

Appointing a Non-Muslim as an Arbitrator in Administrative and Commercial Contract Disputes: A Saudi Perspective

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Abstract

This study examined how non-Muslims can be appointed arbitrators to decide administrative and commercial contract disputes under Saudi law. The study adopted a descriptive methodology by analyzing and interpreting the data collected from legislations related to the topic, jurisprudential views in Islamic Sharia Law, judicial practices, and international conventions to investigate the subject matter. The outcomes of the study expose that appointment of a non-Muslim in adjudicating administrative and commercial contract disputes through arbitration is permissible in Saudi law according to the enforceable Arbitration Law of 2012, jurisprudential views in Islamic Sharia Law, judicial practices, and international conventions. Furthermore, it is not required to appoint the arbitrator religion in arbitration laws. In conclusion, non-Muslims' participation in arbitral tribunals demonstrates that they have become genuine members of these tribunals. This leads to achieving equality and prosperity in society by benefiting from the services of expert and competent individuals.

Keywords: Non-Muslim, arbitrator, administrative, commercial, contracts.

Introduction

Arbitration is a well-known method whereby parties submit their disputes or potential disputes for resolution outside of the state's formal judicial system by mutually or consensually selecting a binding and final award through an independent and qualified third party (Bawazir, 2018), called an arbitral tribunal. The arbitral tribunal consists of one or more arbitrators. If the number of arbitrators is single, then the arbitration shall be invalid (Article 13 of the Arbitration Law of 2012). If the arbitral tribunal consists of three arbitrators, each party will choose one arbitrator, and the two arbitrators will select the judgment. The competent court, acting on a petition filed by the party requesting expedited arbitration, should specify the umpire within 15 days of the date of submission of the petition if a party fails to designate his arbitrator within 15 days of receiving a petition to that effect from the other party, or if the two arbitrators appointed do not agree on the appointment of the judgment within 15 days of the last arbitrator's date. The umpire will preside over the arbitral tribunal; he might be chosen by the two arbitrators or appointed by the appropriate court. When there are more than three arbitrators on

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the arbitration tribunal, these rules will be applicable (Article 15 of the Arbitration Law of 2012). A candidate must meet the following requirements to be qualified to serve on the arbitration tribunal: possessing a minimum university degree in Sharia or law, good conduct and reputation, and full legal capacity. It is sufficient if the chairperson of the arbitral tribunal satisfies these requirements if the tribunal comprises multiple arbitrators. (Article 14 of the Arbitration Law of 2012). The court with original competence over the dispute must select an arbitrator by observing the conditions agreed upon by the parties and additional requirements specified in the Arbitration Law. The court has 30 days from the date of the request to determine which arbitrator to choose. Due to the decision's independence, it is final and cannot be contested on appeal (Article 15/3 of the Arbitration Law of 2012).

The composition of an arbitral tribunal, whether by the parties to the dispute or the court with original competence over the matter to be arbitrated, raises the question of the participation of non-Muslims in the arbitration of administrative and commercial contract disputes under Saudi law. Additionally, there is rising apprehension among Muslims regarding the legitimacy of the increasing number of non-Muslim arbitrators who appear on the roster of arbitrators in Muslim nations or in cases concerning Muslims or transactions that adhere to Sharia. Along with this, the increasing number of interactions between followers of various religions in the modern world (Idid Dato, 2014). Furthermore, though extremity is free to select arbitrators of any religion, ethnicity, or genus, it is disturbing that there is generally a lack of diversity in arbitration (Ahmad, 2024). There is also agreement among most Muslim jurists that it is not permissible for a non-Muslim to arbitrate between Muslim disputants. In addition, there are also arbitration cases that decided by non-Muslims and involve Muslim parties (Al-Khudair, 2019). According to the author's knowledge, the appointment of a non-Muslim arbitrator in administrative and commercial contract disputes has not been investigated independently but as a general topic in sources related to the arbitration. Therefore, the present study aims to address and capture the extent to which a non-Muslim can be a member of an arbitral tribunal according to Saudi law.

Material and Method

The study adopts a descriptive methodology to examine the research topic. Using this kind of such descriptive may provide a clear picture and discover conditions. The data for this study collected from various sources, including legislation related to the topic, jurisprudential views in Islamic Sharia Law, judicial practices, and international conventions.

The Arbitration Legislation

The successive arbitration laws in Saudi Arabia have varied in appointing non-Muslims as arbitrators. According to Article Three of the Executive Regulation of the repealed Arbitration Law of 1983, an arbitrator must be a Saudi national or a Muslim foreigner, chosen from the members of the liberal professions or other

persons. The arbitrator may be also selected from state officials after the authorization of the supervising authority to which he belongs. Thus, it is required that the arbitrator be a Muslim if he is a national, given that all nationals of the Kingdom of Saudi Arabia are Muslims or if he is a Muslim foreigner, as stated clearly in article three. Based on this, jurisprudence has established that the arbitrator must be a Muslim, regardless of the nationalities of the parties involved or their ability to select their arbitrators. (Al-Khudair, 2019). The current Arbitration Law of 2012, derived from the United Nations Commission on International Trade Law (UNCITRAL) Model Rules, specifies in Article 14 the conditions for membership in the arbitral tribunal, which manages different disputes. These conditions include full capacity, good conduct, and holding at least a degree in Sharia or legal sciences. If the arbitral tribunal consists of more than one arbitrator, then meeting the degree requirement is sufficient for its president. Thus, the Arbitration Law of 2012 does not specify the requirement for a member of the arbitral tribunal to be a Muslim (Thilini, 2013). Appointing a non-Muslim, whether a Saudi or a foreigner, is permissible under the legal principle that the original rule of something is its permissibility. In applying this principle, specifying the arbitrator's religion is unnecessary, according to the Arbitration Law of 2012. However, membership in the arbitral tribunal requires that the non-Muslim arbitrator have some knowledge of the rules of Islamic Sharia, at least those related to arbitration, because Islamic Sharia is the formal source of all laws and regulations in the Kingdom of Saudi Arabia per the Basic Law of Governance. (Articles 1 and 7 of the Law of Governance). It stipulates that the Kingdom of Saudi Arabia is one of the Arab Islamic states; follow the religion of Islam, and its constitution is Almighty God's Book, (the Holy Qur'an), and the Sunna (traditions) of the Prophet. The government in the Kingdom of Saudi Arabia derives its authority from the Holy Qur'an and the Sunna of the Prophet Mohamed, the final sources of reference for this law and the state's other laws. Article 55/2/B of the Arbitration Law stipulates that the order to implement the arbitration award under this law shall not be issued except upon verification that the award does not break the provisions of Sharia as well as public order in the Kingdom of Saudi Arabia. If the award is divisible, an order for execution of the part not containing the infringement may be issued.

Jurisprudential Views in Islamic Sharia Law

Islamic jurists have held three different views on the appointment of a non-Muslim as arbitrator. The first view, which is the prevailing one, holds that the general principle is that an arbitrator must have the same qualifications as a judge from the moment of appointment through the end of the arbitral proceedings. This type of arbitrator cannot lose any of his qualifications throughout the arbitral process. Non-Muslims cannot be entrusted with the power of guardianship over Muslims (Idid Dato, Umar A Oseni, 2014). Moreover, the similarities between the requirements for testimony and arbitration have been considered because they are predicated on the claim that a non-Muslim's testimony against a Muslim is null and

void (Bawazir, Hussain Azam, 2018). Supporters of this view cited the Almighty's saying in verse 141 of Surah An-Nisa: "And never will Allah grant to the unbelievers a way over the believers." This demonstrates the arbitrator's power over the parties, which subjects the latter to the mercy of the former. On a similar note, referring to any disagreement with the Prophet Muhammad is one of the core convictions of a true Muslim. Since his passing, disagreements have been referred to esteemed Muslim jurists thought to be the Prophet's heirs. The verse mentioned earlier is regarded as supporting evidence for this view (Idid Dato, Umar A Oseni, 2014).

In the second view, the appointment of a non-Muslim in an Islamic state is based on verse 35 of Surah al-Nisa', which prescribes arbitration in cases involving marital conflicts. In Islam, a man is permitted to marry a "Kitabiyyah" (a female non-Muslim follower of a scripture-based religion), so the supporters of the second view justify the appointment of non-Muslims as arbitrators by arguing that since this verse does not contain any exceptions of non-Muslims, an arbitrator may be chosen from among non-Muslims if the wife is a non-Muslim. Consequently, in this instance, two arbitrators—one Muslim and the other non-Muslim—would render arbitral awards. This suggests that a Muslim and a non-Muslim will most likely be chosen as the two arbitrators who will decide a case involving a non-Muslim wife. The central claim put forth by these jurists is that the Qur'an does not explicitly forbid non-Muslim parties from arbitrating disputes, even though it does contain a clear passage that permits it (Dato' Syed Ahmad Idid, Umar A Oseni).

According to the third view, which adds an exclusion to the general rule that an arbitrator must be a Muslim, it may be appropriate for Muslims living in a non-Muslim state to appoint a non-Muslim arbitrator if necessary for arbitration proceedings to take place there. This opinion is supported by textual evidence that permits a testator to name two non-Muslim witnesses in a non-Muslim setting. In addition, when the testator is outside of Islamic territory: 'O you who believe! When death approaches any of you, and you make a bequest, the testimony of two just men of your folk or two others from outside, while you are traveling through the land and death befalls on you'. The proponents of the third view contend that, in cases of extreme necessity, the concession made to a dying person in the Quran can legitimately be applied to arbitration proceedings that take place outside of the Islamic State. They also referred to the Islamic legal doctrine known as *bayan darurah*, which translates to "elaboration by necessity" and is typically used in *ijtihad*, or jurists' independent legal reasoning, to give a text meaning it did not initially state through extension (Idid Dato, Umar A Oseni, 2014).

Islamic jurists have differing views regarding the appointment of a non-Muslim as arbitrator. It is necessary to discuss the issue in detail from two perspectives: first, the appointment of non-Muslim arbitrators to resolve disputes between Muslim parties, and second, the appointment of non-Muslim arbitrators to resolve disputes between Muslim and non-Muslim parties. Regarding the first perspective, the conservative stance is that non-Muslim arbitrators cannot arbitrate

disputes between Muslim parties (Idid et al., 2013). As for the second perspective, concerning the appointment of non-Muslim arbitrators to resolve disputes between Muslim and non-Muslim parties, where both parties are Muslims, the liberal approach allows a non-Muslim to mediate disputes between Muslims. The number of arbitrators and the mix of Muslim and non-Muslim arbitrators are unaffected; if it is acceptable for a non-Muslim to mediate a dispute between Muslim parties, it is also likely acceptable for non-Muslim arbitrators and the mix of Muslim and non-Muslim arbitrators. Parties in arbitration disputes can cite a legitimate justification for the appointment of a non-Muslim mediator in business disputes involving Muslims and non-Muslims. Islamic law allows Muslim and non-Muslim arbitrators to be appointed to settle disputes between Muslim and non-Muslim parties. In the context of family dispute arbitration—a form of Islamic arbitration used to settle family disputes—this authorization is based on the Holy Qur'an. It is explicitly permitted for Muslim men to marry Christian or Jewish women (Kitabiyyah) in the Holy Qur'an. The Holy Qur'an then allows the married couple to use arbitration to settle disagreements. Under these circumstances, two arbitrators are appointed: one from the husband's family and the other from the wife's family. To arbitrate a disagreement between Muslim and non-Muslim parties in this case, an arbitral tribunal made up of Muslim and non-Muslim arbitrators will be established. Despite its roots in family dispute arbitration, this kind of arbitration can be used to grant permission for any other type of arbitration dispute (Islamic Finance Arbitration, 2015).

Non-Muslim Appointment In Judicial Practice

Judicial awards have been issued in commercial cases under the repealed Arbitration Law of 1983 that deal with non-Muslim arbitration where one of the sides is Saudi. In the first situation, the two sides were Saudi and the United States, and the court decided that it had no jurisdiction to hear the case based on the parties' agreement in the contract concluded between them to arbitrate in the United States. Based on this, the arbitration clause in a foreign country was binding for the Saudi party, and most of the arbitration was undertaken by non-Muslims. In the second case, the court stated that the Saudi courts had no competence to hear the case, even if the arbitrator was not Muslim. This means that the arbitration clause was enforceable abroad, regardless of whether the arbitrator was Muslim or not. The third award applied to the foreign arbitration award, which was issued mainly by non-Muslims, and thus, the court considered the award effective in the Kingdom of Saudi Arabia. Before all these arbitrary awards, a Swiss arbitrator issued a decision in the dispute between the Saudi government and Aramco in 1958 (Al-Khudair, 2019).

International Conventions

According to the Council of Ministers, international conventions are considered one of the sources of arbitration law once the requirements of

international convention ratification are met (Article 20 of The Council of Ministers Law, 1993). This article stipulates that conventions and international agreements shall be issued and amended by royal decrees upon review by the Council of Ministers, and with no conflicting to the Law of the Shura Council. These conventions include the UNCITRAL Model Rules, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights of 1966. The UNCITRAL Model Rules, a historical source of arbitration law, outline the structure mechanism of the arbitral tribunal and do not require arbitrators to belong to a specific religion (UNCITRAL Arbitration Rules, 2010). such as Islam or any other religion. Therefore, there is no requirement under the UNCITRAL Model Rules that arbitrators must be Muslims. Consequently, it is permissible to appoint a non-Muslim arbitrator to resolve administrative and commercial contract disputes, regardless of whether the parties are Muslims or non-Muslims. The Universal Declaration of Human Rights states that all people are equal to the law, without any discrimination, to equal protection of the law. All people are in title to equal protection against any violation of this Declaration and against any incitement to such discrimination. (Universal Declaration of Human Rights, 1948) Therefore, appointing a non-Muslim as an arbitrator respects his right to equality with others under the law and his right not to be discriminated against based on religion. Regarding the International Covenant on Civil and Political Rights of 1966, Article 26 of the Covenant states that all people are equal before the law and enjoy, without any discrimination, an equal right to its protection. The law guarantees all people equal protection against discrimination for any reason, such as sex, race, colour, language, religion, or other factors. (International Covenant on Civil and Political Rights, 1976). As such, it is permissible to appoint a non-Muslim as arbitrator; not doing that is considered a violation of rights and discrimination based on religion, which is contradictory to the convention.

Thus, a non-Muslim has the right to arbitrate administrative and commercial contract disputes according to international conventions at the international or internal levels.

Results And Discussion And Recommendations

The study's main finding is the acceptance of appointing a non-Muslim arbitrator to resolve administrative and commercial contract disputes in Saudi law through arbitration. This aligns with various legal sources, including the Arbitration Law of 2012, Islamic Sharia Law, judicial practices, and international conventions. This finding is supported by previous studies by AL Rajhi (2015), Bargawi (2016), Dalma & Thilini (2013), and Jaacob (2014), and all of them suggest that the appointment of non-Muslim arbitrators is permissible and not restricted by any specific requirements. Notably, the Arbitration Law of 2012 does not specify the religion of the arbitrator, indicating a more flexible approach to arbitrator qualifications and allowing for the selection of a non-Muslim arbitrator under Saudi

Law. This Research recommended to find some of statistics and practical applications that may support this outcome or define it.

Conclusions

The authors discussed whether non-Muslims can be arbitrators in the Saudi Kingdom administrative and commercial contract disputes. The disputes will be adjudicated by an arbitral tribunal composed under the law. The authors raised the question of the extent to which non-Muslims can participate in the membership of the arbitral tribunal. The study explored whether a non-Muslim may be appointed as an arbitrator according to the Arbitration Law of 2012, which is currently in force. This is because the Arbitration Law specifies the conditions for appointing arbitrators to the arbitration tribunal and does not explicitly or implicitly prohibit the appointment of a non-Muslim as an arbitrator. Therefore, the principle remains that the appointment is permissible. Furthermore, arbitration laws do not have to stipulate the arbitrator's religion in the future, since the appointment of a non-Muslim arbitrator is legal. It also demonstrated how the views of Islamic Sharia jurists regarding the appointment of a non-Muslim as an arbitrator range between rejection and acceptance, whether in arbitration between Muslims only or between Muslims and non-Muslims. Nevertheless, it should be noted that these views of Islamic Sharia jurists are not legally binding but rather serve to offer guidance to Muslims and others. Hence, what is stated according to the Arbitration Law of 2012 is relevant regarding the permissibility of appointing a non-Muslim as an arbitrator in administrative, commercial, and civil disputes. On the other hand, the authors reached study results, in addition to the Arbitration Law of 2012, also through judicial awards in the Kingdom of Saudi Arabia and the relevant international conventions, which permitted the appointment of a non-Muslim as an arbitrator.

Acknowledgment

The author extends their appreciation to the Deanship of Scientific Research at Northern Border University, Arar, KSA for funding this research work through the project number NBU-FFR-2024-3238-01.

Conflict of Interest

The author declares no conflict of interest.

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