

THE INSTITUTIONAL FRAMEWORK FOR DISPUTE RESOLUTION IN MALAYSIA'S ISLAMIC FINANCE INDUSTRY

*Umar A. Oseni and Abu Umar Faruq Ahmad**

I. INTRODUCTION

The dispute resolution framework in Islamic finance as practiced in most countries has proven to be inadequate, particularly in its application and interpretation of the Shari'ah. Malaysia has consistently proven its prime position in blazing the trail in most legal and regulatory issues in the Islamic finance industry. It has recognised the increasing importance of the architectural aspects of the industry such as the need to establish the dispute resolution framework.

Muslim scholars have continuously argued that alternative dispute resolution (ADR) has its source in the prime references of Islamic law since it is a practice encouraged in Islam. Therefore, dispute resolution in Islamic law is a wide area of study that, though similar to the conventional practice of ADR, has its unique principles and concepts. The varieties of dispute resolution processes have been practiced since the advent of Islam about fourteen centuries ago. These processes are worth exploring and adapting to suit the modern needs of Muslims across the world.

Actually, dispute resolution has been a human practice since time immemorial because disputes are inevitable in human relationships.

* Umar A. Oseni is Assistant Professor at the International Islamic University Malaysia (IIUM), Malaysia. Abu Umar Faruq Ahmad is Senior Researcher at the International Shari'ah Research Academy for Islamic Finance (ISRA), Malaysia. He also chairs the Shari'ah Supervisory Board of Islamic Cooperative Finance Australia Ltd., Australia. They can be contacted at umaroseni@gmail.com and faruq@isra.my respectively.

ADR is a range of processes for amicable resolution of disputes outside the formal court procedure of litigation; it involves a neutral third party who intercedes to resolve the dispute.

When disputes are channelled through the formal court system, the parties tend to be farther from each other after the judgment because the judgment of the court leads to a win-lose situation in which one of the parties rejoices with pomp while the other party wallows in anguish. In order to avoid a winner-takes-all syndrome, as generally occurs in litigation, effective alternatives were created which satisfy the needs of many litigants. Experience has shown that ADR provides a complementary substitute to litigation. ADR facilitates the administration of the justice system and ensures speedy justice without compromising the rights and liabilities of the parties. In essence, ADR leads to a win-win settlement where the parties resolve the ensuing dispute amicably and secure ongoing relationships.

Islamic finance disputes cannot afford to suffer from protracted delays in the administration of the justice system. The disputes emanating from the Islamic finance industry are *sui generis* and require a speedy and efficient framework for amicable resolution considering the need to secure ongoing business relationships and considering the recent fluctuations experienced in the financial markets across the world. This makes ADR attractive to the Islamic finance industry. Malaysia has blazed the trail in putting in place an adequate framework for dispute resolution in the industry. Such a step may not be surprising, as ADR is ingrained in the culture of Malaysians.

II. RESEACH OBJECTIVES

Drawing on the above developments, this study examines the institutional framework for dispute resolution in the Islamic finance industry in Malaysia. The last decade saw a number of developments targeted at repositioning the legal framework for dispute resolution. Apart from the commonly known frameworks for dispute resolution, such as the Financial Mediation Bureau (FMB), Kuala Lumpur Regional Centre for Arbitration (KLRCA) and the Malaysian Mediation Centre, a new framework was introduced in 2011 to

specifically cater for court-ordered mediation. This creates ample opportunity for the Muamalat Bench of the Kuala Lumpur High Court to explore amicable dispute resolution processes in the handling of Islamic finance disputes. This will facilitate the smooth running and operation of the Islamic financial system in the country. The study therefore explores the feasibility of alternative dispute resolution mechanisms for resolving Islamic finance disputes.

III. METHODOLOGY AND ORGANISATION OF THE STUDY

The research methodology employed in this study is an amalgamation of direct observation from legal and regulatory perspectives and analysis of some landmark cases of the English and Malaysian courts. However, the Islamic legal framework remains the only hypothetical basis of the study.

The paper will be divided into five parts. After the introduction, part II will provide an insight into the history of Alternative (Amicable) Dispute Resolution (ADR) in Malaysia. This background provides a context for appraising the reforms recorded in the dispute resolution framework for Islamic finance disputes. Since Islamic finance disputes relate to Islamic law, part III will present a conceptual analysis of effective dispute resolution processes in Islamic law and the relevance of such processes in the modern Islamic finance industry. Drawing on the above issues, part IV will then examine the dispute resolution framework in the Islamic finance industry in Malaysia through an exploration of the institutional frameworks for the resolution of related disputes. Finally, part V will conclude, give recommendations and elaborate on potential areas for further research.

IV. CONCLUSION AND RECOMMENDATIONS

The dynamics of dispute resolution in the Islamic finance industry seem to be complex, particularly in the aspect of Islamic finance litigation. The existing ADR institutions and bodies should be

strengthened to reflect the modern drift towards amicable resolution of disputes, which, incidentally, is the underlying spirit of Islamic contracts. Rather than duplicating efforts by establishing more ADR bodies to help handle Islamic finance disputes, the existing bodies should be consolidated and a formidable court-annexed programme should be put in place where experts will have the opportunity to mediate Islamic finance disputes with enforceable settlements. This is why Med-Ex, a combination of mediation and expert determination, may be the best bet for the existing court-annexed mediation in the High Court of Malaysia, introduced through the Practice Direction on Mediation. The members of the Sharī'ah Advisory Council (SAC) may be enlisted as neutrals for the purpose of court-annexed mediation at the Muamalat Bench. At least one member of the SAC should sit as a member of the panel of mediators of the Kuala Lumpur Court Mediation Centre (KLCMC).

Numerous arbitral institutions across the world should also recalibrate their rules of arbitration and mediation to allow for Islamic finance disputes. On most of these issues, Malaysia has blazed the trail with the establishment of the KLCMC and the forthcoming Islamic Arbitration Rules 2012. Hence, the need to effectively utilise this window of opportunity to explore the ADR process at the KLCMC. Though the KLCMC was not established for Islamic finance disputes alone, it provides an avenue for proper settlement of disputes in a friendly manner. It is expected that other jurisdictions will introduce similar measures to regulate the dispute resolution aspect of the Islamic finance industry.

These recommendations will drastically reduce the existing tension in the Islamic finance industry, which is occasioned by the increasing number of cases in the courts and the attendant misapplication of underlying principles of Islamic financial contracts brought before the courts. Other potentially relevant areas of research include the practitioners' perspectives on Islamic finance litigation and efforts to use built-in mechanisms of dispute avoidance in Islamic financial contracts. The future of ADR in Islamic finance is dispute avoidance, which should be vigorously pursued by all.

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