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The Objective Factors Affecting the Selection of the Arbitrator's

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Abstract
This study aims to examine the objective factors affecting the selection of the arbitrator's. Five factors have been discussed. Namely, the capacity, the legal background, conventional disqualification, the names of arbitrators, and nationality.The study concludes that while there is unanimous regarding some condition amongst different legislations and institutional rules, other could be arguable. The study recommended adding and revising several rules of within UAE Law.
Key words: arbitration, law, arbitrator, challenging arbitration award, UAE Law.

Chapter one:
Introduction

The general Principle is the freedom of the parties to choose the arbitrator or arbitrators. In the absence of the agreement on the appointment by the parties this could be done by agreeing to mandate a party or person to perform this task. The court could be engaged in this task if there was an arbitration agreement and one of the parties refuse to take his role in the appointing.

One of the question arises in arbitration, is who can be an arbitrator. Or who is disqualified from acting as an arbitrator. Is there certain condition must be met in the arbitrator? Shall he have qualification? Is arbitration limited to lawyers or experts in certain fields?

One of the most important issues in arbitration is the arbitrator neutrality principle. This is almost adopted in all legislation and institutional rules. However this is subjective criteria or condition. While our study is restricted to the objective condition without taking consideration to the relation between an arbitrator and one of the parties in certain case.

In another words, what are the objective condition which shall be met in any arbitrator? Is there unanimous conditions amongst different legislations and institutional rules?

In order to answer these questions, we will discuss some conditions related to this issue in order to constitute a general conviction in this matter.

Chapter two
General capacity and specific incapacity

UAE civil procedure law stipulates in Article 15.1: " a. An arbitrator must not be a minor, an interdicted person or deprived from his civil rights on the ground of a judgment against him for a felony or misdemeanor contrary to honor or due to a declaration of his bankruptcy, unless if he has been rehabilitated."

The same attitude could be found in the Spanish Arbitration Act. Article 13 reads: "Persons in full possession of their civil rights may be arbitrators, unless prevented therefrom by the legislation to which they may be subject in the practice of their profession. No person will be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties."

From the above Articles we can induce that the first objection to the arbitrator is incapacity. So it is not acceptable to appoint a minor as an arbitrator. It is not permissible for a minor to take the task of arbitration because a person who does not have the right to contract for himself or to act in his property cannot be allowed to take over the affairs of others. (Ahmad Abu Alwafa. P 159). Although, some miners have exceptional qualification, the legislator put the rules according to the mostly common situations. (Al Jamal & Abd Elaal, p 606)

The arbitrator is required to have full capacity in accordance with his personal law. It is not permissible to appoint a minor person as arbitrator, otherwise his ruling will be null and void. This condition is related to public order. The parties may not agree to the contrary, and even if they agree, either of them may challenge the invalidity. This is a matter that is settled in the comparative legislations.

This is a *prima facie* condition even if it is not clearly expressed in some Arbitration laws. For example the age of Legal Capacity according to the (Scotland Act)1991 is (16) years. However, the child can enter into a transaction of a kind commonly entered into by persons of his age and. It is certainly beyond doubt that agreeing to act as an arbitrator is not such a transaction. (Fraser, 74)

Insane persons inter into this category. This classification raises most plainly the possible result of the application of the freedom of choice approach. (Fraser, p 74). Nevertheless, any appointment of an arbitrator who have any insane condition will be void. Article (85) of UAE Civil Federal Law reads in Article: (85): "1-

whoever lacks discernment for minority, idiocy or lunacy shall be considered lacking discernment". Article (86) reads: "whoever has attained the age of discernment and has not attained full age but is a prodigal or inadvertent shall be of incomplete capacity as prescribed by the law."

The other category which is not permissible to an arbitrator is interdicted person or a person deprived from his civil rights on the ground of a judgment against him for a felony or misdemeanor contrary to honor or due to a declaration of his bankruptcy, unless if he has been rehabilitated.

The legislator did not specify a criteria to define the crimes which is regarded as a breach of honor. Therefore, it can be said that the misdemeanor offense is one that is contrary to the common morality and the usual behavior. For example the crime of theft, false testimony, fraud. (Hassan, p 100). This clearly demonstrates the sensitivity of the role of the arbitrator and his proximity to the status of the judge. (Batayneh, p 87)

But it is not sufficient to have the civil capacity which is subject to the individual personal. Other conditions are necessary, namely, the conditions of practicing judicial work, the restrictions contained in the national legislations. These conditions are related to jurisdiction of arbitration and have an effect on the validity and invalidity of the judgment, which in this case is subject to the law governing the proceedings. (Abd Elmajeed, P 165).

Finely, restriction could be found for the character of the person which could be called specific incapacity. For instant, Article (26) of the Act of Judicial authority in AUE preclude the judge to be an arbitrator for private legal persons or natural persons unless one of the parties to the dispute is a relative of the judge until the fourth degree.

In all cases, the judge may not, without the approval of the Supreme Council of the Federal Judiciary, be the chairman of an arbitral tribunal or arbitrator, even if the dispute is not before the courts. In the foregoing cases, the Supreme Council of the Federal Magistracy shall choose the judge and determine the remuneration to which he is entitled. The judge may not disburse the said remuneration or any part thereof until after the termination of the arbitration.[1]

The consequence for violating the previous text is nullity because it is contrary to public order. It is better for the judge to stay away from accepting to be an arbitrator to distance himself from suspicion and to maintain the appearance of impartiality that he must have and this impact the judiciary authority as a whole. (Abu Alwafa, p 157)

While the UAE legislator in the Civil Procedure Act stipulate full capacity in order to be an arbitrator and prevent the judge as a general rule to be so, it is preferable in the prospective Arbitration Act to follow the Spanish Act in this issue by stipulating frankly in the Act that persons in full possession of their civil rights may be arbitrators, unless prevented therefrom by the legislation to which they may be subject in the practice of their profession.

Chapter three:
The legal background

In practice, it is usual to assign a lawyer. Even where the case is relatively simple, serious problems of conflict of law and procedures regularly arise. These are problems a person with legal background with suitable procedural and legal experience is mostly better to be treated than a person whose expertise lies in another area. (redfern & Hunter, p 260).

Therefore, it is preferable in the case of the formation of the arbitral tribunal at least one arbitrator should have a legal background. This would have the effect of disciplining arbitration procedures, and the issuance of the award taking into account the basic guarantees in litigation (Fathi Wali, p. 235). If the tribunal consist of three arbitrator it is better that the presiding arbitrator should meet the former condition.

There is nothing persuade to demand that the other two members of the tribunal should as well be lawyers, except the dispute is one in which the issues involved are essentially complex matters of law. One of the most important virtue of arbitration is the way in which the expertise necessary for understanding and resolution of the dispute may be found amongst the arbitrators themselves. For instance, if a case related to international construction contract, containing issues of a technical nature, it may be proper that one of the members of the arbitral tribunal should be a civil engineer. (redfern & Hunter, p 260)

The last argument was challenged. It is not required that the arbitrator must have a professional specialty commensurate with the subject matter of the dispute. Therefore, there is nothing to prevent the arbitrator from having no expertise or expertise in the subject matter of the dispute, because he does not rule in the dispute as an expert, but as a judge chosen by the parties. Moreover, the arbitrator can always use the experts (Abu Al Wafa, p. 154). The arbitrator's role is to govern the rights of the parties according to the evidence, not by use of his own knowledge. (Mekendrick, p 1299)

However, appointing an arbitrator with a legal background could be found in The German Institution of

[1] Article (26) of the Act of the judicial authority in UAE.

Arbitration rules (DIS). Article (2.2) reads: "Unless otherwise agreed by the parties, the chairman of the arbitral tribunal or the sole arbitrator, as the case may be, shall be a lawyer."

The Spanish arbitration act 2003 stipulates: Article 15.1."Unless otherwise agreed by the parties, in arbitration not to be decided *ex aequo et* bono and conducted by a single arbitrator, such person will be required to be an attorney if acting as such. When arbitration is to be conducted by three or more arbitrators, at least one must be an attorney".

While the UNICTRAL MODEL LAW and the UAE Civil and Commercial Procedure Law and the Rules of Abu Dhabi Arbitration Center (ADAC) keep silent in this matter. However, it is highly recommended that the tribunal should have a legal background. So if there is a sole arbitrator, this should be a lawyer or have a strong legal background for at least fifteen years in practicing law. And if the arbitral tribunal consist from three arbitrators, the chairman should have a legal background. The suggested opinion should be taken into account in future amendment of the UAE Civil and Commercial Law or to the anticipated Arbitration Act and to the Rules of (ADAC). This is due to the fact that the tribunal apply law in the procedure and when choosing the applicable law and when issuing the award.

For example Article of the UAE Civil and Commercial Procedure Act reads in Article (212.5): "The award should be issued by the majority opinion of the arbitrators and should be written with the dissenting opinion if exist and should in particular include a copy of the arbitration agreement and summary of the statement of litigants and their documents and the reasons for judgment and the operative and the date of issuance and the place where the signatures of the arbitrators issued, and if one or more of the arbitrators refused signing the award it should be stated in the award and the award shall be valid if signed by a majority of the arbitrators."

Another example could be found in (ADCAC) Rules. Article (28) provides:" 5. The award shall be issued in writing, together with the dissenting opinion. Should one or more arbitrators refuse to sign the award, the refusal shall be mentioned therein and it shall be sufficient to have the signature of the arbitrators forming the majority. As for the case referred to in the third paragraph of this Article, the signature of the Presiding Chairman of the Arbitral Tribunal shall be sufficient. 6. Reasons shall be given in support of the award, unless the parties agree otherwise, or if the applicable law governing the arbitration proceedings does not require the award to contain reasons, or in case the award is rendered as a result of an amicable settlement agreed upon by the parties. 7. The award shall include the place and date of its issuance, the names and addresses of the parties, the names of arbitrators, the text or summary of the arbitration agreement, a summary of the claims, defenses and supporting documents, the findings and conclusions of the award, a decision on which of the parties shall bear the arbitration expenses and the signature of members of the Panel."

The previous Articles and most of other Articles in the Laws or the Rules needs to be treated with it by a person with legal background. If vas versa this is like giving a lawyer a position in medicine or engineering? The reason for choosing arbitration as an alternative method of courts will be all lost under the threat of challenging the award and avoiding it from the courts in deficiency in the award due to legal grounds. We can call here the proverb: "Prevention is better than cure".

Chapter four

Conventional qualification:

The parties of the arbitration may stipulate that the arbitrator must have certain attributes or experiences, such as membership in a, profession, association or organization or experience in certain trade or having a particular activity. (Fraser, p 78).

Generally speaking, stipulating a list of qualification of the arbitrator is not advisable. Since this could leads to a result of not finding a person to meet the requirements when the dispute arise which render the arbitration agreement inoperable. The stipulating qualification may be logical if it is related to the language or nationality. But if it is related to certain technical qualification it is advised to stipulate the criteria after the dispute arose. (Redfern & Hunter,p 259)

Qualification may be specified by agreeing on institutional rules. (Fraser, p77). It is also common in specific international contract such as shipping and insurance to identify arbitrators from the same area. (Redfern & Hunter,p 258) Just as they may lay down a negative condition, such as providing that the arbiter "shall not be a lawyer".

The (ADAC) Rules referred to this in Article (9.5): "In appointing the arbitrators, the Centre shall take into account the terms agreed upon by the parties and the considerations that will ensure the appointment of an arbitrator who is suitable to the nature and circumstances of the dispute as well as meeting the requirements of neutrality and independence."

As a result of the application of basic contractual principles, an individual who lacks the stipulated qualification (or possess the proscribed attributes) is disqualified from acting. (Fraser, p 77). This was

ascertained in *Junghrim, Hopkins & Co. v Foukleman*[1] , Pickford J rendered the award void. In his wards " the qualification seems to me to be a condition of the arbitrators' appointment and …to go to the root of their jurisdiction to act".

However, if the parties in their agreement stipulated certain qualification in the arbitrator to be met, although appoint an arbitrator who lack such qualification, neither the award nor the arbitrator can be challenged on this ground. If the arbitral tribunal consist of number of arbitrator and every each party appoint an arbitrator without objection from the other party although he knows lacking the qualification, this will be considered as an implied consent and put aside the stipulation. (Fraser, p77)

Chapter five

The names of arbitrators:

It is not advisable to nominate the arbitrator before the disputes arise. This is to the fact that the arbitrators who was nominated before may not be able or accept the mission which emptied the arbitration of its contents. However Article (205) of the civil and commercial procedure UAE Act reads**:** "It may not be delegated arbitrators conciliation unless they are mentioned namely in the arbitration agreement or in a subsequent document."

Nevertheless this article seems futile. This is due to the fact that this could render the arbitration agreement not viable. So it is preferable to nominate the arbitral tribunal when the dispute arise. Meanwhile this is a call for the legislator to abandon this Article when modifying the legislation.

Chapter six

Nationality

One of the most accepted rule in Arbitration Acts and Intuitional Rules amongst States and Institutions is irrelevance nationality principle. Nonetheless, it is a controversial idea when it comes to appointing an arbitrator from the same nationality of one of the parties when the two parties are from different nationalities.

According to the Saudi Arabia arbitration Act it is stipulated that the arbitrator should be a Saudi citizen. (Sami, p 154) However, the nationality or place of birth or the passport carried should be beside the point. (Redfern & Hunter, p 262). The model law reads in Article (11.1): " no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by parties". The same trend could be found in the Spanish Arbitration Act which do not put any obstacles in respect to nationality. No person will be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.[2]

However, it is recommended if the there is a sole arbitrator without obligation to appoint an arbitrator of nationality which differ from the parties' nationality. For instance, the UNCITRAL Rules states in Article (6.4) that: " in making the appointment, the appointing authority shall have regard to such consideration as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well as advisability of appointing an arbitrator of nationality other than the nationalities of the parties".

The UAE Civil and Commercial Procedure Law haven't mentioned anything about that. The same attitude could be found in the ADAC rules. According to these rules the arbitrators shall be appointed by agreement of the parties. However, if the parties fail to agree upon their appointment according to mentioned procedures and possibilities, the Center will do so.[3]

In appointing the arbitrators, the Centre shall take into account the terms agreed upon by the parties and the considerations that will ensure the appointment of an arbitrator who is suitable to the nature and circumstances of the dispute as well as meeting the requirements of neutrality and independence.[4]

While according to Article 10 of the ADAC Rules, Neutrality and Independence should be taken into account in all the process. Nevertheless there is no express objection about appointing arbitrators from the same

[1] { [1909] Q.B. 742 }.

[2] Article 13.

[3] Article (9.1) reads: "

Article (9.2) reads:

Article (9.3) reads: If the parties agree that the Panel be formed with three arbitrators, each Party shall nominate one arbitrator on its behalf within a maximum period of fourteen (14) days from the date on which the Respondent was notified of the Arbitration Request. Should one the parties fail to do so, the Director shall take charge of the matter, and regarding to the appointment of the chair person to preside over the Arbitration Panel, If the parties agree upon a given procedure for appointing the president of the Arbitration Panel, such a procedure shall be followed; In the absence of agreement upon a given procedure, the arbitrators appointed by the two parties shall appoint the third arbitrator who shall chair the Panel of three; and Should the two appointed arbitrators fail to agree upon naming the third presiding arbitrator within fourteen (14) days from the date on which the last of the two arbitrators was appointed or from the expiry date of the additional grace period which may be granted by the Director to the parties, the third arbitrator shall be appointed by the said Director.

[4] Article (9.5)

nationality of the parties. This lead to a question which is: is there deficiency in the ADAC Rules?

This question could be answered in the light of the situation of other laws and institutional rules.

For example, according to the Scottish Arbitration Code, if the parties agreed that there is a sole arbitrator and the parties are of different nationalities, the arbitrator shall not be the same nationality as any of them, unless they agree otherwise.[1]

The ICC Rules go further and provide that the chairman of the arbitral tribunal or the sole arbitrator shall be of a nationality other than those of the parties.[2] The LCIA Rules repeated this principle but giving exception if the party which have different nationality from the arbitrator and the other party agrees in writing.[3]

It is widely believed that the best organization for this topic is the (DIAC) Dubai International Arbitration Centre Rules. According to Article (10.1): "Where the parties are of different nationalities, a sole arbitrator or chairman of the Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed arbitrator all agree otherwise in writing."

Paragraph (2) of the Article take an advanced position. It reads: "For the purpose of this Article, a person who is a citizen of two or more states shall be treated as of each state." So according to the previous rule, the arbitrator could not be of the same nationality of one of the parties. The unique rule here is that it is not allowed to appoint an arbitrator if one of the parties have more than one nationality and that nationality was the same nationality of the arbitrator.

Chapter seven
Conclusion

One of the most accepted conditions to act as an arbitrator amongst legislation's is the general and the specific incapacity. For the general capacity condition, the arbitrator must have full possession of his civil rights. Minors, interdicted person, interdicted persons full into this category. Another restriction, is the specific incapacity. This is built on the ground of domestic legislations which prohibit some persons to act as an arbitrator regarding their position as the judges.

Although the UAE legislator stipulate the general capacity and the specific incapacity, however, it is preferable in the prospective Arbitration Act to follow the Spanish Act in this issue by stipulating frankly in the Act that persons in full possession of their civil rights may be arbitrators, unless prevented therefrom by the legislation to which they may be subject in the practice of their profession.

Another issue which is not agreed within different legislation and institutional rules is the legal background of the arbitrator. Although the most of legislations and rules doesn't demand the legal background, some legislations do as the Spanish law. It is widely believed that if there is a sole arbitrator, the legal background is necessary. In the case of the arbitral tribunal consist three or more, the president should have a legal background.

The suggested opinion should be taken into account in future amendment of the UAE Civil and Commercial Law or to the anticipated Arbitration Act and to the Rules of (ADAC). This is due to the fact that the tribunal apply law rules in the procedures and when choosing the applicable law and when issuing the award.

The parties could in their agreement may stipulated certain qualification in the arbitrator to be met, although appoint an arbitrator who lack such qualification, neither the award nor the arbitrator can be challenged on this ground. If the arbitral tribunal consist of number of arbitrator and every each party appoint an arbitrator without objection from the other party although he knows lacking the qualification, this will be considered as an implied consent and put aside the stipulation. However, the previous opinion haven't been adopted frankly in legislations and rules. Therefore, this is a recommendation to adopt this solution expressly in the anticipated Arbitration Act in the UAE.

One of the critical Articles in the civil and commercial procedure Act of UAE, is Article (205). It reads: "It may not be delegated arbitrators conciliation unless they are mentioned namely in the arbitration agreement or in a subsequent document."

Nevertheless this article seems futile. This is due to the fact that this could render the arbitration agreement not viable. So it is preferable to nominate the arbitral tribunal when the dispute arise. Meanwhile this is a call for the legislator to abandon this Article when modifying the legislation.

One of the most accepted rule in Arbitration Acts and Intuitional Rules amongst States and Institutions is irrelevance nationality principle. Nonetheless, it is a controversial idea when it comes to appointing an arbitrator from the same nationality of one of the parties when the two parties are from different nationalities.

The study called for adopting the (DIAC). If the parties are from different nationalities, a sole arbitrator or chairman of the Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed arbitrator all agree otherwise in writing. Meanwhile if the person who is a

[1] Article 4.1, 4.6
[2] ICC Rules, art 9.5
[3] LCIA Rules, ART 6.1

citizen of two or more states, s/he shall be treated as of each state. Accordingly, the arbitrator could not be of the same nationality of one of the parties. The unique rule here is preventing the appointment of an arbitrator if one of the parties have more than one nationality and that nationality was the same nationality of the arbitrator.

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