

***Shariah* Arbitration in Islamic Finance Transaction: An Urgent Need for Muslim Arbitrators**

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ABSTRACT

Muslim Arbitrators are needed to settle the dispute in Islamic Finance. The process Model in *Shariah* Arbitration may differ from the *tahkim* and conventional arbitration which is based totally on the UNCITRAL Arbitration Model and Rules. However, to be in line with internationality of the principles enunciated in UNCITRAL, there is no requirement under the it stating that an arbitrator should not be or must be a Muslim . Based on this comprehension, this paper attempts to propose that the appointment of an arbitrator in Islamic finance should be a Muslim. The paper ends with conclusion and some recommendations for future embarkation on the issue.

Keywords: *Shariah* arbitration, Islamic finance, arbitrator, appointment, muslim

INTRODUCTION

Dispute in Islamic finance may be resolved in many ways under the Alternative Dispute Resolution. One of the ways is Arbitration. Arbitration¹ was approved by the Holy Qur'Én and referred to in a number of verses as an acceptable dispute resolution mechanism. For example, the Holy Qur'Én states: "If you fear a breach between the two of them, appoint (two) arbiters, one

from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation, for Allah has full knowledge and is acquainted with all things."² Another Qur'anic verse states "Allah commands you to render back trusts to those to whom they are due; and when you judge between people, that you judge with justice. How excellent is the teaching which He gives you! For Allah is He Who hears and sees all things."³

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The law governing International Trade at cross border transaction: The United Nations Commission on International Trade Law (UNCITRAL)

The United Nations Commission on International Trade Law (UNCITRAL), was established by the United Nations General Assembly by its resolution 2205 (XXI) of 17 December 1966. It plays an important role in developing the framework in pursuing its mandate to further the progressive harmonization and modernization of the law of international trade. This is done by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law⁴. Those areas include as follows;

1. Dispute resolution,
2. International contract practices,
3. Transport,
4. Insolvency,
5. Electronic commerce,
6. International payments,
7. Secured transactions,
8. Procurement (The combined activities of acquiring services or goods, including ordering, arranging payment, obtaining transportation, inspection, storage, and disposal)
9. Sale of goods

These nine instruments are negotiated through an international process involving a variety of participants, including member States of UNCITRAL

(which represent different legal traditions and levels of economic development), non-member States, intergovernmental organizations, and non-governmental organizations. Thus, these texts are widely acceptable as offering solutions appropriate to different legal traditions and to countries in different stages of economic development. In the years since its establishment, UNCITRAL has been recognized as the core legal body of the United Nations system in the field of international trade law. With regards to item no 1 in dispute resolution, there have been 146 countries ratifying the convention.⁵ Malaysia became the signatory to this convention in 1958. Despite articles in the UNCITRAL Arbitration Rule clearly stating that the appointment of an arbitrator must lie within the consent of parties in disputes,⁶ this paper attempts to prove that, according to *Shariah*, it is required for the disputants to appoint a Muslim to arbitrate in matters involving Muslims .

Arbitration and Arbitrator Definition

Arbitration is the referral of a dispute to one or more impartial persons for a final and binding determination.⁷Its essential characteristics include privacy and confidentiality, and it is designed for quick, practical, and economically efficient settlements. The disputing parties can exercise additional control over the arbitration process by adding specific provisions to their contracts' arbitration clauses or, when a dispute arises, through

the modification of certain aspects of the arbitration rules to suit a particular dispute.

Stipulations may be made regarding confidentiality of proprietary information used - evidence, locale, number of arbitrators, and issues subject to arbitration. The parties may also provide for expedited arbitration procedures, including the time limit for rendering an award, if they anticipate a need for hearings to be scheduled on short notice.

There are three essential elements of arbitration:

- (a) The existence of a dispute between the parties
- (b) An agreement between them to refer it to arbitration⁸
- (c) Both parties agreeing to be bound by the decision of the arbitration

Disputes under arbitration are resolved by an award made by an independent tribunal (third party or parties, the arbitrator or arbitrators). The tribunal is either agreed on by the parties or nominated by a further independent body, e.g., a court or a professional institution such as the Chartered Institute of Arbitrators. According to *Stephenson Arbitration Practice in Construction Disputes* (1998), Lord Justice Raymond provided a definition of an “arbitrator” some 250 years ago that is still considered valid today:

An arbitrator is a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies

between them. And arbitrators are so called because they have an arbitrary power: for if they observe the submission and keep within due bounds, their sentences are definite from which there lies no appeal.

Arbitrator Appointment

- (a) The appointment of the arbitrator is made possible in one of the following ways;
 - (i) Arbitrator agreement or clause – An arbitrator may be specifically named in the arbitration clause of the contract between the parties. This is, however, a very rare occurrence.
 - (ii) Appointment by the parties to the dispute – It is common for contracts to have arbitration clauses providing for the parties to nominate and agree on the identity of the arbitrator upon occurrence of a dispute.
 - (iii) Appointment by an institutional body – In the event that parties cannot agree on the identity of the arbitrator to be appointed pursuant to the arbitrator clause in the contract, then a common contractual “fallback” measure is for a neutral third party to make the appointment for the parties. Generally, arbitration clauses in contracts provide for the president of a professional body or trade association to appoint the arbitrator, e.g., the President Centre for Arbitration.

Section 13(4) of the Arbitration Act 2005 provides that the Director of the KLRCA shall be the default appointing party should parties fail to agree on the arbitrator.

(b) There is also a provision in the Arbitration Act 2005 for the High Court to appoint arbitrators. Section 13(7) provides for appointment by the court when the Director of the KLRCA is unable to act or fails to act within 30 days of the request of parties. Section 13(8) of the Arbitration Act 2005 provides that the High Court shall have due regard for the following matters in appointing an arbitrator:

- (i) Any qualifications required of the arbitrator by the agreement of the parties
- (ii) Other considerations that are likely to secure the appointment of an independent and impartial arbitrator
- (iii) In the case of international arbitration, the advisability of appointing an arbitrator of a nationality other than those of the parties

Parties in an arbitration proceeding are free to determine the number of arbitrators who would constitute the arbitral tribunal (Section 12 of the Arbitration Act 2005). The default position under the Act is that the arbitral tribunal in an international arbitration would be made up of three arbitrators whilst a sole arbitrator would make up the arbitral tribunal in a domestic arbitration.

(c) Parties in an arbitration proceeding are also free to determine whether any person should be precluded from acting as an arbitrator by reason of nationality pursuant to Section 13(1) of the Act. It is to be noted that the default position under the Act is that the nationality of the arbitrator is irrelevant.

(d) An arbitrator is not required to have any special qualification save that which the parties have contractually agreed upon. The arbitrator need not necessarily be legally trained.

(e) Where the parties have agreed that the arbitrator is to possess special qualifications, such as being an engineer, an architect, quantity surveyor or accountant, the award of an arbitrator without the said special qualifications will be void unless the party challenging the award is stopped from doing so.

(f) An arbitrator would be well advised to consider the following matters before accepting appointment as an arbitrator:

- (i) Check arbitration agreement/clause, whether referral of disputes is to be made to arbitration and not to mediation or expert determination;
- (ii) Whether the arbitration clause stipulates that an arbitrator is to have certain special qualifications in order to be able to act in that capacity and, if so, whether this requirement has been met;

- (iii) Whether an issue of conflict of interest may arise pertaining to the identity of the parties; for example, a family or a business relationship with the arbitrator;
- (iv) Whether the arbitrator will be able to deal with the arbitration with due dispatch; i.e., does the arbitrator have the time to devote to the arbitration?
- (v) In the event of appointment by a third party, such as the President of PAM,⁹ whether the parties to the arbitral reference have been properly informed in writing of the arbitrator's appointment.

Arbitrator Powers

The primary sources of an arbitrator's powers lie as follows:

- (a) Agreement of the parties:
- As contained in the arbitration agreement/clause
 - As contained in the document of appointment of arbitrator
 - Ad-hoc agreement of the parties to confer certain powers upon the arbitrator before or during the course of the arbitral reference
- (b) The Act
- (c) Institutional rules
- (d) Case law

Parties to an arbitration agreement can generally confer upon the arbitrator whatever powers they wish to in respect

of the conduct of the reference, subject to certain legal limitations, which are as follows:

- (a) The parties cannot give arbitrators powers; the exercise of which would be contrary to public policy. An example would be terms of an arbitration agreement which seek to give the arbitrator powers to enforce an illegal contract;
- (b) The parties cannot give arbitrators powers to be exercised against persons who are not parties to the arbitration agreement. Accordingly, it is beyond the powers of an arbitrator to compel the attendance of third parties at arbitration hearings or to require third parties to produce documents;
- (c) The parties cannot confer upon the arbitrator powers "which only a judge can use" such as those affecting the life and liberty of a person.

As such, parties to an arbitration agreement are free to confer powers within the limits of the law upon an arbitral tribunal. Any power granted which is over and above those allowed by law would be invalid.

The Act provides for the arbitral tribunal to have certain powers such as the competence to rule on its own jurisdiction by way of Section 18 of the Act. However, it must be noted that the majority of the powers of the arbitral tribunal enumerated in the Act are default provisions which would apply in the absence of the parties' agreement to the contrary.

As such, parties are entitled to decide at the point of contracting or, alternatively, prior to commencement of the arbitral proceedings, whether they are content to allow the default provisions to apply. If not, they must specifically provide for an alternative.

THE SHARĒŃAH DEFINITION OF ARBITRATION

The ×anafĒ School defines arbitration as the process of choosing a person to settle a dispute. The MĒlikĒ School refers to it as the process of choosing a person to settle a dispute between two or more parties. Both parties are required to agree on the decision made by both of them.

The ×anbalĒ School defines it as choosing a party to settle disputes with the decision of the arbitration being binding upon them.¹⁰ It is proposed that arbitration is a mechanism to settle dispute by appointing a person agreed to by both parties to decide a case on their behalf, with the decision being binding upon them.

For the conventional system, arbitration is a settlement outside a court. This is covered under the concept of litigation in court. Hence the system falls within Alternative Dispute Resolution, better known as ADR, where no interference from the court is involved.

However, jurists differ on the nature of arbitration in the SharĒŃah, whether it is *wakĒlah* (agency) or litigation. Some scholars of the ShĒfiŃĒ School as well as the ×anbalĒ and MĒlikĒ Schools consider arbitration as a form of litigation. The

×anbalĒs added that the award is binding upon all parties. However, some MĒlikĒs consider it to be *wakĒlah* (agency), with the arbitrator appointed as a *wakĒl* to settle the dispute for the disputants.

Verse 35 of SĒrah al-NisĒ' confirms that arbitration must be used to resolve dispute between married couples before a divorce is granted; it outlines the need for two arbitrators (one from each side). Al-RĒzĒ,¹¹ in his *TafsĒr*, states that the two appointed arbitrators, as mentioned in the verse, must have the noble intention to make peace between the two. In one *ĪadĒth*, Prophet Muhammad (peace be upon him) said, "Whoever judges between two disputing parties who accept him an arbiter, but does not do justice between them, Allah will curse him."¹²

According to ImĒm al-ShĒfiŃĒ, each arbitrator appointed must be Muslim and responsible (*mukallaf*), which requires being of sound mind. The person must also be just and capable of carrying out the task assigned to him. A male shall judge between both female and male in family disputes. The school requires the person to have the ability to convince the disputants.

According to the ×anbalĒ School, the arbitrator must be competent in matters relating to marital disputes and be expert in *fiqh*.¹³

The ×anafĒ School requires arbitrators to be trustworthy, influential and impressive in their speech; acceptable and able to handle the process justly; and their aim should be to make peace between the married couple. The arbitrator can be more of an agent or

wak'el and not necessarily a judge. A woman can also be appointed as an arbitrator.

The M'lik School states that an arbitrator must be a Muslim male who has reached the age of maturity ; this school does not permit a female or a non-Muslim arbitrator. For obvious reasons, disputes between married Muslim couples would require another Muslim to be an arbitrator. The arbitrator should be a *faq'eh* or someone knowledgeable in the area that he is arbitrating in order to decide correctly and should be a just (*N'adil*) person.

The Singapore Administration of Muslim Law Act 1966 has provided the qualifications of the *Ikam* as follows:

- a. Islam
- b. *Mukallaf*
- c. Just
- d. Have knowledge of the rules of the *Shar'ah*, especially in marriage and divorce
- e. Know his duties as *Ikam*
- f. It is preferred to appoint the relatives of the parties who have the qualifications required under the Islamic law

According to the *Mejelle*, the concept of arbitration can be used to settle disputes in a way that resembles conciliation. Article 1850 of the *Mejelle* states that 'legally appointed arbitrators may validly reconcile the parties if the latter have conferred on them that power'.

Therefore, if each of the parties has given powers to an arbitrator to reconcile them and the arbitrators terminate the

case by a settlement, the parties may not reject such an arrangement. The technique proposed by Article 1850 enables each party to appoint its own arbitrator and the two arbitrators appointed are then authorised to settle the dispute by means of conciliation or *hull'*.

The reason the arbitrators should be from among the married couple's relatives is because they would know the circumstances of the couple's case better than outsiders would.¹⁴This is the reason that an arbitrator needs to be knowledgeable in Islamic finance and must be a Muslim. For disputes relating to commercial, Accounting and Auditing Organization for Islamic Financial Institutions (AAIOFI) Standards No 32 state the needs for arbitration. The standard observes *Shariah* standards in their rules and procedures. The standards make it binding in the following cases;

- i. When it is stipulated as a condition in the contract
- ii. When the two parties agree on seeking arbitration on disputes and pledge to observe the verdicts

The standards clearly state that an arbitrator should be a Muslim in principle. However, the standards allow Non-Muslims to be arbitrators as long as the decision is a valid arbitration decision that conforms to the rules of *Shariah*. This standard is silent on the award written that conform to *Shariah* norms.

It is submitted that, the award or decision in arbitration must be written in reference to Al-Quran and Al-Sunnah. In absence

of any authority in these two sources, the parties must refer to other methods of deriving *hukm* such as *ijtihad*, *qiyas*, *sad al-zara'*, Islamic legal maxim, etc. Failure to understand the concept of *usulfiqh*, Arabic Language, or Methodology of Hadith may lead to manipulation of Shariah sources and diverse interpretation of text.

The main reason a Muslim is needed to be an arbitrator is in award writing. Islamic Finance disputes combines commercial (*muamalat*) and derivation of *hukm*. During deliberation of *hukm* or decision in giving an award, an arbitrator must look into all the Islamic Legal Sources such as Al-Quran, Al-Hadith and other derivation of *Hukm* methodologies.

A simple example like Scott's Schedule is a tool provided for in the Act that is useful when dealing with multiple issues of facts and law found in the Statement¹⁵. The Scott Schedule is essentially a document that splits up the parties' stands on the various matters raised in the Statements. This would assist the parties to have an overview of the matters at hand. It is a tabular presentation of the key issues involved in the dispute, setting forth the claimant's and respondent's positions and the reasons therefore. It is sometimes referred to as the "Official

Referee Schedule" but is more commonly referred to by the name of its inventor, a former Official Referee (predecessor to Circuit Judge) in England. It is commonly used in construction and property disputes, but can be useful in any complex arbitration matter.¹⁶

The objectives of using the Scott's Schedule are as follows;

- i. To reduce the time and cost involved in the arbitration hearing and decision phases.
- ii. To assist the arbitrators to identify issues that are agreed upon by the parties in order to focus on the remaining issues that are crucial to the dispute.
- iii. To eliminate the need to constantly refer to vast volumes of pleadings.
- iv. To assist the arbitrators in focussing on the disputed issues that relate to the most significant monetary amounts claimed.
- v. To provide a convenient tool to ensure that all important issues are addressed in the evidence-taking and decision-making processes.
- vi. To increase the possibility of the parties reaching a settlement on at least some portion of the issues.

TABLE 1
Example of a Scott's Schedule

Item	Item of Change Work Claimed	Claimant's case: basis for entitlement	Claimant's valuation	Respondent's case: Agree, Deny and Why?	Respondent's Valuation

- vii. To force each party to identify areas in which they agree, or have no basis to disagree, with the other party.
- viii. To allow parties to identify any items on which the difference in their positions is less than the cost to litigate them.¹⁷

For Islamic finance, it is submitted that Scott Schedule needs to be supported with Table 2.

The usage of Scott’s Schedule is important when drawing up the awards. It is essential for the arbitrator to understand and know the *Shariah* because it involves derivation of *Hukm* in the awards.

In brief, the differences between *talkÊm* and conventional arbitration are illustrated in Table 3.

LESSONS FROM THE PREVIOUS ARBITRATION CASES:

Non recognition of Shariah Laws

In major international arbitrations, most of the cases replace SharÊÑah law in terms of its practical application. As such, the attitude of the non-Muslim arbitrators seems to be far removed from the *pactasuntservanda* rule.¹⁸

In the case of *Petroleum Development (Trucial Coasts) Limited v Syaikh of Abu*

Dhabi,¹⁹ the arbitrator, Lord Asquith rejected Islamic law, as applied in Abu Dhabi, as being insufficiently competent to regulate a modern commercial instrument.

The same outcome occurred in the case of *Ruler of Qatar v International Marine Oil Company Limited*²⁰ when the arbitrator declined to apply the Concession Agreement according to the SharÊÑah law. The SharÊÑah law of Qatar was clearly Islamic law following the ×anbalÊ School, but the arbitrator still held it to be inappropriate to govern a modern oil concession. In formulating such a view, he opined that SharÊÑah law does not contain any principles which would be sufficient to interpret the modern contract. He further mentioned that both experts (Prof Milliot and Prof Anderson) were in agreement that if Islamic laws were to be applied in the contract, it would be open to grave criticisms of invalidity.

In the famous case of *Aramco Arbitration, Saudi Arabia v Arabian American Oil Company*, the arbitrators, Prof G Sauser Hall (Referee), Sir Saba Habachy KBE (Arbitrator appointed by Aramco) and Muhammad Hassan (Arbitrator appointed by Saudi Arabia), held that the proper law of the concessions contract was the law

TABLE 2
Example of a Scott’s Schedule

Valuation	Issues	Validity –based Al-Quran/Hadith/ qiyas/ uruf , etc	Argument of School/ mazhab/SAC	Remarks
Respondent’s valuation				
Claimant’s valuation				

of Saudi Arabia, which they found to be Muslim law as taught by the *ẖanbalî* school.

However, whilst adhering fully to the rule of *pactasuntservanda*,²¹ which they correctly found to be fully recognised under Islamic law, they nonetheless held that the regime of oil concessions had remained embryonic in Islamic law. Consequently, they found it necessary to fill in the gaps in the law of Saudi Arabia by resorting to global customs and practices in the oil business and industry, global case law and pure jurisprudence. The Anderson-Coulson article suggested that the lacunae in the *Sharîḥ* in relation to modern commercial contracts might be best dealt with by treating such contracts as *sui generis*.²²

The New York Convention of 1958 on the enforcement of foreign arbitration awards had gone a long way to deal with cross-border enforcement of arbitral awards, and most countries under which the arbitration of Islamic finance disputes are carried out are signatories. The Convention requires that signatory states recognise and enforce arbitral awards made under the governing law of other nations.²³

Qualifications of Muhakkam is similar to a judge

Malaysia was in turmoil with regards to the cases being heard in civil court. The civil judges were claimed to have no expertise in Islamic finance cases and therefore the law failed to develop. However, this has been resolved by virtue of the amendment made in 2009.²⁴ Despite the amendment, there are still arguments

on the issues of unconstitutionality and inherent jurisdiction of the court.²⁵ In order to avoid future disputes, it is submitted that the qualification of an arbitrator is to be of a similar requirement as required in appointment as a *Shariah* judge. A minimum qualification is required, which is to be at least knowledgeable in *Shariah* in order to judge a case with fairness and justice. Being knowledgeable in *Shariah* alone without mastering finance/banking and arbitration would not render the person knowledgeable in the matter he arbitrates.

Jurisdiction of an Arbitrator

The jurisdiction of an arbitrator lies in the agreement. It refers to the limits within which the powers of an arbitrator may be exercised. Having a jurisdiction in respect of a particular case, means the arbitrator has the authority to hear and decide on that case. In contrast, the powers of an arbitrator refer to the acts that he is properly able and entitled to perform by law in his capacity as arbitrator. An arbitrator may or may not exercise all powers that he has. The powers of an arbitrator can only be exercised provided that he has the jurisdiction to do so. Powers are therefore subject to the jurisdiction of the arbitrator. The jurisdiction of an arbitrator is derived from the agreement between the parties to the arbitral reference. In the Court of Appeal decision of *Bauer (M) SdnBhd v. Daewoo Corp*,²⁶ on p. 561, Gopal Sri Ram JCA stated:

“To begin with, it is important to recognize that the foundation of

an arbitrator's jurisdiction is the agreement entered into between the disputants. Absent such an agreement, there is no jurisdiction. And as a general rule, mere participation in proceedings before the arbitrator does not cure any jurisdictional defect...."

Award Writing with inputs from Al-Quran and Al-Hadith

In respect of an arbitrator's authority to rule in his own jurisdiction, the position under the old Malaysian Act 1952 was that an arbitrator does not have the power to do so. The position is now different under the new Act as Section 18 provides that the arbitral tribunal may rule its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. It is advisable for the arbitrator to ensure that his appointment as an arbitrator is in order to ensure that the arbitral process proceeds unimpeded. Furthermore, the arbitrator must know the limitations of his power and jurisdiction in order to avoid overstepping the boundaries and risking an application to challenge any award issued. In this regard, the knowledge in *Shariah* is important to write an award that is *Shariah* compliant with the invocation of hadith and Al-Quran as the authority. [This could be done by the Muslim member of the tribunal. In an Islamic finance/banking dispute involving a non-Muslim, the non-Muslim party may wish to appoint a fellow non-Muslim who is knowledgeable of Islamic finance as a member of the arbitrating tribunal]

SHARĒÑAH QUALIFICATIONS OF THE ARBITRATOR

Religion

According to the ×anbalĒ School, non-Muslims are only allowed to settle disputes concerning their own personal law. According to the MÉlikĒs, ×anbalĒs and ShĒfiÑĒs, a non-Muslim is not allowed to be appointed as an arbitrator in Muslim territory. This even applies to arbitration among non-Muslims. This would appear to contradict Verse 5:47: "Let the People of the Gospel judge by what Allah has revealed therein." The above mentioned scholars consider this verse to be abrogated by 5:48: "So judge between them by what Allah has revealed, and follow not their desires away from the truth which has come to you."

Knowledgable in SharĒÑah

An arbitrator must be a person who sufficiently understands the SharĒÑah, especially the Qur'Ēn, Sunnah, and *ijmĒÑ* and *qiyĒs*. A judgment without reference to any of these will be considered as null and void. Some MÉlikĒs, ×anbalĒs and ShĒfiÑĒs even require an arbitrator to be a *mujtahid* who is able to exercise *ijtihĒd*. Ibn Taymiyyah of the ×anbalĒ School argued that arbitrators need only be specialists in matters falling within their expertise. However, the MÉlikĒ School allows a non-specialist to arbitrate provided they refer to the expertise in that particular area; the award given must be based on the testimony given by the expert consulted. Failure to do so may result in the voiding of the award.

Gender

Al-MÉwardÊ, a ShÉfiÑÊ jurist, holds the view that the power to arbitrate lies only with men. The ×anafÊ School, however, permits women to arbitrate all cases except crimes.

Maturity and Prudence

All the four major jurisprudential schools agreed that an arbitrator must have the ability to understand, analyse and solve complicated problems. In other word, he must be an expert in the dispute. ImÊM MÉlik stressed the necessity of an arbitrator possessing the qualities of ÑadÉlah (justice) and *rushd* (prudence). ÑadÉlah requires an arbitrator to be more vigilant and includes behaviour and religiosity. Impartiality is also a must that needs to be observed.

From the above discussion, and within the context of Islamic finance today, it is submitted that the arbitrator must have the following criteria;

- (a) Muslim. (All schools agree that the *Íakam* who arbitrates Muslim matters should be a Muslim). Regardless whether the litigants are Non Muslims, if the matters are within the expertise of a Muslim, a Non Muslim is not allowed to become the arbitrator. This may implicate bad perception in deriving *hukm* from the primary sources like Al-Quran or Al-Sunnah.
- (b) Female or male. (The arbitrator can be viewed as an agent to settle a dispute rather than a judge to decide a case.

Either female or male can be appointed as an arbitrator based on their respective qualifications).

- (c) Knowledgeable and expert in the matters disputed. (Islamic finance has three branches: Islamic banking, *takÉful* and Islamic capital markets; disputes may vary, and experts from each area are required.)
- (d) Knowledgeable on how to conduct arbitration procedures. (Able to conduct arbitration as practiced in the market according to the process model adopted by the Arbitration Act 2005 and in line with SharÊÑah).
- (e) Knowledgeable in the SharÊÑah (as required by MÉlikÊ School; the arbitrator should be a *faqÉh* in order to decide correctly and give an effective award).
- (f) Neutral and having a good intention to settle the dispute impartially.
- (g) Able to carry out the task and make peace between the parties.

Verse 2:235 of the Holy Qur'Én imposes a duty on any person who judges a case and apportions blame between parties to do so fairly and justly. The verse authorises those who judge to make decisions that are binding. It could also be interpreted as imposing *ÍulÍ* between conflicting parties. Either way, the main aim of arbitration is to ensure that disputes between Muslims are resolved amicably and justly. The word *Íakam* refers, in its strict sense, to a person who is authorised for a specific mission.

In this sense, Islamic law commands an arbitrator to try to reconcile the parties first before deciding upon their dispute. Muslim parties place themselves entirely in the hands of a person whom they know, respect, and believe to be capable of helping them out of the deadlock.

CONCLUSION AND RECOMMENDATIONS

From the above discussion, the quality of an arbitrator is of fundamental importance to ensure the success of the process, be it mediation or arbitration. The most important points are that the mediator or the *Áakam* should be someone who is impartial, responsible and capable of carrying out the task. He or she is also expected to be knowledgeable in the area of the dispute. Thus this paper recommends as follows;

- i. Training for *Shariah* scholars in Islamic finance to become the arbitrator is pivotal. The training can be conducted by Kuala Lumpur Regional Centre or International setting Body collaboration with Islamic Finance.
- ii. The appointment of *Shariah* scholar as an arbitrator to hear disputes in Islamic finance is important. This is due to the fact that the appointment is similar to a *qadhi* who decide the cases in court.
- iii. Recognize the process Model in *Shariah* Arbitration differs from the conventional arbitration process model.
- iv. The standard drafting in arbitration relating dispute in Islamic finance is important to ensure there are specific

clauses countered with no element of *gharar* or interest imposition to any of the parties.

- v. The appointment of a Muslim arbitrator is important since the award writing in conventional arbitration is different from *caward* writing in conventional arbitration.
- vi. The confidence among the disputants will reach certain recognition and of value when it comes to disputes involving matters and issues of *Shariah*.

REFERENCES

- Ahmad Hidayat Buang. (2007). Islamic Law Contracts in a Secular Court Settings: Lessons From Malaysia. *Arab Law Quarterly*, 21, 317-340.
- Aishah Bidin. (2001). The Impact of Islamic Law in the Banking System and Financial Market: A Malaysian Perspective. *The Company Lawyer*, 157-158.
- Mohamed Illiayas. (1995). Islamic/Interest-Free Banking in Malaysia: Some Legal Considerations. *Malayan Law Journal*, cxlix-clxiv
- Arfazadeb, H. (1992). Settlement of International Trade Disputes in Southeast Asia: The Experience of the Kuala Lumpur Regional Centre for Arbitration, vol. 1. *Malayan Law Journal*, CXXii-CXLii.
- Bagshaw, D. (1997). The Move towards Primary Dispute Resolution in Family: The Role of Government and Implications for Justice, *Flinders Journal of Law Reform* (no. 1), pp. 1-12.
- Brown, H., & Marriot, A. (1999). *ADR Principles and Practice*. (2nd eds.), London: Sweet Maxwell, pp.12.
- Deshphande, V. S. (1989). The Applicable Law in International Commercial Arbitration. *Journal*

- of the *Indian Law Institute*, vol. 31, no. 2, pp. 127-135.
- Elias, A. (1986). *Modern Dictionary: Arabic English*, Beirut: DĒr al-JalĒl, pp. 377-378.
- Harland, D. (1991). Implementing the principles of the United Nations guidelines for consumer protection. *Journal of the Indian Law Institute*, 33(2), 189-245.
- Husain, M. B. (1994). International Commercial Arbitration in a Changing World, *Arab Law Quarterly*, 9, 144-157.
- IbnQudĒmah. (1984). *Al-MughnĒ*, vol. 4, Makkah: al-Maktabah al-TijĒriyyah, p. 351.
- Lim P. G. (1997). Practice and Procedure under the Rules of the Kuala Lumpur Regional Centre for Arbitration, vol. 2. *Malayan Law Journal*, Lxxiii-Lxxxiv.
- Lim, P. G. (1998). The Growth and Use of Mediation throughout the World: Recent Developments in Mediation/Conciliation among Common Law and Non-Common Law Jurisdictions in Asia, vol. 4. *Malayan Law Journal*, cv-cxiii.
- McCurdy, K. R., & Rosenblatt Grott, K J. (2005). *The Summary Jury Trial: An Alternative to the Traditional Alternative Dispute Resolution Process*, the Metropolitan Corp. Counsel. Retrieved May 16, 2009 from <http://www.metrocorp.counsel.com/pdf/2005/May/16.pdf>
- Menkel-Meadow, C. (1993). Lawyer Negotiations: Theories and Realities – What We Learn From Mediation. *Modern Law Review*, 56(3), 361-379.
- Rachagan, S. S. (1992). Insurance Mediation Bureau, Malaysia, An ADR for Consumer Dispute in Insurance. In *Conference on Conflict Resolution in the Asia Pacific Region: Culture, Problem Solving and Peacemaking*, 22-26 May, 1994. Organised by the Asia Foundation, Universiti Sains Malaysia and APPRA, at Penang.
- Sabiq, S. (1990). *Fiqh al-Sunnah*, Cairo: DĒr al-DayyĒn li al-TurĒth, vol. 3, pp. 389.
- Syariah Civil Procedure Enactment 1991, (Selangor) (No. 7 of 1991).
- Pradhan, Vinayak P. (1994). Kuala Lumpur Regional Centre for Arbitration: Arbitral Awards. *Malayan Law Journal*, 2, CXXiv-CXL
- Yaacob, H. (2010). The Central Banking Act 2009: uplifting the integrity and the Role of the Shariah Advisory Council. *ISRA research paper*, 6.
- Yaacob, H. (2011). *Islamic Banking & Finance: Principles, Instruments & Operations*. KL: MCLJ Publication, ISBN978-967-0379-01-2,.
- Yaacob, H. (2011). Critical Analysis on International Islamic Finance Cases in English Court. *ISRA research Paper*, 17.
- Yaacob, H. (2011). *International Legal framework of Islamic finance: CAGAMAS-ISRA* edited Chapter: ISRA publication, Pearson Education Malaysia, KL.
- Yaacob, H. (2011). Empirical Study on Islamic finance cases decided in Malaysia: With Special Reference to the Cases decided in Muamalat Court, Jalan Duta Malaysia 1980 – 2010. *ISRA research paper*, 25.
- Yaacob, H. (2012). *Legal Issues in Musharakah Mutanaqisah*. *Malayan Law Journal*. Lexis Nexis.
- Yaacob, H. (2012). *Alternative Dispute Resolution in Islamic Finance: issues and challenges*. ISRA publication.
- Yaacob, H. (2012). The Role of Shariah Advisory Council in Governing Islamic Financial Matters: An Evaluation of Central Bank of Malaysian Act 2009. *Journal of International Banking Law and Regulation (JIBLR)*, 5.
- Yaacob H. (2012). The implementation of Wa'ad from Shariah & Legal Perspectives. *ISRA Research Paper*, 30.

ENDNOTES

- ¹ *Shariah* arbitration and *Tahkim* are used interchangeably in this paper.
- ² SĒrah al-NisĒ' (The Women), Verse 35.
- ³ SĒrah al-NisĒ' (The Women), Verse 58.
- ⁴ See the report of the Committee on Conferences (Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 32 (A/34/32), para. 32 (e) (iii)). Prior to the relocation of the UNCITRAL secretariat from New York to Vienna, sessions of the Commission alternated between New York and Geneva (see General Assembly resolution 2205 (XXI), sect. II, para. 6, reproduced in UNCITRAL Yearbook, vol. I: 1968-1970, part one, chap. II, sect. E; General Assembly resolution 31/140, sect. I, para. 4 (c) and General Assembly resolution 40/243, part one, para. 4 (c).
- ⁵ For details refer to www.un.com
- ⁶ Refer to UN Convention on Arbitration, Art 5.
- ⁷ The arbitrators, judges and ombudsman (*al-muġtasib*) are also known as the adjudicators. Adjudication involves an independent third party considering the claims of both sides and making a decision. The adjudicator is usually an expert in the subject matter in dispute. Adjudicators are not bound by the rules of litigation or arbitration. Their decisions are often interim ones; i.e., they can be finalised using arbitration or another process. Adjudication decisions are usually binding on both parties by prior agreement. In relation to construction contracts, adjudication is a statutory procedure by which any party to the contract has a right to have a dispute decided by an adjudicator, normally used to ensure payment. It is intended to be quicker and more cost-effective than litigation or arbitration. Adjudication is also sometimes used to describe a non-specific alternative dispute resolution process in which a third party makes a decision as to the best way to resolve the dispute. In this sense, ombudsmen, arbitrators and judges are all types of adjudicators (online, available at http://www.infolaw.co.uk/partners/alternative_dispute_resolution.htm).
- ⁸ Refer to *Scott v Avery*. Clause states that the right for parties to litigate is denied until the matter in dispute has been considered by arbitrators and both parties agree to be bound by the decision of the arbitrators. Retrieved from <http://www.feg.com.au/Glossary.htm#NR4>
- ⁹ Pertubuhan Arkitek Malaysia (Malaysian Institute of Architects).
- ¹⁰ Al-Mawardi, *Adab al-QĒĒĒ* (Dar Alanili al-ĪibĒĒ, 1972, 4th ed.), vol. 2, p. 379.
- ¹¹ Al-RĒzĒ, Fakhr al-DĒn, *al-TafsĒr al-KabĒr*, ed. Ābd al-RaĪmĒn MuĪammad, (Cairo, 1983) vol. 4, p. 27.
- ¹² Al-BuĪĒtĒ, ManĪĒr Ibn YĒnus IdrĒs, *KashshĒf al-QinĒĒĒan Matan al-IqnĒĒ*, DĒr al-Fikr (1982) p107-108
- ¹³ Al-BuĪĒtĒ, *KashshĒf al-QinĒĒĒan Matan al-IqnĒĒ*, vol. 5, p. 211.
- ¹⁴ Al-QurĪubĒ, *al-JĒmiĒ li-ĀĪĒm al-Qur'Ēn*, (Cairo: DĒr al-KitĒb al-ĒArabĒ, 1967), vol. 5, p. 175.
- ¹⁵ Scott De Gray, "Use of Scott Schedule to Expedite the Quantum Issues", International Arbitration Conference: Managing Risk in a High-Growth, High-Risk Market, A conference for In-House Counsel and Executives Involved in International Arbitration, Wednesday, September 10, 2008.
- ¹⁶ In the case of *GMTC v Yuasa Warwick* (1994) 73BLR 102, the U.K. Court of Appeal allowed the appeal because the judge had struck out parts of the plaintiff's claim for his inability to provide such details in the form of a Scott Schedule. It held that no judge was entitled to require

- a party to establish causation and loss by a particular method, and advised parties to object at the outset if they are required to plead a case in a way which does not represent the way they wish to put the case. Where experts give evidence, it may be prudent for the expert for each side to give evidence on each item in the Schedule, rather than for the claimant's expert to give evidence on all items and the respondent's expert to give evidence on all items after the close of the Claimant's case. This will enable the arbitrator to decide each issue when both conflicting views are fresh in his mind. Scott De Gray, "Use of Scott Schedule to Expedite the Quantum Issues", International Arbitration Conference: Managing Risk in a High-Growth, High-Risk Market, A conference for In-House Counsel and Executives Involved in International Arbitration, Wednesday, September 10, 2008. For detail refer to the speech by WM Ballantyne, The SharĒÑah; a speech to the IBA Conference in Cairo on Arab Comparative and Commercial Law; 15-18 February 1987, Brill, *Arab Quarterly Law*, vol. 2, no. 1, p. 12-28.
- ¹⁷ Scott De Gray, "Use of Scott Schedule to Expedite the Quantum Issues", International Arbitration Conference: Managing Risk in a High-Growth, High-Risk Market, A conference for In-House Counsel and Executives Involved in International Arbitration, Wednesday, September 10, 2008.
- ¹⁸ For detail refer to the speech by WM Ballantyne, The SharĒÑah; a speech to the IBA Conference in Cairo on Arab Comparative and Commercial Law; 15-18 February 1987, Brill, *Arab Quarterly Law*, vol. 2, no. 1, p. 12-28.
- ¹⁹ [1951] ILR Case No 37; (1951) 1 ICLQ.
- ²⁰ (1953) 20 ILR 534.
- ²¹ Latin for "agreements must be kept", Black's Law Dictionary (8th ed. 2004).
- ²² Latin for "Unique on its own characteristics", Ibid.
- ²³ Agha, Oliver, "Islamic Finance Dispute Resolution", *Islamic Finance News*, August 2009.
- ²⁴ Refer to Section 56 and Sec 57 of the Central Bank of Malaysian Act 2009
- ²⁵ For details refer Yaacob H, "The Central Banking Act 2009: uplifting the integrity and the Role of the Shariah Advisory Council", ISRA research paper, Vol 6:2010
- ²⁶ [1999] 4 MLJ 545 at p. 561.

