Civil Procedure Review
AB OMNIBUS PRO OMNIBUS

Arbitration on family matters and religious law: a Civil Procedural Law Perspective*

Laura Baccaglini

Professor at the University of Trento, Italy

Abstract: The paper aims to discuss the limits and possibilities of family arbitration between common law and civil law. To examine which grounds eventually can bar the effects of awards on family matters, when they are governed by a religious law, we particular notice will be given to some European countries (Italy, German and France), which are commonly regarded as having Civil Law, and some US states, Canada and the United Kingdom, as examples of Common Law.

Keywords: Arbitration. Family matters.

Summary: 1. Preliminary remarks. – 2. The ground of "arbitrability of a dispute" as a form of State control over arbitration. – 3. The constrained attitude of Civil Law Systems towards family arbitration: to what extent do provisions that bar family arbitration apply? – 4. Whether and how to arbitrate family disputes in Common Law: is there any place for faith-based arbitration? 5 – The recent Canadian experience in Ontario and the current debate in England. The concern for respecting public policy.

* The paper reproduces the contents of the report, made at Trento Faculty of Law on 16 May 2014, during the Conference "*Citizenship, equality and personal Laws in Northern Africa and Middle East: which prospects for sustainable Legal Pluralism in Europe*?".

1. Preliminary remarks

The exercise of jurisdiction by arbitrators according to a religious law, is not a recent phenomenon. In the commercial field, there are a large number of cases, where parties appoint arbitrators of the same religious faith, asking them to adjudicate disputes under a specific religious law or principle[1]. As a matter of fact, choice of judges and choice of applicable law are typical of those who opt for an arbitral proceeding instead of a judicial one: parties to a dispute are free to decide who can resolve their disputes, provided there are safeguards that are necessary in the public interest, as most Arbitration Acts provide.

This paper will analyse the phenomenon of faith-based arbitration, for disputes other than commercial ones. More precisely, attention will be drawn to family matters, which "broadly present a very narrow degree of openness to private dispute resolution in Law Systems", due to the fact that, normally, the State retains an interest in marriage and divorce[2].

The issue of faith-based family arbitration is current and of great importance, as the heated debate in the Canadian systems and the United Kingdom reveals[3]. In those systems, academic scholars and even politicians have strongly argued over whether or not to recognise the decisions of Sharia Councils: they represent a kind of Islamic arbitral tribunal that decides divorce, patrimonial disputes between spouses, child custody and inheritance, in accordance

[1] Faith-based arbitration in the commercial field is a common praxis in the Jewish and Islamic communities. Grounds that prevent US courts from enforcing commercial arbitration awards are explored in Pengelley, *Faith Arbitration in Ontario*, in *Vildobona J. Int'l and Commercial Law and Arbitratrion*, 2005, 113 s. Recently, the English Supreme Court overruled a judgement by the London Court of Appeal (Javrai c. Hashwani [2010] EWCA Civ. 712) and held that an arbitral agreement, under which parties provided the arbitrators to be chosen among the Ismaili community, would not be discriminatory at all, due to the fact that parties can choose arbitrators in whom they have confidence, and who have the technical expertise to resolve a dispute. English Supreme Court, 27 July 2011 [2011 UK SC. 40], in *Riv. Arb*., 2012, 621, commented by F. Marella, *Arbitrato, diritti umani e religiosi*; see also, Leben, *L'arbitrage par un tribunal rabbinique applicant le droit hébraique*, in *Rev. arb*., 2011, 87 ff.

[2] J. Bowen, *How Could English Courts Recognize Shariah*?, in *University of St. Thomas Law Journal*, 2010, 3, 411. As for now, one should specify that the Islamic religious law is not uniform, because of differences among several Muslim schools of thought.

[3] Referring to "Canadian systems" instead of "Canadian system" seems appropriate, since in Canada family law is normally regulated by state (not federal) rules: this is why in a same country, statutory laws can be different. The same conclusions apply to the US: see, § 5).

with Islamic Law[4]. The growing spread of such religious tribunals in Canada and the United Kingdom depends on large-scale immigration of Islamic people to those countries[5]. At any rate, the concern is not strictly related only to Canadian or English attitudes towards Islamic family arbitration: more generally, the issue is whether, when and how religious awards on family disputes could be binding in secular law systems.

Generally speaking, there are several reasons that cause people to choose religious jurisdiction in resolving family disputes. On the one hand, the ground could be institutional. Sometimes, the State itself allows religious courts to exercise jurisdiction on personal status matters, with effects in country: it regularly happens in so-called multiple jurisdictional systems, such as Israel. On the other hand, there are reasons for preferring religious means to civil ones: people of some religious faiths (such as Islam), who live in States other than of those of their origin, normally reject the authority of secular institutions, considering Islamic Law as binding even outside the boundaries of Islamic countries. Muslim communities feel more comfortable referring their matters to their religious Courts, which operate as private judges in their country of residence deciding according to principles of Islamic law[6]. As a matter of fact, these

[4] The existence of religious Tribunals that settle family law matters is by no means typical only of Islam. Another example is the Rabbinic Tribunal (or Beth Din), which is normally asked to certify divorce (known as *Get*) between Jewish spouses (according to Judaism, divorce is reached by a mutual consent of the spouses who nonetheless need a Get issued by a Rabbinic Tribunal for the divorce to be lawful under Jewish law). In addition, Beth Din can resolve other family disputes (which can pertain to patrimonial rights between spouses, often arising from the dissolution of a marriage). Even the Roman Catholic Church provides jurisdictional institutions (Sacra Rota tribunal), which are authorised to annul religious marriages. Anyway, a difference exists between Roman Catholic Tribunals, on the one hand, and the Beth Din or Sharia Councils on the other. The key fact is that the Catholic marriage cannot be dissolved without a statement of the Tribunal, while the Beth Din has only the duty to certify the will of the spouses to dissolve a Jewish marriage. As to Islamic marriage, a man can dissolve a marriage unilaterally, while a woman has to bring a suit before a religious Court to obtain a divorce.

[5] As a scholar reported, recent estimates reveal there are at least 85 Islamic Arbitration Tribunals currently operating throughout the United Kingdom; see D. MacEoin, *Sharia Law or "One law for all"?*, London, 2009, 69.

[6] R. Maret, *Mind the Gap: The Equality Bill and Sharia Arbitration in the United Kingdom*, in *Boston College International and Comparative Law Review*, 2013, 36, 260, observes that "Though many Sharia arbitration proceedings occur without the involvement of British civil law, the community-based system is heralded by many as helping to preserve minority cultures and community values". Many Muslim immigrants, unfamiliar with the formalities of English legal proceedings, may appreciate arbitration tribunals that are more flexible and do not require the execution of many legal formalities. As a scholar has noted, one of the main benefits of community-based dispute resolution systems - like those of the Sharia courts in England – "are their ability to secure the authority of the local, common people in the formulation and application of Islamic law as opposed to a remote, centralized authority dominated by professional jurists and scholars". See R. Adhar - N. Aroney, *The topography of Shari'a in the Western Politicial Landscape, in Shari'a in the West*, 1, 1.

alternative dispute resolution means – especially favoured in the family law field – ensure that decisions are recognised among religious members, as if a Court of their country of origin had ruled upon them[7]. At the same time, however, Muslims claim to use secular law of their country of residence in order to recognise and enforce those decisions in the State[8]. While, for reasons mentioned later, some Canadian systems annul familiar awards, if they have been granted under a law other than a Canadian one, the United Kingdom has not yet taken an explicit stand.

The subject is certainly interesting from a constitutional law perspective, as it represents a form of multiculturalism that demands to be recognised in terms of legal pluralism[9]; however, the matter needs to be investigated also from a civil procedural law point of view: there is no doubt that the recognition of religious awards, on family law matters, depends above all on whether and how statute laws allow those disputes to be settled by arbitration.

This is what the paper mainly endeavours to explore, with the aim of examining later which grounds eventually can bar the effects of awards on family matters, when they are governed by a religious law; particular notice will be given to some European countries (Italy, German and France), which are commonly regarded as having Civil Law, and some US states, Canada and the United Kingdom, as examples of Common Law.

The meaning of the phrase "family matters" should be immediately specified, as it involves several classes of disputes: among others, those strictly related to divorce or legal separation (i.e. questions which pertain to the change of personal status); patrimonial disputes between spouses (during marriage or as a consequence of the dissolution of marriage: maintenance and/or alimony); patrimonial disputes between spouses (like child custody, after the dissolution of the marriage); claims arising from unions which are not recognised by countries (even *more uxorio* relationships, between people of the same sex); inheritance

[7] J. Bowen, *How Could English Courts Recognize Shariah*?, cit., 418.
[8] It could be the case of Sharia Council's *order* of payment or an *order* to return assets that the wife/husband has received from the other according to the statement of those religious arbitrators.
[9] See, among others, Yilmaz, *The Challenge of Post-modernity Legality and Muslim Legal Pluralism in England*, in *Journal of Ethnic and Migration Studies*, 2002, Vol. 28, 343 ff.

claims. The analysis focuses only on disputes that involve rights and the legal positions of the spouses at the moment of the breach of marriage: (i) change of personal status; (ii) disputes relating to child custody; (iii) division of assets belonging to spouses.

2. The ground of "arbitrability of a dispute" as a form of state control over arbitration

As a preliminary remark, one should observe that family arbitration raises different issues from those which occur when the judgements of foreign civil courts (on the same subjects) demand to be recognised abroad: in both cases, the enforcing state can bar the recognition of (private or judicial) judgements, unless certain grounds are met. At any rate, the exercise of jurisdiction by a foreign (secular) court is the only one that cannot be barred at all. The situation is different for arbitration, as it represents a form of private jurisdiction - that is to say: a manner of limiting the jurisdictional power of Civil Courts. This is why there is a proper control of the State over arbitration, basically preventing some matters being referred to arbitration or an award being refused, if the state has ruled on them.

Therefore, there are countries whose statutory laws expressly indicate which subject matters must be decided only by judicial courts: this approach is typical of civil law systems, which adopted the method of the so called *ex ante* control[10]. Conversely, there are legal systems whose Arbitration Acts do not specifically identify disputes which are not open to arbitration[11]. In the latter case, the control is demanded of judicial courts, once the award is delivered. Precisely, if the private judgement is appealed or if the party needs to enforce it, it is

[10] F. Perret, *I limiti dell'arbitrabilità*, in *Riv. arb*., 1994, 677 ff. and P. Schlosser, *Die objektive Schiedsfähigkeit des Streitgegenstandes – eine rechtsvergleichende und internationalrechtliche Studie*, in *Festschrift für Hans W. Fasching*, Wien, 1988, 405 ff.

[11] In this sense, see for instance section 81 of English Arbitration Act of 1996 (*Saving for certain matters governed by common law*) according to which "Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to (a) matters which are not capable of settlement by arbitration; …or (c)the refusal of recognition or enforcement of an arbitral award on grounds of public policy". Identification of subject-matter disputes are traditionally demanded to Common Law.

up to the courts to decide whether the awards respect "safeguards necessary in the public interest" (the approach of the so called *ex post* control)[12].

Although the ground of "non-arbitrability" of a dispute technically defers from public policy, there is no doubt that the former regards matters which have a strong (and public) impact on society[13]. In other words, the conditions are different but partially reflect the State's attitude towards controlling such disputes.

It is not by chance that, despite technical differences among legal systems, an award can have legal effects in the eyes of the State, provided at least two grounds are met: on the one hand, the subject matters, which the award decides upon, should be capable of settlement by arbitration; on the other hand, the award should be in harmony with public policy. The grounds, which have been just referred to, are not of the same importance: firstly, there is a prejudicial concern over the exercise of arbitral jurisdiction; secondly, provided that it occurs, it needs to be verified whether or not public policy would have been respected by the arbitral proceeding.

Therefore, for the purposes of this paper, one should prejudicially investigate whether family disputes, as specified above, are capable of settlement by arbitration under the law of the state where the award would have effect. Supposing that it occurs, then it is a matter of identifying what other questions arise when a religious award has been delivered: over and above all, the concern is whether the arbitral proceeding or the award has violated public policy.

This methodological approach applies irrespective of whether or not the award is domestic: that is to say, whenever the seat of arbitration was fixed (inside or outside the state's boundaries). Assuming that a domestic award cannot be delivered on a certain subject matter,

[12] A. Berlinguer, *La compromettibilità per arbitri. Studio di diritto italiano e comparato, II, Le materie compromettibili*, Torino, 1999, 81; B. Zuffi, *L'arbitrato nel diritto inglese. Studio comparatistico sulla natura dell'arbitrato e sull'imparzialità dell'arbitro in Inghilterra*, Torino, 2008, 51. It's worth specifying that the category of "arbitrability of a dispute" is typical of Civil Law systems, but not of Common Law, although the concept has been accepted in the conventional language of international arbitration, such as the New York Convention of 1958).

[13] F. Perret, *I limiti dell'arbitrabilità*, cit., 678.

the same solution applies when the award is a foreign one. Thus, a foreign enforcing country can refuse to recognise the award, if the subject matter is not capable of settlement by arbitration, under its own law. This is a common conclusion, drawn by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in 1958, and signed by most nations. According to art. V, subsection 2, let. (a) of this Convention, the proper authority in the country where recognition and enforcement of award have been sought, should refuse to give effects to the award if the subject matter cannot be referred to arbitration under the laws of the enforcing state[14].

As a prerequisite to applying the New York Convention, the decision can be considered as a binding award, in a proper sense: in other words, it shall be a private judgement with the same effects as a court order. As we will examine, the qualification has a certain importance especially in the field of family law, where firstly it is a matter of distinguishing between voluntary arbitration and other forms of alternative dispute resolutions, like mediation or med-arbitration; secondly, regardless of the label "award", one should wonder whether the arbitral statement, which Law considers as equal to a contract, could be equally inside the scope of the New York Convention[15].

[14] D. Otto- O. Elwan, Sub *Art. V (2)*, in H. Kronke, P. Nascimento, D. Otto, N.C. Port. *Recognition and Enforcement of Foreign Arbitral Awards. A Global Commentary on the New York Convention*, Austin – Boston – Chicago – New York – The Netherlands, 2010, 349.

[15] The concern of a proper qualification of the award has been strongly debated in Italy, among scholars and courts: the question relates to the so called *arbitrato irruale* (or *arbitrato libero*), whose origins date back to an old case law (Cass. Torino, 27 December 1904, in *Riv. Dir. Comm*., 1905, II, 45). Although this kind of arbitration has been recently ruled in Italian c.p.c. by L. 40/2006 (by the new art. 808-*ter* Italian c.p.c.), the new provisions did not change the authentic nature of *arbitrato libero*, which have always been regarded as a means of resolving disputes by an award, which is binding between parties as if it were a contract. Accordingly, this kind of award cannot be enforced in Italy as a judgement by means of a court *exequatur* and, for the same reason, it cannot be challenged before national courts, under art. 829 c.p.c. (i.e.: appeal before Court of Appeal). These features have real consequences even in an international perspective: precisely, the concern is whether the recognition and the enforcement of such an award are inside the scope of the New York Convention of 1958. Italian scholars are not of the same opinion; there are those who strongly argue that this kind of judgement cannot be recognised abroad as something different from what it represents in the State of origin: if the so called *lodo libero* is regarded as contract in Italy, the same conclusion should be reached when the award would have effects abroad (this is argued by E.F. Ricci, *Il lodo arbitrale irrituale di fronte alla Convenzione di New York*, in *Riv. Dir. Proc.* 2001, 599; G. Verde, *Arbitrato e giurisdizione*, in *L'arbitrato secondo la legge 28/1993*, Napoli, 1985, 1970; recently, M. L. Serra, *L'impugnazione per nullità del lodo rituale*, forthcoming, § 9; see also Ravidà, *La circolazione internazionale del "nuovo" lodo irrituale italiano nel sistema della convenzione di New York, in Studi in onore di Carmine Punzi*, Torino,

3. The constrained attitude of Civil Law Systems towards family arbitration: to what extent do provisions which bar family arbitration apply?

Statutes in Civil Law systems show a very restricted approach to the arbitration on family matters. In Italy, France and Germany, there is a common trend of considering marital status and questions which pertain to child custody as something not to be settled by arbitrators. As for Italy, reference shall be drawn to art. 806 c.p.c., which has been recently amended by Statutory Law n. 40/2006. Actually, the foregoing provision expressly ruled out personal status and matters concerning legal separation and divorce from arbitration, while art. 806 c.p.c., currently in force, generically opts for a criterion whereby arbitration does not work if the subject matter regards rights or law positions upon which parties cannot decide by agreement. Therefore, nothing has changed compared to the past, as marital status and child custody have always been considered something which parties can decide upon[16].

2008, 579 ff., according to which the new provisions of L. 40/2006 should allow the recognition even of a "*lodo irrituale*" (in so far as they stress the application of *audiatur et altera pars* principle providing grounds of appeal of this kind of award, which are strictly related to the conduct of the proceeding). There are few foreign case laws which deal with the question of recognition of this peculiar type of Italian award: some of them reach the same outcome as the narrow approach of Italian scholars. Reference is to BGH, 8.10.1991, in *Yearbook*, 1983, p. 366; and in *ZFRV*, 1983, commented by Bajons: the German judgement is particularly interesting, in so far as it identifies the reason for the refusal of recognition on the grounds that the contractual nature of the award can prevent it from being considered binding, under art. Y, co.1 let. e) New York Convention. However recent judgements of American Courts seem to upset this approach, by allowing a *lodo irrituale* to be recognised in the US, in the same way as a *lodo rituale*. The case law is Spier v. Calzaturificio Tecnica, s.p.a.no. 86 civ. 3447 (CHS) District Court for the Southern District of New York, 663 F.Supp. 871, 1987; U.S. Dist. Lexis 5789. Here, the petitioner filed a motion to enforce in the US an Italian *lodo irrituale*, delivered in Italy. Although the motion was dismissed, on the grounds that the award was set aside in Italy, the case law was interesting because the New York Court seems to consider even the arbitral proceeding, which is *irrituale*, as capable of giving binding award, under the scope of the New York Convention. Anyway, there has been a favourable stand on the so called Italian *irrituale* arbitral proceeding by American Courts (Gidatex s.r.l. v. Campaniello Ltd., Campaniello Imports of Florida Ltd. and Campaniello Enterprises Inc.; 97 Civ. 9518 SAS, 13 F. Supp. 2d 420; 1998 U.S. Dist. Lexis 8663), which apply New York Convention to an Italian arbitral agreement in favour of so called *irrituale* arbitration.

[16] See, among others, E. Zucconi Gali Fonseca, *Arbitrato e famiglia: una via possibile?*, in *Riv. trim. dir. proc. civ.*, 2011, 143 ss; Cass., 12 august 1954, n. 2942, in *Foro it*., 1955, I, 1526 and in *Giur. compl. cass. civ*., 1954, 297, commented by A. Motta, *Clausola compromissoria e questioni di separazione tra coniugi*; V. Andrioli, *Commentario al c.p.c*., IV, Napoli, 1964, 755; Vecchione, *Nullità ed inesistenza del compromesso in arbitri relativo ai rapporti patrimoniali tra coniugi separati*, in *Foro Pad.*, 1953, c. 536; A. Berlinguer, *La compromettibilità per arbitri*, cit., 21.

French and German approaches are quite similar: as for the former, art. 2060 of the Civil Code rejects arbitration on issues concerning personal status, divorce and legal separation between spouses[17]; as for the latter, § 1030 ZPO allows arbitration only on patrimonial disputes, while § 1564 BGB provides an exclusive judicial court jurisdiction on divorce.

It is a common belief that the constrained attitude of Civil Law Systems towards arbitration in family matters reflects how they consider personal status: one should observe that, in a civilian perspective, the distinction between what is (or is not) referred to arbitration is based on the criterion of "parties' disposition of a right"; that is to say that a right or a legal position can be referred to arbitration with the proviso that parties can submit an agreement upon this right, deciding to transfer it to someone or to make a settlement[18]. Personal status has always been considered as a crossover between private and community, a matter upon which a State wants to exercise the entire control, so that disputes are to be decided only by courts[19]. After all, it is not by chance that under art. 70 c.1 n. 2) of Italian c.p.c. the public prosecutor must take part in jurisdictional proceedings that involve personal status.

Scholars observe that, despite the growing forms of uncontested divorce, continental European countries tend not to complete "the transition from de-institutionalization to de-jurisdicization of divorce"[20], in so as far the intervention of a third (judicial or administrative) authority is still mandatory in every form of divorce.

This is why, in *a de iure condito* perspective, there is no place for giving legal effect to arbitral family judgments. Accordingly, parties' agreement to arbitrate this kind of disputes has no legal force in the eyes of the State and, consequently, any award, delivered in breach of law,

[17] About the French legal system's approach to family arbitrations, see Mallet-Bricourt, *Arbitrage e droit de la familie*, in *Droit et patrimoine*, 2002, p. 59; see even A. Berlinguer, *La compromettibilità per arbitri*, cit., 33.
[18] A serious reflection on the concept of "parties disposition of the right" in C. Consolo, Sul campo "dissodato" della compromettibilità in arbitri, in *Riv. arb*., 2003, spec. 252-255.
[19] W.G. Friedman, *Some reflections on Status and Freedom, in Concepts of Jurisprudence*, *Essays in Honour of Roscoe Pound*, Indianapolis-New York, 1962; P. Rescigno, *Situazione e* status *nell'esperienza del diritto*, in *Riv. dir. civ*., 1973, 1, 211; 211; G. Alpa, Status *e capacità. La costruzione giuridica delle differenze individuali*, Roma-Bari, 1993, 29.
[20] A. Madera, *Civil and Religious Law concerning Divorce: the condition of Women and their empowerment*, in *Journal of Law and Family Studies*, 2010, 12, 385.

will be set aside by Courts, regardless of whether the law of arbitration was a religious one or the arbitrators are of the same religious faith.

However, it is worth pointing out that according to those statutory laws there is an exclusive civil court jurisdiction only upon issues that are strictly related to marital status or child custody. Conversely, it is a common opinion of Italian academic scholars and courts that disputes of maintenance or, generally, patrimonial rights that arise from the dissolution of marriage (i.e. division of assets between spouses) could be settled by arbitrators, even though cases laws are very few and dated[21]. This is also the German point of view, as § 1030 ZPO expressly confirms.

Therefore, an award could have legal effects in legal systems, if the patrimonial dispute arose between spouses after a (secular) judgement of divorce, or if the spouses had chosen to refer some disputes over distribution of assets to arbitration, at the time of the divorce claim before a judicial court. When such cases occur, there are no reasons for preventing parties from preferring arbitration: they are allowed to appoint arbitrators of the same religious faith and the arbitral proceeding can be regulated by particular religious laws or principles. The award that will be eventually delivered will be enforced in the state provided other grounds for recognition are met (at least respect of public policy).

Lastly, one should analyse the case of an award, which settles both upon dissolution of a marriage and patrimonial rights: while the statement upon the former issue cannot have effects, for reasons mentioned above, the concern is whether or not to recognise the mere statement about patrimonial rights. It is my opinion that the negative solution should be preferable, since one part of a private judgement upon patrimonial rights depends on the other part, which judges upon matters that cannot be referred to arbitration.

[21] There are very few case laws that have ruled on this issue, but courts seem to allow spouses to arbitrate the amount of child maintenance, after a judicial separation. Cass., 12 August 1954, 2924 (cited above nt.18) is one of the very few case laws pertaining to family arbitration. The Italian court held that spouses, after a judicial separation, could refer the amount of child maintenance to arbitration (while the issue of whether they do must be judged only before judicial courts). Contra, U. Azzolina, *Sulla compromissione in arbitri di controversie patrimoniale pertinenti alla separazione dei coniugi*, in *Giur. it*., 1954, I, 1, c. 1069 ff.

If such is the situation, there is not great freedom to invoke arbitration in family matters in Civil Law countries, where they seem to have a very limited scope, although German courts have been experiencing the application of Sharia law[22].

4. Whether and how to arbitrate family disputes in Common Law: is there any place for faith-based arbitration?

The stand of Common Law systems on family arbitration appears at first sight quite different from that of Civil Law ones: there, family disputes seem to be considered as capable of settlement by arbitration and there are several types of arbitration (med-arb, arb-med, court-ordered arbitration, and voluntary arbitration) with different effects in law systems[23].

Actually, the approach of Common Law towards family arbitration is uniform: a critical analysis reveals many differences among countries on whether to recognise (and how to regulate) arbitration on family matters.

More in detail, as for subject matters that arbitrators can decide upon, the scenario appears as follows: broadly speaking, Common Law countries prevent arbitration for divorce and child custody matters but make spouses free to resolve patrimonial disputes before arbitrators, as happens in Civil Law (see, for instance, North Carolina, Canada, Australia, United Kingdom)[24]. Anyway, there are even countries where divorce could be judged before arbitrators

[22] Case laws are related to the application of the *mahr* before judicial courts. The *mahr* is a legal institution of Islamic family law, consisting of an asset of monetary value that the husband gives his wife upon marriage. Usually, *mahr* is partially due at the time the marriage is concluded and partially it should be paid during the marriage (at least, when it is dissolved). German case law refers to the contested payment of *mahr*, when a (civil) divorce was before courts: thus, this was not a matter of recognising a religious divorce award. See BGH, 28 January 1987, *Zeitschrift für das gesamte Familienrecht*, 1987, 463-464 and BGH, 9 December 2009, in *Entscheidungen des Bundesgerichtshofes in Zivilsachen*, 2010 289-299, both reported in N. Yassari, *Understanding the Use of Islamic Family Law Rules in German*. *The example of Mahr,* in M.S. Berger, *Applying Shari'a in the West - Facts, Fears and the Future of Islamic Rules on Family Relations in the West*, Leiden, 2013,165 ff.

[23] See J. Wade, *Arbitration of Matrimonial Property Disputes*, in *Bond Law Review*, 1999, 395 ff.

[24] The State of California shows a very narrow approach, as only patrimonial disputes should be referred to arbitrators (see art. 2554 of California Family Code). G. Walker, *Arbitrating Family Law Cases by agreements*, in

while child custody must be decided only by a State court (this is the legal approach of Indiana)[25].

Moreover, important differences arise in the regulation of family arbitration: while some States provide a Family Arbitration Act (e.g. North Carolina or Indiana and Australia[26]), others countries simply state specific rules to apply with general rules of arbitration (such as the District of Columbia in the US and British Columbia in Canada)[27].

At any rate, even the Common Law stand on faith-based family arbitration appears very constrained, although the issue of public policy seems to weigh more than the issue of the arbitrability of disputes.

To understand why, one should first reflect on how Common Law systems rule family arbitration, despite technical differences among their statutory laws: there is a deep awareness that arbitration in commercial disputes is different from family arbitration. While in the commercial field, the arbitral proceeding aims at speed and efficiency at the cost of minimum oversight, in the family scope the private judgement aims at protecting vulnerable persons and requires rigorous oversight at the risk of speed of efficiency[28]. When family disputes occur, Arbitration Acts provide a lot of safeguards, which make the content and the governing of a family arbitration more constrained than those of other types of arbitrations. In Australia and

---

Journal of American Academy of Matrimonial Lawyers, 2003, vol. 18, 429 http://www.aaml.org/sites/default/files/Journal_vol_18-2-4_Arbitrating_by_Agreement.pdf.

[25] Family Arbitration Rules of Indiana can be read at http://www.in.gov/legislative/ic/2010/title34/ar57/ch5.html. See, E. Zucconi Galli Fonseca, *Arbitrato e famiglia nelle esperienze d'oltre confine*, in *Riv. trim. dir. proc. civ.*, 2010, spec. 484.

[26] North Carolina was the first US State to adopt a specific Statutory Law on Family Arbitration Act (see https://ncbar.org/media/20668/commissiontaskforcespecialreport.pdf., in Walker, *Revised handbook: arbitrating family law cases under the North Carolina Family arbitration act, as amended in 2205*). For Indiana Family Arbitration Act of 2005, see J. W. Ruppert, M. G. Ruppert, *Recent developments: Indiana Family Act*, at https://mckinneylaw.iu.edu/ilr/pdf/vol39p995.pdf. As for Australia, see J. Wade, *Arbitration of Matrimonial Property Disputes,* cit., where the Author explains different types of arbitration that the Australian Family Law Act provides.

[27] On British Columbia: C. Morris, *Arbitration of Family Law Disputes in British Columbia: Paper prepared for the Ministry of Attorney General of British Columbia* July 7, 2004, in www.bcjusticereview.org; on the District of Columbia, G. Walker, *Cutting Edge Issues in Family Law: Family Law Arbitration: Legislation and trends*, in *Journal of the American Academy of Matrimonial Lawyers*, 2008, 593 ff.

[28] L. Resnick, *Family Dispute arbitration and Sharia law*, http://bccla.org/wp-content/uploads/2012/04/2007-BCCLA-Sharia-law.pdf (2007) 3.

the US family arbitration acts and special provisions that apply to family arbitration (when it is submitted to commercial arbitration) expressly state that parties shall consciously agree to arbitration and be aware that alternatives to arbitration exist[29]; parties shall know the potential outcomes of the awards and they must understand the laws of procedure governing the hearing and the legal framework of the award. Sometimes, statutory laws require arbitrators to have specific technicalities, so that parties can choose among arbitrators who have undergone specific training[30]. Normally, parties will not be allowed to waive the existing right to appeal on a question of law, with leave of court[31]. In countries where family arbitration is ruled, the award is not always considered as equal to a civil court judgement[32], as many States give to this private judgement the same effects of a contract[33]: consequently, when it is a matter of recognising abroad those kinds of awards, one should wonder whether the New York Convention of 1958 applies. As some scholars have observed, the approach of Common Law systems reflects the States' will to give great weight to the public elements of private resolutions and to deny that such decisions be converted easily to court orders[34].

These very constricted requirements that Common Law systems provide for family arbitration seem to prevent faith-based family awards from having legal effects in the eyes of those countries, provided that the mandatory requirements of statute laws in conducting the proceedings are not met.

[29] Section 34-57-5-1 (b) of Indiana Family Act. E. Zucconi Galli Fonseca, *Arbitrato e famiglia nelle esperienze di confine*, cit., 494.

[30] As in Ontario (see Rule 3 of Ontario family Act). Indiana (see IC 34-57-5-5) and Australia (rule 67b Family Law Amendment Regulations 2001) specifically require arbitrators to have proper experience in the field of family law. See E. Zucconi Galli Fonseca, *Arbitrato e famiglia nelle esperienze di confine*, cit., 496.

[31] As in Ontario and Indiana.

[32] This is the case of Australia, whose Family Law Act provides that the award is equal to a judicial court order.

[33] See Section 59.5 of Ontario Family Law Act, under which the family arbitration award may be enforced or set aside in the same way as a domestic contract.

[34] A.M. Predko, J. Gregory, *Family arbitration in Ontario. Recent Changes*, http://www.ulcc.ca/images/stories/2006_en_pdfs/2006ulcc0011_Family_Arbitration_in_Ontario.pdf, 5.

5. The recent Canadian experience in Ontario and the current debate in England. The concern for respecting public policy

Over and above, the crucial question which prevents faith-based family awards from having legal effects pertains just to the use of religious law, both with regard to applicable law and principles that govern arbitral proceeding: generally speaking, one should observe that there is an increasing concern that arbitral religious judgements, especially those which decide upon family matters, could violate public policy.

As remarked, "the public policy ground for *vacatur* could serve as an important constraint on the ability of religious arbitration courts to adjudicate disputes in accordance with substantive religious law"[35].

Actually, defining what is public policy is not an easy operation. It could be described as a set of principles, normally inferred by the Constitutional Law, which found the legal system, in a particular historical moment. This kind of principle represents the cornerstone of the ethical framework and social and economic life of the national community. Public policy pertains both to substantive law and procedural law (respect of human rights; equality of the parties before law and judge; right to be heard; equality to give evidence to the facts).

Thus, assuming that family matters should be capable of settlement by arbitration in a certain State, the award (even a faith-based one) should be binding in the eyes of a country if it is in accordance with its public policy. Therefore, one should wonder how arbitral proceedings, given under a certain religious law, are governed. Here, some examples will be given with reference to Islamic Law, reflecting a current debate in Canada and the United Kingdom.

The analysis of Muslim faith-based arbitrations on family matters shows how Muslim principles are far from the respect of the concept of public policy, which is current in Western countries. Islamic laws and practices regarding divorce provide examples of such issues[36]. Thus,

[35]M.A. Helfand, *Religious arbitration and the new multiculturalism: negotiating conflicting legal orders, in New York University Law Review*, 2011, 86, 1258.

[36] The text refers to Islamic Laws, instead of Islamic Law, because Muslim faith principles are far from being considered a consistent body of rules in practice. This is why legal scholars and opinions have been different in the past and this diversity is reflected in the laws of states which, on the subject of personal status, apply Islamic

a Muslim male can dissolve a marriage by pronouncing his intention to do so three times in a prescribed manner. There are different ways of doing it, but in principle a man can divorce at will, even when he is advised to seek reconciliation. Conversely, women can apply for divorce under exceptional circumstances, though that does not mean that a woman can secure a divorce at will. Normally, she has to be ready to pay an agreed sum of money to the husband, who must agree to her proposal[37]. Those provisions could be considered as antithetical to civil laws on monogamy and gender equality. Most importantly, discriminatory tools arise even in governing arbitral proceedings: as some scholars observe, the basis of arbitration (i.e. the voluntary agreement between parties) is usually not met, as Muslim women are often pressured by their families to go to a Sharia council, in order to obtain a decision that is accepted by their families' communities; in addition, according to Islamic principles, the testimony of a woman is valued at half that of a man[38].

Although divorce matters (strictly regarded) cannot broadly be referred to arbitration, nonetheless the disparity between men and women appears even in patrimonial disputes, which arise from the dissolution of a marriage and are decided before Sharia Councils.

One should remember that arbitral proceedings, as much as judicial ones, must comply at any rate with human rights standards concerning the right to a fair trial and countries are liable if basic standards are not met. Although the ECHR's judgement on Pellegrini vs Italy does not arise from an award, it is interesting to recall what the European Court of Human Rights ruled. The case involved a proceeding of annulment of a Roman Catholic marriage before an ecclesiastical court: so, a judicial proceeding in a proper sense, instead of a kind of arbitration governed by religious law[39]. The petitioner (the ex-wife: defendant before religious court) had

principles. See M. Rohe, *The application of Shari'a Law in Europe: Reasons, scope and Limits*, at http://www.verenigingrimo.nl/wp/wp-content/uploads/Recht-van-de-Islam-23_03-Rohe.pdf, 53

[37] M.M. Keshavjee, *Islam, Sharia and Alternative Dispute Resolution, Mechanisms for Legal Redress in the Muslim Community*, London, 2013, 36.

[38] Zee, *Five Options for the Relationship between the State and Sharia Councils*, cit., 7-8; A. Madera*, Civil and Religious Law concerning Divorce: The Condition of Women and Their Emporment*, in *Journal of Law and Family Studies*, 2012, 12, 375.

[39] In 1984, the so called Accordo di Villa Madama modified the Lateran Treaty of 1929 (in force between Italy and the Roman Catholic Church): currently, a Catholic judgement of marriage dissolution has no automatic effect before the State, although religious marriage had been allowed to have civil effects. Judgements shall have effect

not been told of the nature of the proceeding in advance and was not allowed to read her husband's witness statements. The marriage had been dissolved by judgement, which was recognised before Italian courts. The European Court of Human Rights held that Italy was in breach of art. 6 of ECHR, just because "the Court should have refused to confirm the outcome of such unfair proceeding" and "failed in their duty to check that the applicant had enjoined a fair trial in the ecclesiastical proceeding"[40].

Providing that the same principles apply even to arbitration, the State could be in breach of Art. 6 of ECHR if it were to recognise religious awards – on subject matters that can be settled by arbitrators – which do not comply with human rights standards.

The recent experience in Ontario shows how topical that concern is. The Ontario Arbitration Act of 1991 (in force until 2006) allowed the parties to use a non-Canadian law, with a proviso that no arbitral ruling would violate Canadian Law; the Islamic community suggested the creation of a formal arbitral tribunal, to offer private dispute resolution – including family ones – based on Islamic personal law and according to the Ontario Arbitration Act. They claimed that its arbitral awards would be enforceable under the Act. The proposal raised a major concern especially among women's rights groups: the prospect of duress, the absence of informed consent to arbitration, and the subsequent loss or abuse of rights were the main factors that made Ontario revise several arbitral law provisions, in the Ontario Family Law Amendment. In 2004, the Government appointed the former Attorney General and former Minister of Women's Issues to examine the question. Although the report was basically in favour of faith-based religious awards[41], new provisions opted for an opposite approach[42]. The Ontario Family Act, as amended in 2006, currently provides that any decision made by a third

in Italy, once they have been recognised before a court, under a summary proceeding, according to artt. 797 c.p.c. and art. 702 bis c.p.c. For the stand of Catholic religious dissolution of a marriage in a European and comparative perspective, N. Marchei, *Il Regolamento (CE) 2201/2003 e i concordati con la Santa Sede*, in S. Bariatti – C. Ricci, *Lo scioglimento del matrimonio nei regolamenti europei: da Bruxelles II a Roma III*, Milano, 2007, 51 ff.

[40]ECHR, 20 July 2001, C 30882/96 can be read at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59604#{"itemid":["001-59604"]}. See L. P. Comoglio, *Diritto di difesa e condizioni di riconoscimento delle sentenze ecclesiastiche matrimoniali*, in *Osservatorio delle libertà ed istituzioni religiose*.

[41] Report can be read at http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/.

[42] N. Pengelley, *Faith Arbitration in Ontario*, cit., 111 s.; L. Resnick, *Family Dispute Arbitration and Sharia Law*, 2007, 1 ff.

party in family arbitration cannot be of effect if it has been delivered according to a law other than the law of Ontario, or other than the law of another Canadian province (section 59.2 (1) of Family Act) [43].

Among others, this is the most crucial provision for preventing faith-based family awards from having legal effects in Ontario. One should notice that, under statute laws of this State, people are allowed to resolve family disputes privately, except for personal status matters that belong to a public record, such as division of property and support payments, as a consequence of a marriage breach[44]. Therefore, according to section 59.2 (1), mentioned above, the outcome seems to be of denying legal effects of family religious awards, although their subject matters – upon which they decide - are theoretically capable of settlement by arbitration.

In doing so, the concern for the respect of public policy seems to be rooted out, by preventing the parties from choosing the law under which the award should be delivered.

A similar restrained scenario appears in the US, as several state legislatures across the country recently avoided any decision issued by court or arbitral tribunal if such judgements are based upon laws, legal codes or systems that fail to grant parties the same fundamental rights accorded under the state or federal constitution[45].

[43] "When a decision about a matter described in clause (a) of the definition of "family arbitration" in section 51 is made by a third person in a process that is not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction, (a) the process is not a family arbitration; and (b) the decision is not a family arbitration award and has no legal effect." See, http://www.search.e-laws.gov.on.ca/en/isysquery/188a2cf6-b150-4fd6-89ef- 4d0b7e272baa/11/doc/?search=browseStatutes&context=#BK71.

[44] J. D. Gregory, A.M. Predko, J. Nicolet, *Faith based family arbitration: Uniform Law Conference of Canada*, 4. http://www.ulcc.ca/images/stories/2005_English_pdf/faith-based_family_arbitration_en.pdf

[45] See, M.A. Helfand, *Religious arbitration*, cit. 1233, nt. 4 and accompanying text. Here the author remarks on the experience of Oklahoma, where the state constitution was amended in 2010 by a referendum, with the outcome that state courts are banned from applying legal precepts of other nations or cultures, and particularly the courts shall not consider Sharia Law. Something similar happened in other US states: in 2011, many statutory laws precluded courts, arbitrators and administrative agencies from enforcing foreign laws or forum contract provisions that would not grant the parties the same rights and privileges available under the state or federal provisions (see for a list of States, M.A. Helfand, *ibidem*).

The debate that raged in Canada on Islamic family arbitration exploded in the United Kingdom some years later[46], for very similar reasons: mass immigration, on the one hand, and the general principles outlined in Part I of the Arbitration Act 1996, on the other hand. More in detail, section 1 of the Statute specifies that parties to arbitrations "should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest". As a scholar observed, the key fact is that, under section 46, parties are free to choose for disputes to be decided "in accordance with other considerations" rather than "in accordance to the law". Since "law" has generally been considered as a synonymous of "the law of the State", "other considerations" express other systems of law that are not the law of the State, such as religious law[47]. Ideally, the English Arbitration Act supported the power and the authority of religious tribunals, thereby promoting "the autonomy and effectiveness of the arbitral process and respect for the parties' option for a private system of dispute resolution"[48]. For sure, English courts can set aside an arbitration award if the arbitrators do not fulfil this duty or if the agreement suffers from a serious irregularity, more generally if a violation of public policy occurs. This ground has been sometimes used by secular courts to prevent (commercial) religious award having effects in the State[49].

[46] The heated debate originated from speeches by the Archbishop of Canterbury and Lord Phillips of Worth Matravers, who was Lord Chief Justice at the time: both suggested that individuals should be able to choose jurisdiction when settling private legal matters, including the option to have matters settled under Sharia Law. See, among others, Zee, *Five Options for the Relationship between the State and Sharia Councils*, in *Journal of Religion and Society*, 2014, 1 ff.; M. Reiss, *The Materialization of Legal Pluralism in Britain: why Shari'a Council Decisions should be Non-Binding*, in *Arizona Journal of International and Comparative La*w, 2009, 741 ff.; S. Ahmed, *Recent development: Pluralism in British Islamic Reasoning: The Problem with Recognizing Islamic Law in the United Kingdom*, in *Yale Journal of International Law*, 2008, 491.

[47] R. Blacklett, *The Status of Religious Courts in English Law*, in *Disputes and International Arbitration Newsletter*, 2009, 13.

[48] O. Chukwumerije, *English Arbitration Act 1996: Reform and Consolidation of English Arbitration Law*, in *American Revue of International Arbitration*, 1997, 45.

[49] See Soleimany v. Soleimany [1999], QB 785. Two Iranian Jewish merchants were exporting Persian carpets. This circumstance breaches Iranian Law, so one of them brought a suit before the Jewish court (Bed Din) which considered the illegality irrelevant under the applicable Jewish law and so decided the dispute, delivering the award. The Court of Appeal refused to enforce it on the grounds that public policy would not allow English Courts to enforce an illegal contract and stated as follows "An award, whether domestic or foreign, will not be enforced by an English Court if the enforcement would be contrary to public policy of this country". Case reported by R. Sandberg, *Law and Religion*, Cambridge, 2011, 185.

Even in the United Kingdom people cannot divorce before arbitrators; nevertheless, Muslim communities aim for their decisions to be recognised as awards in the State, at least if family disputes they resolve can be referred to arbitration.

The English approach is not constrained in terms of the application of religious law to arbitration, although a significant Bill to revise the Arbitration Act of 1996 was presented in the House in 2011, with the aim of striking down discriminatory rules, through criminal sanctions[50] (rules which provide testimony of a man being worth more than a woman, or – in a substantive perspective – rules that favour a man over a woman in property rights).

The idea seems to be good, in so far it does not bar the family from religious arbitrations at all, but it allows it with the proviso that human rights shall be granted.

[50] Zee, *The relationship between the State and Sharia Councils*, cit., 13; R. Maret, *Mind the Gap: the Equality Bill, Sharia Arbitration*, cit., 268.