

Resolving Clan-Based Disputes Using the *SULHA*, the Traditional Dispute Resolution Process of the MIDDLE EAST

BY DORON PELY

Many of the customs practiced in the Middle East go back thousands of years. To people who do not live there, these customs are virtually unknown. One little-known custom that pre-dates Islam¹ is the *Sulha* ritual. This is a method of resolving disputes used in many parts of the Middle East.² The *Sulha* provides the path for reconciliation between the extended families of the disputants, whereas either *Sharia* law and/or formal

legal systems are used to adjudicate disputes between individual disputants, or between disputants and the state. The need for a special “clan-level” process arises from the strong affiliation among family members that exists in much of the Arab world. The result of this affiliation is that disputes between individuals automatically become disputes between clans.

Unlike the *Sharia* courts, the *Sulha* process is an informal conflict resolution mechanism. Many different kinds of disputes can be resolved

through *Sulha* dispute resolution, including business, financial and consumer conflicts, although many disputes arise out of acts of violence, including murder. Much of the information about the *Sulha* involves the more extreme murder cases. For this reason, this article describes rituals and techniques applicable to such cases. However, the rituals and techniques used in other kinds of cases are similar.

There is no clan conflict too small for the *Sulha*, which takes a community approach to



The traditional informal conflict resolution method in the Middle East is called *Sulha*, which means “peace” in Arabic. This process is specifically designed to resolve conflicts between the familial clans to which the disputants belong (called *Hamula* in Arabic). Although the process employs techniques that are similar to mediation and arbitration as used today throughout the world, it also differs in major respects. This article examines the *Sulha* process and looks at its similarities and differences from modern ADR.

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dispute resolution, according to Sheikh Farage Khneifes, a member of the *Sulha* Committee of the Arab community in the north of Israel. The reason for this, he explained, is that if small, relatively less severe conflicts are not dealt with at their inception, they might grow to become major conflicts. The communal approach to conflict is based on the view that hurting an individual means hurting the entire community.³ One author wrote that the *Sulha* “stresses the close link between the psychological and political dimensions of communal life through its recognition that injuries between individuals and groups will fester and expand if not acknowledged, repaired, forgiven and transcended.”⁴

The *Encyclopedia of Islam* gives the word “peace” two distinct meanings in Arabic: *Salaam* and *Sulb*. *Salaam* refers to the abstract notion of peace, while *Sulb* refers to the literal act of settlement.⁵ As we will see, the *Sulha* process involves both parts of this definition.

The *Sulha* Committee

The *Sulha* ritual is conducted by a *Sulha* Committee called the *Jaba* in Arabic. The *Jaba* draws its power from the positions its members hold in the community, and from the fact that it never operates without the explicit authorization of the disputants, which generally are the families of the victim and the offender.

The *Jaba* is made up of respected men of standing in the community, men with a reputation for honesty, even-handedness and intelligence. Women are not permitted to serve on it. The *Jaba* is headed by its most experienced member (in most cases, also its eldest member). This person is charged with managing the *Jaba*'s activities and steering the disputing parties on the sometime rocky road to an agreement. Success can depend on the clout the *Jaba* leader has in the community. The literature indicates that a *Jaba* can have one member or more, even as many as 20.⁶ It is desirable to have members who can influence the disputants to increase the chances of resolution.

According to Sheikh Khneifes and Sheikh Hamis Mahmud Abu Saaluk, a *Sulha* maker in the Bedouin and West Bank communities in Israel, the disputants can veto the participation of a particular person on the *Jaba*. Ordinarily, the

offender's family has the greatest input in this matter.

Initiating the *Jaba*

If a conflict involves family matters, it may be adjudicated between the individual disputants in religious court. If a conflict involves a criminal offense, the matter will be adjudicated in criminal court (a *Sharia* court if *Sharia* is the official law of the land). In both situations, the conflict is likely to provoke a dispute between the clans to which the victim and offender belong. The *Sulha* process will address the clan-level dispute.

Unlike the Sharia courts, the *Sulha* process is an informal conflict resolution mechanism used to resolve disputes between the clans of the disputing parties.

The *Jaba* is not marshaled automatically following an impropriety or crime. Before the *Jaba* can act in an official capacity, some preliminary steps must be performed. Step one is that representatives of the offender's family must contact a member of the local *Jaba* to request an intervention and authorize the *Jaba* to meet with the offender's family (not the offender) about the problem.

The ritual requires the offender's family to state that, on its own behalf and that of the offender, it assumes responsibility for the offender's deed, it feels regret for that deed, and it seeks a reconciliation with the victim's

family. The tradition calls for the *Jaba* to respond by saying, “You requested that we intervene. We, as a *Jaba*, want to hear your authorization and to receive it in writing.”⁷

The next step is for the offender's family to give the *Jaba* irrevocable written authorization, called a *Taffwith* in Arabic. This document has two parts. The first part authorizes the *Jaba* to act on behalf of the offender's family in approaching the victim's family and conducting the *Sulha*. The second part contains the offender family's commitment to abide by whatever verdict the *Jaba* reaches.⁸ The *Taffwith* states: “I [the offender's family representative] accept that my case will be in your hands, and that it is now on your conscience, and I will accept any ruling you issue in this case.”⁹ On occasion, the offender's family has to deposit a bond as an additional assurance of its agreement to abide by the *Jaba*'s ruling.

If the offender's family fails to promptly contact the *Jaba*, one of the *Jaba*'s members, or a village elder, could decide that the situation is suffi-

ciently grave (such as when there is a risk that a member of the victim's family might attempt to retaliate against the offender's family) to contact the offender's family in order to encourage its members to start a *Sulha* process and begin to negotiate a temporary cessation of hostilities.

It may take several days to obtain a signed *Taffwith*. Then, the next step in the ritual is for the *Jaba* to go the victim's house, stand in front of the door and recite the following: “We were sent and are authorized as *Jaba* by the offender's family, and we invite you to consider us.”¹⁰ The purpose of this invitation is to have the victim's family publicly authorize the *Jaba* to negotiate on its behalf with the offender's family. This may not happen immediately. The victim's family may be too upset to agree to start the *Sulha* process.¹¹ But taking too long to authorize the *Jaba* to act may appear to be a sign of disrespect to the offender's family.

The Ancient Practice of *Tarbil*

Before beginning negotiations with the two families, the *Jaba* may decide that the situation between the disputants is volatile enough to merit using a *Tarbil*, which is Arabic for “leaving the place,” meaning the relocation of the offender's family. Another Arabic term for this is *Jala*, which means “departing under duress.” According to Sheikh Khneifes, in nomadic times, the offender's family might be asked to pack up its tent and move far away from the tent of the victim's family to reduce the potential for anyone to get hurt.

Today, *Tarbil* is practiced less and less, for social and practical reasons. For one thing, it is difficult to uproot and move large families. But it is still practiced when the *Jaba* decides that it is necessary (e.g., when the disputing families reside across the street from each other). The *Jaba* members use their connections and clout to help find a proper refuge for the offender's family when needed.¹²

Negotiating a Ceasefire

The *Jaba*'s initial goal is to persuade the families of the victim and offender to agree to a temporary ceasefire, called a *Hodna* (or *Hudna*) in Arabic, during which the *Jaba* can conduct an investigation of the dispute, reach a verdict, and obtain the agreement of the two families to abide by it. Negotiating the *Hodna* involves the use of shuttle diplomacy, akin to mediation of today.

To facilitate reaching a rapid *Hodna*, the *Jaba*

Relevant Terms Translated from Arabic to English

Atwa: a token of good faith; also a symbolic cash advance the offender's family gives to the victim's family when the *Hodna* (ceasefire) is negotiated.

Diya: “blood money.”

Jaha: the *Sulha* Committee.

Jala: same meaning as *Tarbil*.

Hodna: a ceasefire agreement between the families of the victim and offender that enables the *Jaha* to investigate the dispute.

Mumalacha: a ceremonial meal that ends the *Sulha* process, attended by the families of the victim and offender.

Musafacha: in the context of the *Sulha*, a handshake between the families of the offender and the victim.

Musalaha: reconciliation, forgiveness.

Taawir: final compensation paid by the offender's family to the victim's family.

Taffwith: an irrevocable written authorization given by the offender's family that allows the *Jaha* to intercede with the victim's family and to conduct the *Sulha*; also a commitment by the offender's family's to abide by the *Jaha*'s verdict in the matter.

Tarbil: leaving a place; also a forced relocation of the offender's family to a place away from the victim's family.

sometimes uses evaluation methods, and when unsuccessful, it may resort to some unconventional methods. For example, it could invite influential persons who are not *Jaba* members to intercede with one or both families to urge them to agree to a *Hodna*. In rare instances the *Jaba* may ask the police in confidence to “extend” the detention of the offender (if he is detained at the time) in order to pressure the offender's family to agree to a *Hodna*. (The implication is that agreeing to a *Hodna* could be considered by a judge who is deciding a change in detention status.)

The term of a *Hodna* depends on the judgment of the *Jaba* and the disputants. Usually, the initial *Hodna* remains in effect for a short period. According to Sheikh Abu Saaluk, if the *Hodna* expires before a settlement agreement is reached, the *Jaba* can negotiate one or more extensions, as necessary.

A Token Payment of Good Faith

However, the *Hodna* does not become immediately effective. The *Sulha* process generally requires the offender's family to pay a symbolic cash advance, called an *Atwa* in Arabic, to the victim's family,¹³ in an amount determined by the *Jaba*. The *Atwa* is in addition to any payment made by the offender's family to secure its agree-

ment to abide by the *Jaba's* final decision. The *Atwa* has a different purpose. It is intended to express remorse on the part of the offender's family and to cement the *Hodna*. (Guilt is not a significant element here, since it was already acknowledged by the offender's family inviting the *Jaba* to intercede on its behalf.)

The general rule is that as soon as the victim's family accepts the *Atwa*, the *Hodna* goes into effect. However, according to Sheikh Abu Saaluk, sometimes no money changes hands in reliance on the offender's family's signing of the *Taffwith*.

The *Jaba's* Investigation

Having secured the authorization of the disputants and their commitment to abide by the *Jaba's* final decision, and having negotiated the *Hodna*, the *Jaba* begins its investigation of the dispute. The purpose is to determine the scope of the offender's culpability and liability. The *Jaba's*

The Sulha process is different from mediation in that once the parties agree to participate, they are bound to accept the Sulha Committee's verdict.

investigation is generally carried out in private discussions with representative of the disputing clans, and with witnesses who either step forward and volunteer their knowledge or are identified by the disputants or other witnesses. The offender and victim, if the victim is alive, often take part in the negotiations. Tradition holds that the *Jaba* usually meets first with the victim's family to demonstrate empathy and compassion.

The meetings with each side may take as little as a day, or much longer, possibly weeks, months or even years. During these meetings, the *Jaba* listens to the disputants' and witness accounts. As in mediation today, the *Jaba* will reframe aggressive statements made by a disputant and highlight any positive or conciliatory statements to develop a framework within which to resolve the conflict. Sheikh Khneifes gave this example: If one disputant says that the disputants formerly enjoyed a good relationship, the *Jaba* could use that positive history to engineer good will that could later be used to reconcile the parties.

According to Sheikh Khneifes, during the private discussions with each side, the *Jaba* will tell each side about prior similar disputes and how they were resolved. These precedents could be from the personal experiences of *Jaba* members or learned from members of earlier *Jabas*. Sheikh Khneifes learned these precedents from his father, Sheikh Saleh Khneifes (who led the *Jaba*

for the better part of 40 years), while he served as his father's escort and driver.

Determining the Verdict

After interviewing the parties and witnesses, and visiting the sites where the events took place, the *Jaba* will discuss all the issues (unless it has only one member). The head of the *Jaba* will lead the discussions and assign speaking slots to *Jaba* members.

If the case under discussion is one in which the offender has already assumed responsibility (such as in a murder case), what remains for the *Jaba* to determine is the amount of compensation (called *Diya* in a murder case—meaning “blood money,” and *Taarwir* in a non-murder case), and other conditions of the reconciliation. If the dispute did not arise out of violent conduct, the *Jaba* will not try to assign guilt. Instead, much like a mediator in modern mediation, it will try to craft a medi-

ated agreement that both sides will be able to accept without feeling that they were singled out in any way. The *Jaba* will also go to some length to avoid giving either clan the feeling that it is being coerced into an agreement (even though the *Jaba* has the full authority to impose the agreement).

According to Sheikh Khneifes, every once in a while a vote of the *Jaba* will be taken. Once a majority is achieved, the final verdict is reached and the discussions end. The verdict will be presented to the two families as a unanimous decision.

Each geographical region in Israel and across the Middle East has a price list of the amounts to be paid as compensation for various misdeeds. According to Sheikh Khneifes, there is also a price list for different kinds of physical disability suffered by the victim (e.g., loss of limb, loss of mobility, loss of the ability to work). If the misconduct involved did not result in a permanent handicap, the *Jaba* could decide that no or little *Taarwir* will be paid. If the handicap is permanent, the *Jaba* could consult one or more medical professionals to determine its severity and impact in determining the amount of the *Taarwir*.

The *Jaba's* verdict is supposed to be binding on the disputing clans. A rejection of the verdict would be considered a severe infraction of the *Sulha* process, an insult to the *Jaba*, and a general

loss of face for both sides and for the *Jaba* members and dignitaries who were involved in the negotiations (as non-*Jaba* outsiders).

Even though both families agreed to abide by the verdict, one (or both) may engage in lengthy discussions with the *Jaba* over its terms if it believes that the final payment is insufficient.¹⁴ According to Sheikh Khneifes, the *Jaba* will patiently negotiate with the disputants until they agree to the verdict. These negotiations can last for months or even years.

When both families agree to the verdict, it is then memorialized in writing (the *Sulha* Agreement). Both families receive a copy of the written agreement. At this point, there are no further negotiations or appeals allowed on its contents.¹⁵

In murder cases, the *Sulha* Agreement formally settles these key questions for the record: Who is guilty? Of what? To what extent? Who pays whom? How much? When? In what currency? In non-murder cases, the same questions are answered except for guilt.

The *Sulha* Agreement must be signed by representatives of both clans in a public ceremony. The *Jaba* determines the location and date for the ceremony. It also determines who will participate from each side and which community dignitaries will be invited to attend. The dignitaries can include leaders of the religions of the disputants, members of state and local governments, and high-ranking local police officers. The purpose of having these dignitaries present is to give moral and religious support to the agreement and stamp their seal of approval on it.¹⁶

At the public ceremony, the *Sulha* Agreement is read aloud and signed by the designated representatives for each clan. Afterward, it is signed by the members of the *Jaba* and then by dignitaries from within and without the community. All this is designed to give the agreement as much weight as possible in the hope that the agreement will be respected.

In murder cases, the most senior representatives of the disputing clans are invited to tie a symbolic knot in a “Peace Flag.” The white cloth flag represents forgiveness by the victim's family and surrender and submission of both families to the authority of the *Sulha* Committee.

The *Sulha* ceremony involves three symbolic acts: (1) *Musafacha*: a handshake between the families of the offender and victim; (2) *Musamacha*: a declaration of forgiveness by the victim's father (if available, otherwise the closest relative); and (3) *Mumalacha*: the ceremonial meal that ends the *Sulha* process.¹⁷ The offender's family extends an invitation to the victim's family to attend the ceremonial meal. The victim's fami-

ly is obliged to accept the invitation and sit down at the table but they are not required to eat. The *Mumalacha* ritual takes place in most murder cases. In other kinds of cases, the *Mumalacha* dinner is not mandatory; whether it takes place mostly depends on the mood of the two families at the end of the process.

Comparing *Sulha* with Western ADR

Private mediation is a voluntary process in which a neutral third party (the mediator) helps the parties negotiate a mutually acceptable agreement. The process usually involves a mix of joint and private meetings (caucuses) with the parties. A key aspect of this process is that the parties cannot be forced into a settlement; they completely determine the outcome in the sense that they can walk away from it at any given moment.

The *Sulha* process is different in that once the parties agree to participate, they are bound to accept the outcome.¹⁸ In addition, joint caucuses are rare and various forms of coercion are liberally used by the *Jaba* when its members feel they are needed to push the process forward.

The *Sulha* process also differs from mediation



Sheikh Farage Khneifes, a member of the *Sulha* Committee of the Arab community in the north of Israel, holding a *Sulha* flag.

(and arbitration) in that there could be strong pressure from the community or the *Jaba* to participate in it.¹⁹

Notwithstanding these differences, the *Sulha* ritual has a major similarity to both mediation and arbitration. It cannot be used without the parties' agreement. It also uses some mediation-like techniques. For example, it makes heavy use of the private caucus, probably because of the anger each side feels for the other.²⁰ In addition, the *Sulha* process aims to achieve reconciliation (*Musalaba*) between the two parties,²¹ which is often a key goal of mediation.²²

One stage of the *Sulha* process that is especially mediation-like is the process of negotiating the *Hodna* (ceasefire). The *Jaba* uses shuttle diplomacy to attempt to persuade each side to cease hostilities for a period of time in order to allow it to hear witnesses, consider evidence, and craft a reconciliation agreement between the disputants.

During the investigatory stage, the precursor to deliberations and the verdict, the *Jaba* also uses some mediation-like techniques. For example, the *Jaba* members will discuss prior precedent (like evaluative mediation), reframe aggressive statements, and allow the disputing clans to vent their emotions. However, the place for venting emotions is different from Western mediation.

In the *Sulha*, venting of grief, anger and frustration is heard only by the *Jaba*, because the victim and perpetrator's families do not meet until the *Sulha* ceremony to sign the *Sulha* Agreement. In Western mediation, where the mediator often holds an early joint session, the parties can vent their feelings, teaching each other that they share similar feelings of anger and frustration. This can help them become "unstuck" so that they can start to move toward a possible solution.

Nevertheless, venting before the *Jaba* is still important and can lead to a desire for reconciliation. To allow this to happen, the *Jaba* members must be patient and tolerant of verbal and possibly physical abuse by the victim's family.²³

The fact-finding, deliberations and verdict stages are more like arbitration, with touches of mediation. For example, although the *Jaba* determines the facts and decides the verdict (like arbitration), it will avoid coming up with a verdict

that would not be acceptable to both disputants. Its goal is to generate a narrative that both sides can agree with (like mediation), as well as an acceptable verdict that both families will abide by. It will negotiate the verdict with a family that is dissatisfied with the verdict.

The instruments of coercion in the *Sulha* process are the written and verbal commitments the disputing clans give the *Jaba*, obliging them to abide by the *Jaba's* verdict. According to Sheikh Abu Saaluk, this obligation may be reinforced by the bond given by the offender's family at the beginning of the process.

But the strongest leverage available to the *Jaba* is its clout in the community and the threat of losing respect and social standing by refusing to abide by the *Sulha* verdict. These consequences may seem trivial to a Western observer, but in a tribal

culture, honor and respect are central elements, so the threat of shame or lost honor can provide considerable leverage.²⁴ They also provide motivation to carry out the terms of the *Sulha* Agreement.

Confidentiality

Without confidentiality, witnesses and others would be unlikely to trust and confide in the mediator. Thus, in the West, there is strong confidentiality protection for communications learned by the mediator during private caucuses. There is some confidentiality protection for information learned by the *Jaba* during its investigation. But it is more limited and its purposes are different from the West. The main reason behind *Sulha* confidentiality is the desire to increase harmony (i.e., decrease friction) between the two sides.

In the *Sulha* ritual, confidentiality must be given to negative information about the other side that the *Jaba* collected during its investigation. Sheikh Khneifes explained: "Why on earth should we go and tell one side bad things that the other side said about it? What good does it do the process or the parties, or the desired agreement and reconciliation?" Sheikh Khneifes' explanation is consistent with the goal of not fueling the fire of ill will between the parties. Since revealing positive things the parties said about each other would not increase friction and

could promote resolution, *Jaba* members are permitted to testify about such things if they are not incriminating.

The *Jaba* members are also supposed to keep their individual views and their deliberations confidential.²⁵

The accepted convention, although not stated in the law, is that the *Sulha* Agreement is not confidential and can be submitted to a court, even though it could contain incriminating information (e.g., details of the victim's injuries or an admission of guilt by the accused) that could influence the court's decision. The result of this convention is why many criminal defendants avoid disclosing to the court any mention of the ongoing concurrent *Sulha* process between their clan and the victim's clan.

Neutrality

Neutrality (i.e., the sense that the mediator and arbitrator are impartial) is also central to the effectiveness of western arbitration and mediation. There are neutral-selection and neutral-challenge procedures designed to protect the parties from mediators and arbitrators who could be biased.

According to Sheikh Khneifes, neutrality is also important to the *Sulha* process. Since the *Jaba* is supposed to reach a binding decision about the dispute, both sides of the dispute should feel that the members of the *Jaba* will be neutral. A tool that can facilitate neutrality is the right of the parties to veto members of the *Jaba*. The *Jaba* is obliged to respect such a veto and replace a vetoed member with one that is acceptable to both sides.

The *Jaba* could also seek location-neutrality by holding private caucuses at a location that is not associated with the dispute or either side,²⁶ for example the home of one of the committee members.

How mediators and arbitrators are paid can cast doubt on their neutrality.²⁷ To completely circumvent this minefield, *Jaba* members traditionally are unpaid. Both Sheikh Khneifes and Sheikh Abu Saaluk say they perform all their work voluntarily at their own expense, often at a loss of their own income.²⁸

Conclusion

The *Sulha* is designed to ensure that disputes in clan-based societies are resolved at the clan level. This unique process seeks to achieve reconciliation for all generations past, present and future, and thereby provide a practical solution to the tendency of disputes to expand beyond the original disputants.

We have seen that the members of the *Jaba* act as decision makers and facilitators and they employ a toolbox containing techniques, both voluntary and coercive. One coercive tool to which there is nothing remotely similar in the West is the ability to encourage judges in criminal court to extend the detention of an offender to push the clan reconciliation process forward.

Thus, the *Sulha* process is a kind of mediation/arbitration cross. The similarities to mediation and arbitration indicate that western and Islamic culture share many principles and seek the same kind of reconciliation when disputes arise. This is an important lesson, showing that despite many cultural differences, there are also cultural similarities that could lead to even greater understanding.

With Arab societies throughout the world undergoing rapid changes, the *Sulha* and its relative place in these societies may also undergo some evolution. It is reasonable to assume that in the coming decades we will see significant changes taking place in both the process, practices and its position within Arab society. ■

ENDNOTES

¹ There is evidence linking the *Sulha* to early Semitic writings and Christian Scriptures dating from around the first century. Elias D. Jabbour, *Sulha Palestinian Traditional Peacemaking Process* 13 (1993). Another pre-Islamic conflict resolution tradition in the Middle East is the informal arbitration process known as *Tabkim*. The *Tabkim* evolved into the more formal *Qadi* system in which religious judges who are officials of the state apply the law of Islam within the Muslim community. The *Qadi* institu-

tion took over as the state-authorized method of conflict resolution. See J. T. Barrett & J. Barrett, *A History of Alternative Dispute Resolution. The Roots of ADR, The Deciding Stone to the European Law Merchant* 13-14 (Jossey-Bass 2004); A. Layish & A. Shmueli, "Shari'a in the Bedouin Family According to Legal Documents from the Judeaean Desert, 42(1) *Bull. Sch. Oriental & Afr. Stud.* 29-45 (Univ. of London 1979).

² *Sulha* is used in Lebanon and throughout the Arab community in

Israel. In Jordan, it is the officially recognized conflict resolution tradition of the Bedouin tribes. The process differs slightly between regions.

³ Jabbour, *supra* n. 1, at 26.

⁴ *Peace and Conflict Resolution in Islam* 182 (Abdul Azziz *et al.*, eds. Univ. Press of Am. 2001).

⁵ *The Encyclopedia of Islam* 845-46 (P.J. Bearman *et al.*, eds. Brill, 1997).

⁶ Jabbour, *supra* n. 1 at 28.

⁷ *Id.* at 31.

⁸ According to Sheikh Khneifes.

⁹ Jabbour, *supra* n. 1 at 32.

¹⁰ *Id.*

¹¹ Interview with Sheikh Abu Saaluk, 2007.

¹² Jabbour, *supra* n. 1 at 36. Sheikh Khneifes confirmed that this happens.

¹³ In the West Bank, the Negev and in Israeli Arab villages near the West Bank, the Jordanian *Dinar* is legal tender for payments made during the *Sulha* process.

¹⁴ Jabbour wrote: "Sometimes, we offer the *Diya* money and people say: 'This is not enough.' But this attitude is not acceptable, since once the *Diya* is set [by the *Sulha* Committee] it cannot be changed. There is no room for further bargaining.... The minute the *Jaha* has ruled, *Diya* cannot be changed—it is too late." Jabbour, *supra* n. 1, at 43.

¹⁵ *Id.*

¹⁶ *Id.* at 51.

¹⁷ *Id.* at 56.

¹⁸ This article does not address whether there are any similarities to or differences from western-style, court-referred ADR, which represents a policy decision that there are reasons to seek a resolution of the dispute outside of court.

¹⁹ While parties who agree to arbitrate or mediate may also feel strong pressure to do so, that pressure is more likely to be self-imposed or imposed by family members or business associates.

²⁰ This view was voiced by Sheikh Abu Saaluk. It is also suggested in Mohammed Abu-Nimer, "Conflict Resolution Approaches: Western and Middle Eastern Lessons and Possibilities," 55(1) *Amer. J. Econ. & Soc.* 46 (Jan. 1996).

²¹ According to Jabbour, *supra* n. 1, at 56, the *Sulha* is sometimes called *Musalaba*.

²² This is often a goal of victim-offender mediation programs. Transformative mediation also has broader reconciliation goals. R. Bush & J. Folger, *The Promise of Mediation* (Jossey-Bass 1994).

²³ Jabbour, *supra* n. 1, at 47 ("Grief work, in many cases, must be enabled by the *Jaha* to make way for peace").

²⁴ Abu-Nimer, *supra* n. 20, at 44.

²⁵ Jabbour, *supra* n. 1, at 37.

²⁶ *Id.* at 38.

²⁷ This issue has arisen typically in employment cases in which the employer pays the neutral's compensation, raising an issue of the neutral's neutrality.

²⁸ Jabbour, *supra* n. 1 at 47.

Court Decisions

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After disputes arose and mediation failed, C&W filed a demand for arbitration with the AAA. The tribe agreed to arbitrate C&W's claims under all four contracts. It even filed counterclaims under the fourth contract, the one that did not contain an arbitration clause. In addition, it did not assert sovereign immunity as a defense under the fourth contract.

But before the hearings commenced, the tribe moved to dismiss C&W's claims under the fourth contract, asserting sovereign immunity. The arbitrator denied the tribe's motion after concluding that the tribe waived its immunity. The arbitrator subsequently issued an award in favor of C&W. C&W moved to confirm the award in a South Dakota state court. The court confirmed the award as a default judgment since the tribe declined to participate in the confirmation proceedings.

After that, the tribe had the award vacated in its tribal court. Separately, it filed an action in federal court seeking a ruling that the state court lacked jurisdiction to consider C&W's motion to confirm the award. The district court agreed with the tribe and issued a permanent injunction enjoining the state court from exercising jurisdiction over the matter. The district court also vacated the state court's order confirming the award and ordered the parties to exhaust their tribal court remedies. C & W appealed.

The 8th Circuit reversed. First it noted that in *C & L Enterprises v. Citizen Band Potawatomi*

Indian Tribe (532 U.S. 411, 2001), the Supreme Court found that entering into an arbitration agreement is a clear waiver of tribal immunity to a state court enforcement action. The High Court reasoned that the arbitration agreement would be meaningless if a tribe could avoid complying with an award by asserting sovereign immunity.

The 8th Circuit also pointed out that the AAA arbitration rules provide that an award may be confirmed by a state or federal court with jurisdiction. It concluded that by agreeing to AAA rules in three contracts, the tribe subjected itself to the procedures contained in those rules. "If a tribe were allowed to operate under AAA rules, and after an adverse decision assert sovereign immunity and then walk away, it would convert sovereignty from a shield into a sword," the court said, stressing that "[s]overeignty does not extend so far."

With regard to the fourth contract, which had no arbitration clause, the 8th Circuit found that the tribe voluntarily agreed to arbitrate disputes when it asserted its own counterclaims under that contract.

Finally, the court held that under the AAA rules, South Dakota's courts had jurisdiction to enforce the award. It reasoned that when the tribe agreed to AAA arbitration and then participated in the South Dakota arbitration, it acquiesced in the arbitrator's decision, placing jurisdiction over the award in South Dakota's courts.

Oglala Sioux Tribe v. C&W Enterprises, No. 07-3269, 2008 WL 4093007 (8th Cir. Sept. 5, 2008).