

Arbitration Under The  
Malaysian Arbitration Act 1952 -  
A General Assessment  
vis-a-vis  
Shari'a - A General Assessment.

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by

**Ashgar Ali bin Ali Mohamed**  
**G 911017**

**Masters In Comparative Law**  
**International Islamic University**  
**Petaling Jaya**  
**Selangor**

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List of Abbreviations

AC	Appeal Cases
AIR	All Indian Report
AIR (S.C)	All Indian Report (Supreme Court)
AIR (All.)	All Indian Report (Allahabad)
AIR (Cal.)	All Indian Report (Calcutta)
ALR	American Law Report
Aust. L.R	Australian Law Report
Beav.	Beavan
CLJ	Curren Law Journal
Ch. App.	Chancery Appeal
Ch. D	Chancery Division
E.R	English Report
HLC	House of Lords Cases
ILR	Indian Law Report
Ind. App.	Indian Appeal
KB	Kings Bench
Ky	Kyshe's Report
Ll. Rep	Lloyds Report
LRC (comm)	Law Report of Commonwealth (commercial)
MLJ	Malayan Law Journal
NSWR	New South Wales Report

NZLR	New Zealand Law Report
QB	Queens Bench
QBD	Queens Bench Division
SCR	Supreme Court Report
Sol. Jo	Solicitors Journal
VR	Victorian Report
WAR	Western Australia Reports
WLR	Weekly Law Reports

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## CHAPTER 1

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## 1. Introduction

All lawyers are potently aware of the time-worn cliché 'justice delayed is justice denied' but the economic consequence of this is a reality to consumers and business people alike when dispute arises. Any delay invariably has financial implications for the commercial community. Frustration by the delays, costs and unsatisfactory conclusions of the formal legal process, many people began to seek alternative solution to their problems and disputes. One of the most enduring and widely accepted alternative to the formal legal process is arbitration, particularly in the area of commercial.

The law of arbitration is based upon the principle of withdrawing the disputes from the ordinary courts and enabling the parties to substitute a domestic tribunal. The greater use of alternatives to the traditional court's system would be to unburden the judiciary of part of its workload, streamline the judicial process and ultimately preserve the quality of the judicial system. According to Peh Swee Chin J. in the *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn. Bhd.*<sup>1</sup>,

"Arbitration Act... the very laudable purpose of resolving commercial disputes, bearing in mind at the same time that courts have always more work than they can ever handle..."

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<sup>1</sup> 1991 CLJ 1584 at p.1585

Thus, to pragmatic business people the use of such methods can be seen as more commercially responsive to their often highly specialised and lengthy dispute with resultant saving in costs, delay and the preservation of commercial goodwill.

## 2. Arbitration

Arbitration is a means by which parties to a dispute get the same settled through the intervention of a third person but without having recourse to a court of law.

When two persons agree to have their differences settled through arbitration, what they really mean is that the actual decision of the dispute will rest with a third person called an arbitrator, though court may have to intervene to regulate arbitration proceedings or to give the award<sup>2</sup> of the arbitration sanction of law.

In Wharton's Law Lexicon, the word 'arbitration' has been defined as "the determination of a matter in dispute by the judgment of one or more persons, called arbitrators, who in case of difference, usually call in an umpire to decide between them" and according to Mozley and Whiteley, "arbitration is where two or more parties

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<sup>2</sup> The decision of an arbitrator or umpire is called the award.

submit all matters in dispute to the judgment of arbitrators who are to decide the controversy <sup>3</sup>.

The word 'arbitration' has not been defined in the Arbitration Act or in the English Act. In *Collins v. Collins* <sup>4</sup>, Sir John Romilly M.R said;

" An arbitration is a reference to the decision of one or more persons either with or without umpire, of some matter or matters in difference between the parties. It is very true that in one sense it must be implied that although there is no existing difference, still that difference may arise between the parties; yet I think the distinction between an existing difference and the one which may arise is a material one, and one which has been properly relied upon is the one, and one which has been properly relied upon in the case...."

Reference to arbitration is of two main kinds ;

1. Conventional, the parties agree to refer their present or future disputes to a tribunal of their own choosing instead of to a Court, and
2. Statutory, such reference is imposed on them by the terms of a particular statute.

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<sup>3</sup> Mozley and Whiteley's Concise Law Dictionary

<sup>4</sup> 26 Bear. 306; 28 LJ Ch.184

Our concern however is only with the first kind of arbitration, and particularly with the validity and scope of arbitration agreement, the enforcement of such agreements by the courts, power to stay an action brought in breach thereof, the appointment and removal of arbitrators, the conduct of the reference, the rules of fair trial, award and the enforcement. These matters are of the most part regulated by statute <sup>5</sup>.

### Arbitrator Defined and Distinguished

An arbitrator is a person to whose attention the matters in dispute are submitted by the parties, a judge of the parties own choosing whose functions are judicial and where duties are not those of a mere partisan agent, but of an impartial judge, to dispense equal justice to all parties, and to decide the law and facts involved in the matters submitted with a view to determine and finally end the controversy.

To quote Russell on Arbitration <sup>6</sup>,

"..An arbitrator is neither more nor less than a private judge of a private court (called an arbitral tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him; he is not a mere investigator but a person before whom material is placed by the parties, being either or both of evidence and submissions; he gives a decision in accordance with

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<sup>5</sup> Arbitration Act 1952 (Act 93)

<sup>6</sup> 20th.Edition, at p.104

some recognised system of law and the rules of natural justice. He is private in so far as ;

1. he is chosen and paid by the disputants,
2. he does not sit in public,
3. he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy,
4. so far as the law allows he is set up to the exclusion of the state courts,
5. his authority and power are only whatsoever he is given by the disputant's agreement,
6. the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of these powers must not be contrary to the proper law of the contract or the public policy of England, bearing in mind that the paramount public policy is that freedom of contract is not lightly to be interfered with..."

As Lord Esher said in *Re Carus & Wilson-Greene*<sup>7</sup>,

"...If it appears from the terms of the agreement by which a matter is submitted to any person, that what he is to do, is to be in the nature of a judicial enquiry, and that the object is that he should hear the parties and decide the matter upon evidence to be led before him, there the person is an arbitrator. "

An arbitrator differs from mediator, referee, commissioner etc. The importance of the distinction lies in this, that, if the agreement between the parties amounts to a reference to an arbitrator, the provision of the Arbitration Act would apply, whereas in any other case the agreement may, if at all, be binding only as an ordinary contract but not subject to the law of arbitration.

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<sup>7</sup> [1886] 56 LJQB 530; 18 QBD 7

## Arbitration in Shari'a

Arbitration is described in Shari'a texts as the spontaneous and more or less improvised move by two or more parties in dispute to submit their case to a third party called 'hakam' or 'muhakkam' (arbitrator). The arbitrator is an ordinary man, but is required to possess all the qualifications of a Qadhi (Judge). The dispute is to be determined according to Shari'a both in procedure and in substance, whether or not the dispute is extra-judicial or already pending before the Court. The whole procedure is called Tahkim.

### i. The Concept of Arbitration in Shari'a

The validity of arbitration has been recognised by the Holy Quran itself.

*" Allah doth command you, to render back your trusts to those to whom they are due, and when ye judge between man and man, that ye judge with justice. Verily how excellent is the teaching which He giveth ye ! For Allah is He who heareth and seeth all things..."<sup>8</sup>*

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<sup>8</sup> Surah An-Nisa : 58 (translation by Yusof Ali)