Singapore Convention Series: The “Sharia-Compliance” Requirement to Safeguard Enforcement Of Mediated Settlements In The MENA Region

Kluwer Mediation Blog
September 30, 2020

David Lutran (Lutran Avocats & Mediation) and Josephine Hage Chahine (Attorney & Lecturer, Sorbonne University)

Please refer to this post as: David Lutran and Josephine Hage Chahine, ‘Singapore Convention Series: The “Sharia-Compliance” Requirement to Safeguard Enforcement Of Mediated Settlements In The MENA Region’, Kluwer Mediation Blog, September 30 2020, http://mediationblog.kluwerarbitration.com/2020/09/30/singapore-convention-series-the-sharia-compliance-requirement-to-safeguard-enforcement-of-mediated-settlements-in-the-mena-region/

Settlement agreements reached through mediation are mere contracts and not court decisions. As such, and in the absence of a statutory framework, enforcement of mediated settlements can only be carried out voluntarily by the parties. Failing which, the aggrieved party must enter into a court or arbitral process through which the defaulting party is compelled to comply with the settlement agreement.

Under the Singapore Convention, and through a simplified and streamlined procedure, the purely private contractual agreement becomes enforceable in all contracting states and is granted a *sui generis* status comparable to the status of arbitral awards under the New York Convention.

To date, fifty-three countries have signed the Singapore Convention, including three countries of the MENA region: Jordan, Qatar, and Saudi Arabia. Five countries have already ratified the Convention (Singapore, Fiji Islands, Qatar, Saudi Arabia and Belarus), which entered into force on 12 September 2020.

Article 5 of the Singapore Convention provides for several grounds to refuse recognition of the mediated settlement and, more particularly, when “*granting relief would be contrary to the public policy’ (*a parallel can be draw with Article 5(2)(b) of the New York Convention).

When enforcement is sought in a MENA region country, particular attention should be paid to the compliance of mediated settlements with the *Shari’a* insofar as it is a core component of public policy in these jurisdictions, notably in three ratifying countries, i.e. Jordan, Qatar and Saudi Arabia.

Introduction to Shari’a

The legal systems of the MENA region countries can be classified into three categories:

- *Shari’a*-based systems, where *Shari’a* is formally equated with national law as regards all subject matters, such as Saudi Arabia and Qatar;
- Secular systems where domestic legislation is not based on *Shari’a*, including for personal status, such as Tunisia;
- Mixed systems where a body of secular domestic rules coexists with *Shari’a* based rules (namely governing personal status) such as Jordan, Lebanon, Iraq, Algeria and Egypt.

Shari’a is composed of the following pillars: the *Coran* (the Islamic sacred book, believed to be the word of God as dictated to the prophet); the *Sunna* (the prophet’s words and acts); and the *Fiqh* (the interpretation of the Coran and Sunna by scholars). There are several schools of interpretation, known as ‘*Madhahib*” that diverge over several subject matters but not on *Shari’a* fundamentals, i.e. the prohibition of alcohol, pork, *Riba*, *Gharar*, *Maysar* (as are considered below).

Shari’a prescriptions may be classified in two main groups: (1) regulations relating to worship and ritual duties and (2) regulations relating to legal, juridical and political matters. As far as commercial transactions are concerned, three general principles apply: mutual consent, gainful exchange and the obligation to fulfil one’s undertaking. In addition, the following restrictions must be observed: several subject matters may not be traded (such as wine, pork, rights of clientage, etc.), *Riba* (interest), *Gharar* (uncertainty) and *Maysar* (gambling) are prohibited.[fn] See in this respect: Amel Makhlouf, *L’émergence d’un droit international de la finance islamique, origines, formation et intégration en droit français*, IRJS, 2015 ; Geneviève Causse-Broquet, *La finance islamique*, 2ème édition, RB édition ; Chihab Mohammed Himeur, *Les contrats de la finance islamique*, Larcier, 2019 ; International Encyclopedia of Comparative Law Online, Volume VII : Contracts in General | Chapter 7 : Contract Law of Islam and the Arab Middle East, Part II. Classical Islamic Contract Law by Frank E. Vogel.[/fn]

Potential relevance of Shari’a prohibitions to mediated settlement agreements

Riba derives from the word “*Rabawa*” which means to grow, and is a synonym of interest (whether usurary or not) and more generally to any unjustified increase of capital for which no compensation is given. *Shari’a* forbids *Riba* because it leads to exploitation, injustice and idleness. *Riba* should be distinguished from profit or financial gain (*Ribh*) which can be defined as the difference between the amount earned and the amount spent in buying, operating, or producing something by investing labour, effort and resources. Profit is allowed under *Shari’a* insofar as it is earned, unlike interest that is considered unearned as no effort is required. For instance, *Mourabaha*, i.e. a sale at a percentage markup, *Moucharaka,* i.e. a classical form of partnership, and *Moudaraba,* i.e. a type of partnership to which some partners contribute only in capital, (without any managing rights and who will bear all the losses) and other partners only in labour (with managing rights and who will not bear any losses), are *Shari’a* compliant insofar as they generate earned profit. Mediated settlement agreements that encompass undertakings to pay interest, notably in the context of the reimbursement of a loan or a delay in the performance of payment obligations (such as in a sale and purchase agreement) will be deemed contrary to *Shari’a*. On the contrary, mediated settlement agreements that give effect to for profit-based operations will be considered compliant.

Gharar means uncertainty, hazard, chance or risk and refers to any transaction whose existence or characteristics are not certain. *Gharar yasir* (light Gharar) is tolerated, unlike *Gharar Fahish* (excess Gharar) and the threshold beyond which *Gharar* becomes prohibited will depend on a case by case analysis. As such, any mediated settlement agreement which provides for the performance of an undertaking tainted with *Gharar Fahish* will be in breach of *Shari’a*. The rationale behind the prohibition of *Gharar* is ensuring full consent and satisfaction of the parties (and therefore avoiding deceit), which can only be achieved through certainty and full knowledge of each party’s undertakings. The uncertainty (or the absence of adequate and accurate information known as “*Jahl*”) can relate to ownership and possession (such as in the sale of an item that may not exist or that is not in the possession of the seller) or to the key characteristics of the contract (such as the price, the features of the item and the exact date of performance of the undertaking).

Maysar amounts to pure games of chance. It is forbidden under *Shari’a* in order to avoid the lure of easy profits. Examples of prohibited transactions are trade options on the financial markets. Such transactions can be defined as contracts by which two parties undertake to buy or sell an asset at a specified future time (t+1) at a price agreed upon at the time of conclusion of the contract (t), regardless of the asset’s price and of the existence of the object of the sale (in the same quantity and quality agreed upon on the date (t)) on the date (t+1). Such transactions are prohibited first because they amount to pure acts of speculation (*Maysar*) and second because they are based on *Gharar* since one party might receive an asset at a greater or lesser value that what it paid for on the date (t), and since the object of the sale may not exist at the time the trade is to be executed. Any mediated settlement agreement relating to the performance of trade options could be seen as non-*Shari’a* compliant.

Consequences of a breach of Shari’a prohibitions and suggested solutions

In any case, a breach of the *Shari’a* requirements would likely lead to the denial of enforcement of the mediated settlement agreement, a denial that could be total or partial, i.e. limited to the non-compliant provisions, provided they could be isolated from the other valid provisions without altering the overall equilibrium of the settlement.

Parties to a non-compliant mediated settlement agreement could also seek enforcement in jurisdictions that do not apply the *Shari’a*. This could lead to *forum* shopping and therefore to “two different yardsticks”, i.e. a mediated settlement agreement enforceable in jurisdiction A but not in jurisdiction B, a consequence that seriously undermines predictability and legal certainty.

In order to avoid such prejudicial consequences, mediators could be trained to better understand the *Shari’a* requirements and guide the parties through reaching a *Shari’a*-compliant settlement. Another solution could be to establish two separate settlement agreements, one dealing with the issues involving *Riba*, *Gharar* and *Maysar* and one dealing with the remaining issues. As such, parties will safeguard the enforcement of at least one settlement agreement without the risk of a denial of enforcement of an entire settlement agreement (dealing with all the parties’ issues).

Moreover, mediation centres could scrutinize the settlement agreement, as it is the case with many arbitration centres that scrutinize the award before releasing the final version [fn] Article 34 of the ICC 2017 rules combined with article 6 of Appendix II provides for a scrutiny process of the award that takes into consideration the requirements of the mandatory rules of the place of the arbitration. The MENA region arbitration and mediation centres also provide for scrutiny services, but only as regards arbitration. A few examples related to countries that have ratified the Singapore Convention are as follows: Article 28 §1 of the Jordanian-based Franco-Arab chamber of commerce arbitration and mediation rules; Article 35.3 of the Qatar international centre for conciliation and arbitration rules; Article 30 § 5 of the SCCA rules.[/fn], and draw the parties’ as well as the mediator’s attention to the *Shari’a* breaches in order for them to restructure/renegotiate the settlement in a more compliant manner.

It results from the above that an absence of compliance with the Shari’a requirements (i.e. the prohibition of *Gharar*, *Riba* and *Maysar)* could hinder the recognition and enforcement of mediated settlement agreements in MENA countries on the grounds of a breach of public policy i.e Article 5(2)(a) of the Singapore Convention). In order to avoid such consequences, trained mediators and mediation centres ought to remain alert and draw the parties’ attention thereon, so that a *Shari’a*-compliant settlement could ultimately be reached.