

The Qualifications of Arbitral Tribunal: Perspectives of *Shariah* Law and UNCITRAL Model Law

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Abstract

Arbitration is an alternative mechanism which can be adopted by the parties involved in any legal issues other than the court. Arbitral tribunal plays essential role and has roles and functions similar to the court judges. Only qualified person is eligible to be appointed as arbitrator. From Islamic perspective, the Muslim jurists have laid down several requirements to be fulfilled by such person before the appointment has been made. The UNCITRAL Model Law which is internationally adopted by most of the countries in the world in setting up their arbitration institution also has a provision pertaining to the qualifications of arbitral tribunal. The question arises, what are the qualifications required under *Shariah* law and prescribed by UNCITRAL Model Law? Is there any similarities? Based on such research questions, this article seeks to analyse the qualifications of the arbitral tribunal from the perspectives of *Shariah* law and UNCITRAL Model Law. Based on the library data, content analysis method is adopted to compare the qualifications of arbitral tribunal from both perspective. This study found that, the *Shariah* law and UNCITRAL Model Law have its own requirements for the person to be appointed as arbitrator. The study also found that, *Shariah* law provides more details in this regard compared to UNCITRAL Model Law which provides only the general principles.

Keywords: Arbitration; Tribunal; Arbitrator; UNCITRAL model law; *Tahkim*.



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1. Introduction

Arbitration is one of alternative dispute resolution mechanisms and considered as a more formal process compared to conciliation or mediation with the aims to settle the disputes through the parties presenting their case to an independent and qualified third party (Trakic *et al.*, 2019). In general, arbitration can be defined as a process which is mutually or consensually chosen by the parties that submit their disputes or those that may arise to be settled outside the court system by binding and final award (Born, 2012). The award is based on neutrality and equal treatment and equal opportunity to the disputing parties to present their cases. Similarly, it is an alternative approach to specific disputes that disputing parties have knowledge of such disputes (World Trade Organization, 2001). The disputes are clearly known to the disputing parties which arisen from the arbitration agreement. They also agreed on the procedures and processes to be conducted during the arbitration session.

The arbitration can be conducted by one arbitrator or more (Webster and Michael, 2014). Also, the arbitral claim can be filed by one claimant or more against one respondent or more. Then, the appointed arbitrators are authorized to render *inter alia*, an interim, partial or final arbitral award. The arbitral terms and conditions are more flexible and subject to the agreement of the disputants.

Shariah law is a divine law applicable to Muslims. Historically, arbitration and amicable settlement (*sulh*) is not new in *Shariah* law and have a long history within Arab and Islamic societies and have their roots in pre-Islamic Arabia (al-Ramahi, 2008). From the *Shariah* law perspective, the arbitration is known as *tahkim* which has the function to resolve any disputes referred to it by conflicting parties. The word *tahkim* literally means, to entrust a third party neutral to adjudicate the dispute (Idid and Oseni, 2014). Technically, *tahkim* is an appointment by the disputing parties of someone to judge on a matter that both parties are in disputes. In other words, *tahkim* comes to the function when both disputing parties agree to appoint an arbitrator to settle the dispute that may raise or has arisen among them.

Also, the United Nations Commission on International Trade Law has issued UNCITRAL Model Law to be adopted by arbitration institutions in resolving trade disputes. The arbitration system recognizes the parties' autonomy relating to the choice of law or the place where the award is given. It is not very important for the disputing parties having assets in the host states. The creditor party has to make reference to the state where the debtor party has assets to coerce the debtor party to enforce the award. The recognition and the enforcement may be challenged by the losing party due to some limitations existed in the New York Convention. One of the possible issues is regarding the qualifications of the arbitrators which might be raised by the unsatisfied party.

In order to discuss on the qualifications of arbitral tribunal from the *Shariah* law perspective and UNCITRAL Model Law, the following discussions are divided into several parts beginning with the *Shariah* law perspective and followed by UNCITRAL Model Law.

2. The Qualifications of Arbitral Tribunal from *Shariah* Law Perspective

Shariah law has stipulated certain qualifications that need to be fulfilled before a person can be appointed as an arbitral tribunal. In general, the well-known four schools of thought in *Shariah* law, i.e. the Hanafi, Maliki, Shafii and Hanbali, have agreed that the arbitrator should possess a qualification similar to the judges.

However, they are different regarding the elements of the competency of the arbitrator as follows:

- i. Shafii school of thought: An arbitrator should possess the qualifications similar to as required to a judge, unless there is no qualified arbitrator has found. Thus, if the arbitrator does not have such qualifications as required, the award made by such arbitrator is not recognized and cannot be enforced under *Shariah* (al-Nawawi, 1991).
- ii. Hanafi school of thought: stipulates that a person whose testimony is admissible can be appointed as an arbitrator. The arbitrator should be the age of majority and competent person. It is not necessary whether the arbitrator has the qualification similar to the judge or not (al-Sharbini, 1997).
- iii. Maliki school of thought: The arbitrator should possess the same qualifications as a judge. His award will only be bound and not subject to appeal as long as complies with the requirements of *Shariah* (al-Dusuki, 2010). It means the award cannot be enforced if the arbitrator has no qualifications similar to the judge as stipulated under Islamic law.
- iv. Hanbali school of thought: No stipulation that the arbitrator has to possess the same qualifications as the judge (al-Dusuki, 2010).

It can be seen that, the four schools of thought of Islamic law have the same opinion on the qualifications of the arbitrator in terms of legal capacity, sound mind, Islamic religion and justice. However, they are different of opinion pertaining to several qualifications regarding the gender and the independence status of arbitrator whether the slave can be appointed as arbitral tribunal or not. The researchers consider that the justice and knowledge are related which cannot be separated from each other where the justice will not be achieved unless the arbitrator has knowledge as well.

From the above discussion, the researchers do agree with the Shafii and Maliki schools of thought, i.e. the person to be appointed as arbitrator should possess qualifications similar to the qualifications as a judge. This is due to the roles of arbitrator as a decision maker to resolve the disputes brought before him.

The details of the qualifications of an arbitrator from the *Shariah* law perspective are as follows:

2.1. Full legal Capacity and Sound Mind

The person to be appointed as an arbitrator must be a person with full legal capacity in term of the puberty age (*bulugh*), maturity (*rushd*) and sound mind. Therefore, a minor person or unsound mind cannot be appointed as an arbitrator due to the shortage of legal capacity. How the person without legal capacity can be appointed as arbitrator since such person is not liable for committing an illegal act nor liable for any obligations imposed by the law? Therefore, the appointment of minorities or unsound mind as an arbitrator is totally void and the final judgment made by such incompetent person is ineffectual. The arbitrator must be an adult man, sane and wise in order to deliberate a just and wise decision to resolve the dispute referred before them (al-Kasani, 1986).

2.2. The Religion of the Arbitrator

The majority of Islamic schools of thought opined that the arbitrator should be a Muslim. Their opinion is based on the argument that the testimony of a non-Muslim against a Muslim is void, so it takes into consideration the similarity between the arbitration requirements and testimony requirements. Furthermore, their view is based on a verse of the Holy Quran in *surah* (chapter) al-Nisa', verse 141, which has the meaning that, never will Allah grant to the unbelievers a way (to triumphs) over the believers.

Based on the above Quranic sanction, non-Muslim cannot be appointed as arbitrator to the disputing parties who are Muslims or even one of the parties is Muslim. As a result, the award rendered by non-Muslim arbitrator is void even the parties accepted it (Abidin (2003)). There are several other Quranic verses which have the same injunction. For example, verses 60 and 61 of the *surah* (chapter) al-Nisa' which confirm the impermissibility of non-Muslim to arbitrate between Muslim parties or one of the parties to the dispute.

2.3. Justice and Trustworthiness

The arbitrator has to be fair and deal with the disputing parties equally. The Shafii, Maliki and Hanbali sects require that the arbitrators should be trustworthy, influential and impressive in matter of talk, acceptable and able to arbitrate justly with the main aim is to resolve the disputes between the parties peacefully. These conditions are crucial in order to protect people's lives, dignity and property as uphold by Islamic law and known as *Maqasid al-Shariah* (Objectives of *Shariah* Law). On the other hand, without such significant elements, the arbitrator might lead to repression, loss of rights, property and bring injustice to any parties involved in the conflict.

The different opinion given by Hanafi sect. The elements of justice and trustworthiness are not required. The person without such elements can be appointed as a judge and the appointment is considered as obnoxious (al-Kasani, 1986).

Now the question is, whether a sinner is qualified to be appointed as an arbitrator? There are several opinions in this regard:

- (a) The sinner is prohibited to be appointed as arbitrator as it is suspicious to safe guide the arbitrated dispute justly (al-Ansari, 1994).

- (b) The sinner is allowed to be appointed as arbitrator. However it is preferred not to appoint such person if an alternative exists (Ibn Nujaim, 2010).

In this regard, it can be concluded that, majority schools of thought shared the same opinion on the matter that the justice requirement is an essential condition in order to appoint a judge or an arbitrator.

2.4. The Good Health and Senses

The person to be appointed as arbitrator should enjoy the good health especially the senses, i.e. hearing, sight and speech. Majority of jurists do not permit the deaf person due to the fact that he does not listen to the words of the two disputing parties; the blind person due to the fact that he might not recognized the plaintiff and the defendant nor the witness of the acclaimed him or it; and the dumb person due to the problem that he might not be able to distinguish between confirmation and rejection, his arbitration might be subject to uncertainties (Zahraa and Abdul Hak, 2006).

2.5. The Gender of Arbitrator

There is a divergence of opinion among schools of thought pertaining to the question whether the gender of arbitrator is material. Shafii, Maliki and Hanbali sects insist that the arbitrator must be male gender. A female is not permissible to be appointed as an arbitrator and an award rendered by a female arbitrator is void. Their opinion is based on the qualification of a judge which has to be a man (al-Bukhari, 1987). The reason is related to the nature of a woman for example, that they are forgetful compared to man. Even though their testimony is accepted in that transaction case, a woman cannot be appointed as a judge or an arbitrator.

On the other hand, the Hanafi sect opines that the female can be appointed as a judge or arbitrator to conduct civil issues such as property issues and family disputes. This is based on the capacity of woman to become a witness, so she could be appointed as a judge or an arbitrator. However, it must be noted that, the female is only permitted to arbitrate or adjudicate civil cases and not Islamic criminal cases i.e. *hudud* or *qisas* (al-Zuhaily, 2011).

There are other jurists agreed that a woman can be appointed as an arbitrator but cannot be appointed as a judge (al-Ghamrawi, 2015). While Ibn Jarir al-Tobari argued that woman could be appointed as a judge or arbitrator to conduct any cases either civil or criminal including *hudud* and *qisas* (al-Sharbini, 1997).

2.6. The Knowledge of the Shariah Law

The judge has to be familiar with the *Shariah* law as the judge will adjudicate among people through applying *Shariah* law. The arbitrator who does not have knowledge of *Shariah* law is more likely to give awards which are contravened to *Shariah* principles. Hence, the rendered awards will be voided under *Shariah* law. Specifically, the arbitrator must have a knowledge of the subject matter and justice cannot be obtained if the arbitrator is ignorant of the subject matter. Accordingly, he is not the qualified and capable person to hold such position as arbitrator. Hence only the knowledgeable person should be appointed as an arbitrator (al-Sharbini, 1997).

2.7. Diligence

The majority of scholars of Shafii, Maliki and Hanbali and some of Hanafi (al-Hasfaki, 2014) stipulate that the arbitrator needs to be diligent in carrying out duties and responsibilities as an arbitrator. The imitative person is disqualified to be appointed as an arbitrator. This is based on the opinion that, the imitative cannot be appointed as a *Mufti*, thus, it also applied on the arbitrator.

In contrast to the Hanafi sect which rules that diligence is not a condition in the appointment of arbitrator. The basis of their argument is based on that the diligence is not the condition of the *Imam* (ruler) since he may consult or refer to an expert in deciding any disputes brought before them. However, several Hanafi scholars opine that ignorant person always adjudicates based on his opinion not based on *Shariah* rules (al-Kasani, 1986).

3. The Qualifications of an Arbitral Tribunal under UNCITRAL Model Law

According to Article 12 of UNCITRAL Model Law, the provision stipulates the qualifications of the person to be appointed as an arbitrator. Article 12 grants the right of the disputing parties to challenge the validity of the appointed arbitrator if the parties doubt in the matter of impartiality or independence, or the arbitrator does not possess qualifications agreed by the parties.

Based on that Article, there are two qualifications set out by the UNCITRAL Model Law as guidance to appoint the arbitrator. First, the impartiality or independence of the candidate. Second, the agreed qualifications by the parties to the arbitration agreement. In this regard, if any of the parties is not satisfied with any of the qualifications of the arbitrator, they could apply to the competent court by providing basis or reason of such application of challenge based on an article 13(2)(3) of UNCITRAL Model Law.

Article 12(1) requires the arbitrator appointed by the party, or by another arbitrator or by the competent authority is obligated to disclose any factors that may adversely affect his/her independence and impartiality. While paragraph (2) of that same Article gives the right to the opponent party to challenge the arbitrator if failed to disclose such information related to independence and impartiality. Accordingly, the law bears the burden upon the party resisting the appointment to rise the justifiable doubt of the arbitrator's independence and impartiality. While the same paragraph disallows resisting party to challenge the arbitrator who, appointed by himself/herself unless such exceptions rose after the appointment or the resisting party has no knowledge of such exceptions before the appointment (Mistelis, 2010).

However, the UNCITRAL Model Law did not specify what are the others qualifications which the arbitrator shall possess. Who is defined as competent arbitrator? What is the minimum qualification the arbitrator should possess?

4. Research Methodology

This article employed qualitative research methodology. The data relevant to the qualification of arbitral tribunal was collected using library method from the Islamic literature and UNCITRAL Model Law. In order to determine the qualification of arbitral tribunal from Islamic perspective, the collected data was analyzed using content analysis method. Meanwhile the legal doctrinal analysis was used to identify the qualification of arbitral tribunal prescribed by UNCITRAL Model Law. Then the comparative analysis methods were used to compare the qualification of arbitral tribunal from the perspectives of *Shariah* law and UNCITRAL Model Law.

5. Findings and Discussion

Based on comparative analysis on the qualification of arbitral tribunal from perspectives of *Shariah* law and UNCITRAL Model Law, this study found that both laws have a principle of law in this regard. Undoubtedly both laws emphasize on the qualifications of arbitrator in order to ensure the quality of the decision and satisfaction to the disputed parties.

However, it can be seen that, the UNCITRAL Law Model only provides the general provision. According to Article 12(1), UNCITRAL Model Law only stipulates the fulfillments on the qualifications such as impartiality and independence of the arbitrator while other qualifications are only subject to the prior consensus of opinion among the disputing parties pursuant to article 12(2). In addition, other qualifications of arbitrator may be included as agreed by the parties. It seems that the UNCITRAL Law Model offers freedom to the disputed parties to choose the best qualified person to be appointed as arbitral panels to decide their case.

In contrast to *Shariah* law where such qualifications of the arbitrator are derived from the sources of *Shariah* law and all Muslims should always observe such qualification as previously discussed. The disputed parties have no freedom to choose the panel of arbitrator.

Moreover, UNCITRAL Model Law is silent with regard to the safety of the senses of arbitrator like hearing, sight and speech. In contrast, *Shariah* law extremely concerned in this regard. The safety of the senses represent the quality needed for someone to judge the case brought before them. This is crucial to make sure that the panel is capable to notify everything including the saying as well as action by the disputed parties. By comparing the requirement of both laws, it can be seen that the requirement of *Shariah* law is more comprehensive and more relevant to be fulfilled by those to be appointed as arbitral panel. This also to show that, *Shariah* law is extremely concerned to make sure that the arbitral process will bring justice to the disputed parties. This only can only be achieved if the hearing process is arbitrated by the person with full knowledge of the subject matter brought before him and free from any disabilities which might lead to dissatisfaction to any parties. In addition, this is to ensure that he/she is clearly listen to all claims and defenses which lead to a fair trial.

Furthermore, the UNCITRAL Model Law does not emphasize regarding the arbitrator's religious as enshrined in article 11(1). Meaning that, based on the provision of UNCITRAL Model Law, impliedly understood that, the appointment of arbitral panels is subject to the agreement of the disputed parties regardless of the religion of the arbitrators.

In principle, there is no issue of religion of the arbitrator as long as they have sufficient knowledge to deal with the subject matter of the case brought before them. As long as the disputed parties agree with the panels, then they may proceed to the arbitration process to settle their dispute. However, our concern is what if the subject matter is related to *Shariah* law of contract for example? As we know, the basis of *Shariah* law of contract is derives from the sources of *Shariah* law, i.e. the Holy Quran, the *Sunnah* (the tradition) of the Prophet Muhammad and other recognized *Shariah* law sources. In principle, only the Muslim with relevant knowledge and expertise have a capacity to refer to the sources of *Shariah* law in deciding any *Shariah* issue brought before them.

Undeniable and no doubt that some of non-Muslim might have a good understanding of *Shariah* law, and have capacity to refer to *Shariah* law sources, but it is still questionable, to what extent such panels will refer to *Shariah* law in deciding any *Shariah* issue brought before them. What will happen if they refused to refer to *Shariah* law and decide the case using different law?

It would be good if the UNCITRAL Model Law have additional provision stating that, in the case pertaining to *Shariah* issue, the arbitrators should be a Muslim in religion of those with the knowledge and expertise in *Shariah* law. In addition, the arbitrator should refer to *Shariah* law sources in deciding the *Shariah* law contract. It is crucial to ensure that the *Shariah* issue is decided based on *Shariah* law.

In contrast, *Shariah* law stipulates that the arbitrator has to be a Muslim to settle the dispute if one of the disputing parties is Muslim especially, if the place suits the arbitration in Islamic country. This is to avoid non-Muslim arbitrator not to use *Shariah* law where the decision might be different especially if the contract is based on *Shariah* law. Therefore, the main difference that has to be considered, the arbitrator has to be a Muslim, and non-Muslim cannot be an arbitrator to resolve the dispute if both parties and one of the parties are Muslim. Thus, the rendered award, which is issued by non-Muslim arbitrator will not be enforced under *Shariah* law. However, if the place suits the arbitration is in non-Muslim country, the Muslim investor can enter into arbitration agreement even the arbitrator/tribunal is non-Muslim. But, the rendered arbitral award by non-Muslim arbitrator/tribunal shall not conflict with *Shariah* principles.

In addition, the researchers consider that justice, knowledge and diligence are related which cannot be separated from each other. Justice cannot be achieved unless the arbitrator has knowledge as well. The arbitral award is more expected to set aside in case of breach of the justice proceedings of the non-qualified arbitrator. Hence, *Shariah* law stipulates that the arbitrator must be a diligent and educated person, have knowledge of Islamic teachings to arbitrate the dispute based on *Shariah* principles and provide justice to all disputing parties. Thus, as commonly known the arbitral award under *Shariah* law is binding and none of the disputing parties could appeal against it unless under some provided grounds as long as the award is final and binding. Finally, it is unreasonable to appoint an unqualified person to run the arbitration session.

6. Conclusion

Based on the above discussion, it can be concluded that *Shariah* law and UNCITRAL Model Law have a stipulation on the qualification of arbitrator. However, it seems that, the qualification set out by *Shariah* law is more comprehensive in order to ensure that only qualified person be appointed as an arbitrator. Meanwhile, according to UNCITRAL Model Law, the provision regulating the qualifications of arbitrators seemed too general which may invite a room for legal debate if any of the disputing parties raised the issue in this regard. Hence, it would be good if the respective body or the arbitration institution to do necessary clarification and amendment in order to make it clear pertaining to the qualification of arbitral tribunal.

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