not mention to divide the law into separate branches, it developed the civil, property and contract relationships. Studies show that many of the Uzbek traditions practiced today have their roots in ancient religious customs both from Islam and other religious traditions that co-existed with Islam. For example, the Mongols brought the ***Great Yasa*** to Central Asia and strengthened "edgen tradition", four centuries after the Arab occupation [25]. The elders have had a role in the justice system and in politics in Central Asian countries for many years. *Keller* notes that male and female Muslim leaders acted as counselors and mediators in pre-Soviet Central Asia who were and still are known as "Aqsaqals" and "Otinoyilar". For instance, there are still aqsaqals courts in Kyrgystan. *Beyer* by her scientific research on the "customization" of law in Kyrgyzstan found that the resolution of disputes is carried in mosques by Kyrgyz aqsaqals and in the process of disputes they use Sharia rules. In Uzbekistan, which has a more urban society than other Central Asian countries, cities are divided up into mahallas with an aqsaqal who acts as the district leader. It is important here to point out that today Uzbek mahallas play an essential role in processing the disputes focusing on State law and Islamic traditions at the same time. As demonstrated in a recent study of *Ato*, also male Muslim leaders of Tajikistan process disputes over family issues regarding divorce, alimony and inheritance. [26]. Since at least the 19th century, 'Otinoyilar', who acted as women Muslim leaders, have taught Islamic principles, mediate conflicts within families and assisted in preserving Islamic Sharia during the repression of Islam by the Soviets

in Central Asia. However, some limitations regarding women in Central Asia leads to scholars' debate on "how and to what extent Muslim women leaders influence and help the resolution of disputes by using Islamic Sharia", which can contribute to the scholarship on Islam and resolution of interpersonal disputes based on Islamic law in Central Asia. Today, Islamic law and jurisprudence is not a source of state law in the post-Soviet countries of Central Asia, including Uzbekistan with Muslim-majority populations and secular governments. Islamic courts and Sharia which existed and prevailed before the Soviet Union were abolished and replaced by the Soviet government with secular Soviet laws and the Soviet Courts, which influenced the resolution of disputes by state courts of Central Asia till nowadays. However, even in the period of the USSR Islamic Sharia has kept its role in non-state dispute resolution processes in Central Asia. *Keller* notes that male and female Muslim leaders acted as counsellors and mediators in pre-Soviet Central Asia who were and still are known as "Aqsaqals" and "Otinoyilar". *Beyer* by her scientific research on the "customization" of law in Kyrgyzstan found that the resolution of disputes is carried in mosques by Kyrgyz aqsaqals and in the process of disputes they use Sharia rules. These elders have had a role in the justice system and in politics in Central Asian countries for many years. For instance, there are still aqsaqals courts in Kyrgystan. In Uzbekistan, which has a more urban society than other Central Asian countries, cities are divided up into mahallas with an aqsaqal who acts as the district leader. *Allen Frank* emphasizes 'mahalla' as a religious institution in the period of imperial Russia and notes that it was a community of Muslims that supported a single mosque and the mosque's imam, since he had both religious and civil duties as the spiritual head of mahalla. Some investigations on Central Asian customary law revealed how the Muslim leaders of mahallas in Uzbekistan and other Central Asian countries invoked the purported stability of customary law while situationally incorporating State law, Sharia and international norms into the legal repertoire, as a practical means and a justifiable claim to order ever-changing lives of people. There are a lot of examples that respected Muslim leaders, when they mediate or arbitrate disputes, base on both: State law and Sharia. The types of disputes they process vary from the disputes, resolved by arbitration courts. Comparing to Uzbek arbitration courts, the leaders of Uzbek mahallas process the disputes, arisen from family and administrative relationships that are not resolved by arbitration courts. Particularly, male Muslim leaders of mahallas help Uzbek families to solve the family issues. While one of the tasks of the mahalla is the promotion of social control, it plays a major role in the treatment of domestic crises. This role has been expanded and sanctioned by the government. Family problems are therefore often resolved by mahalla's less-formal mediation bodies, rather than through the judicial system. A council of elders (aqsaqals) informally advises the mahalla chairman and takes part in mediating conflicts. As demonstrated in a recent study of *Ato,* also male Muslim leaders of Tajikistan process disputes over family issues regarding divorce, alimony and inheritance.

During the Soviet period several bilateral and multinational treaties on international commercial arbitration were concluded by the Soviet government.

The USSR signed the 1958 UN Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) on 29 December 1958 and ratified it on 24 August 1960. The USSR also ratified the 1961 European Convention on International Commercial Arbitration on 14 March 1962, and the 1972 Moscow Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation on 26 May 1972. Despite the existence of a legislative framework for the development of arbitration courts, in conditions of the administrative-command system, the activities of arbitration courts have not been sufficiently developed in the Soviet Union due to the lack of free enterprises and other economic factors [27]. The former Soviet state arbitration courts did not relate to the arbitration courts, since they were direct political institutions of the planned economy and failed to meet one of the main requirements of commercial arbitration i.e. the establishment of arbitration on the basis of the will of individuals. The former arbitration courts were apparently close to the commercial arbitration courts. *Lebedev* noted that disputes between Soviet enterprises were solved by economic courts ("state arbitration"), which were nevertheless not arbitration *stricto sensu* [28]. *Butler* expressed the opinion that the Soviet government preferred arbitration in order to avoid litigation in foreign courts and concluded bilateral treaties with the countries, containing provisions of mandatory enforcement of arbitral awards, over which the USSR could politically and economically hold a dominant position [29]. Like many other CIS countries, the Republic of Uzbekistan has continued to recognize and apply legislation of the former Soviet Union, only if it is not contrary to the legislation of Uzbekistan. Actually in practice, making legislation is almost the same as the former Soviet legislation. It should be noted that arbitration in Uzbekistan is at present used widely for solving domestic commercial disputes as a new phenomenon since it has not been used for over 70 years for that aim. The main reason for this limitation is the administrative command economy of the former totalitarian regime, which reduced the status of private property in relation to socialist property [30]. Taking into account the importance of the institute of legal proceedings, in the first stage of independence of Uzbekistan, public attention was drawn to develop a truly independent judiciary, which had to be transformed from a punishing organ to a body protecting the rights and interests of people. The Republic of Uzbekistan took steps on liberalization of economy which was based on the Soviet regime. The need for an effective commercial arbitration system was felt in Uzbekistan to attract foreign investors. Under the *Welfare Improvement Strategy "Encouraging property rights' protection and other rights and guarantees of investors by means of alternative ways and institutions for the settlement of commercial disputes, especially arbitration tribunals"* is determined as one of the significant objectives of legal reforms. Many positive changes in the field of arbitration have been made in recent years. The provision of the legal framework for the arbitration tribunals' functioning is seen in the adoption of some legal acts as the Presidential Decree "On measures for further improving the system of legal protection of enterprise entities" of 14 June 2005. The next step was followed by adoption of the Law "On Arbitration Courts" of 26 August 2007

and the law “On International Commercial Arbitration” of February 2021. Both laws’ fundamental aim is to overcome the defects and imperfections of legal regulations on establishment, functioning and termination of arbitration courts’ activity in Uzbekistan and the ameliorating the business climate in the country, since arbitration is one of the most popular mechanisms of alternative dispute resolution [31]. Development of arbitral tribunals as an alternative to state courts would greatly alleviate the burden of the competent courts in the resolution of disputes arising between the parties of economic relations [32]. In this context, several arbitration institutions were created in Uzbekistan after its independence, which facilitate the creation of arbitration friendly environment for domestic and international business actors [33].

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