



Arbitration in Endowment-Related



Problem Definition and Background

Endowments (Awqaf) own assets that they manage and invest in various types of ventures, including their development, preservation, leasing, and maintenance. The endowment administrator (Nadzir) has the authority to carry out transactions that serve the best interest and benefit of the endowed property and its revenue. The activities of the administrators are subject to the supervision of the General Authority for Awqaf, which is regulated by Royal Decree No. 11/M, dated 26/02/1437H.

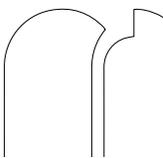
Various transactions undertaken by endowments may lead to disputes related to the management of endowment funds and the contracts they enter into, including sales, purchases, leases, and other acts of disposition and administration. Some endowments have adopted the practice of stipulating arbitration as a means of resolving potential disputes arising from these contracts.

It is noteworthy that the Arbitration Law excludes disputes related to personal status matters and matters that cannot be settled through conciliation.

Endowments may be categorized as public, which are designated for charitable purposes; family endowments, which are designated for the descendants or relatives of the founder; or mixed endowments, which combine elements of both types, as detailed in Article 1 of the General Authority for Awqaf Law.

The General Authority for Endowments (Awqaf) supervises all public, family, and mixed endowments, as well as the activities of custodians or administrators within the limits prescribed by laws¹, without violating the conditions set by the endowers or interfering with the

¹ The authority to supervise family endowments was previously held by the General Authority for the Guardianship of Minors' Funds and their equivalents before this responsibility was transferred to the General Authority for Endowments under its governing law. This law nullified any conflicting provisions found in the regulations of the General Authority for the Guardianship of Minors' Funds.



administrators' duties. The authority may also assume custodianship of an endowment if the endower has not appointed another person to undertake this responsibility.

Judicial practices in the Kingdom have varied regarding the permissibility of resolving disputes related to endowment management through arbitration. Some rulings have dismissed lawsuits due to the existence of an arbitration clause, while others have invalidated arbitration awards on the grounds that all disputes involving endowments fall under personal status matters and matters that cannot be settled through conciliation.

On the other hand, some judicial precedents have held that the endowment administrator lacks the legal capacity to enter into arbitration agreements.

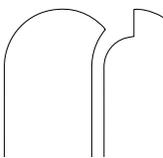
Undoubtedly, the inconsistency in judicial decisions in this regard leads to legal uncertainty and ambiguity concerning disputes related to endowment management and asset investment. This results in substantial financial expenditures on managing such disputes without achieving meaningful outcomes.

This paper aims to explore the dimensions of the issue and provide a legal analysis of the permissibility of arbitration in disputes concerning the management of endowment funds, the contracts they enter into, and the legal capacity of endowment administrators to enter into such agreements. This will be achieved by considering relevant legal texts, judicial rulings, and comparative judicial applications.

The Permissibility of Arbitration in Endowment-Related Disputes

Article 2, Paragraph 2 of the Arbitration Law (Royal Decree No. 34/M, dated 2/5/1433H) states that the provisions of the law do not apply to disputes related to personal status matters or those that cannot be settled through conciliation.

Article 33 of the Law of Civil Procedures specifies the jurisdiction of personal status courts and refers to several matters related to endowments, including:



- Paragraph 2 states that personal status courts have jurisdiction over the establishment of endowments, wills, lineage, absence, death, and the identification of heirs.
- Paragraph 3 includes inheritance and the division of estates, including real estate, if they involve disputes, endowed shares, wills, minors, or absent persons.
- Paragraph 4 grants personal status courts jurisdiction over appointing guardians, trustees, and endowment administrators, authorizing them for transactions requiring court approval, and dismissing them when necessary.

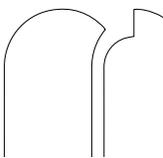
The Implementing Regulations of the Law of Civil Procedures specify that jurisdiction over the appointment of endowment administrators belongs to the court within whose jurisdiction the endowment property is located. If multiple properties exist, jurisdiction is determined by the court overseeing the majority of the endowed assets.

Notably, the new Personal Status Law, issued by Royal Decree No. 73/M, dated 6/8/1443H, does not include any provisions related to endowments.

This raises the question of whether disputes concerning the management of endowment funds fall under personal status matters, which are excluded from the scope of the Arbitration Law.

Judicial practices in Saudi courts have varied regarding the permissibility of arbitration in endowment-related disputes. Some courts have ruled that arbitration clauses in lease contracts between an endowment and a company are invalid, based on the argument that endowment-related disputes fall under personal status matters². Similarly, the Riyadh Court of Appeals annulled an arbitration award in a dispute between an endowment and an individual regarding the management of the endowment's affairs. The court justified its decision by stating that, under the Law of Civil Procedures, endowment-related disputes fall within the realm of personal status

² Court of Appeals ruling in the Makkah Region No. 3799264, dated 24/3/1437H, in case No. 37203338 regarding a request for the appointment of an arbitrator.



matters, and that endowment affairs are non-arbitrable, as stipulated in Article 2 of the Arbitration Law³.

Conversely, another court took a different approach, ruling that a lawsuit could not proceed due to the existence of an arbitration clause in a sales contract between an endowment and a company. The court rejected the argument that arbitration is impermissible in endowment-related disputes⁴.

The rulings of the Egyptian Court of Cassation have established that excluding matters related to the essence of endowments from the jurisdiction of civil courts and assigning them to Sharia courts— as stipulated in the regulations governing the organization of Sharia courts at the time⁵—. However, lawsuits related to financial accounts against endowment administrators, as well as disputes concerning the lease of endowed properties, are not considered matters of endowment foundation and thus fall under the jurisdiction of civil courts⁶.

Furthermore, rulings have established that disputes over the ownership of endowed properties or their recovery from illegal occupants are not considered matters of endowment validity and do not fall under the jurisdiction of Sharia courts but rather civil courts⁷. Similarly, claims for financial entitlements filed against an endowment administrator in their official capacity are classified as financial claims within the jurisdiction of civil courts, rather than Sharia courts⁸.

A reading of the Law of Civil Procedures indicates that the jurisdiction of personal status courts over endowment-related matters is limited to issues concerning the establishment of endowments, including disputes over the validity, nullification, enforceability, or interpretation of endowment deeds. It also includes matters related to the division of estates containing

³ Riyadh Court of Appeals ruling in case No. 429000805, dated 8/8/1442H.

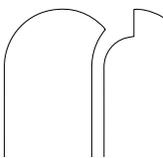
⁴ Ruling of the Court of Appeals in the Makkah Region in case No. 33699557, dated 6/4/1434H.

⁵ This regulation was later repealed, and family courts were established, excluding endowment-related matters from their jurisdiction, which then became the responsibility of civil courts.

⁶ Egyptian Court of Cassation, Appeal No. 71 of Year 4, Omar Collection, dated 16/5/1935.

⁷ Egyptian Court of Cassation, Appeal No. 35 of Year 13 Q, Omar Collection, Session dated 13/4/1944.

⁸ Egyptian Court of Cassation, Appeal No. 3 of Year 26, Technical Office, dated 14/6/1958.



endowed shares and the appointment, dismissal, and authorization of endowment administrators for transactions requiring court approval.

General courts hold general jurisdiction under Article 31 of the Law of Civil Procedures, except where the law specifically assigns jurisdiction elsewhere. The rules on jurisdiction should not be interpreted expansively or analogically.

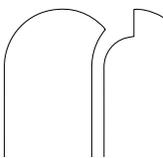
Accordingly, it is evident from the provisions of the Law of Civil Procedures that not all endowment-related disputes fall under personal status matters excluded from arbitration under the Arbitration Law. Only the matters explicitly listed in Article 33 of the Law of Civil Procedures are non-arbitrable. This exclusion does not extend to the management of endowment funds or the investment of endowment assets, which may be resolved through arbitration.

The Endowment's Capacity to Enter into an Arbitration Agreement

The first paragraph of Article (10) of the Arbitration Law No. 34/M, dated 24/5/1433H, stipulates that arbitration is only valid if conducted by a party who has the legal capacity to dispose of their rights, whether a natural or legal person. Accordingly, an arbitration agreement must be concluded by someone who has the capacity to dispose of their rights. If the arbitration agreement is entered into by a representative of a natural person or a legal person, regardless of the source of representation or agency, the representative must have the capacity to undertake acts of disposition, not just acts of management. If obtaining prior authorization from the judiciary or any other relevant authority is required, such authorization must be secured before agreeing to arbitration.

It is well established that an endowment (Waqf) has legal personality and can initiate legal action and be sued. If a lawsuit involves a right claimed by or against the endowment, such a case may be filed and heard in both instances⁹.

⁹ Sheikh Dr. Abdullah bin Muhammad bin Saad Al-Khunain, *Regulation of the Actions of Endowment Administrators by the Judiciary*, p. 36.

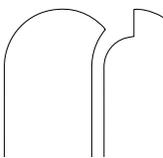


The judiciary in comparative legal systems has upheld this principle. The Egyptian Court of Cassation ruled that an endowment, as governed by Islamic jurisprudence, constitutes a legal entity in civil law, possessing all the attributes of legal personality. A legal entity, like a natural person, has a legally presumed existence and a presumed will, which is exercised through its legal representative¹⁰.

Regarding an endowment's capacity to settle disputes through conciliation, Islamic jurisprudence holds that an endowment administrator may only enter into a settlement if it clearly benefits the endowment and serves its best interests, a determination typically made by the judiciary. Courts have required that settlements in endowment disputes undergo judicial review and approval by the judiciary. Based on this principle, an endowment administrator may engage in arbitration with judicial authorization¹¹.

¹⁰ The Egyptian Court of Cassation, Appeal No. 54 of the Year 17, Omar Collection, dated 11/3/1948.

¹¹ Sheikh Dr. Abdullah bin Muhammad bin Saad Al-Khunain, *ibid*

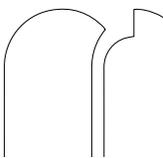


It is also notable that statutory provisions governing endowments impose restrictions on certain acts of disposition and, in some cases, acts of management, requiring prior judicial approval. Article (223) of the Civil Procedure Law states that if the public interest necessitates the sale, substitution, or relocation of a public endowment, the endowment administrator may not proceed without authorization from the competent court. Additionally, if the management of a family endowment necessitates actions such as selling, substituting, transferring, mortgaging, borrowing for its reconstruction, purchasing a replacement, dividing, segregating, merging, leasing for a period exceeding ten years, or engaging in Profit-Sharing Partnership (Mudaraba) if the sale proceeds are insufficient for replacement, the endowment administrator must obtain prior judicial approval to execute such transactions. It should be noted that if the General Authority for Endowments is appointed as the administrator of an endowment, it has broader powers under Article 5 of the General Authority for Endowments Law No. M/11, dated 1437 AH. This is an exception to the provisions of Judicial Procedures Law, as stipulated in Article 25 of the General Authority for Endowments Law.

Conclusion and Recommendations

From the analysis of the preceding legal texts, the following conclusions can be drawn:

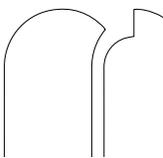
- The management of endowment (waqf) assets does not fall under the category of personal status matters that the Saudi Arbitration Law excludes from arbitration. The matters classified as personal status issues under the jurisdiction of personal status courts are explicitly listed in the Civil Procedure Law, including the establishment of the endowment, the division of an estate containing a waqf share, and the appointment, dismissal, and authorization of endowment administrators for transactions requiring judicial approval. This conclusion is also supported by established practices in comparative legal systems.



- Disputes related to the management of the endowment and its contractual agreements for investment purposes are not excluded from arbitration under Saudi Arbitration Law based on the argument that they involve matters that cannot be settled amicably. In fact, settlements involving endowments are permissible as long as they serve the best interests of the endowment and receive judicial authorization.
- The settlement of a dispute through conciliation during arbitration proceedings and the issuance of an arbitral award incorporating the settlement terms, in accordance with Article (45) of the Arbitration Law, is permissible, provided that the competent court grants approval.
- However, arbitration should not include an agreement where the parties authorize the arbitral tribunal to decide the dispute *ex aequo et bono or amiable compositeur*, as per the second paragraph of Article (38) of the Saudi Arbitration Law. Delegating the tribunal to decide the dispute *ex aequo et bono or amiable compositeur* does not mean resolving the dispute amicably; rather, it grants the tribunal the authority to rule power to decide a dispute based on equity and fairness rather than strictly applying the law, provided that it does not violate Islamic law.
- An arbitration agreement is considered a dispositive act, and an endowment administrator must obtain court authorization to enter into such an agreement, whether the endowment is public, family or mixed. This authorization must be obtained, whether the arbitration agreement is concluded before or after the dispute arises, and regardless of the nature of the contract, since the arbitration agreement itself constitutes a dispositive act.

Based on the above analysis, the following recommendations are suggested:

- Modern endowments manage substantial assets and engage in complex transactions with third parties, making it crucial to establish a legal framework that provides clarity and certainty for all parties involved. The lack of a clear regulatory framework and inconsistent judicial practices regarding arbitration in disputes related to endowment transactions may



lead to financial losses in managing these disputes or discourage third parties from engaging in transactions with endowments due to legal uncertainties and unpredictability.

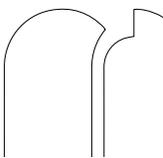
- Addressing inconsistencies in judicial rulings regarding the permissibility of arbitration in disputes arising from contracts concluded by endowments in managing their assets and investments is necessary. This could be achieved by issuing a directive from the Supreme Judicial Council or referring the matter to the Supreme Court to establish a unified legal principle. Such a measure would promote legal certainty, stability in transactions, and effective dispute management. It would also clarify which court is competent to grant authorization for endowment administrators to agree to arbitration for existing or potential disputes.
- In light of the determination regarding the permissibility of settling disputes arising from contracts concluded by the endowment in managing its assets, efforts should be made to develop model arbitration clauses for contracts entered into by the endowment. These clauses should specify the scope of arbitrable matters and outline the process for obtaining the necessary approvals to ensure the validity of the arbitration clause or agreement.
- Creating a practical guide for endowment administrators, outlining the limits of their authority and powers in managing disputes involving the endowment. It should also specify the cases in which court authorization is required.

Dr. Mostafa Abdelghaffar

m.abdelghaffar@mrf.sa

Dr. Majed AlRasheed

majed@mrf.sa



ماجد الرشيد
محامون ومستشارون
MAJED ALRASHEED LAW FIRM



-  800 303 1000
-  info@mrf.sa
-  7069 Al Sahafa District, Riyadh 13315 - 2416, KSA
-  www.mrf.sa

