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**E-ARBITRATION AS AN ALTERNATIVE DISPUTE
RESOLUTION MECHANISM IN ISLAMIC BANKING
DISPUTES IN MALAYSIA**



**DOCTOR OF PHILOSOPHY
UNIVERSITI UTARA MALAYSIA
2021**

**E-ARBITRATION AS AN ALTERNATIVE DISPUTE
RESOLUTION MECHANISM IN ISLAMIC BANKING
DISPUTES IN MALAYSIA**



**A thesis submitted to the Ghazali Shafie Graduate School of Government in
fulfilment of the requirements for the Doctor of Philosophy.
Universiti Utara Malaysia**



Kolej Undang-Undang, Kerajaan dan Pengajian Antarabangsa
(College of Law, Government and International Studies)
UNIVERSITI UTARA MALAYSIA

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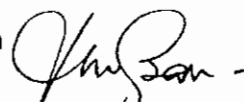
Nama Pelajar : **MOHAMAD FATEH LABANIEH (902440)**
(Name of Student)

Tajuk Tesis : **E-ARBITRATION AS AN ALTERNATIVE DISPUTE
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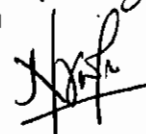
Penyelia Pertama : **ASSOC. PROF. DR. MOHAMAD
(First Supervisor) AZAM HUSSAIN**

Tandatangan
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ABSTRAK

Malaysia menggunakan timbangtara tradisional sebagai salah satu mekanisme untuk menyelesaikan pertikaian perbankan Islam. Namun begitu, ramai berpendapat terdapat masalah dengan timbangtara tradisional dan ini memerlukan intervensi segera. Dengan menggunakan metodologi penyelidikan doktrinal, tesis ini meneliti kemungkinan memperkenalkan timbangtara secara elektronik atau e-timbangtara sebagai mekanisme alternatif untuk menyelesaikan beberapa masalah yang dihadapi dalam timbangtara tradisional. Oleh itu, dalam konteks penyelesaian pertikaian perbankan Islam di Malaysia, tesis ini mengkaji masalah timbangtara tradisional, menganalisa keperluan undang-undang dan bukan undang-undang untuk menggunakan e-timbangtara dan mengesyorkan pelaksanaan e-timbangtara dalam industri perbankan Islam di Malaysia. Data dikumpulkan melalui pendekatan berasaskan perpustakaan dan wawancara separa struktur bersama peguam, ahli akademik, penimbang tara dan ketua pegawai eksekutif. Beberapa kaedah analisis data seperti analisis kritis, analitik dan kandungan digunakan dalam menganalisa data yang diperoleh dari literatur dan wawancara. Tesis ini dimulakan dengan cadangan bahawa e-timbangtara dapat menjadi mekanisme alternatif bagi penyelesaian pertikaian perbankan Islam di Malaysia. Hasil kajian menunjukkan bahawa timbangtara tradisional tidak begitu efektif dan efisien dalam menyelesaikan pertikaian perbankan Islam di Malaysia kerana wujud cabaran undang-undang dan bukan undang-undang. Namun begitu, memperkenalkan e-timbangtara di Malaysia akan menghadapi banyak masalah kerana kerangka undang-undang timbangtara sedia ada tidak memenuhi keperluan e-timbangtara. Idea untuk melaksanakan e-timbangtara bagaimanapun bukan sesuatu yang mustahil. Ia memerlukan beberapa penambahbaikan pada kerangka undang-undang sedia ada khususnya timbangtara Akta 2005 (Akta 646) dan Peraturan AIAC I-Arbitrase 2018 serta aspek bukan undang-undang seperti keperluan untuk memastikan keselamatan dan latihan yang mencukupi. Oleh itu, satu kerangka undang-undang untuk e-timbangtara dicadangkan dengan mengambil kira keperluan dan penambahbaikan yang diperlukan. Tesis ini juga menyediakan model e-timbangtara yang menggambarkan prosedur yang diperlukan untuk menyelesaikan pertikaian perbankan Islam di Malaysia. Tesis ini menyimpulkan bahawa e-timbangtara mampu mengatasi sebahagian besar masalah timbangtara tradisional serta mampu menawarkan kelebihan baru kepada piha dalam pertikaian perbankan Islam di Malaysia. Sehubungan dengan itu, ia perlu dipertimbangkan sebagai salah satu mekanisme dalam menyelesaikan pertikaian Perbankan Islam di Malaysia.

Kata kunci: Timbangtara Tradisional, E-Timbangtara, Perbankan Islam, Pertikaian Resolusi, Undang-Undang.

ABSTRACT

Malaysia applies traditional arbitration as one of the mechanisms to resolve Islamic banking disputes. However, many opined that traditional arbitration is riddled with problems that need a prompt intervention. By adopting a doctrinal research method, this thesis examines the possibility of introducing electronic arbitration or e-arbitration as an alternative mechanism to overcome the problems in the traditional arbitration. Therefore, in the context of Islamic banking dispute resolution in Malaysia, this thesis seeks to examine the challenges with traditional arbitration, to analyse the legal and non-legal requirements in establishing e-arbitration, and to recommend the implementation of e-arbitration in the Islamic banking industry in Malaysia. The data was collected through the library-based approach and semi-structured interviews with lawyers, academicians, arbitrators, and a chief executive officer. Several methods of data analysis, such as critical, analytical and content analysis, were employed in analysing the data. The thesis began with the proposition that e-arbitration can be an alternative dispute resolution mechanism for Islamic banking disputes in Malaysia. The findings reveal that traditional arbitration is not fully effective and efficient in resolving Islamic banking disputes in Malaysia because of its inherent legal and non-legal challenges. Despite this, the establishment of e-arbitration in Malaysia is fraught with many foreseeable problems as current arbitration framework does not accommodate e-arbitration. The idea of implementing e-arbitration is, however, not far-fetched. It requires some improvement to the current legal framework especially to the Arbitration Act 2005 (Act 646) and AIAC I-Arbitration Rules 2018 as well as to the non-legal aspect of e-arbitration such as the need for ensuring security and providing sufficient training. A legal framework for e-arbitration is, therefore suggested after taking into considerations the necessary improvements and requirements. This thesis also provides an e-arbitration model that illustrates the procedures required to resolve the Islamic banking disputes in Malaysia. The thesis concludes that e-arbitration is capable of addressing some major problems in traditional arbitration, along with the ability to offer new advantages to the Islamic banking disputants in Malaysia. Therefore, e-arbitration should be considered as one of the mechanisms in resolving Islamic Banking disputes in Malaysia.

Keywords: Traditional Arbitration, E-Arbitration, Islamic Banking, Dispute Resolution, Legal.

ACKNOWLEDGEMENTS

All praises are due to Allah the Lord of the Worlds for granting me the life, the opportunity, strength and wisdom to pursue this higher degree and making this academic journey possible right from the very beginning up to the end. Ya Allah Lakal Hamdu washukur. I owe a huge debt of gratitude to my supervisors Assoc. Prof. Dr. Mohammad Azam Bin Hussain and Dr. Nazli Binti Mahdzir under whose supervision this thesis became a successful endeavour. Their immeasurable contributions and constructive criticisms shaped the entire thesis. I have learnt so much from their erudite scholarship. I ask Allah (SWA) to increase their knowledge and wisdom. The acknowledgement cannot be complete without appreciating the contribution of my reviewers. I equally wish to express my sincere thanks and gratitude to my family for their support and encouragement throughout the PhD journey. May you live long in good health to reap the benefits of their patience and sacrifice.

(وَافْعِضْ لَهَا حَاجَ الدُّلِّ مِنْ الدَّرْخَمَةِ قُلْ رَبِّ ارْحَمْهُمْ كَمَا رَحَّمْتَ بَنِي آدَمَ وَبَنِي نُوحَ وَبَنِي إِبْرَاهِيمَ وَبَنِي إِسْمَاعِيلَ إِنَّكَ أَنْتَ الْعَلِيمُ الْحَكِيمُ) سورة السراء-الآية 24

I equally salute all my relatives and friends for their direct and indirect contributions and supports.



TABLE OF CONTENTS

PERMISSION TO USE	i
ABSTRAK	ii
ABSTRACT	iii
ACKNOWLEDGEMENTS	iv
TABLE OF CONTENTS	v
LIST OF TABLES	xi
LIST OF FIGURES	xii
LIST OF CASES	xiii
LIST OF STATUTES / LAWS / RULES	xiv
LIST OF APPENDICES	xvi
LIST OF ABBREVIATIONS	xvii
CHAPTER ONE: INTRODUCTION	1
1.1 Background of the Study	1
1.2 Problem Statement	7
1.3 Research Questions	18
1.4 Research Objectives	19
1.5 Significance of the Study	19
1.6 Research Methodology	21
1.6.1 Research Design	21
1.6.2 Research Scope	23
1.6.3 Types of Data	24
1.6.4 Data Collection Methods	25
1.6.5 Data Analysis	29
1.7 Limitations of the Study	30
1.8 Literature Review	31
1.8.1 Definition of Operational Terminologies	31
1.8.2 The Islamic Banking Dispute Resolution Framework in Malaysia	34
1.8.3 E-Arbitration as an Alternative Dispute Resolution Mechanism	38
1.8.3.1 The Legal Requirements in Establishing E-Arbitration	38
1.8.3.2 The Non-Legal Requirements in Establishing E-Arbitration	46

1.8.4 The Use of Online Dispute Resolution (ODR) in the Malaysian Islamic Finance Industry	48
1.8.5 Research Gap	49
1.9 Outline of Chapters	50

CHAPTER TWO: BACKGROUND OF THE TRADITIONAL ARBITRATION SYSTEM 52

2.1 Introduction	52
2.2 Background of the Traditional Arbitration System: Malaysian and Islamic Perspective	53
2.3 Traditional Arbitration Theories	70
2.3.1 The Contractual Theory	71
2.3.2 The Jurisdictional Theory	74
2.3.3 The Hybrid (Mixed) Theory	78
2.3.4 The Autonomous Theory	81
2.4 Challenges in the Current Traditional Arbitration in Resolving the Islamic Banking Disputes in Malaysia	84
2.4.1 The Legal Challenges in the Current Traditional Arbitration in Resolving the Islamic Banking Disputes in Malaysia	85
2.4.1.1 The Uncertainty in Referring any Shariah Matter to Shariah Advisory Council	85
2.4.1.2 The Element of Bias in Traditional Arbitration Mechanism	90
2.4.1.3 The Continued Hesitation to Utilise Amiable Composition in Traditional Arbitration	93
2.4.1.4 The Difficulty in Enforcing the Arbitral Awards in Traditional Arbitration	95
2.4.1.5 The Judicial Intervention in Traditional Arbitration	96
2.4.2 The Non-Legal Challenges in the Current Traditional Arbitration in Resolving the Islamic Banking Disputes in Malaysia	98
2.4.2.1 High-Cost and Less-Speed in Traditional Arbitration	98
2.4.2.2 Difficulty in Using Traditional Arbitration by The Parties	101
2.4.2.3 Traditional Arbitration is Not a Suitable Option to Resolve Small-Claim Islamic Banking Dispute	102

2.4.2.4 The Lack of Experienced Arbitrator In Islamic Banking Disputes	104
2.4.2.5 The Lack of Awareness on Traditional Arbitration	106
2.5 From Online Dispute Resolution (ODR) to E-Arbitration	106
2.6 Conclusion	110

CHAPTER THREE: THE LEGAL REQUIREMENTS IN ESTABLISHING E-ARBITRATION TO RESOLVE ISLAMIC BANKING DISPUTES IN MALAYSIA **112**

3.1 Introduction	112
3.2 The Legitimacy of E-Arbitration Agreement in Malaysia	113
3.2.1 The Formal Requirements of a Valid E-Arbitration Agreement	114
3.2.2 The Substantive Requirements of a Valid E-Arbitration Agreement	124
3.2.2.1 The Consent of the Parties to the E-Arbitral Agreement	125
3.2.2.2 The Eligibility of the Parties to the E-Arbitral Agreement	127
3.2.2.3 The Arbitrability of the Subject Matter of the Dispute in E-Arbitration	129
3.3 The Legitimacy of the E-Arbitration Procedures in Malaysia	131
3.3.1 The Validity of E-Request in E-Arbitration	132
3.3.2 The Validity of E-Notification in E-Arbitration	133
3.3.3 The Formation of the Arbitral Tribunal in E-Arbitration	137
3.3.3.1 The Number of Arbitrators in E-Arbitration	137
3.3.3.2 The Procedures for Appointing the Arbitrators in E-Arbitration	138
3.3.3.3 The Qualifications and Duties of the Arbitrators in E-Arbitration	139
3.3.3.4 The Liabilities of the Arbitrators in E-Arbitration	141
3.3.3.5 The Readiness of Act 2005)Act 646(and I-Arbitration Rules 2018 to Use Artificial Intelligence Arbitrator (AIA)	143
3.3.4 The Determination of the Place of Arbitration in E-Arbitration	144
3.3.5 The Validity of E-Hearing in E-Arbitration	148
3.3.6 The Validity of E-Submission and E-Exchange of Documents in E-Arbitration	150

3.3.7 Equal Treatment in E-Arbitration	151
3.3.8 The Electronic Means Used in E-Arbitration	152
3.3.8.1 Video Conferencing	153
3.3.8.2 E-Mail	153
3.3.8.3 Case Management Website	154
3.3.9 The Substantive Law Applied in E-Arbitration	155
3.4 The Legitimacy of E- Arbitration Award in E-Arbitration in Malaysia	156
3.4.1 The Contents and the Formal Requirements of a Valid E-Arbitral Award in E-Arbitration	157
3.4.2 The Validity of E-Deliberation in E-Arbitration	161
3.4.3 The Validity of E-Delivery of E-Arbitral Award in E-Arbitration	163
3.4.4 The Recognition and Enforcement of E-Arbitral Award in E-Arbitration	164
3.4.4.1 The Traditional Mechanism for Enforcing the E-Arbitral Award According to Act 2005)Act 646(164
3.4.4.2 Self-Enforcement Mechanisms in E-Arbitration	167
3.4.4.2.1 Direct Self-Enforcement Mechanisms	168
3.4.4.2.2 Indirect Self-Enforcement Mechanisms	169
3.5 Conclusion	170

CHAPTER FOUR: THE NON-LEGAL REQUIREMENTS IN ESTABLISHING E-ARBITRATION TO RESOLVE ISLAMIC BANKING DISPUTES IN MALAYSIA **174**

4.1 Introduction	174
4.2 The Non-Legal Requirements in Establishing E-Arbitration to Resolve Islamic Banking Disputes In Malaysia	175
4.2.1 The Need for Sufficient Knowledge and Training	175
4.2.2 The Need for Changing the Mindset to Accept the Use of E-Arbitration	176
4.2.3 The Need for Infrastructure	177
4.2.4 The Need for Providing Several Languages in the E-Arbitration Platform	180
4.2.5 The Need for Ensuring Security and Confidentiality in E-Arbitration	180
4.2.6 The Need for Establishing a Local Centralised E-Platform	183

4.2.7 The Need for Access to Internet	184
4.2.8 The Need for Access to Technology	185
4.2.9 The Need for the Support of Traditional Arbitration Center	187
4.3 Conclusion	188
CHAPTER FIVE: THE IMPLEMENTATION OF E-ARBITRATION IN RESOLVING THE ISLAMIC BANKING DISPUTES IN MALAYSIA	190
5.1 Introduction	190
5.2 The Benefits of Implementing E-Arbitration in Islamic Banking in Malaysia	191
5.3 The Practical Implementation of E-Arbitration in Dealing with Islamic Banking Disputes in Malaysia	195
5.4 Is E-Arbitration an Alternative to The Traditional Arbitration System or Evolution to the Traditional Arbitration System?	196
5.5 The E-Arbitration Clause Builder	197
5.6 The Predictive E-Arbitral Award	198
5.7 A Model for Resolving Islamic Banking Disputes in Malaysia via E-Arbitration Mechanism	199
5.8 Conclusion	199
CHAPTER SIX: CONCLUDING REMARKS	201
6.1 Introduction	201
6.2 Theoretical and Practical Contributions	201
6.3 Findings of the Study	202
6.3.1 Findings on the Challenges in the Current Traditional Arbitration in Resolving the Islamic Banking Disputes in Malaysia	203
6.3.1.1 Findings on the Legal Challenges in the Current Traditional Arbitration in Resolving the Islamic Banking Disputes in Malaysia	203
6.3.1.2 Findings on the Non-Legal Challenges in the Current Traditional Arbitration in Resolving the Islamic Banking Disputes in Malaysia	206
6.3.2 Findings on the Legal Requirements in Establishing E-Arbitration to Resolve Islamic Banking Disputes in Malaysia	207
6.3.3 Findings on the Non-Legal Requirements in Establishing E-Arbitration to Resolve Islamic Banking Disputes in Malaysia	214

6.3.4 Findings on the Implementation of E-Arbitration in Islamic Banking Industry in Malaysia	216
6.4 Recommendations of the Study	217
6.4.1 Recommendations on the Challenges in the Current Traditional Arbitration in Resolving the Islamic Banking Disputes in Malaysia	218
6.4.1.1 Recommendations on the Legal Challenges in the Current Traditional Arbitration in Resolving the Islamic Banking Disputes in Malaysia	218
6.4.1.2 Recommendation on the Non-Legal Challenges in the Current Traditional Arbitration in Resolving the Islamic Banking Disputes in Malaysia	221
6.4.2 Recommendations on the Legal Requirements in Establishing E-Arbitration to Resolve Islamic Banking Disputes in Malaysia	222
6.4.3 Recommendations on the Non-Legal Requirements in Establishing E-Arbitration to Resolve Islamic Banking Disputes in Malaysia	241
6.4.4 Recommendations on the Implementation of E-Arbitration in Islamic Banking Industry in Malaysia	243
6.4.4.1 Recommendation on Using the E-Arbitration Clause Builder	243
6.4.4.2 Recommendation on Using the Predictive E-Arbitral Award	244
6.4.4.3 Recommendation on Using a Model for Resolving Islamic Banking Disputes in Malaysia via E-arbitration Mechanism	247
6.5 Suggestions for Future Studies	255
6.6 Conclusion	256
REFERENCES	258
LIST OF APPENDICES	282

LIST OF TABLES

Table 1.1 Muamalat Appeals in 2016: The Number of Registered, Disposed of and Pending Cases	10
Table 1.2 Muamalat Appeals in 2018: The Number of Registered, Disposed of and Pending Cases	11
Table 1.3 The Number of Traditional Arbitration Cases Registered in AIAC in 2016	13
Table 1.4 The Number of Traditional Arbitration Cases Registered in AIAC in 2017	14
Table 1.5 The Number of Traditional Arbitration Cases Registered in AIAC in 2018	14
Table 1.6 The Preferences Of Dispute Resolution Mechanisms Among Malaysian Retail Customers In Resolving Islamic Financial Services Disputes (IFSD) With Their Islamic Financial Services Providers (IFSP)	16
Table 2.1 The Average Duration of the Domestic and International Arbitration Cases In the AIAC as of Between 16 th December 2017 and 31 st December 2018	100
Table 2.2 The Arbitrator's Fees and Administrative Fees under I-Arbitration Rules 2018 In Domestic Traditional Arbitration Cases	103

LIST OF FIGURES

Figure 2.1 The Procedures of Referring the <i>Shariah</i> Matters to the <i>Shariah</i> Advisory Council by the Arbitrator under the Manual	87
Figure 2.2 The Procedures of Referring the <i>Shariah</i> Matters to the <i>Shariah</i> Advisory Council by the Arbitrator under I-Arbitration Rules 2018	89
Figure 6.1 The Steps of Using the E-Arbitration Clause Builder	244
Figure 6.2 The Steps of Using the Predictive E-Arbitral Award by the Human-Arbitrator	245
Figure 6.3 A Model for Resolving Islamic Banking Disputes in Malaysia via E-arbitration Mechanism	249



LIST OF CASES

- Arul Balasingam v. Ampang Puteri Specialist Hospital Sdn Bhd (formerly known as Puteri Specialist Hospital Sdn Bhd)* [2012] 6 MLJ 104.
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UNCITRAL Model Law on Electronic Commerce 1996.

United Nations Convention on the Use of Electronic Communications in International Contracts 2005.

World Intellectual Property Organization-Expedited Arbitration Rules.

LIST OF APPENDICES

APPENDIX 1: Letter of Data Collection	282
APPENDIX 2: List of Respondents	283
APPENDIX 3: Interview Questions	284



LIST OF ABBREVIATIONS

AALCO	Asian-African Legal Consultative Organisation
ADRIC	ADR Institute of Canada
AIA	Artificial Intelligence Arbitrator
AR	Augmented Reality
ADR	Alternative Dispute Resolution
AIAC	Asian International Arbitration Center
AVS	Audio and Video Conference System
BCAM	Bulgarian Chamber of Arbitration and Mediation
B2B	Islamic Bank to Islamic Bank
B2C	Islamic Bank to Islamic Banking Client
CXA	CaseXplorer Arbitration
CAP	Cecil Abraham and Partners
CBM	Central Bank of Malaysia
CBR	Case-based Reasoning
CD4	Commercial Division 4 of Kuala Lumpur High Court
CEO	Chief executive officer
CIP	Corporate Integrity Pledge
CLJ	Current Law Journal
CRT	Court Recording and Transcription
CMS	Case Management System
CIETAC	China International Economic and Trade Arbitration Commission
E	Electronic
ECACCR	Economic Chamber and the Agricultural Chamber of the Czech Republic
EU	European Union
F2F	Face to Face
FMB	Financial Mediation Bureau
GZAC	Guangzhou Arbitration Commission
ICANN	Internet Corporation of Assigned Names and Numbers
ICT	Information and Communications Technology

ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IUM	International Islamic University Malaysia
IFDI	Islamic Finance Development Indicator
IFDR	Islamic Finance Development Report
IFSP	Islamic financial services providers
IT	Information Technology
IM	Instant Messaging
IRC	Internet Reply Chat
IR	Industrial Revolution
KLRCA	Kuala Lumpur Regional Center of Arbitration
MCMC	Malaysian Communications and Multimedia Commission
Med-Ex	Expert Determination and Mediation
MLEC	Model Law on Electronic Commerce
MLES	Model Law on Electronic Signatures
NY	New York
NZIAC	New Zealand International Arbitration Centre
ODR	Online Dispute Resolution
OFS	Ombudsman for Financial Services
PWSBH	Perbadanan Wang Simpanan Bakal-bakal Haji
RAA	The Russian Arbitration Association
RM	Ringgit Malaysia
SAC	Shariah Advisory Council
SC	Securities Commission
SCIA	Shenzhen Court of International Arbitration
SSI	Semi-Structured Interview
SIDREC	Securities Industry Dispute Resolution Center
SLB	Shook Lin and Bok
S.W.O.T	Strengths, Weaknesses, Opportunities, and Threats
UDRP	Uniform Domain Name Dispute Resolution Policy
UECIC	United Nations Convention on the Use of Electronic Communications in International Contracts
UM	University Malaya

UNCITRAL	United Nations Commission on International Trade Law
USD	United States Dollar
VMP	Virtual Magistrate Project
WIPO	World Intellectual Property Organization



CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

Islamic finance becomes the fastest growing industry in the world. According to the Islamic Finance Development Report 2019 (hereinafter referred to as “IFDR”), the total assets of the Islamic finance in the world increased by three (3) per cent in 2018 to reach two point five (2.5) trillion United States dollar (hereinafter referred to as “USD”).¹ Specifically, Islamic banking was founded in the middle of 1970,² and it aims to conduct banking activities in accordance with the principles of *Shariah*.³ Islamic banks observe certain prohibitions and rules that are not observed by conventional banks.⁴ For instance, interest (*riba*), uncertainty (*gharar*), and gambling (*maysir*) are strictly prohibited in the practices of Islamic banking. Hence, the Islamic banking system has seen as a better alternative than the conventional banking system.⁵

¹ The Islamic Corporation for the Development of the Private Sector, *Islamic Finance Development Report 2019 Shifting Dynamics* (Malaysia: Kuala Lumpur, 2019), 24, accessed March 27, 2020, https://icd-ps.org/uploads/files/ifdi_2019_def_digital1574605094_7214.pdf.

² Wan Shahdila Shah bt Shahar *et al.*, “The Historical Development of Islamic Banking,” paper presented at *The 4th International Conference on Management and Muamalah* (Malaysia, Kuala Lumpur, 2017), 505, accessed March 14, 2020, <http://conference.kuis.edu.my/icom4th/eproceedings/IC%20045.pdf>.

³ Sherin Kunhibava, “Islamic Banking in Malaysia,” *International Journal of Legal Information* 40, no. 1 (2012): 192, accessed March 26, 2020, <https://doi.org/10.1017/s0731126500006478>.

⁴ *JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Berhad* [2019] MLJU 275, at [54].

⁵ Mustafa ‘Afifi bin Ab. Halim, “Enhancing the Effectiveness of Legal Infrastructure: A Study on Legal Issues and Other Challenges of Islamic Banking and Finance in Malaysia,” paper presented at *the 8th International Conference on Islamic Economics and Finance Enhancing* (Qatar, Doha, Center for Islamic Economics and Finance, 2011), 12, accessed April 5, 2020, <http://conference.qfis.edu.qa>.

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LIST OF APPENDICES

For interested readers, a detailed description is presented in the following appendices:

APPENDIX 1: Letter of Data Collection



GHAZALI SHAFIE GRADUATE SCHOOL OF GOVERNMENT
UUM Kolej Undang-Undang, Kerajaan dan Pengajian Antarabangsa
Universiti Utara Malaysia
06010 UUM SINTOK
KEDAH DARUL AMAN
MALAYSIA



Tel: 604 928 7751 / 7752
Faks (Fax): 604 928 7799
Laman Web (Web): www.gsgsg.uum.edu.my

Reference No.UUM/COLGIS/GSGSG/P-30
Date: 12 September, 2018

TO WHOM IT MAY CONCERN

Sir/Madam,

DATA COLLECTION FOR PHD

This is to certify that **MOHAMAD FATEH LABANIEH (Matric Number: 902440)** is a full time Phd student at Universiti Utara Malaysia, Sintok, Kedah.

He needs to collect data for his research thesis of Phd in order to fulfil the requirement of his Phd programme.

We duly hope that your organization will be able to assist him in getting the necessary information for his research thesis of Phd.

Thank you.

"KNOWLEDGE, VIRTUE, SERVICE"

"KEDAH AMAN MAKMUR- HARAPAN BERSAMA MEMAKMURKAN RAKYAT"

Yours faithfully,


(MOHD SUKRI OTHMAN)
Senior Assistant Registrar,
Ghazali Shafie Graduate School of Government
E-mail: md_sukri@uum.edu.my
Tel: 04-9287752/ fax:04-9287799

Universiti Pengurusan Terkemuka
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APPENDIX 2:
List of Respondents

Number	Expert	Gender	Site	Rank	Date
1	Academic	Male	Interview by using e-mail	Dr. / Lecturer.	May 24, 2019.
2	Academic	Female	University Malaya	MS. / Lecturer.	April 24, 2019.
3	Academic	Male	Interview by using e-mail	Assoc. Prof. Dr. / Lecturer.	June 18, 2019.
4	Lawyer	Male	Office of Shook Lin & Bok	Lawyer.	June 21, 2019.
5	Chief executive officer	Male	Interview by using e-mail	Chief executive officer / Assoc. Prof. Dr.	May 12, 2019.
6	Academic/ Arbitrator	Male	Universiti Teknologi MARA	Dr. / Lecturer.	May 23, 2019.
7	Academic	Female	University Malaya	Dr. / Lecturer.	May 2, 2019.
8	Academic	Male	International Islamic University Malaysia	Dr. / Lecturer.	March 30, 2019.
9	Lawyer/ Arbitrator	Male	Office of Messrs Cecil Abraham & Partners	Lawyer/ Arbitrator	May 31, 2019.

APPENDIX 3:
Interview Questions

1. What is your opinion regarding the development of the arbitration laws in Malaysia?
2. What do you think challenges facing the existing arbitration legislations in resolving the Islamic banking disputes?
3. How to solve these challenges?
4. To what extent do you think the introducing of electronic arbitration system would overcome the existing challenges?
5. Do you think from a legal perspective, the Malaysian legislations are sufficient to implement electronic arbitration?
6. Do you think we will face non-legal barriers in terms of introducing electronic arbitration? And how to solve if any?
7. Do you think the current technological infrastructures and tools in Asian International Arbitration Center and Malaysian electronic court help in implementing electronic arbitration in Malaysia?
8. What are the potential benefits of implementing electronic arbitration in the Islamic banking industry?
9. What is the ideal place, in your opinion, for the implementation of electronic arbitration? (Under Asian International Arbitration Center or the Malaysian government) And why?
10. Do you think electronic arbitration system will be an alternative to the traditional arbitration system or it is only evolution of traditional arbitration system?
11. Do you agree with the idea of implementing electronic arbitration in dealing with Islamic banking disputes?
12. Do you have any other suggestions or recommendations that can be useful and helpful to this study?