

## **ALTERNATIVE DISPUTE RESOLUTION IN ISLAMIC FINANCE: WHAT'S NEXT?**

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### **Abstract**

In Islamic transaction, the disputations between two or more parties could affect the roles and responsibilities. Furthermore, when the court received a case from disputed parties, there will be a perception among each of parties of win-lose situation, whereby one party embellished with satisfaction, while the other party will beat in suffering, so the impact is the relationship between two parties are become farther. Therefore, alternative dispute resolution (ADR) in Islamic Finance is suggested in by many Muslim economist and legal experts as a substitute to any further legal activities. This is because it will satisfy many of litigants and it provides a complementary substitute to litigation. The study about ADR in Islamic finance has been done by previous literature. By the way, the implementation of ADR in Islamic financial institutions still needs to be elaborated. Therefore, this paper aims to discuss about updated issues and challenges of implementations of ADR in Islamic finance. This paper found that the ADR in Islamic finance need a model to make the ADR more flexible and eligible with different kinds of conflicts.

Keywords: Alternative, dispute, resolution, Islamic finance.

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### **Introduction**

Islamic finance is defined as any financial business in ringgit or other currency which is subject to the laws enforced by the bank and consistent with the Shari'ah (Jasri Jamal, Nor Aziah Mohd, & Kamal Halili, 2011). Islamic finance comprises the banking system, takaful (Islamic insurance) and capital markets products and services which offer an alternative to society (Nooraslinda Abdul Aris, Rohana Othman, Rafidah Mohd Azli, et al., 2013). Islamic finance also promoting social and economic welfare and has been practised by Islamic Banks in Malaysia (Nooraslinda Abdul Aris, Rohana Othman, & Rafidah Mohd Azli, 2013). Nowadays, Islamic banking practitioners (bankers and lawyers) were realized about the imperatives of education and more regulatory upheavals in order to create a level playing field for Islamic finance as well as publicize Islamic banking products to a wider clientele (Nooraslinda Abdul Aris, Rohana Othman, & Rafidah Mohd Azli, 2015).

While Alternative Disputation Resolution (ADR) is defined as a range of processes for amicable resolution of disputes, either as court-annexed processes or out-side court settlement by a third party neutral based on the Islamic worldview without compromising the fundamentals of Islamic Law (Umar A. Oseni & Abu Umar Faruq Ahmad, 2015). In order to operationalize ADR, the concept of Sulh, tahkim, muhtasib and the hybrid of processes recognized by Shariah law are need to be adopted (Omar Oseni, 2009). The hybrid of processes such as *nasihah* or counselling, *qadha* or process of judicial

administration, fatwa or expert determination, wali al-mazalim (chancellor), med-arb, med-ex. The legal framework of ADR is established with the principles of justice, equity and fairness (Umar A. Oseni, Abideen Adewale, & Zain, 2016).

This definition is in lined with the several evidences of Al-Quran as stated below:

*“Invite (people) to the way of your Lord with wisdom and good counsel. And argue with them in the best of manners. Surely, your Lord knows best the one who deviates from His way, and He knows best the ones who are in right path.” – Surah Al-Nisa’: 125. Translations by Mufti Taqi Uthmani.*

*Oh ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties: let not the scribe refuse to write: as Allah has taught him, so let him write. Let him who incurs the liability dictate, but let him fear His Lord Allah, and not diminish aught of what he owes. If they party liable is mentally deficient, or weak, or unable Himself to dictate, Let his guardian dictate faithfully and get two witnesses, out of your own men, and if there are not two men, then a man and two women such as ye choose, for witnesses, so that if one of them errs, the other can remind her...” – Surah al baqarah 282. Translations by Yusof Ali.*

### Literature Review

Omar A.Oseni has elaborates about ADR extensively in his writings. The elaborations and discussions cover the mechanisms used to serve the resolution of disputes between parties involved in the Islamic banking and finance industry (Umar A. Oseni & Abu Umar Faruq Ahmad, 2015), the suggestion of internationalization of legal framework for dispute resolutions in Islamic banking and finance(Omar Oseni, 2009), integrating classical framework into modern framework (Umar A. Oseni, 2010), acknowledging the civil court scheme with a hybrid feature of expert determination by referring all issues pertaining to Islamic law to a recognized body of Shariah experts (Umar A. Oseni & Abu Umar Faruq Ahmad, 2015). Nur Khalidah Dahlan, Mohd Rizal Palil, Noor Inayah Yaa“kub, and Hamid (2015) support these opinions by highlighting on 29 related cases from 1986 until 2012. These theoretical studies are supported by the empirical study. The trust in technology and effort expectancy are indicated as the most influencing determinants of behavioral intention of stakeholders in Islamic banking to use ODR (Umar A. Oseni, Abideen Adeyemi Adewale, & Sodiq O. Omoola, 2018). It also indicated that the legal understanding of Islamic banking contracts and clauses can produce towards the reduction of disputations choice.

The application of ADR in Islamic finance is extensively discussed by authors. The development of ADR is elaborated as the institutional framework with the aims to reposition the legal framework such as

**Table 1. Legal Framework of ADR**

<ul style="list-style-type: none"> <li>• Muamalat Bench of the Commercial Division in the High Court of Malaya,</li> <li>• Financial Mediation Bureau, (FMB) set up by Bank Negara Malaysia</li> <li>• Kuala Lumpur Court Mediation Centre (KLCMC) annexed to the High Court</li> <li>• Islamic finance arbitration under the KLRCA i-Arbitration Rules 2013 of the Kuala Lumpur Regional Centre for Arbitration,</li> </ul>	<p><b>Umar A. Oseni et al. (2016)</b></p>
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- Malaysian Mediation Centre,
  - Securities Industry Dispute Resolution Centre (SIDREC)
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The release of the Shari'ah Standard No. 32 on Arbitration by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI)

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According to Omar A. Oseni and Abu Umar Faruq Ahmad (2016), recently, the financial ombudsman scheme is introduced by the IFSA 2013 and it is expected to operate based on the underlying principles of Muhtasib.

### **Challenges of ADR**

Based on the literature, the constituency of function and power of Shariah Advisory Counsel (SAC) become one of the challenges of ADR in Islamic finance. Jasri Jamal et al. (2011) pointed out several cases in Islamic finance since 2003, part of them are the case of Bank Islam v Adnan Omar, Dato' Hj Nik Mahmud bin Daud v Bank Islam and Arab- Malaysia Finance Bhd v Taman Ihsan Jaya Sdn Bhd. From these cases, it is learned that the definition of Islamic banking business in the Islamic Bank Act 1983 have been alleviated by various amendments made to BAFIA and Central Bank of Malaysia Act 2009.

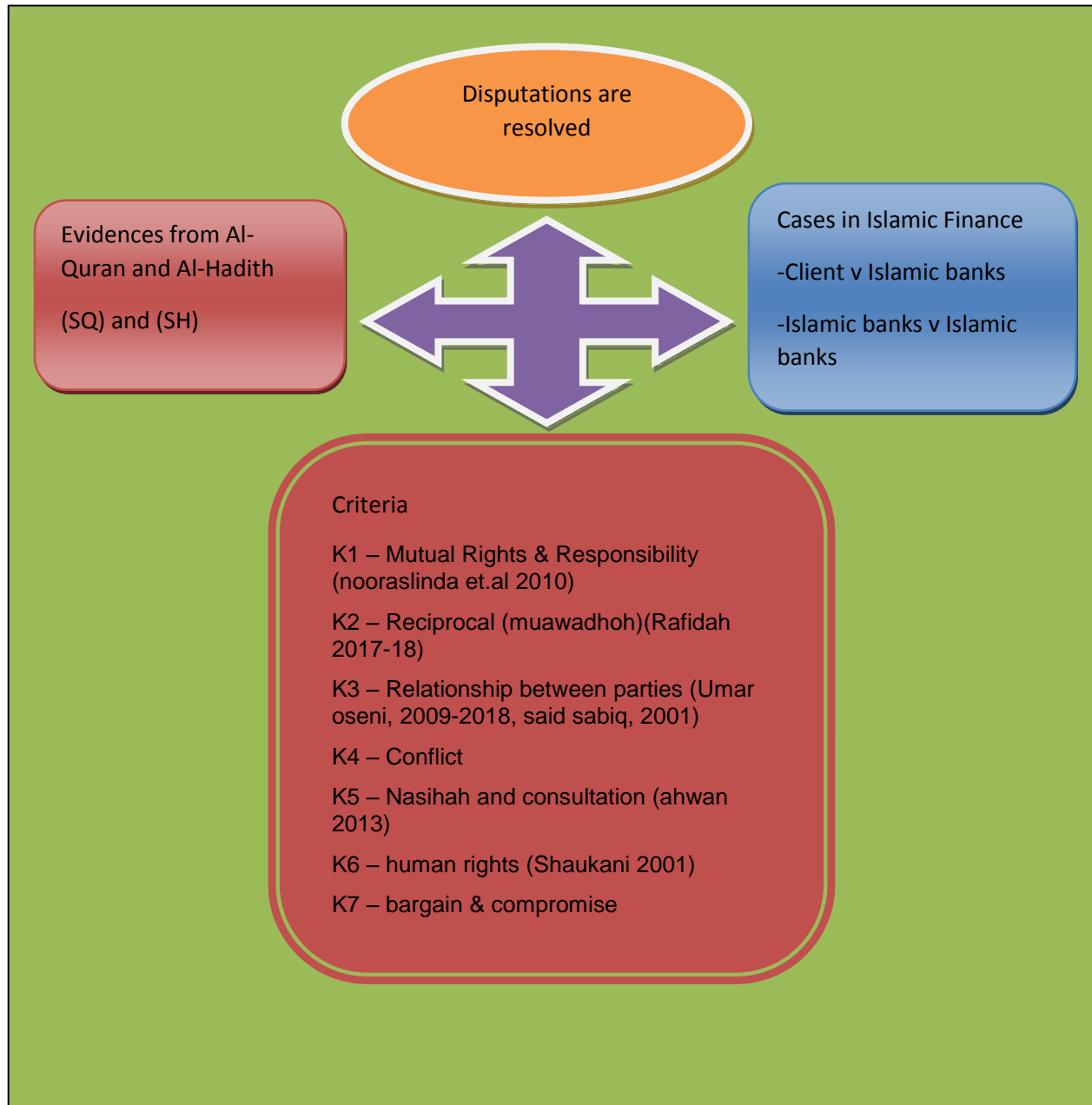
The SAC is a committee set up either in Islamic financial institutions or takaful operators with a purpose to ensure Shariah compliance to its operations and products. The Shari'ah Advisory Council (SAC) of BNM was established in May 1997 as the highest *Shari'ah* authority in Islamic finance in Malaysia. The SAC has been given the authority for the ascertainment of Islamic law for the purposes of Islamic banking business, *takaful* business; Islamic financial business, Islamic development financial business, or any other business based on *Shari'ah* principles and supervised and regulated by BNM. As the reference body and advisor to BNM on *Shari'ah* matters, the SAC is also responsible for validating all Islamic banking and takaful products to ensure their compatibility with the *Shari'ah* principles. In addition, it advises BNM on any *Shari'ah* issue relating to Islamic financial business or transactions of BNM as well as other related entities.

Their role and function were further reinforced in the recent Central Bank of Malaysia Act (CBMA) 2009. While the rulings of the SAC prevail over any contradictory ruling given by a *Shari'ah* body or committee constituted in Malaysia, the court and arbitrator are also required to refer to the rulings of the SAC for any proceedings relating to Islamic financial business. Such rulings are also binding. The SAC consists of prominent *Shari'ah* scholars, jurists and market practitioners who are qualified and have vast experience in banking, finance, economics, law and the application of *Shari'ah*, especially in terms of Islamic economics and finance (Nooraslinda Abdul Aris et al., 2015).

### **What's next?: Suggesting the Model of ADR-i**

The disputed issues in Islamic finance need to be refer to SAC and the resolution should be recorded, published to the public without undermining the confidentiality of parties involved (Nor Razinah Mohd Zain, Engku Rabiah Adawiah Engku Ali, & Adewale Abideen, 2017). ADR promotion by making a policy, a mechanism or customer relationship management program within the Islamic financial institutions. Beside of the suggestion of bridging effort between SAC and ADR institutions, between ADR institutions and Islamic finance provider in resolving IFSD, a model of Islamic mediation to set up the ADR.

**Table 2. The Model of Islamic Mediation as the basis of ADR in Islamic Finance**



In order to understand the process of mediation, arbitration and all kind of mechanism to set up ADR, it is very important for Shariah experts to explain about the basis of mediation stated in Al Al – Quran and Al-Hadith. From these two revelations, there are seven criterias that could be explained. These criterias are become the key elements of ADR that can be used by Shariah experts in resolving certain disputations.

There are differents types of disputations that may hold in relationships between the stakeholders. If the key element of the disputation can be discovered then, the process of mediation becomes easier and faster:

- K1 – Mutual Rights & Responsibility (Rafidah Mohd Azli et al., 2011)
- K2 – Reciprocal (Rafidah Mohd Azli, Mohd Rizal Palil, & Shifa Mohd Nor, 2016)
- K3 – Relationship between parties.(Asyraf Wajdi Dusuki, 2008)
- K4 – Conflict (Chowdhury, 2011)
- K5 – Advice and consultation.(Mehmet Asutay, 2012)
- K6 – Human rights.(Abubakar Sadiq Usman & Rosmaini Tasmin, 2016)
- K7 – Bargain & compromise (Amin, Isa, & Fontaine, 2013)

Bil	Recources	Description	Criteria	Related criteria
1		<p style="text-align: center;">SQ1</p> <p><i>hujurat 9 &amp; 10: “O ye who believe! Let not some men among you laugh at others: It may be that the (latter) are better than the former: Nor let some women laugh at others: It may be that the latter are better than the former. Nor defame nor be sarcastic to each other, nor call each other by offensive nicknames: Ill-seeming is a name connoting wickedness, (to be used of one) after he has believed: And those who do not desist are (indeed) doing wrong.</i></p>	<p>K1 – Mutual Rights &amp; Responsibility</p> <p>K2 – Reciprocal</p> <p>K3 – Relationship between parties</p> <p>K4 – Conflict</p> <p>K5 – Advice and consultation.</p> <p>K6 – Human rights.</p> <p>K7 – Bargain &amp; compromise</p>	<p>K1 – Mutual Rights &amp; Responsibility (Qurtubi 1993)</p> <p>K7 – Bargain (Qurtubi 1993)</p> <p>K3 – Between parties</p> <hr/> <p>K4 - Conflict</p> <p>K7 – bargain</p> <p>K2 – Reciprocal</p> <p>K3 – Between parties</p> <hr/> <p>K3 – Between parties</p> <p>K4 – Conflict</p> <p>K5 – Advice and consultation</p>
2		<p style="text-align: center;">SQ2</p> <p><i>an-Nisa 59: Oh ye who believe obey Allah and obey the messenger and those in authority among you. Then, if you quarrel about something, revert it back to Allah and the Messenger, if you believe in Allah and the Last Day. That is good, and the best at the end.</i></p>		<p>K5 – Advice and consultation</p> <p>K3 – Between parties</p> <hr/> <p>K5 – Advice and consultation</p> <p>K3 – Between parties</p>
3	SH3	Bukhari 2708		<p>K3 – Between parties</p> <p>K4 – Conflict</p>

4	SH4	Bukhari 2710		K6 – hak manusia K7 – bargain K3 – Between parties
5	SQ5	an- nahl 125		K5 – Advice and consultation K3 – Between parties
6	SQ6	al baqarah 281		K7 – bargain & compromise K3 – Between parties K5 – Advice and consultation K6 – human rights
7	SH7	Bukhari 2698		K4 – Conflicts K3 – Between parties K2 – Reciprocal K7 – bargain & compromise K5 – Advice and consultation

### Conclusion

From the discussion above, we can conclude that the framework of ADR in Islamic finance should be enhanced in terms of the key elements derived from the revelations.

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