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## Islamic Finance Arbitration: Is It Possible for Non-Muslims to Arbitrate Islamic Financial Disputes? by A. Alrajhi

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# **Islamic Finance Arbitration: Is It Possible for Non-Muslims to Arbitrate Islamic Financial Disputes?**

Abdulmajed Alrajhi\*

## **Abstract**

Is it possible for non-Muslims to arbitrate Islamic financial disputes? Islamic financial products and services are a multi-trillion dollars industry. Given the nonexistence of interest and other features, these products and services have become desirable investments globally. Yet, due to the emergence of this field, some concerns have arisen regarding the arbitration method that will be used to resolve Islamic financial disputes as a result of the interaction of the international commercial arbitration and Islamic law. Neither the literature reviews nor the arbitration precedents have addressed whether the appointment of non-Muslim individuals to arbitrate the Islamic financial disputes is valid. This paper examines this issue from the Islamic law perspective and reaches the right conclusion that appointing non-Muslim arbitrators is valid in Islamic financial disputes. In doing so, this paper will contribute to the existence literature reviews and the development of Islamic arbitration practices, which include the Islamic financial arbitration.

## **I. Introduction**

With over two trillion dollars assets, the Islamic finance industry has been growing rapidly and globally.<sup>1</sup> Islamic financial products have been entering the global markets since the

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mid-seventies and have become desirable investments.<sup>2</sup> One of the main reasons behind the great success of the Islamic finance field is that Islamic financial products do not allow or validate the use of interest – “usury” – in any form.<sup>3</sup> Islamic financial investors and users are therefore more comfortable to trade in this field that ensures fair rates for them.

Yet, some Islamic financiers, investors, and arbitration practitioners have been concerned about the arbitration method that resolves Islamic financial disputes due to the interplay of international commercial arbitration law and Islamic law. One of the main concerns is whether non-Muslim individuals may be appointed as arbitrators to arbitrate Islamic financial disputes where Islamic law is the applicable law. Another concern about the arbitration method is whether non-Muslim financiers and investors are required to appoint Muslim arbitrators to arbitrate the Islamic financial disputes.

As a result, this paper aims to clarify one of the great concerns regarding the arbitration method that will be used in the Islamic financial arbitration, which is the validity of appointing non-Muslim individuals to arbitrate Islamic financial disputes. In addition, this paper examines the validity of appointing non-Muslim arbitrators in Islamic arbitration from the perspective of Islamic law and the approaches of the four Islamic schools, which are the Hanafih, Maliki, Shafi’i, and Hanbali schools. It is important to mention that when non-Muslim individuals are allowed to be appointed as arbitrators in Islamic arbitration, they are also allowed to be appointed as arbitrators in any type of Islamic arbitration as a result, which includes Islamic finance arbitration.

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background include: International Business Law, International Commercial Arbitration, Islamic Law, Civil Law, and Common Law.

<sup>1</sup> THE ECONOMIST, <http://www.economist.com> (last visited July. 2, 2015).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

There is not much in the way of literature of judicial precedents on this topic. As a result, this paper includes the following parts. Part II of this paper provides background on arbitration in the Arab region before the establishment of Islam as a religion. It also describes the practices of arbitration in the early stages of Islam. Part III clarifies the role of arbitrators inside the arbitral tribunals and whether arbitrators are required to possess the qualifications of judges. Part IV discusses the validity of appointing non-Muslims to arbitrate disputes either between Muslim and non-Muslim parties or between only Muslim parties. Finally, Part V draws the conclusion of this paper and mentions some recommendations to be taken into consideration.

## II. Background

Arbitration as a dispute-resolution mechanism was well known in the Arab region even before the establishment of Islam as a religion.<sup>4</sup> Pre-Islam Arabs lived in different tribes on the Arab island without formal governments to organize the people and their lives or to resolve their disputes.<sup>5</sup> These tribes lacked judicial systems, courts, and judges to resolve disputes.<sup>6</sup> As a result, arbitration was the only mechanism Arabs had to resolve their disputes.<sup>7</sup>

Although there were no written rules or specific laws that governed and organized the lives of pre-Islam Arabs, arbitrators used common sense, traditions, habits, and customs as rules to resolve disputes.<sup>8</sup> In addition, the types of cases and disputes that arbitrators dealt with were limited, due to the simple life at that time, such as the ownership of the water and the pasture and disputes over the presidency, honor, and wealth confronted those early arbitrators.<sup>9</sup> As for the

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<sup>4</sup> See ALI ABDULQADIR, *AL-FIQH AL-ESLAMI AL-QADA WA AL-HOSBAH* 60 (1st ed. 1986).

<sup>5</sup> MUHAMMAD RA'AFT OTHMAN, *AL-NITHAM AL-QADA'AI FI AL-FIQH AL-ISLAMI* 33, 35 (2nd ed. 1994).

<sup>6</sup> *Id.* at 33.

<sup>7</sup> See ABDULQADIR, *supra* note 4, at 59.

<sup>8</sup> OTHMAN, *supra* note 5, at 35.

<sup>9</sup> ABDULQADIR, *supra* note 4, at 60.

selection of arbitrators, the disputes at that time were always arbitrated by sole arbitrators who were selected by the parties due to their well-known qualifications and honorable characteristics.<sup>10</sup>

After the establishment of Islam, Islamic law confirmed the use of arbitration as an alternative dispute resolution and a mechanism for resolving disputes.<sup>11</sup> Islamic law also created rules and laws that have to be applied by arbitrators and parties when using arbitration under Islamic law.<sup>12</sup> Islamic law also confirmed the flexibility of the arbitration procedure and granted the enforceability of the arbitration awards.<sup>13</sup> Finally, Islamic law established a new type of arbitration, Family Dispute Arbitration, to arbitrate and resolve families' disputes.<sup>14</sup>

It is important to note that the use of arbitration to resolve disputes, either in the pre-Islam ages or after the establishment of Islam, was not often obtained.<sup>15</sup> During pre-Islamic ages, the small number of the people and their disputes resulted in a predictably low use of arbitration.<sup>16</sup> After Islam was established, arbitration was not frequently demanded because Caliphs had appointed judges to decide people's disputes.<sup>17</sup> Therefore, arbitration in the Arab region before and after the establishment of Islam has always existed but was not often used.<sup>18</sup> As a result, arbitration practices under Islamic law have not been developed and need to be improved to align with arbitration practices internationally.

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<sup>10</sup> ABDULQADIR, *supra* note 4, at 60.

<sup>11</sup> OTHMAN, *supra* note 5, at 51.

<sup>12</sup> *See* ABDULQADIR, *supra* note 4, at 15, 26-27.

<sup>13</sup> *See* MUHAMMAD BIN ALI BIN MUHAMMAD ALSHOKANI, AL-SAIL AL-JARAR AL-MOTADAFIQ ALA'A HADAEQ AL-AZHAR 835 (1st ed.).

<sup>14</sup> *See* 7 ALA'A ALDAIN ABU BAKR BIN MASAUD ALKILANI, BDA'A AL-SNA'A FI TARTEEB AL-SHRA'A 3 (2nd ed. 1986); *see also* 4 OTHMAN BIN ALI BIN MUHJIN ALBARAE & AHMED BIN MUHAMMAD BIN AHMED AL-SHALABI, TABIEEN AL-HAQAIQ SHARH KANZ AL-DAQAIQ WA HASHIAT AL-SHALABI 193 (1st ed.).

<sup>15</sup> *See* ABDULQADIR, *supra* note 4, at 60, 68.

<sup>16</sup> *See* ABDULQADIR, *supra* note 4, at 60.

<sup>17</sup> *See* ABDULQADIR, *supra* note 4, at 68.

<sup>18</sup> *See* ABDULQADIR, *supra* note 4, at 60, 68.

### III. The Role of Arbitrators and the Qualifications of Judges

Whether it is valid to appoint non-Muslims to arbitrate Islamic financial disputes between Muslim parties is related to the question of whether judges and arbitrators should be viewed in the same light.<sup>19</sup> It also relates to whether arbitrators must possess the qualifications of judges to be valid arbitrators.<sup>20</sup> This Part clarifies the role of arbitrators and the qualifications of judges that some Islamic schools require arbitrators to possess.

#### A. The Role of Arbitrators Inside the Arbitral Tribunals

The role of arbitrators inside the arbitral tribunals is a widely discussed issue among the Islamic schools, and Muslim scholars still debate the proper understanding of the role of arbitrators inside the arbitral tribunals.<sup>21</sup> Three different approaches to the role of arbitrators dominate the conversation: (1) arbitrators are the same as judges and required to possess the judges' qualifications;<sup>22</sup> (2) arbitrators are either agents, representatives, or conciliators and not required to possess the judges' qualifications;<sup>23</sup> and (3) arbitrators are not the same as judges and not required to possess the judicial qualifications.<sup>24</sup>

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<sup>19</sup> See 15 MUHAMMAD BIN SALEH BIN MUHAMMAD ALOTHIMAIN, AL-SHARAH AL-MOMTA'A ALA'A ZAD AL-MOSTAQNA'A 285-286 (1st ed. 2007).

<sup>20</sup> See 6 MANSOUR BIN YOUNIS BIN SALAH ALDAIN ALBUHUTI, KASHAF AL-QINA'A ALA'A MATN AL-EQNA'A 309.

<sup>21</sup> See 9 ALI BIN MUHAMMAD BIN MUHAMMAD BIN HABIB ALBSRI, AL-HAWI AL-KABAIR FI FIQH MATHHAB AL-IMAM AL-SHAFI'I 604 (Ali Muhammad Muawad et al. eds., 1st ed. 1999).

<sup>22</sup> See 3 ALI BIN ABI BAKR BIN ABDULJALIL, AL-HEDIAH FI SHARH BEDAIAT AL-MUBTADI 108 (Talal Yusuf ed.); see also 6 SHAMS ALDAIN MUHAMMAD BIN MUHAMMAD BIN ABDULRAHMAN, MWAHIB AL-JALIL FI SHARH MUKHTASAR KHALIL 112 (3rd ed. 1992); see also ALBSRI, *supra* note 21, at 604; see also 4 MUWAFIQ ALDAIN ABDULLAH BIN AHMED BIN MUHAMMAD BIN QUDAMH, AL-KAFI FI FIQH AL-IMAM AHMED 130 (1st ed. 1994).

<sup>23</sup> See ALBARAE & AL-SHALABI, *supra* note 14, at 132; see also 13 ABDULMALIK BIN ABDULLAH BIN YUSUF BIN MUHAMMAD ALJWAINI, NEHAIAAT AL-MATLAB FI DERAIAT AL-MATHHAB 282 (Abdulazim Mahmoud Aldaib ed., 1st ed. 2007).

<sup>24</sup> See 4 MOUSA BIN AHMED BIN MOUSA BIN SALEM ALMQDISI, AL-EQNA'A FI FIQH AL-IMAM AHMED BIN HANBAL 376-377 (Abdullataif Muhammad Alsabki ed.).

As for the first approach, some Islamic schools argue that the role of arbitrators inside the arbitral tribunals, which includes issuing awards, is essentially the same role that judges play in issuing decisions.<sup>25</sup> As such, according to these schools, arbitrators must possess the qualifications of judges.<sup>26</sup> The similarity of their roles of deciding the disputes and issuing the decisions requires them to have the same qualifications.<sup>27</sup>

For those schools, arbitral awards cannot be recognized and enforced unless they have been issued by arbitrators who possess the qualifications of judges.<sup>28</sup> Otherwise, the arbitration awards will be unenforceable until they are approved by the authority of the state – the judicial branch.<sup>29</sup> Islamic schools espousing this position consider arbitrators to be in a lower position than judges due to their limited authority and the limited types of disputes that are subject to arbitration.<sup>30</sup>

As for the second approach, some Muslim scholars have stated that arbitrators are considered to be agents or representatives for the parties who appointed them<sup>31</sup> and, as a result, arbitrators are not required to possess the qualifications of judges.<sup>32</sup> In addition, other Muslim

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<sup>25</sup> See ABDULJALIL, *supra* note 22, at 108; see also ABDULRAHMAN, *supra* note 22, at 112; see also ALBSRI, *supra* note 21, at 604; see also BIN QUDAMH, *supra* note 22, at 130.

<sup>26</sup> See ABDULJALIL, *supra* note 22, at 108; see also ABDULRAHMAN, *supra* note 22, at 112; see also ALBSRI, *supra* note 21, at 604; see also BIN QUDAMH, *supra* note 22, at 130.

<sup>27</sup> See 8 BORHAN ALDAIN MAHMOUD BIN AHMED BIN ABDULAZIZ, AL-MOHAIH AL-BURHANI FI AL-FIQH AL-NOUMANI 117 (Abdulkarim Sami Aljoundi ed., 1st ed. 2004); see also ABDULRAHMAN, *supra* note 22, at 112.

<sup>28</sup> See ABDULAZIZ, *supra* note 27, at 117.

<sup>29</sup> See ABDULAZIZ, *supra* note 27, at 126; see also ABDULRAHMAN, *supra* note 22, at 113.

<sup>30</sup> 7 MUHAMMAD BIN MUHAMMAD BIN MAHMOUD ALROUMI ALBABARTI, AL-ENAIH SHARH AL-HEDIAH 315; OTHMAN, *supra* note 5, at 51.

<sup>31</sup> ALJWAINI, *supra* note 23, at 282.

<sup>32</sup> See ALBSRI, *supra* note 21, at 604.

scholars have stated that arbitration is conciliation and arbitrators are the same as conciliators<sup>33</sup> and therefore are not obligated to possess judges' qualifications.<sup>34</sup>

It is important to note that those Muslim scholars who consider arbitrators to be agents, representatives, or conciliators do not recognize or consider enforceable arbitration awards without the consent of the parties.<sup>35</sup> For those Muslim scholars, arbitration awards are nonbinding and unenforceable until they are approved and confirmed by the arbitration parties, even if the arbitrators who issue them possess the qualifications of the judges.<sup>36</sup>

As for the third approach, one of the schools of thought has stated that arbitrators are not the same as judges and therefore are not required to possess the qualifications of judges.<sup>37</sup> This school of thought reasoned its approach by indicating that arbitrators' authorities are limited to deciding specific disputes for specific people who agreed to arbitration whereas judges decide general disputes for general people without prior agreement.<sup>38</sup> Arbitrators therefore are not required to possess judges' qualifications.<sup>39</sup> In addition, the arbitration awards are enforced even if the arbitrators do not possess the qualifications of judges as long as these awards do not contradict with Islamic law.<sup>40</sup>

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<sup>33</sup> See ALBARAE & AL-SHALABI, *supra* note 14, at 193.

<sup>34</sup> ALOTHIMAIN, *supra* note 19, at 285-286.

<sup>35</sup> 9 MAHMOUD BIN AHMED BIN MUSA BADR ALDAIN ALAINI, AL-BENAIHAH SHARH AL-HEDAIAH 58 (1st ed. 2000); 7 ZAID ALDAIN BIN IBRAHIM BIN MUHAMMAD ET AL., AL-BAHAR AL-RAEQ SHARH KANZ AL-DAQAEQ WA MENHAT AL-KHALEQ WA TAKMILAT AL-TOURI 27 (2nd ed.).

<sup>36</sup> See ABDULAZIZ, *supra* note 27, at 117; see also 18 ABDULMALIK BIN ABDULLAH BIN YUSUF BIN MUHAMMAD ALJWAINI, NEHAIAH AL-MATLAB FI DERAIAH AL-MATHHAB 583 (Abdulazim Mahmoud Aldaib ed., 1st ed. 2007).

<sup>37</sup> ALMQDISI, *supra* note 24, at 377.

<sup>38</sup> ALOTHIMAIN, *supra* note 19, at 285-286.

<sup>39</sup> ALOTHIMAIN, *supra* note 19, at 285-286.

<sup>40</sup> See ALBUHUTI, *supra* note 20, at 309.



## B. The Qualifications of Judges

The qualifications of judges that some Islamic schools also require of arbitrators in order to validate their appointments<sup>41</sup> and grant the enforceability of their awards<sup>42</sup> can be categorized into three different classifications. These classifications are: (1) qualifications that all Islamic schools require;<sup>43</sup> (2) qualifications that some Islamic schools require;<sup>44</sup> and (3) qualifications that some Islamic schools find preferable.<sup>45</sup>

The four Islamic schools have agreed on some requirements that all judges must possess.<sup>46</sup> For those schools, judges must be Muslims, adults, and possess sound minds, the sense of sight, and the sense of hearing.<sup>47</sup> In addition to these requirements, judges also must have the ability to speak, knowledge of Islamic general principles and general rules, and knowledge of Islamic law.<sup>48</sup>

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<sup>41</sup> See ABDULJALIL, *supra* note 22, at 108; see also ABDULRAHMAN, *supra* note 22, at 112; see also ALBSRI, *supra* note 21, at 604; see also BIN QUDAMH, *supra* note 22, at 130.

<sup>42</sup> See ABDULAZIZ, *supra* note 27, at 117.

<sup>43</sup> MUAFAQ ALDAIN ABDULLAH BIN AHMED BIN MUHAMMAD BIN QUDAMH, UMDAT AL-FIQH 147 (Ahmed Muhammad Azuz ed., 2004); IBRAHIM BIN ALI BIN YUSUF ALSHIRAZI, AL-TANWAIH FI AL-FIQH AL-SHAFI'I 251 (1st ed. 1983); ABDULRAHMAN BIN MUHAMMAD BIN AUSKAR ALBAQDADI, ERSHAD AL-SALIK ELA ASHRAF AL-MASALIK FI FIQH AL-IMAM MALIK 117 (Ibrahim Hasan ed., 3rd ed.); see ALBARAE & AL-SHALABI, *supra* note 14, at 175-176.

<sup>44</sup> JAMAL ALDAIN BIN UMAR ABIN ALHAJIB ALMALIKI, JAMAE AL-UMAHAT 462 (Abu Abdulrahman Alakhdar ed., 2nd ed. 2000); see 3 IBRAHIM BIN ALI BIN YUSUF ALSHIRAZI, AL-MUHATHAB FI FIQH AL-IMAM AL-SHAFI'I 377 (Zakaria Umirat ed., 1st ed. 1995).

<sup>45</sup> ALMALIKI, *supra* note 44, at 462; 11 MOHEI ALDAIN YAHYA BIN SHARAF ALNAWAWAI, ROUDAT AL-TALEEBIN WA UMDAT AL-MUFTAIN 97 (Zuhair Alshaweish ed., 3rd ed. 1991).

<sup>46</sup> BIN QUDAMH, *supra* note 43, at 147; ALSHIRAZI, *supra* note 43, at 251; ALBAQDADI, *supra* note 43, at 117; see ALBARAE & AL-SHALABI, *supra* note 14, at 175-176.

<sup>47</sup> 6 Zaid Aldain Bin Ibrahim Bin Muhammad Et Al., AL-BAHAR AL-RAEQ SHARH KANZ AL-DAQAEQ WA MENHAT AL-KHALEQ WA TAKMILAT AL-TOURI 283 (2nd ed.); ALMALIKI, *supra* note 44, at 462; 7 MUHAMMAD BIN MUHAMMAD ALGAZALI ALTOUSI, AL-WASAIT FI AL-MTHAHAB 289 (Ahmed Mahmoud Ibrahim et al eds., 1st ed. 1996); 8 IBRAHIM BIN MUHAMMAD BIN ABDULLAH BIN MUHAMMAD BIN MUFLEH, AL-MUBDAE FI SHARH AL-MUQNAE 154 (1st ed. 1997).

<sup>48</sup> MUHAMMAD, *supra* note 47, at 283; see 8 MAHMOUD BIN AHMED BIN ABDULAZIZ, AL-MOHAIT AL-BURHANI FI AL-FIQH AL-NOUMANI 5 (Abdulkarim Sami Aljoundi ed., 1st ed. 2004).

Because these requirements are considered so obviously necessary for judges, some Islamic schools mention them only briefly and without explanation.<sup>49</sup> In the event that a judge loses one of these qualifications, the judge will be dismissed.<sup>50</sup>

Some Islamic schools have argued that qualified people must possess other requirements in order to be appointed as judges.<sup>51</sup> These schools require qualified people to have characteristics of idealism, shrewdness, and diligence and only allow males to be appointed as judges.<sup>52</sup> These extra four requirements have engendered some debate among the Islamic schools.<sup>53</sup>

It is important to mention that the main argument among the Islamic schools regarding these four requirements is whether to consider them as mandatory qualifications that must be possessed or as desirable qualifications that are recommended to be possessed.<sup>54</sup> Three of the Islamic schools noted that these four requirements are mandatory qualifications that must be possessed by qualified people in order to be appointed judges.<sup>55</sup> Yet one of the Islamic schools has stated that these four requirements are desirable to be possessed by judges but not mandatory.<sup>56</sup>

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<sup>49</sup> See 2 ABU ALWALEED MUHAMMAD BIN AHMED BIN RASHID ALQURTUBI, *AL-MUQADIMAT AL-MUMAHIDAT* 258-259 (1st ed. 1988); see also MUHAMMAD, *supra* note 47, at 283.

<sup>50</sup> See ABDULRAHMAN, *supra* note 22, at 87; see also 8 MUHAMMAD BIN YUSUF BIN ABI ALQASM, *AL-TAJ WA AL-EKLIL LE-MUKHTASAR KHALIL* 63 (1st ed. 1994).

<sup>51</sup> ALMALIKI, *supra* note 44, at 462; see ALSHIRAZI, *supra* note 44, at 377.

<sup>52</sup> ALQASM, *supra* note 50, at 63; see ALSHIRAZI, *supra* note 44, at 377; see also ABDULRAHMAN, *supra* note 22, at 87-88.

<sup>53</sup> See ABDULAZIZ, *supra* note 48, at 5-6; see also ABDULJALIL, *supra* note 22, at 101.

<sup>54</sup> See ALQURTUBI, *supra* note 49, at 258-259; see also ALSHIRAZI, *supra* note 44, at 377-378; see also 10 MUAFAQ ALDAIN ABDULLAH BIN AHMED BIN MUHAMMAD BIN QUDAMH, *AL-MUQNI* 37 (1968); see also 2 ABDULSALAM BIN ABDULLAH BIN ALKHODUR BIN MUHAMMAD BIN TIMIAH, *AL-MUHARER FI AL-FIQH ALA MTHAHAB AL-IMAM AHMED BIN HANBAL* 203 (2nd ed. 1984); see also ALBARAE & AL-SHALABI, *supra* note 14, at 175.

<sup>55</sup> ALQURTUBI, *supra* note 49, at 258-259; see ALSHIRAZI, *supra* note 44, at 377-378; see also BIN QUDAMH, *supra* note 54, at 36-37; BIN TIMIAH, *supra* note 54, at 203.

<sup>56</sup> See ABDULAZIZ, *supra* note 48, at 5-6; see also ALBARAE & AL-SHALABI, *supra* note 14, at 175-176.

Finally, there are other qualifications that some Islamic schools recommend qualified people to possess in order to appoint the most highly qualified judges.<sup>57</sup> For example, some Islamic schools recommend that judges are better to be financially comfortable, not in debt or in need, and never convicted of any crime.<sup>58</sup> In addition, some Islamic schools have stated that judges are better to be mindful, careful, not spiteful or greedy, and not powerful or weak.<sup>59</sup>

In short, the reason behind the misunderstanding of the role of arbitrators under Islamic law has its roots in the old ages where Islamic schools were in the early stages of their establishments, and it was not common to use arbitration to resolve disputes.<sup>60</sup> At the time, arbitration existed but it did not much resemble today's form.<sup>61</sup> Thus, Islamic schools and Muslim scholars discussing the role of arbitrators considered them to be judges and required them to possess the qualifications of judges.<sup>62</sup>

However, it is clear that arbitrators are not the same as judges.<sup>63</sup> Although both arbitrators and judges issue decisions that resolve people's disputes, arbitrators are different from judges due to their limited authority, limited jurisdiction, and the requirement that parties consent to arbitration.<sup>64</sup> As a result, arbitrators are not the same as judges and, therefore, are not required to possess the qualifications of judges, including the requirement that judges must be Muslims.<sup>65</sup>

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<sup>57</sup> ALMALIKI, *supra* note 44, at 462; ALNAWAWAIM, *supra* note 45, at 97; ALQURTUBI, *supra* note 49, at 259.

<sup>58</sup> ALMALIKI, *supra* note 44, at 462; ALQURTUBI, *supra* note 49, at 259.

<sup>59</sup> ALNAWAWAIM, *supra* note 45, at 97.

<sup>60</sup> *See* ABDULQADIR, *supra* note 4, at 23.

<sup>61</sup> *See* KHALED BIN ABDULLAH ALKHUDAIR, HOKAM SHART AL-ISLAM FI AL-MOHAKIM FI AL-MONAZA' AT AL-TAHKIMIAH 22 (Majalah Alqada'iah. 4th ed. 2011).

<sup>62</sup> *See* ABDULJALIL, *supra* note 22, at 108; *see also* ABDULRAHMAN, *supra* note 22, at 112.

<sup>63</sup> *See* ALOTHIMAIN, *supra* note 19, at 284-286.

<sup>64</sup> *See* ALOTHIMAIN, *supra* note 19, at 285.

<sup>65</sup> *See* ALBUHUTI, *supra* note 20, at 309.

#### IV. The Appointment of Non-Muslim Arbitrators

Although Islamic schools and Muslim scholars have considered the role of arbitrators<sup>66</sup> and whether arbitrators are required to possess the qualifications of judges,<sup>67</sup> the appointment of non-Muslim individuals to arbitrate disputes involving Muslim parties has not carefully discussed.<sup>68</sup> It has been said that non-Muslim individuals are not supposed to be appointed to arbitrate disputes between either Muslim parties or Muslim and non-Muslim parties.<sup>69</sup> Yet another approach has stated that appointing non-Muslim arbitrators to arbitrate disputes is permitted by Islamic law in certain situations.<sup>70</sup>

Therefore, this Part will attempt to clarify some situations where Islamic law permits the appointment of non-Muslim arbitrators and other situations where Islamic law is silent but likely accepts appointing them.<sup>71</sup> In doing so, this Part examines the validity of appointing non-Muslim arbitrators or both non-Muslim and Muslim arbitrators when one of the arbitration parties is a Muslim. Then, this Part discusses the validity of appointing non-Muslim arbitrators or both non-Muslim and Muslim arbitrators when all the arbitration parties are Muslims.

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<sup>66</sup> ALBSRI, *supra* note 21, at 604; ALOTHIMAIN, *supra* note 19, at 285-286.

<sup>67</sup> See ALBUHUTI, *supra* note 20, at 309.

<sup>68</sup> See ABDULJALIL, *supra* note 22, at 108; *see also* 10 ABU ALABAS SHIHAB ALDAIN AHMED BIN EDRAIS BIN ABDULRAHMAN, AL-THAKHAIRAH 36 (Muhammad Bu Khabzah ed., 1st ed. 1994); *see also* ALKHUDAIR, *supra* note 61, at 40-41.

<sup>69</sup> See ABDULJALIL, *supra* note 22, at 108; *see also* ABDULRAHMAN, *supra* note 68, at 36.

<sup>70</sup> ALKHUDAIR, *supra* note 61, at 40-41.

<sup>71</sup> See ALKHUDAIR, *supra* note 61, at 40-46.

## **A. The Appointment of Non-Muslim Arbitrators to Arbitrate Disputes Between Muslim and Non-Muslim Parties**

The appointment of non-Muslim arbitrators to arbitrate disputes between Muslim and non-Muslim parties is permitted under Islamic law<sup>72</sup> and is evident in three different situations:<sup>73</sup>

(1) when an arbitral tribunal is constituted by a sole non-Muslim arbitrator to resolve a dispute between Muslim and non-Muslim parties; (2) when the arbitral tribunal is constituted by Muslim and non-Muslim arbitrators to resolve a dispute between Muslim and non-Muslim parties; and (3) when the arbitral tribunal is constituted by non-Muslim arbitrators to resolve a dispute between Muslim and non-Muslim parties.

Islamic law permits the appointment of a sole non-Muslim arbitrator to arbitrate a dispute between Muslim and non-Muslim parties.<sup>74</sup> This permission originates from an arbitration dispute that was conducted during the era of the Prophet Muhammad.<sup>75</sup> In that arbitration dispute, which was between Prophet Muhammad with his followers and another non-Muslim Arab tribe, Prophet Muhammad asked the non-Muslim Arab tribe if they would agree to appoint a sole arbitrator who was non-Muslim and from their religion to arbitrate the dispute.<sup>76</sup> The non-Muslim Arab tribe agreed to appoint that arbitrator who, in the end, decided the dispute and resolved the issue.<sup>77</sup> Although that arbitration dispute was not about a commercial issue, it can

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<sup>72</sup> See ALKHUHAIR, *supra* note 61, at 40-46.

<sup>73</sup> See ALKHUHAIR, *supra* note 61, at 40-46; see also 3 ABDULMALIK BIN ABDULLAH BIN YUSUF BIN MUHAMMAD ALJWAINI, KETAB AL-TALKHAIS FI AUSOL AL-FIQH 145 (Abdullah Jolim Alnabali et al. eds.); see also 17 SIRAJ ALDAIN OMAR BIN ALI BIN ADEL ALNOAMANI, AL-LIBAB FI AULOM AL-KETAB 528 (Adel Ahmed Abdulmojud et al. eds., 1st ed. 1998).

<sup>74</sup> ALKHUHAIR, *supra* note 61, at 41-44; see 4 ALA'A ALDAIN ALI BIN MUHAMMAD BIN IBRAHIM BALKHAZIN, LIBAB AL-TA'WAIL FI MA'ANI ALTANZEEL 177 (Muhammad Ali Shahain ed., 1st ed. 1994).

<sup>75</sup> 9 MUHAMMAD THANA'A ALLAH ALMADHARI, AL-TAFSAIR AL-MADHARI 44 (Qulam Nabi Altounesi ed., 1991).

<sup>76</sup> ALNOAMANI, *supra* note 73, at 528.

<sup>77</sup> BALKHAZIN, *supra* note 74, at 177.

be used as a valid ground to support the appointment of a non-Muslim to arbitrate commercial disputes between Muslim and non-Muslim parties.<sup>78</sup>

Islamic law also permits the appointment of Muslim and non-Muslim arbitrators to arbitrate a dispute involving Muslim and non-Muslim parties.<sup>79</sup> This permission is founded in the holy Qur'an in the family dispute arbitration, which is a type of Islamic arbitration that resolves family disputes.<sup>80</sup> The holy Qur'an clearly allows Muslim men to marry Christian or Jewish women.<sup>81</sup> Then, the holy Qur'an gives the married couple the option to resolve their disputes, in case there are any, by using arbitration.<sup>82</sup> Two arbitrators are appointed in these circumstances, one from the wife's family members and another arbitrator from the husband's family members.<sup>83</sup>

As a result, when a Muslim man marries a Christian or Jewish woman and they have family issues, they can agree to resolve their disputes through arbitration.<sup>84</sup> In this case, the husband will appoint an arbitrator from his family members or his people, which will probably be a Muslim, and the wife will appoint an arbitrator from her family members or her people, which will probably not be a Muslim, then those arbitrators will arbitrate the dispute.<sup>85</sup> In this situation, the arbitral tribunal will be constituted by Muslim and non-Muslim arbitrators to

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<sup>78</sup> See ALKHUHAIR, *supra* note 61, at 41, 43-44.

<sup>79</sup> See ALKHUHAIR, *supra* note 61, at 40-41.

<sup>80</sup> See Chapter Al-Ma'idah verse 5 and Chapter An-Nisa' verse 35 of the holy Qur'an, ALLAHS QURAN, <http://www.allahsquran.com> (last visited July. 2, 2015).

<sup>81</sup> Chapter Al-Ma'idah verse 5 of the holy Qur'an states "And [lawful in marriage are] chaste women from among the believers and chaste women from among those who were given the Scripture before you." ALLAHS QURAN, <http://www.allahsquran.com> (last visited July. 2, 2015).

<sup>82</sup> Chapter An-Nisa' verse 35 of the holy Qur'an states "And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted [with all things]." ALLAHS QURAN, <http://www.allahsquran.com> (last visited July. 2, 2015).

<sup>83</sup> *Id.*

<sup>84</sup> ALKHUHAIR, *supra* note 61, at 40-41.

<sup>85</sup> ALKHUHAIR, *supra* note 61, at 40-41.

arbitrate a dispute between Muslim and non-Muslim parties.<sup>86</sup> Even though this type of arbitration is based on family dispute arbitration, it can be used as a permission in any other type of arbitration disputes.<sup>87</sup>

Islamic law is silent as to whether it is permissible to appoint non-Muslim arbitrators to arbitrate a dispute between Muslim and non-Muslim parties. Regardless, reasoning by analogy leads to the conclusion that this kind of situation should be permitted under Islamic law.<sup>88</sup> Under Islamic law, reasoning by analogy, which means transferring a judgment from a situation to another when the two situations have something in common, is a general principle that can be applied to address some situations when Islamic law is silent.<sup>89</sup> As a result, because appointing a sole non-Muslim arbitrator to arbitrate a dispute between Muslim and non-Muslim parties is allowed under Islamic law,<sup>90</sup> the appointment of more than one non-Muslim arbitrator to decide a dispute between Muslim and non-Muslim parties should also be permitted.

In short, appointing non-Muslim arbitrators to decide arbitration disputes involving Muslim and non-Muslim parties is valid and permitted under Islamic law.<sup>91</sup> Islamic law permits the appointment of either a sole non-Muslim arbitrator, non-Muslim arbitrators, or Muslim and non-Muslim arbitrators to resolve disputes as long as these disputes involve Muslim and non-

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<sup>86</sup> ALKHUDAIR, *supra* note 61, at 40-41.

<sup>87</sup> ALKHUDAIR, *supra* note 61, at 40-41.

<sup>88</sup> See MUHAMMAD BIN ABDULLAH ABU BAKR BIN ALARABI ALESHBILI, AL-MAHSOUL FI AUSOL AL-FIQH 124 (Hussain Ali Alyadiri et al. eds., 1st ed. 1999).

<sup>89</sup> See 2 ABDULMALIK BIN ABDULLAH BIN YUSUF BIN MUHAMMAD ALJWAINI, AL-BRHAN FI AUSOL AL-FIQH 5-6 (Salah Bin Muhammad Bin Awidah ed., 1st ed. 1997).

<sup>90</sup> See ALKHUDAIR, *supra* note 61, at 41-44; see also BALKHAZIN, *supra* note 74, at 177.

<sup>91</sup> ALKHUDAIR, *supra* note 61, at 40-46; see ALESHBILI, *supra* note 88, at 124; see also ALMADHARI, *supra* note 75, at 44.

Muslim parties.<sup>92</sup> In addition, the appointment of those non-Muslim arbitrators is also valid in any type of arbitration dispute.<sup>93</sup>

## **B. The Appointment of Non-Muslim Arbitrators to Arbitrate Disputes Between Muslim Parties**

The appointment of non-Muslim arbitrators to resolve disputes between Muslim parties is an issue that has been mentioned only briefly under Islamic law.<sup>94</sup> The conservative approach has been that non-Muslim arbitrators are not allowed to arbitrate disputes between Muslim parties.<sup>95</sup> The liberal approach allows their appointments.<sup>96</sup> In addition, where both parties are Muslims, the number of arbitrators and the combination of Muslim and non-Muslim arbitrators are not issues;<sup>97</sup> if it is permitted for a non-Muslim arbitrator to arbitrate a dispute between Muslim parties, it is *a fortiori* permitted for non-Muslim arbitrators and the combination of Muslim and non-Muslim arbitrators as well.

The majority of Islamic schools and Muslim scholars take the conservative approach and have stated that non-Muslim individuals cannot be appointed as arbitrators to decide disputes between Muslim parties.<sup>98</sup> Some have indicated that arbitrators are the same as judges and are required to possess judges' qualifications, including being Muslims.<sup>99</sup> As a result, non-Muslim

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<sup>92</sup> ALKHUHAIR, *supra* note 61, at 40-46; *see* ALJWAINI, *supra* note 89, at 5-6; *see also* BALKHAZIN, *supra* note 74, at 177.

<sup>93</sup> ALKHUHAIR, *supra* note 61, at 40-41.

<sup>94</sup> *See* 2 MALIK BIN ANAS BIN MALIK BIN AMER ALASBAHI, AL-MUDAWANH 266 (1st ed. 1994); *see also* 12 YAHYA BIN ABI ALKHAIR BIN SALEM ALAMRANI, AL-BAIAN FI MTHAHAB AL-IMAM AL-SHAFI'I 165 (Qasim Muhammad Alnouri ed., 1st ed. 2000).

<sup>95</sup> ABDULJALIL, *supra* note 22, at 108; ABDULRAHMAN, *supra* note 68, at 36.

<sup>96</sup> *See* ALKHUHAIR ALSHARQ ALAWSAT, <http://www.archive.aawsat.com> (last visited July. 2, 2015).

<sup>97</sup> *See id.*

<sup>98</sup> ABDULJALIL, *supra* note 22, at 108; ABDULRAHMAN, *supra* note 68, at 36; ALAMRANI, *supra* note 94, at 165; BIN QUDAMH, *supra* note 22, at 130.

<sup>99</sup> *See* ALBARAE & AL-SHALABI, *supra* note 14, at 193; *see also* BIN QUDAMH, *supra* note 22, at 130.



individuals are not allowed to be appointed as arbitrators in disputes between Muslim parties.<sup>100</sup> Other majorities have mentioned that arbitrating disputes is considered to be a powerful and honorable act, which non-Muslim arbitrators are not supposed to perform over Muslim parties.<sup>101</sup> It is important to note, however, that this school of thought appeared during the Islamic Empire, where judges were appointed all over the region and arbitrating disputes was not often conducted.<sup>102</sup>

The liberal approach allows the appointment of non-Muslim individuals to arbitrate disputes between Muslim parties.<sup>103</sup> This liberal approach mentions several rational reasons that grant the validity to appoint non-Muslim arbitrators under Islamic law.<sup>104</sup> These rational reasons are: (1) the origin in everything is permissible until proves otherwise; (2) arbitration differs from judicial proceedings; (3) a contract is a law between the parties; (4) the comparison between non-Muslim judges with non-Muslim arbitrators; and (5) the need and necessity of arbitration clauses. These concepts are clarified below.

As to the first rational reason, Islamic law grants the validity and the legality for everything and every legal act as long as there is no clear evidence to prohibit it.<sup>105</sup> This is a general principle under Islamic law which reads as, “The origin in everything is permissible until

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<sup>100</sup> See ALBARAE & AL-SHALABI, *supra* note 14, at 193; see also BIN QUDAMH, *supra* note 22, at 130.

<sup>101</sup> See ALKHUHAIR, *supra* note 61, at 38.

<sup>102</sup> See ABDULQADIR, *supra* note 4, at 26, 63.

<sup>103</sup> See ALKHUWAILDI, *supra* note 96.

<sup>104</sup> See ABDULWAHAB KHALAF, *ELM AUSOL AL-FIQH WA KHOLASAT TAREKH AL-TASHRAI'A* 225; see also ALKHUWAILDI, *supra* note 96; see also 4 AHMED BIN ALI BIN HAJAR ABU ALFADAL ALASQALANI, *FATAH AL-BARI SHARH SAHAIH AL-BOKHARI* 410 (Muhammad Fowad Abdulbaqi et al. eds., 1959); see also OTHMAN, *supra* note 5, at 63-64; see also 1 ABDULRAHMAN BIN SALEH ALABDULATAIF, *AL-QWA'AD WA AL-ZAWABID AL-FIQHAI'A AL-MOTAZAMINAH LALTAISER* 241-244 (1st ed. 2003).

<sup>105</sup> See ABDULWAHAB KHALAF, *ELM AUSOL AL-FIQH* 91 (8th ed.).

proves otherwise.”<sup>106</sup> In the case of appointing non-Muslim arbitrators to decide disputes between Muslim parties, it is a legal act that fits under this general principle,<sup>107</sup> which is considered to be permitted. The opponents’ evidence, which centers on the argument that arbitrators are essentially judges and arbitrating disputes is honorable and powerful act;<sup>108</sup> is not enough proof to prohibit the appointment of non-Muslim arbitrators.<sup>109</sup> Therefore, appointing non-Muslim arbitrators to arbitrate disputes between Muslim parties should be permitted under Islamic law due to this general principle.

As to the second rational reason, arbitration as a dispute-resolution mechanism is different from judicial proceedings.<sup>110</sup> People are not required to sign any contract that contains an arbitration clause, which means people are not compelled to use arbitration, and arbitrators derive their authorities and their jurisdictions from arbitration parties.<sup>111</sup> Consequently, people’s wills and consents initiate the arbitration that aims to resolve their disputes.<sup>112</sup> As a result, non-Muslim arbitrators who derive their authorities from the will of the parties are capable of resolving people’s disputes<sup>113</sup> and, therefore, should be allowed to be appointed to arbitrate disputes between Muslim parties when needed.

As to the third rational reason, under Islamic law, people have the right to include, exclude, and agree on what they want in their contracts as long as they do not conflict with

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<sup>106</sup> 8 BDR ALDAIN MUHAMMAD BIN ABDULLAH ALZARKSHI, *AL-BAHAR AL-MOHAIT FI AUSOL AL-FIQH* 10 (1st ed. 1994); ABDULRAHMAN BIN ABI BAKR JALAL ALDAIN ALSWAITI, *AL-ASHBAH WA AL-NADAER* 60 (1st ed. 1990).

<sup>107</sup> See KHALAF, *supra* note 104, at 225.

<sup>108</sup> See BIN QUDAMH, *supra* note 22, at 130; see also ALKHUHAIR, *supra* note 61, at 38.

<sup>109</sup> See ALOTHIMAIN, *supra* note 19, at 284-286; see also ALMAKTABH ALSHAMILAH MAJLT MUJAMA’ ALFIGH ALISLAMI, <http://www.shamela.com> (last visited July. 2, 2015).

<sup>110</sup> See ALSHOKANI, *supra* note 13, at 818.

<sup>111</sup> See OTHMAN, *supra* note 5, at 23-33.

<sup>112</sup> See ABDULAZIZ, *supra* not 27, at 119.

<sup>113</sup> See ALKHWAILDI, *supra* note 96.

Islamic law.<sup>114</sup> This is a general principle in Islamic law that is called “A contract is a law between the parties.”<sup>115</sup> In addition, it is permitted under Islamic law to hire and work with non-Muslim individuals.<sup>116</sup> As a result, it is permitted for two Muslim individuals to hire a non-Muslim individual to work with them and draft their contract.<sup>117</sup> Consequently, those two Muslim individuals should have the right to appoint that non-Muslim individual as an arbitrator to resolve their disputes, in case there are any, due to his knowledge and experience about the work and the contract.

As to the fourth rational reason, another of Islamic law’s general principles and regulating rules is reasoning by analogy.<sup>118</sup> This general principle can be used to transfer a judgment from one case to another when the two cases have something in common.<sup>119</sup> An example of applying this general principle, Muslim people who live in non-Muslim countries can use those countries’ judicial systems, which is usually run by non-Muslim judges, to decide their disputes as long as they do not conflict with Islamic law.<sup>120</sup> Consequently, Muslim people should be allowed to appoint non-Muslim arbitrators to decide their disputes, especially when the Muslim parties can stipulate that Islamic law is the governing and applicable law,<sup>121</sup> compared to the non-Muslim judges who decide Muslim people disputes in the non-Muslim countries.

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<sup>114</sup> See AHMED ALRAISONI, NADARAIT AL-MAQASID ENDA AL-IMAM AL-SHATIBI 346 (2nd ed. 1992).

<sup>115</sup> AHMED BIN ALSHAIKH MUHAMMAD ALZARQA, SHARAH AL-QWA’AD AL-FIQHAI’A 482 (Mustafa Ahmed Alzarqa ed., 2nd ed. 1989).

<sup>116</sup> See ALASQALANI, *supra* note 104, at 410.

<sup>117</sup> See 4 ABDULAZIZ BIN AHMED BIN MUHAMMAD ALA ALDAIN ALBOKHARI, KSHF AL-ASRAR SHARH AUSOL AL-BAZDAWI 242.

<sup>118</sup> See ALJWAINI, *supra* note 73, at 145.

<sup>119</sup> See ALJWAINI, *supra* note 89, at 5.

<sup>120</sup> See OTHMAN, *supra* note 5, at 63-64.

<sup>121</sup> See ABDULRAHMAN, *supra* note 68, at 36; see also ALKHWAILDI, *supra* note 96.

As to the fifth rational reason, arbitration today is considered to be the most preferable mechanism for resolving international disputes given its efficiency, credibility, and flexibility.<sup>122</sup> Moreover, arbitration clauses have become obligatory and necessary in many different international and national contracts.<sup>123</sup> In addition, those arbitration clauses have extended to stipulate certain institutions, organizations, and laws that govern the arbitration disputes where the religion of arbitrators is usually not mentioned.<sup>124</sup>

Some arbitral tribunals might therefore consist of Muslim arbitrators, Muslim and non-Muslim arbitrators, or entirely non-Muslim arbitrators.<sup>125</sup> As a result, and due to the two general principles under Islamic law, “Necessities permit prohibitions” and “The need is in the place of necessity,”<sup>126</sup> the appointment of non-Muslim arbitrators to arbitrate disputes between Muslim parties should be allowed under Islamic law, even from the opponents’ perspective, due to these general principles and the necessity of those arbitration clauses.

In short, the appointment of non-Muslim arbitrators to arbitrate disputes between Muslim parties is a matter that has had some discussions under Islamic law and resulted in two different approaches, conservative and liberal.<sup>127</sup> The conservative approach prohibits the appointment of non-Muslim arbitrators to arbitrate disputes between Muslim parties,<sup>128</sup> while the liberal approach permits the appointment of non-Muslim arbitrators to decide disputes between Muslim

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<sup>122</sup> See OTHMAN, *supra* note 5, at 51.

<sup>123</sup> ALKHUDAIR, *supra* note 61, at 20.

<sup>124</sup> ALKHUDAIR, *supra* note 61, at 22.

<sup>125</sup> ALKHUDAIR, *supra* note 61, at 22.

<sup>126</sup> See ALABDULATAIF, *supra* note 104, at 241-244.

<sup>127</sup> See ABDULJALIL, *supra* note 22, at 108; *see also* ABDULRAHMAN, *supra* note 68, at 36; *see also* ALKHWAILDI, *supra* note 96.

<sup>128</sup> ALAMRANI, *supra* note 94, at 165; BIN QUDAMH, *supra* note 22, at 130.

parties.<sup>129</sup> However, the liberal approach is considered to be the proper approach due to the rational reasons stated above and the necessity and the need for the arbitration clauses.<sup>130</sup>

## V. Conclusion

This Paper, after setting forth some paragraphs, concludes that non-Muslim individuals may, under Islamic law, be appointed as arbitrators regardless of their number and the religion of the parties. In addition, their appointments also should be valid in all types of arbitrations, including Islamic financial disputes. Moreover, this Paper concludes that the combination of Muslim and non-Muslim arbitrators to arbitrate disputes between Muslim parties is not required and, therefore, arbitral tribunals can be constituted either by a sole non-Muslim arbitrator or an odd number of non-Muslim arbitrators. Finally, this Paper concludes that the opponents lack valid and explicit reasons and evidence for prohibiting non-Muslim arbitrators from arbitrating disputes between Muslim parties.

Today, non-Muslim arbitrators have been considered the most qualified, educated, and experienced people, and there is need for them to arbitrate Islamic financial disputes due to their qualifications. There might be issue for some non-Muslim arbitrators who do not speak Arabic and are not familiar with Islamic law or applying Islamic law, particularly when the arbitration clauses of Islamic financial disputes do not reference the laws of any specific country. In these kind of cases, non-Muslim arbitrators should use the traditional method – that is, they should apply Islamic law by evaluating the Islamic schools' approaches to resolve the disputes. Non-Muslim arbitrators, who do not speak Arabic and are not familiar with Islamic law, should

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<sup>129</sup> See ALKHWAILDI, *supra* note 96.

<sup>130</sup> See KHALAF, *supra* note 104, at 225; *see also* ALKHWAILDI, *supra* note 96; *see also* ALASQALANI, *supra* note 104, at 410; *see also* OTHMAN, *supra* note 5, at 63-64; *see also* ALABDULATAIF, *supra* note 104, at 241-244.

consult with Islamic law experts to ensure understanding and applying the proper approach to the dispute.



This article from the **TDM 4 (2015) ArbitralWomen/TDM 'Dealing with Diversity in International Arbitration' Special** has been made available in support of the "*Equal Representation in Arbitration*" Pledge initiative ([www.arbitrationpledge.com](http://www.arbitrationpledge.com)) – for citation purposes please use the following:

*A. Alrajhi; "Islamic Finance Arbitration: Is It Possible for Non-Muslims to Arbitrate Islamic Financial Disputes?"*

*TDM 4 (2015), [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)*

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