

# CHAPTER

# 36

## ALTERNATIVE DISPUTE RESOLUTION IN ISLAMIC BANKING AND FINANCE\*

### Introduction

Islamic banking and finance is relatively a new component in the contemporary financial industry and growing fast across the globe. Consequently, like in any other area of business, occurrence of disputes that arise among stakeholders is unavoidable and normal. However, resolution of such disputes without prejudice to the business relationship is imperative. The deficiencies that exist in the litigation process necessitate the industry players to find alternative ways of dispute resolution which is cheaper, protects privacy and is less formal. This chapter examines the possibility of application of various ways of Alternative Dispute Resolution (ADR) for Islamic banking and finance disputes.

A number of ADR mechanisms have been developed besides litigation across the globe. ADR includes a number of out-of-court conflict management and dispute resolution mechanisms such as negotiation, ombudsman, mediation, arbitration, fact-finding, dispute resolution boards, and other related dispute resolution processes. ADR is widely encouraged for Islamic banking and finance disputes in many countries such as Malaysia, United Arab Emirates, Bahrain, etc. where Islamic

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banking is extensively practised.<sup>1</sup> Hence, this chapter focuses on a few ADR mechanisms such as arbitration, mediation and ombudsman only as the scope does not allow covering all of them.

## Arbitration

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Arbitration is used to resolve all kinds of disputes<sup>2</sup> and it is also a common and desired process of settling commercial and other disputes in Islamic countries.<sup>3</sup> Kuwait, the United Arab Emirates and Bahrain have updated arbitrating laws based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (the UNCITRAL Model Law) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). In Bahrain, Islamic finance institutions have been instructed to resolve disputes through arbitration. Accordingly, arbitration may be utilised fully in Islamic banking and finance disputes as it is no longer considered as an 'alternative' but has become an established option to litigation.<sup>4</sup>

### Arbitration From Western And Islamic Perspective

Arbitration is actually similar to litigation — the way its proceedings are conducted and that it is widely supported by Western legal and political institutions. It has been praised as a way of dispute settlement for

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- 1 SMM Nafees, ZA Ayub 'Resolution of Islamic Banking Disputes by Way of Arbitration in Sri Lanka' *Arab Law Quarterly* Vol. 30(4) 2016 p. 335; SMM Nafees, MH Ahmad, A Masum, NHM Dahlan 'Legal Aspect of Islamic Banking: A Case Study of Bahrain' *Journal of Islamic Law Review* Vol. 14(1) 2018 pp. 109-129.
  - 2 T Sourdin *Alternative Dispute Resolution* (2002) p. 34.
  - 3 SA Saleh *Commercial Arbitration in the Arab Middle East* (1984) pp. 1-4 cited in Sundra Rajoo *Law, Practice and Procedure of Arbitration* (2003) p. 8.
  - 4 R Charlton *Dispute Resolution Guidebook* (2000) p. 12.

many centuries and it remains a favoured means of dispute resolution among other options.<sup>5</sup> As far as the emergence of this concept is concerned, scholars have different opinions and some argue that the concept emerged in ancient Egypt first and then in Rome. Plato defined arbitration as:

If a man fails to fulfil an agreed contract, an action should be brought in the tribal courts if the parties have not previously been able to reconcile their differences before arbitrators.<sup>6</sup>

Aristotle's view on arbitration was:

It bids us remember benefits rather than injuries, and benefits received rather than benefits conferred, to be patient when we are wronged; to settle a dispute by negotiation and by force; to prefer arbitration to litigation — for an arbitrator goes by equity of a case, a judge by the law, and arbitration was invented with the express purpose of securing full power for equity.<sup>7</sup>

However, modern arbitration is heavily influenced by the notion of English law. According to Sir Edward Coke, disputes were also settled through arbitration in the 15th century in England.<sup>8</sup> The American Arbitration Association (AAA) defines arbitration as:

[A] submission of a dispute to one or more impartial persons for a final and binding decision. The arbitrators may be attorneys or business persons with expertise in a particular field. The parties control the range of issues to be resolved by arbitration, the scope of the relief to be

5 T Sourdin *Alternative Dispute Resolution* (2002) p. 33.

6 Plato *The Laws* (1980) p. 16 cited in Sundra Rajoo *Law, Practice and Procedure of Arbitration* (2003) p. 16.

7 Jonathan Barnes (Ed) *The Complete Works of Aristotle* (1984) 'Rhetoric' Vol. 2 Book I, Ch 13 p. 2189 cited in Sundra Rajoo *Law, Practice and Procedure of Arbitration* (2003) p. 16.

8 SS Wijeratne 'Arbitration in Sri Lanka' *Arbitration Law in Sri Lanka* (2011) pp. 1-2.

awarded and many of the procedural aspects of the process. Arbitration is less formal than court trial. The hearing is private. The arbitrator's decision or award is made in writing.<sup>9</sup>

Another definition derived from the Australian Guide to Prevention, Handling and Resolution of Disputes reads as follows:

A process in which the parties to a dispute present arguments and evidence to a neutral third party (arbitrator) who makes a determination.<sup>10</sup>

In Islam, arbitration is a fundamental part of *Syariah*. Ibn Qudama expresses it in detail under *Kitab al-sulh* and he defines it as follows:

Arbitration is an agreement by which the disputing parties reach settlement.

All the Muslim jurists have agreed on its legality.<sup>11</sup> The term and concept are recognised by the *Qur'an*<sup>12</sup> and *Sunnah*. Accordingly, the *Qur'an* states:

There is no blame on them both if they settle the dispute by arbitration. Arbitration is better.<sup>13</sup>

The *Prophet (s.a.w.)* said as reported by Abu Hurairah, recorded by Tirmithi that:

Arbitration is permitted between two Muslims provided that it does not permit what is prohibited and prohibits what is allowed in Islam.<sup>14</sup>

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- 9 American Arbitration Association 'Alternative Dispute Resolution Basic FAQ' at <http://www.aaaonline.org> (accessed 28 July 2019).
  - 10 The Australian Standard 'Guide to the Prevention, Handling and Resolution of Disputes' cited in T Sourdin *Alternative Dispute Resolution* (2002) p. 34.
  - 11 Ibn Qudamah *Al-Muqni* Vol. 6 2004 pp. 236-294.
  - 12 MA Alhajeri 'A Critical Approach to the Kuwaiti Law of Judicial Arbitration No.11 of 1995 with reference to the UNCITRAL Model Law on International Commercial Arbitration' *Arab Law Quarterly* Vol. 15(1) 2000 p. 48.
  - 13 *Surah Al Nisa* 4:128.
  - 14 Ibn Qudamah *Al-Muqni* Vol. 6 2004 p. 236.

Hence, it is crystal clear that arbitration is not new to Islamic law and it is more suitable for the Islamic banking and finance industry for resolution of disputes. In addition, Caliph Umar instructed Abu Musa to implement arbitration in Iraq where he was the governor.<sup>15</sup>

In the history of Islam, it was even used to settle political disputes. The first ever recorded arbitration agreement was the agreement between Ali Ibn Abi Talib and Mu'wiyah Ibn Abi Sufiyan, the governor of Syria, over a dispute of the headship of the Caliphate. On this occasion, two arbitrators were selected to resolve the above dispute.<sup>16</sup> Such an arbitration agreement was similar to an agreement written for modern commercial arbitration and it stipulated the place of arbitration, the applicable law and procedural rules accompanied by provisions for the appointment of a substitute arbitrator.<sup>17</sup> This agreement reads in part as below:

In the name of Allah, the powerful, the merciful. This is what was agreed between Ali Ibn Abi Talib and Mu'wiah Ibn Abi Sufiyan, Ali for the people of Iraq and their Muslim and believing partisans and Mu'wiyah for the people from the country of Damascus and their Muslims and believing partisans: We shall comply with the decision of Allah by complying with the provisions of His Book with respect to our dispute and by applying them from the beginning up to the end, affirming what is affirmed therein and rejecting what is therein rejected. This dispute must be examined in the time period expiring during the month of Ramadan unless the arbitrators desire to settle the dispute earlier or later. If one of the arbitrators dies, the chief of each sect shall appoint, with the help of partisans a man to replace him and who shall be chosen amongst the wide and just. The place of arbitration shall be located between Kufa, Damascus and the Hijaz. Each of the arbitrators shall be entitled to appoint witnesses of his choice, but these witnesses' statements must be written in this document ...<sup>18</sup>

15 *Ibid.*

16 AH Al-Ahdab 'Muslim Arbitration Law' International Bar Association, First Arab Regional Conference, Cairo 15-19 February 1987 Vol. 1 p. 337 cited in Sundra Rajoo *Law, Practice and Procedure of Arbitration* (2003) p. 8.

17 Sundra Rajoo *Law, Practice and Procedure of Arbitration* (2003) p. 8.

18 *Ibid.*

The *Syariah* administers arbitration in accordance with the Islamic context. The *Qur'an*, *Sunnah*, *Ijma* and *Qiyas* are the main sources of *Syariah*. An arbitration administered by *Syariah* must comply with substantive and procedural laws of *Syariah* wherever the arbitration takes place. The position of arbitrator in *Syariah* is similar to that of a *qazi* (judge) in relation to his power of making an award. Equally, he must possess the same qualifications as that of a *qazi* in terms of personal and religious character. In addition, he must be divine conscious and just. He must be eligible to be a witness in a court of law.<sup>19</sup> Hence, the arbitration is entirely governed by *Syariah*. According to *Syariah*, the view of the majority jurists is the award of an arbitral tribunal, which has the same degree of binding effect as the judgment of a *qazi*. The award made in accordance with *Syariah* is enforceable under *Syariah* procedural rules. The award can be annulled if it contravenes the principles of *Syariah*.<sup>20</sup>

As the Islamic banking and finance industry is growing tremendously, the ever-growing number of transactions based on the principles of *Syariah* will predictably lead to a number of disputes arising from these transactions. It is natural that even though the transactions are based on religious rules, the contracting parties may dispute on any issue with regard to the transaction. Although the contracts are carried out with the utmost care and vigilance, conflicts are still inevitable. However, it is not necessary for the parties to seek the solution from the common law courts where the law, which is not relevant to the transaction, is applied. In addition, it is not necessary to find expensive methods of resolution while there is an option that is close to *Syariah*, economical, less susceptible to delays and more independent.

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19 *Ibid* p. 9.

20 *Ibid*.

### Arbitration For Islamic Banking And Finance Disputes

There are a number of advantages and fruitful benefits when a dispute is resolved through arbitration rather than by means of litigation. Arbitration gives the parties an opportunity to influence the composition of the arbitral tribunal as it entitles the parties to choose their arbitrators and the method in which the proceedings are carried out.<sup>21</sup> These privileges obviously are not recognised in court proceedings. Furthermore, parties can pre-determine the qualifications and experience of an arbitrator while entering into the contract and when a dispute arises, a mutually acceptable arbitrator is chosen.<sup>22</sup> Another benefit is that arbitration proceedings are much speedier than court proceedings.<sup>23</sup> A convenient place and time is also determined by the parties. Tight budgets and the appeal of cases create delays for years to reach a final result in the courts, whereas in arbitration, there is no 'docket' (no line in which to wait for one's day in court). The factors governing speed are the willingness of the parties to conclude the dispute and the intricacy of the cases to be resolved professionally. Here, results could be reached within a few weeks or months of filing.<sup>24</sup>

Parties who resolve their disputes through arbitration may enjoy the assistance of neutrals who are expert in the subject matter of their disputes. For example, parties to a construction industry dispute may select an architect, a contractor or a lawyer with lifelong experience

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- 21 ARB Amerasinghe 'The Sri Lanka Arbitration Act No. 11 of 1995' *Arbitration Law in Sri Lanka* (2011) p. 16.
- 22 American Arbitration Association 'Alternative Dispute Resolution Basic FAQ' at <http://www.aaauonline.org> (accessed 28 July 2019).
- 23 ARB Amerasinghe 'The Sri Lanka Arbitration Act No. 11 of 1995' *Arbitration Law in Sri Lanka* (2011) p. 16.
- 24 American Arbitration Association 'Introductory Guide to AAA Arbitration and Mediation' at <http://www.adr.org>.

in construction law to serve as their arbitrator. The 'subject matter expertise' of the neutral lessens the time necessary to educate a judge or jury about the technical parts of a dispute.<sup>25</sup> Informality and flexibility are the unique characteristics of arbitration. In addition, the parties are free to choose the law governing the arbitration agreement.

Arbitration proceedings are conducted in a manner that is more businesslike than litigation. Each party may tell its side of the story to the arbitrator in an environment that is less formal than a court proceeding. Testimony might be taken using new information technology, e.g. the telephone, teleconferencing, *Skype*, *Whatsapp*, etc. The hearing might take place at the place of dispute or during evening hours when the parties are free to attend. Through arbitration, privacy of the parties is ensured as proceedings are confidential and not open to the public like in court. The hearings and awards are kept private and confidential, which enables the parties to preserve a positive working relationship. One important aspect of arbitration is that it is less expensive and more economical. Time saved is money saved. Many of the costly procedures are ignored in the arbitration proceeding such as filing appeals and motions.<sup>26</sup> Another benefit is that a foreign arbitral award could be enforceable in many jurisdictions as most of the countries have ratified the New York Convention.

### **Challenges In Implementation Of Arbitration Laws**

A number of criticisms have been leveled against it. The main criticism is that arbitration proceedings have become similar to that of court proceedings. In order to overcome from this challenge, albeit arbitration laws were introduced in various jurisdictions, unfortunately,

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*



proceedings of arbitration are also often delayed and sometimes take much longer than the parties had expected when they incorporated an arbitration clause in their contract.<sup>27</sup> In order to overcome this challenge the parties to arbitration shall choose their arbitrators who can fulfill their expectations.

In addition, the arbitration laws of many countries do not provide time limits within which the arbitral award has to be rendered and the absence of such provision might be an important reason for such delays and it places the arbitration in a parallel position to the court. Such provisions are found in a few jurisdictions to avoid delays. For example, art. 210(1) of the United Arab Emirates Civil Procedure Code provides that the award shall be given within six months from the date of commencement of the arbitral proceedings.<sup>28</sup> This is actually in line with the guidelines of the International Court of Arbitration of the International Chamber of Commerce that mandates that a final award must be made within six months.<sup>29</sup> More importantly, it has to be pointed out that as the parties to arbitration are free to choose the pre-determined time limits, they must exercise this right without fail in order to avoid such long delays. In fact, the time factor is an integral motive for the parties to seek arbitration.<sup>30</sup>

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27 K Kanag-Isvaran 'A comment of the operation of the Arbitration Act — Has it worked?' *Arbitration Law in Sri Lanka* (2011) pp. 175-176.

28 A Dimitrakopoulos 'Arbitration Practice in the UAE' *Arab Law Quarterly* Vol. 16(4) 2001 p. 401.

29 The International Court of Arbitration of International Chamber of Commerce art. 31.

30 A Respondek 'Minimising Delays in International Arbitration Proceedings' *SI Arb Newsletter* No. 10, June 2014 pp. 12-14.

Another deficiency is the confrontational character of the proceedings as more stress is given to legal procedural technicalities. Due to this factor, the basic philosophy underlying arbitration is ignored.<sup>31</sup> The issue again relates to the retired judges who serve as arbitrators. The disputing parties may avoid appointing retired judges and find industry experts who can be trained as arbitrators. For example, for Islamic banking and finance disputes, the arbitrators who are experts in *Syariah*, economics and banking law may be considered. They may be practicing lawyers or executives of Islamic financial institutions.

Another factor discouraging arbitration proceedings is that sittings are of short duration and there are many sittings. The parties have to pay for every sitting.<sup>32</sup> This is actually similar to the payment made for lawyers appearing in court. The parties must be advised that the assistance of lawyers is not necessary for the proceedings. The disputing parties must be ready to tell their side of the story to the arbitrators who must listen to them and decide on the award.

Another frightening complaint concerns the integrity and honesty of arbitrators. It is observed that some of them seem biased.<sup>33</sup> In order to circumvent this situation, the party considering the arbitrator who may be biased, shall object to his appointment and replace him with a more suitable person. The parties to a dispute should exercise this right, see for example s. 10(2) of the Sri Lanka's Arbitration Act 1995:

An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence ... .

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31 K Kanag-Isvaran 'A comment of the operation of the Arbitration Act — Has it worked?' *Arbitration Law in Sri Lanka* (2011) pp. 175-176.

32 *Ibid.*

33 *Ibid.*

The party willing to express his dissatisfaction over the order of the tribunal must inform the arbitral tribunal of this and if such application is not successful, he may within thirty days of receipt of the decision appeal to the High Court.<sup>34</sup> Similar provisions may be made available in arbitration laws of many countries.

### Choice Of Laws

In Sri Lanka, in terms of the law applicable to the substance of dispute, the arbitral tribunal shall determine the dispute according to the substantive law chosen by the parties — failure to do so would result in the arbitral tribunal applying conflict of laws.<sup>35</sup> In such a situation, a question arises as to whether *Syariah* principles are permitted to be adopted under this provision. However, one can presume that as the arbitration laws of many countries are comprehensive and the parties are free to determine the substantive law by which arbitration proceedings is to be carried out, *Syariah* principles could be absorbed. In addition, the Islamic banking and finance industry is governed by the principles of *Syariah* and disputes are also resolved based on the *Syariah*, subject to the provisions of the relevant Arbitration Act of a respective country. This presumption is confirmed by Kanag-Isvaran whose statement is given below:

A tribunal sitting in Colombo may be asked to apply the law of France to the merits of the dispute, but its own proceedings will be regulated by the law of Sri Lanka. However, the parties are also free to choose to have the proceedings governed by a law different from the law of the place of arbitration.<sup>36</sup>

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34 Arbitration Act (No.11 of 1995) (Sri Lanka), s. 10(4).

35 *Ibid* s. 24.

36 K Kanag-Isvaran 'International Commercial Arbitration: A Sri Lankan Perspective' *Arbitration Law in Sri Lanka* (2011) p. 53.

Hence, it is very clear that *Syariah* may be adopted as the governing law of arbitration for Islamic finance disputes. In addition, Alan Redfern and Martin Hunter argue that:

The parties are free to choose the applicable law to their dispute. When a clear choice is not made, the intention is to be inferred from the nature and terms of the contract and from the general circumstances of the case and such inferred intention determine the proper law governing the contract.<sup>37</sup>

It is affirmed further that *Syariah* can be the choice of laws for arbitration in Islamic finance and in case of an absence of such a choice, still *Syariah* must be applied considering the nature of the contract of Islamic banking and finance. However, in the absence of choice of law governing the dispute, the arbitral tribunal shall apply conflict of law rules. Hence, it is essential to know a bit about the conflict of laws (or private international law).

Conflict of laws is that part of private law of a country that deals with cases consisting of foreign elements that means a contract based on some legal system other than the law of Malaysia. This situation may arise, for instance, when a contract was entered into or to be carried out in a foreign jurisdiction, the property in relation to the contract is located outside Malaysia or the parties to the disputes are not Malaysians. The important sources of conflict of laws are statutes, the decisions of the court and the opinion of jurists.<sup>38</sup> In *Vita Food Products Inc v. Unus Shipping Co Ltd*,<sup>39</sup> it was held that:

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37 A Redfern, M Hunter *Law and Practice of International Commercial Arbitration* (1999), p. 129 cited by U Egalahewa 'International Commercial Jurisdiction and Forum Non-conveniensi' *Arbitration Law in Sri Lanka* (2011) p. 68; SMM Nafees, MH Ahmad, A Masum 'Enhancement of Islamic Banking Industry in Sri Lanka: A View Point' *Journal of Islamic Law Review* Vol. 14(1) 2018 pp. 131-153; SMM Nafees, MH Ahmad, A Masum, & MZM Nor 'Legal and Regulatory Issues in Islamic Banking: A Sri Lankan Experience' *Journal of Islamic Law Review* Vol. 14(2) 2018 pp. 379-397.

38 K Kanag-Isvaran 'Conflict of Laws' *Arbitration Law in Sri Lanka* (2011) p. 179.

39 [1939] AC 277, PC.

... a distinction must be made between the parties' express choice of the proper law of the contract and the incorporation of some provisions of a foreign law. The effect is not to encourage the foreign law to be proper law but to incorporate it as contractual terms into the contract governed by the proper law of the contract.

Likewise, in *Compagnie Tunisienne de Navigation SA v. Compagnie d'Armement Maritime S.A.*,<sup>40</sup> it was held that:

... tribunals seem to be lenient in favour of applying a system of law on which the contract was based and valid rather than under which it would be void, on the grounds that the parties were very willing for their contract to be valid. From this case, it is clear that intention is to be inferred from the terms and nature of the contract when the law governing the contract is not expressed in words. In addition, when there is no law governing the contract in an expressed manner and the tribunal is unable to infer from the nature and the circumstances, the contract is governed by the law that is closest and the real link to the transaction.<sup>41</sup>

Therefore, an Islamic financial institution as a party to the dispute to be resolved through arbitration should be vigilant and not neglect to exercise the right provided by the relevant arbitration law when domestic and international commercial contracts are made.

### **Qualifications Of Arbitrators For Islamic Banking And Finance Disputes**

The arbitration laws of many countries may not have set out any specific qualifications for arbitrators. Such responsibility has been left to the parties to the contract.<sup>42</sup> At present, arbitration proceedings are generally carried out in collaboration with the arbitration centre of a respective country which employs most probably retired judges as

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<sup>40</sup> [1971] AC 572, HL.

<sup>41</sup> K Kanag-Isvaran 'Conflict of Laws' *Arbitration Law in Sri Lanka* (2011) p. 179.

<sup>42</sup> Arbitration Act (No.11 of 1995) (Sri Lanka), s. (4).

arbitrators. Hence, the door is wide open for parties to appoint persons they deem fit to perform the duties of arbitrators. This liberal policy of arbitration law is more suitable and conducive to appoint arbitrators for Islamic banking and finance disputes.

It is relevant to follow the procedures that are adopted by the AAA when arbitrators are appointed for Islamic and finance disputes. The AAA requires that applicants must have a minimum of ten years of senior level business or professional expertise or legal practice. In addition to that, the following factors are taken into consideration such as, 'a commitment to neutrality and objectivity; dispute management skills; judicious personality such as patience and courtesy; respect of bar or business community for integrity and strong academic background or professional or business credentials'.<sup>43</sup> It is suggested, therefore, that an arbitral tribunal for Islamic banking and finance disputes may adopt these factors when arbitrators are appointed. In order to circumvent the problem in advance, the arbitral agreement should set out such qualifications in advance at the time of the contract. In addition, Islamic finance institutions may jointly establish an arbitration centre in a respective country.

It could be relevant to investigate a few countries where arbitration is encouraged for Islamic banking and finance disputes in order to learn from them. In Indonesia, for example, the Indonesian Ulema' Council (IUC) has established the 'Shariah Arbitration Board' (SAB). The SAB has prepared guidelines to resolve disputes arising from *Syariah* based transactions. When the IUC issues any *fatwa* in relation to a transaction, the *fatwa* includes a clause that mentions that any dispute arising from the transaction, shall be resolved by the SAB. For example, in its *fatwa* in relation to *Syariah* bonds, it sets out as below:

Should any of the party fail to perform its obligation or in the event there is a conflict between the relevant parties and amicable solution failed the resolution of such matter shall be done through the Shari'ah Arbitration Board.

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43 American Arbitration Association 'Introductory Guide to AAA Arbitration and Mediation' at <http://www.adr.org>.

This clause, indeed, is not binding from a legal perspective. However, if this clause is a part of an agreement or included in the agreement, it shall be binding on the parties in accordance with art. 1338 of the Indonesian Civil Code which provides that all legally executed agreements shall bind the parties by law.<sup>44</sup>

In Malaysia, for example, the arbitration process is being greatly encouraged. The Asian International Arbitration Center (AIAC) (formerly known as the Kuala Lumpur Regional Centre for Arbitration or KLRCA) is determined to resolve Islamic banking and financial disputes in accordance with *Syariah*. It has developed specific rules for this purpose. It could be relevant to cite the statement of the former governor of the Central Bank of Malaysia:

To complement the court system, disputes may also be referred to an arbitration centre for resolution. In this regard, the Kuala Lumpur Regional Centre for Arbitration will be enhanced to serve as a platform to deal with cases involving Islamic banking and finance and to extend these services beyond the borders.<sup>45</sup>

In addition, the arbitral tribunal has been advised during its proceeding to consult the *Syariah* Advisory Council (SAC) in relation to *Syariah* issues regarding cases involving Islamic banking and finance and the ruling of the SAC is binding on the arbitral tribunal.<sup>46</sup>

### Arbitral Awards

The Arbitration Act of Sri Lanka provides that the arbitral award shall be in writing and shall be signed by the arbitrator or by the majority of its members. The award shall stipulate the reasons upon which it is based. Parties may also agree that no reason shall be given in the award.

44 I Rakhmat 'Urgent Need to Improve Resolution of Disputes in Shariah Transactions' *Islamic Finance News* Vol. 5(6) 15 February 2008 pp. 13-14.

45 ZA Aziz 'Arbitration for Islamic Financial Business under the Auspices of Kuala Lumpur Regional Centre for Arbitration' *The Star* 26 August 2004.

46 Central Bank of Malaysia Act 2009, ss. 51-58.

Furthermore, the award shall specify its date and place of arbitration.<sup>47</sup> It is better for parties to agree that no reason shall be given in the award because the purpose of the award is to solve the dispute finally and conclusively. It is achieved within the scope of the arbitration agreement. The AAA for example, does not request the arbitrators to write opinions explaining the reasons for their decisions unless the parties require so. As a general rule, the AAA commercial arbitral awards include a brief direction to the parties on a single sheet of paper. Written opinions may create attacks on the award because they identify targets for the losing party.<sup>48</sup> This practice will be beneficial for both parties preserving the business relationship and forgetting the past. The other important aspect is that the arbitrators do not need to spend much time on rationalising the awards like court judgments.

According to s. 28 of the Arbitration Act of Sri Lanka, for example, the arbitral tribunal may in the award for payment of money, order a party to pay interest at the rate agreed upon by the parties or, in the absence of such agreement, at the rate of legal interest prevailing at the time of offering the award from the date of the initiation of the arbitral proceedings.<sup>49</sup> This provision, indeed, contravenes *Syariah*. Hence, this shall be made optional by amending that provision of the Act in order to accommodate the Islamic finance businesses which shall be free from involvement of interest. Until then, the agreement of the parties to the arbitration must waive this right by inserting a clause in the agreement. Similar provisions may be available in other jurisdictions too. Furthermore, the parties may require the arbitral tribunal to make any correction, modification or to make an additional award within 14 days of receipt of the award.<sup>50</sup>

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47 Subsections 25(1), (2), (3).

48 American Arbitration Association 'Introductory Guide to AAA Arbitration and Mediation' at <http://www.adr.org>.

49 ARB Amerasinghe 'The Sri Lanka Arbitration Act No. 11 of 1995' *Arbitration Law in Sri Lanka* (2011) p. 24.

50 Arbitration Act (No.11 of 1995), s. 27.



The enforcement of awards is more imperative than anything else. Proper enforcement will make claimants confident in the system of arbitration. Thus, the arbitration laws of many countries do not fail to encompass such a provision that makes the enforcement of an arbitral award mandatory. Accordingly, an award is final and binding on the parties to the agreement. Citing the example of the Arbitration Act of Sri Lanka, a party willing to enforce a domestic award shall apply to the High Court in this respect within 14 days of the making of the award.<sup>51</sup> If there is no objection and the court finds no reason to refuse the enforcement, the court shall give the judgment in accordance with the award.<sup>52</sup> Although the judgment, decree or order of the High Court is final, the parties are at liberty to appeal to the Supreme Court on a question of law for which leave to proceed must be given by the Supreme Court. However, such leave shall not be granted if the parties have agreed in advance in writing to exclude any right to appeal in relation to the award.<sup>53</sup>

Meanwhile, s. 34 of the Arbitration Act provides necessary arrangements for foreign arbitral awards to be recognised and enforced in Sri Lanka, that would be the position in many other jurisdictions too. Refusal of enforcement can only take place on the same grounds that are applicable for domestic awards, e.g. it has been set aside by a court. Furthermore, s. 32 of the Arbitration Act provides the grounds on which awards could be set aside or which can lead to invalidity. They are formal procedural

51 Every Application to the High Court shall be made by way of a petition along with an affidavit. All parties other than the petitioner will be named as respondents and notice will be given of the application to the respondents. Consequently, the respondent will be given an opportunity to express his objections in writing supported by an affidavit. *Viva voce* evidence may be required by the court if necessary: sub-ss. 40(1), (2), (3).

52 Arbitration Act (No.11 of 1995), s. 31(1).

53 *Ibid* ss. 37(1), (2), 38(1); see also ARB Amerasinghe 'The Sri Lanka Arbitration Act No. 11 of 1995' *Arbitration Law in Sri Lanka* (2011) p. 25.

mistakes or errors, the invalidity of the arbitration agreement, subject matter not being arbitral and the award being against the public policy of a respective country.<sup>54</sup> In case of the death of a party to an arbitration agreement, the agreement is still enforceable by or against the legal representative of the estate of the deceased unless there is a provision contrary to this intention in the agreement.<sup>55</sup>

### Harmonisation Of *Syariah* And Civil Law On Arbitration

*Syariah* stands as one of the few non-Western legal systems that has normative, social or political significance. The degree of its application varies in different parts of the world. Muslims feel that they are obligated to regulate their personal and formal affairs subject to *Syariah*. The principles of *Syariah* have become transnational and its application is no longer limited to traditional Muslim countries. *Syariah* is recognised in international tribunals as well as decisions of many courts all over the world.<sup>56</sup> For example, in *Libyan American Oil Company v. The Government of the Libyan Arab Republic*,<sup>57</sup> the arbitral tribunal appointed by the President of the International Court of Justice (ICJ) concluded that the concession rights were regarded in Islamic law as incorporeal property that cannot be interfered with by any trend of nationalisation.<sup>58</sup> Hence, the important point to be drawn here is that *Syariah* has been recognised as the governing law.

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54 ARB Amerasinghe 'The Sri Lanka Arbitration Act No. 11 of 1995' *Arbitration Law in Sri Lanka* (2011) p. 26.

55 Arbitration Act (No.11 of 1995), s. 46.

56 A Ahmad 'Educating Lawyers for Transnational Challenges: The Challenge of Islamic Law' *Journal of Legal Education* Vol. 55(4) 2005 p. 475.

57 20 I.L.M. 151 (1981).

58 A Ahmad 'Educating Lawyers for Transnational Challenges: The Challenge of Islamic Law' *Journal of Legal Education* Vol. 55(4) 2005 p. 475.

Likewise, domestic application of *Syariah* is in force in the Province of Ontario in Canada where the courts are required to provide a mandatory session for Muslim litigants to settle their civil matters according to *Syariah*. In addition, the courts in the United States have resolved a number of *Syariah* issues favourably. For example, in *O'Lone v. Estate of Shabazz*,<sup>59</sup> new prison policies that resulted in the restrictions to attend *Jumah* (Friday congregational prayer) were challenged by Muslims. Consequently, the *Syariah* view in this respect was analysed by the US Supreme Court.<sup>60</sup>

Furthermore, *Syariah* is taught in the universities around the globe including Harvard and Oxford. A survey on the Law Schools teaching Islamic law in the US was conducted by John Makdisi and he found that it has been taught in a number of universities since 1997. In his concluding remarks he states as follows:

The number and variety of courses offered in the United States are strong indication that Islamic law has entered the mainstream of American legal education.<sup>61</sup>

In commenting on the above survey, Lama Abu-Odeh states that:

We need to stop approaching the Islamic world through the prism of religion, culture and history and start approaching it as a modern product of the colonial experience, with all complexity. This may indeed require that we approach its contemporary law with the same tools, methodologies and conceptual structures that we use to understand American Law.<sup>62</sup>

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59 482 US 342 (1987).

60 A Ahmad 'Educating Lawyers for Transnational Challenges: The Challenge of Islamic Law' *Journal of Legal Education* Vol. 55(4) 2005 p. 475.

61 J Makdisi 'A Survey of AALS Law Schools Teaching Islamic Law' *Journal of Legal Education* Vol. 55(4) 2005 p. 588.

62 L Abu-Odeh 'Commentary on John Makdisi's "A Survey of AALS Law Schools Teaching Islamic Law"' *Journal of Legal Education* Vol. 55(4) 2005 p. 591.

Therefore, it is clear that the harmonisation of *Syariah* and Western law is not so difficult. The attitude of people around the globe is changing in favour of *Syariah*. When *Syariah* is incorporated into the arbitration agreement, it is possible to carry out a process of harmonisation between the two legal systems.

## Mediation

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Mediation is another form of ADR mechanism. The process of mediation is aided by a trained and skilled third party who acts as mediator involving reconciliation and negotiation for the parties to come for an amicable solution to the any given issue. Mediation is defined as a confidentially assisted negotiation, substantially dominated by parties concerned and procedurally controlled by the mediator or mediators who have no authority to use force with regard to the outcome of the proceeding.<sup>63</sup> In *Islamic Banking & Finance: Principles, Instruments & Operations*, mediation is defined as:

... negotiation carried out with the assistance of a third party. The mediator in contrast to the arbitrator or judge has no power to impose an outcome on disputing parties. Despite the lack of “teeth” in the mediation process, the involvement of a mediator alters the dynamics of negotiations. Depending on what seems to be impeding an agreement, the mediator may attempt to encourage exchange of information, provide new information, help the parties to understand each other’s view, let them know that their concerns are understood; promote a productive level of emotional expressions; deals with differences in perceptions and interest between negotiations and constituents (including lawyer and client) help negotiations realistically, assess

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63 KA Mokhtar, SNS Ahmad ‘Mediation in Islamic Banking’ in *Islamic Banking & Finance: Principles, Instruments and Operations* (2016) p. 573.

alternatives to settlements, learn (often in separate sessions with each party) about those interest the parties are reluctant to disclose to each other and invent solutions that meet the fundamental interests of all parties.<sup>64</sup>

In fact, there are three kinds of mediation. They are facilitative, evaluative and transformative mediations. The distinction among these is dependent on the volume of control that lies with the parties to a dispute. In the first type of mediation, the mediator merely controls its process while the disputing parties are in charge of the result. Here, the disputing parties have self-determination, that means they are free to resolve their own issues themselves with the advice of the mediator who acts impartially between disputants. In case of evaluative mediation, the strength and weaknesses of the disputing parties are assessed by the mediator who makes suggestions to resolve issues. In this sense, the mediator predicts the view of a judge or jury if the case is brought before them. For this purpose, the mediator conducts a separate meeting with disputing parties at a different time. Parties are given a chance to evaluate the cost and other benefits of mediation compared to litigation. Thus, the mediation process is controlled by the mediator who is involved directly with the outcome of the mediation. Meanwhile, in transformative mediation, the mediator normally tries to inculcate mutual recognition and empowerment between the parties to a dispute. Efforts are made to make each other understand the problem and respect each other's needs, interests, values and opinion. Both parties are made to approach the problem with a more informed viewpoint. This may also be called as facilitative mediation.<sup>65</sup>

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64 SB Goldberg, FEA Sander, NH Rogers *Dispute Resolution: Negotiation, Mediation and other Process* (1999) p. 123 cited in KA Mokhtar, SNS Ahmad 'Mediation in Islamic Banking' in *Islamic Banking & Finance: Principles, Instruments and Operations* (2016) p. 574.

65 LL Riskin 'Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed' *Harvard Negotiation Law Review* Vol. 1(7) 1997 p. 24 cited in KA Mokhtar, SNS Ahmad 'Mediation in Islamic Banking' *Islamic Banking & Finance: Principles, Instruments and Operations* (2016) pp. 574-575.

### **Syariah Principles In Mediation Process**

Islamic law encourages and appreciates the parties to disputes to find solutions amicably, especially for contractual disputes. Generally, Islam discourages waste of time, resources and spoiling a good relationship between individuals. Mediation is a process where parties agree to resolve their issues with the support of a mediator while preserving the individuals' reputation. In Islamic law, *wassatab* is considered equivalent to mediation. It means benevolent and non-binding procedure to resolve a dispute. It is identified as, by one or more persons intervening in a dispute either of their own or at the request of one of the parties to a dispute. In the history of Islam, mediation has been adopted for resolving disputes. For instance, in *Kitab-al-Wuzraa* (The Book of Ministers), Al-Jahshiary, who is the author, has used the term *Tawasut* regarding the issue of Mohamed bin Muslim where mediation was adopted. Similarly, mediation played a great role for resolving an issue between a man and Caliph Harun al-Rashid.<sup>66</sup>

With regard to the legality of mediation, one may find it in the *Qur'an*, *Sunnah* and from the statements of Companions of the *Prophet Mohamed (s.a.w.)*:

Help ye one another in righteousness and piety, but help ye not one another in sin and rancor.<sup>67</sup>

In most of their secret talks, there is no good; but if one exhorts to a deed of charity or justice or conciliation between men to him who does this seeking the pleasure of Allah, We shall soon give a reward of the highest.<sup>68</sup>

If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves and such settlement is best ...<sup>69</sup>

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66 KA Mokhtar, SNS Ahmad 'Mediation in Islamic Banking' in *Islamic Banking & Finance: Principles, Instruments and Operations* (2016) p. 577.

67 *Surah Al Ma'idah* 5:2.

68 *Surah Al Nisa* 4:114.

69 *Surah Al Nisa* 4:128.

*Prophet Mohamed (s.a.w.)* appreciated the mediation process by saying that:

The best of you in and amongst Allah's eyes are those who are beneficial to others and amongst the best deeds in Allah's eyes are creating happiness in the heart of a Muslim, paying his debt or eradicating his hunger.<sup>70</sup>

### **Mediation In Islamic Banking And Finance Disputes**

Mediation, similar to arbitration, is normally cheaper in terms of cost compared to litigation. Equally, parties may get the results of mediation rapidly as no procedural laws or evidence ordinances are followed during the process. In addition, parties to a dispute would be satisfied with the results due to the fact that they themselves resolve the issues without any compulsion or confronting attitude. Implementation of mediated issues will be easier as both parties amicably reach the conclusion, being clearly aware of its terms and conditions. Preserving relationship between disputing parties is another remarkable benefit reachable through mediation compared to litigation that generally spoils the good relationship between the disputing parties. Another encouraging and important feature is that in mediation, there are no losers at the end of the process. Most importantly, the mediation process is confidential and that preserves the reputation of the parties.

Every Islamic commercial bank, for example in Malaysia, has its own unit to handle issues and disputes by way of mediation. Some banks openly publish on their websites encouraging their customers to find solutions through mediation in case of disputes. In addition, the Financial Mediation Bureau (FMB) in Malaysia plays a greater role in resolving disputes between a customer and financial service provider. It is notable that its service is provided free of charge. The FMB entertains disputes, among others, related to Islamic personal financing; Islamic

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70 Al-Mu'jam al-Awsat, *Hadith* No. 6192.

housing financing; Islamic credit card; Islamic hire purchase; Islamic saving and current accounts and *Takaful*. It has to be noted that the FMB also runs the operations for the Ombudsman Financial Services (OFS).

One of the important measures that Malaysia has taken with regard to dispute resolution is the introduction of the Mediation Act 2012 that promotes mediation as a means of effective alternative dispute resolution mechanism. Similarly, The Malaysian Mediation Centre (MMC) has been established under the Bar Council of Malaysia with the purpose of promoting mediation which provides services in civil, commercial and matrimonial matters.<sup>71</sup> As such, the mechanism of mediation is considered a better means to resolve disputes than litigation and arbitration. A senior Malaysian judge even went on to say that mediation is the best means to resolve disputes. A former Chief Justice of the Federal Court of Malaysia also suggested introducing mediation to expedite the disposal of cases in the courts.<sup>72</sup>

## **Ombudsman**

The Ombudsman is another form of ADR which is available in many countries. For example, in Malaysia, the Ombudsman for Financial Services, set up since 2005, provides ADR services between financial consumers and financial service providers. Under this organisation, the Financial Ombudsman Scheme (FOS) has been incorporated with the approval of the BNM that operates pursuant to the Financial Services Act 2013 and Islamic Financial Services Act 2013. It has been providing its services since 2016. According to FOS, its mandate is to resolve

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71 KH Lee 'Mediation Act 2012: Not so bad After All' *The Sunday Daily*, (7 January 2013) <http://www.malaysianbar.org.my> (accessed 28 July 2019).

72 KA Mokhtar, SNS Ahmad 'Mediation in Islamic Banking' in *Islamic Banking & Finance: Principles, Instruments and Operations* (2016) p. 573.



disputes between financial consumers and financial service providers in an independent, fair and timely manner. It is claimed to be unbiased and impartial in resolving disputes and makes decisions based on relevant facts or evidence and circumstances of each dispute. Furthermore, it declares its vision as, 'To be the trusted and well-respected independent dispute resolution avenue for financial consumers'.<sup>73</sup> Consumers may refer any eligible complaints regarding the following sectors:<sup>74</sup>

- (1) Licensed Commercial and Islamic Banks;
- (2) Licensed Insurers and *Takaful* Operators;
- (3) Prescribed Development Financial Institutions;
- (4) Approved Designated Payment Instrument Issuers and Designated Islamic Payment Instrument Issuers;
- (5) Approved Insurance and *Takaful* Brokers and
- (6) Approved Financial Advisers and Islamic Financial Advisers.

Their services are also confidential and professional. The Client Charter of the FOS declares:

No person including the member of the Board, Chief Executive Officer, Ombudsman, Case Manager, officer and employee of OFS shall disclose any data, document or information relating to a dispute to any person except with prior consent from you and our Member or if required to or permitted to do so under any applicable laws, regulations or by any court.<sup>75</sup>

So, it is clear that the Ombudsman service is also utilised for providing ADR for Islamic banking and financial disputes.

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73 Ombudsman for Financial Services 'Company Overview' at <http://www.ofs.org.my> (accessed 28 July 2019).

74 Ombudsman for Financial Services 'Our Members' at <http://www.ofs.org.my> (accessed 28 July 2019).

75 Ombudsman for Financial Services 'Client Charter' at <http://www.ofs.org.my> (accessed 28 July 2019).

### Ombudsman In Islamic Banking And Finance Disputes

It strives to resolve issues by processing a complaint within seven working days. Endeavours are made to resolve disputes within 3-6 months. If a dispute does not fall within the scope of the Ombudsman, it would help refer it to the relevant agency for resolution. More importantly, confidentiality is protected. The following table illustrates the period of time taken for resolving disputes.<sup>76</sup>

Turnaround time for outstanding cases on Islamic banking and finance (2018)

Sector	Islamic Banking	Takaful
Less than 1 month	03	26
1-2 months	04	6
2-3 months	0	2
3-4 months	1	5
4-6 months	1	8
6-9 months	1	1
9-12 months	0	0
More than 12 months	0	1

Source: OFS Annual Report 2018 p. 49

76 *Ibid.*

### Scope Of Ombudsman

The OFS has some criterion to accept disputes from financial consumers and the decision will be dealt with the member organisations only — amounted to 202 as at 31 December 2018.<sup>77</sup>

#### OFS Monetary Jurisdiction

Type of Dispute	Maximum Amount (Per dispute)
Banking and Islamic banking products and services/Insurance and <i>Takaful</i> claims	RM 250,000
Motor Third Party property damage insurance/ <i>Takaful</i>	RM 10,000
Unauthorised transactions through the use of designated payment instruments or a payment channel such as internet banking, mobile banking or automated teller machine (ATM), or unauthorised use of a cheque	RM 25,000

Source: OFS Annual Report 2018 p. 33

Similarly, the following Islamic banks and *Takaful* operators have obtained the OFS membership and agreed to resolve disputes through OFS by way of ADR.<sup>78</sup>

<sup>77</sup> Ombudsman for Financial Services 'OFS Annual Report 2018' p. 30 at <http://www.ofs.org.my> (accessed 28 July 2019).

<sup>78</sup> *Ibid* p. 89.

No.	Islamic Banks	Takaful Operators
1	Affin Islamic Bank Berhad	AIA PUBLIC Takaful Berhad
2	Alkhair International Islamic Bank Berhad	AmMetLife <i>Takaful</i> Berhad
3	Al Rajhi Banking & Investment Corporation (Malaysia) Berhad	Etiqa Family Takaful Berhad (formerly known as Etiqa Takaful Berhad)
4	Alliance Islamic Bank Berhad	Etiqa General Takaful Berhad
5	AmBank Islamic Berhad	FWD Takaful Berhad
6	Bank Islam Malaysia Berhad	Great Eastern Takaful Berhad
7	Bank Muamalat Malaysia Berhad	Hong Leong MSIG Takaful Berhad
8	CIMB Islamic Bank Berhad	Prudential BSN Takaful Berhad
9	Hong Leong Islamic Bank Berhad	Sun Life Malaysia Takaful Berhad
10	HSBC Amanah Malaysia Berhad	Syarikat Takaful Malaysia Am Berhad
11	Kuwait Finance House (Malaysia) Berhad	Syarikat Takaful Malaysia Keluarga Berhad (formerly known as Syarikat Takaful Malaysia Berhad)
12	Maybank Islamic Berhad	<i>Takaful</i> Ikhlas Family Berhad (formerly known as <i>Takaful</i> Ikhlas Berhad)
13	MBSB Bank Berhad (formerly known as Asian Finance Bank Berhad)	Takaful Ikhlas General Berhad
14	OCBC Al-Amin Bank Berhad	Zurich Takaful Malaysia Berhad
15	PT Bank Muamalat Indonesia, Tbk	Zurich General Takaful Malaysia Berhad
16	Public Islamic Bank Berhad	
17	RHB Islamic Bank Berhad	
18	Standard Chartered Saadiq Berhad	

## Ombudsman: A Case Study

The following case study indicates how a dispute has been resolved by way of Ombudsman. Real names are omitted due to confidentiality.

### Case 1: ATM – *Alleged Unauthorised Withdrawal*

Background: ‘the complainant alleged that money was withdrawn from his account at Bank C’s ATM without his knowledge. The complainant contended that the ATM card was in his possession and he did not record the PIN for reference. He has viewed the CCTV footage and he does not know the person who had used his card at the ATM to perform the unauthorised withdrawals from his account.’

Investigation and findings: ‘the following evidence was exposed during the mediation session held to hear the dispute between the complainant and Bank C:

- (1) The complainant was requested to key in his PIN on the bank’s keypad at the customer service area when he opened his account. The disputed ATM withdrawal occurred on the same day, around 5pm.
- (2) The CCTV footage offered by the Bank C revealed that the complainant’s colleague was standing beside him and had witnessed him keying the PIN. It is highly likely the complainant’s PIN was conceded during this time.
- (3) The CCTV recordings at the time of the account opening at the bank exposed that the bank’s staff at the customer service counter had furnished the complainant’s ATM card to the complainant’s colleague whilst the complainant was at the ATM at the material time. OFS underlined to Bank C that the bank owed a duty of care to its customer to ensure that the ATM card that is as good as cash must be given only to the rightful owner, i.e. the cardholder.

- (4) The complainant's colleague was seen handing a card to the complainant when he returned to the counter. However, it is difficult to establish whether the ATM card given to the complainant belonged to him. On this, Bank C was unable to confirm based on the CCTV recordings as to whether the complainant was given the genuine card bearing his card number and not any other card. OFS highlighted to Bank C that the complainant's colleague could have switched the card thereby deceiving him into believing that the ATM card was in his possession during the occurrence of the disputed withdrawals.

OFS's view: 'Based on the CCTV recordings, OFS held that Bank C had facilitated the fraud by the third party. Thus, Bank C's contention that the transaction was successfully executed with a valid chip-based ATM card and PIN does not apply.'

Settlement: 'Based on the findings and the circumstances that led to the loss of money from the complainant's account, OFS requested Bank C to review the findings and work towards an amicable settlement with the complainant. The complainant also accepted Bank C's settlement offer'<sup>79</sup>

#### Case 2: ATM – Non-Dispensation of Cash

Background: 'Mr G maintains a savings account with Bank H and was issued with a debit card. Mr G withdrew the sum of RM1,500.00 from Bank H's ATM located at a supermarket on 2/8/2017. Mr G contended that he had waited for some time for the cash to be dispensed at the ATM. However, the cash and the transaction slip were not dispensed by the ATM. He did not hear the sound of the cash being counted by the said ATM. He discovered that the sum had been deducted from his savings account when he made a subsequent withdrawal at the next ATM.'

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79 Ombudsman for Financial Services 'Publications: Case Studies' at <http://www.ofs.org.my> (accessed 28 July 2019) (accessed 28 Jul 2019).

Investigation and findings: 'Bank H's ATM Electronic Journal revealed that Mr G's withdrawal was successfully executed and 30 pieces of RM50.00 notes totalling RM1,500.00 was dispensed by the said ATM. In accordance with the records of the ATM Journal, Host Report and Engineer's Report, the ATM was functioning smoothly and there were no irregularities or cash retraction during the Mr. G's withdrawal. Bank H's ATMs are equipped with retraction function whereby the dispensed cash will be retracted into the machines if it is not taken within 30 seconds. The cash balancing records revealed that there were no discrepancies or cash excess at the said ATM. From the ATM Electronic Journal record, it is detected that numerous customers had negated their transactions before and after the disputed withdrawal. Bank H's investigation and ATM records disclosed that some of the cancellations were due to the unavailability of the denominations requested. However, Bank H was unable to clarify the reasons for the rest of the cancelled transactions. It is also perceived that Bank H's CCTV was not deliberately placed and it did not capture a clear image of the complainant performing the transaction. The CCTV recording was essential evidence to decide what had transpired during Mr. G's transaction at the ATM and to recognise the person who had probably collected the dispensed cash. The Guideline on Provisions of Electronic Banking (e-banking) Services by Financial Institutions issued by BNM recommends that banks ought to install close circuit camera or transactions triggered camera at strategic locations with sufficient lighting so as to capture clear images of a person performing a transaction and the retention period on the recorded information must be established.'

Settlement: 'Based on the Case Manager's observations, the dispute was settled amicably between the parties.'<sup>80</sup>

## Conclusion

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In a nutshell, arbitration is becoming an important ADR mechanism in many countries and even for Islamic banking and finance disputes. Since Islamic finance is based on the principles of the Islamic *Syariah*, it is imperative to adopt a system that suits the industry with regard to the issue of dispute resolution. In this sense, the arbitration laws of many countries enable the disputing parties to choose *Syariah* as a governing law of the arbitration process. In the same vein, mediation is also one of the great ADR mechanisms for resolving Islamic banking and finance disputes as it is more independent and convenient as parties themselves resolve their differences with the help of a mediator who facilitates the process towards a successful and amicable solution. In many countries, including Malaysia, mediation laws are available for governing this process and resolving disputes outside the courts. In addition, the ombudsman system is also becoming an ideal form of ADR mechanism among Islamic financial institutions and a good example is Malaysia. Finally, the notable problem with regard to ADR is the lack of awareness among financial consumers and service providers which may incline towards litigation for resolving disputes. However, courts are firm in their position by encouraging the parties to find the ADR mechanism at the beginning or even during the litigation process for resolving their issues amicably while preserving their reputation and business relationship.