

Enforcing Arbitral Awards in Islamic Finance Contracts

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Having recently moved from California to Amman Jordan, I found myself contemplating writing this article and in search for an hour of solitude and I hastily made plans to follow up on my previous article outlining preventative and remedial measures protecting Sukuk investment account holders. This of course was derailed by a call from my mother to pay her rent-to-own payment at a local Islamic Bank. My first impression took the intellect out of intellectual debate, what would seem to be a simple transaction in a conventional bank requires: getting an approval from a bank officer, standing in line to get the payment endorsed, and then finally pay at a cashier's window. My inquisitive nature took the better of me and soon I was interrogating the bank officer. Soon I realized that most debates we read and articles we write are aimed at the wrong audience. The consumers at large are unaware of the different modes of obtaining funds to support their financial needs.



This is not entirely surprising, since bank officers at Islamic banks come from a finance background that - most often than not - is heavily laden with conventional banking experience (and corresponding perspective/notions). I took the liberty of examining a copy of a contract that was written in English, finding a major discrepancy in its contractual terms. While it is universally known in the legal field that arbitration is binding and final, the finality of arbitration seems to be arbitrary to say the least. The line that follows arbitration, states that if the terms are not satisfactory to the disputing parties then they will resort to the court of law (?). To add insult to injury the contract never states a jurisdiction nor does it state a venue, leaving ambiguity in the details to put it mildly.

Having encountered this major issue, I decided to address remedial measures, arbitration, in advance of preventative measures (meaning corporate governance) hoping to introduce this issue in a simple format with the risk of insulting the more educated audience but hoping that the benefit to the reader community at large outweighs the risk.

So what is Arbitration? Arbitration is a form of alternative dispute resolution (ADR), a legal technique for the resolution of disputes outside the courts, wherein the parties to a dispute refer it to one or more persons (the "arbitrators", "arbiters" or "arbitral tribunal"), by whose decision (the "award") they agree to be bound. It is a settlement technique in which a third party reviews the case and imposes a decision that is legally binding for both sides, and arbitration has recently gained traction in resolving various International disputes. Not surprisingly the New York Convention of 1958 is one of the most important and successful United Nations' sponsored commercial law treaties. As of January 1, 2009, 143 states, out of 192 member States, have adopted the New York Convention including all the major players in the Sukuk bonds market: Bahrain, Malaysia, Qatar and the UAE. As Sukuk issuance have gained global acceptance, arbitration can be an effective tool in resolving international disputes arising under provisions of Sukuk contracts. The Convention has indeed seen an increasing number of accessions by Gulf States over the past few years - Kuwait led the way (1978), followed by Bahrain (1988), Saudi Arabia (1994) and Oman (1999). The most recent Gulf State to accede is Qatar, where the New York Convention entered into force on March 2003.

Moreover, the cross-border nature of sukuk issuance and the increasing international dynamic that has been observed provide further motivation for expanding on the use of arbitration. As a matter of fact the New York Convention is not the only treaty dealing with cross-border enforcement of arbitration awards. The earlier Geneva Convention on the Execution of Foreign Arbitral Awards 1927 remains in force, but the success of the New York Convention means that the Geneva Convention is rarely utilized in practice. Arbitration is an invaluable tool for the average investor in any foreign investment dispute (Islamic finance included). In most cases, an average investor

does not have the financial resources to litigate. Even if the legal expertise were available and supported by the financial ability, dealing with conflicts of laws in foreign disputes and the lack of uniformity of remedies regarding litigation cost and lawyer fees creates enough hardship in getting an equitable relief for the adversely affected party.

The aforementioned reasons, inter alia, makes arbitration the most effective tool in getting the needed relief for a Sukuk investment account holders whether in a domestic court or in a cross border dispute .

One of the reasons that arbitration is so popular in international trade as a means of dispute resolution, is that it is often easier to enforce an arbitration award in a foreign country than it is to enforce a judgment of the court.

Under the New York Convention 1958, an award issued to a contracting state can generally be freely enforced in any other contracting state, only subject to certain, limited defenses.



Source: National Arbitration Forum

So how are arbitral awards enforced in Islamic countries that are parties to the New York Convention?

In an article written by the law firm Abdul Razzaq outlining the enforcement of Arbitral awards in Kuwait (for both domestic and foreign judgments) the author asserts that “in an era of globalization with so many investors entering and establishing themselves in the Muslim world a sound knowledge of how Muslim laws operate would be crucial for anyone involved in banking, insurance, syndicated loan agreements, agency contracts and distributorships”.

They proceed to outline the mechanisms of enforcing arbitral awards in Kuwait in accordance with Judicial Arbitration Law No. 11 for the year 1995 that establishes the procedure whereby a panel of arbitrators may be formed in the Court of Appeals. Article 1 of the said law states that one arbitration board or more shall be formed in the house of the court of Appeal, consisting of three judges and two arbitrators, each of the disputing parties can choose from the arbitrators enrolled, from the tables prepared in this regard in the arbitration department of the court of Appeal. Article two of the said Law confirms that the five-member panel shall decide on the following matters: Any arbitration matter that the parties agree to refer to the panel arising under a disputed contractual matter either between ministries and governmental authorities or other commercial disputes between individuals , corporations or governmental entities.

The individuals and corporate entities can choose either to proceed to the court or force the government entity to submit to judicial arbitration as long as the same dispute is not already being litigated in the courts in violation of the principles of Lis pendens (pronounced “Lay penden”) or any parallel or pending judgments. The rationale behind barring parallel proceedings is to avoid forum shopping as articulated by the landmark case of Piper v. Reyno where one party seeks to either double the awards or shop for higher awards (such as punitive awards under the American legal system).

As for conformance with Shari’a law, the author states: “an arbitral award has a jurisdictional character and is binding and enforceable. According to the Maliki, Hanbali, Hanafi and the majority of the Shafi’ School an arbitral award is as enforceable as a court order. As to the enforcement of

foreign arbitral awards, the attitude of Sharia is dependant on the bilateral and international conventions and treaties to which the party states have entered. Moreover, the Muslim judge may set aside a foreign award or refuse enforcement if the award violates the general principles of Sharia law”.

Reality on the ground might state otherwise, as for the example of the aforementioned contract with contradicting terms deeming arbitration non-binding in a jurisdiction. Also, leaving a judgment of enforcing a contract to a judge gives a very wide discretionary power to the local judiciary if it is decided to violate the principles of Islamic law. In closing, seeking an arbitral award in a country member to the New York convention is a far better alternative for an average individual than a traditional judicial award. In future articles , we will explore more examples of different jurisdictions of the major market players in Islamic finance, both challenges and mechanism of enforcing such awards.

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