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Dispute Resolutions in Islamic Contract: What are the Options?

Introduction

Dispute resolution is a mechanism to resolve disputes. All disputes are possible to be settled, be it commercial, domestic or family related matters. In a bigger picture, disputes can be international or domestic. There are two mechanisms to resolve disputes, either through the courts or via Alternative Dispute Resolution (ADR). Settling disputes through the court system is the most opted method, whether it is international or domestic. The bindingness and enforceability of a verdict from the court gives confidence to the litigants to believe that their rights will be upheld; and if not, there are still tiers to climb for an appeal. If the contract is breached, with locus standi and cause of action, the litigants can bring the case to the court. Once a decision is made, it is then binding upon both parties to follow the decision under the name of "the Order" from the court. This might sounds very simple; however, on the contrary, it involves a lot of procedures, costs, evidences, witnesses, summons, etc. Furthermore, the disputes settled in public courts can be heard by the general public and could probably bring reputation risks. Companies that rely on business reputation might prefer not to go through the court for settlement but rather opt for settlement via negotiation. However, should we be able to negotiate the settlement of millions, or billions, of dollars due to negligence or breach of contract? The answer is in the affirmative. Negotiation is a significant part of ADR. The negotiation procedure is an agreement between two or more parties in their efforts to reach a compromise. This is at the core of most ADR processes. Generally, negotiation occurs directly between the parties and their counsels, and does not involve the neutral third party. However, if the negotiators break down and/or reach an impasse, then a third party may be introduced, which is commonly referred to as the facilitated negotiation. Facilitated negotiation tends to be a more ad hoc and informal process than mediation. Facilitated negotiation uses a neutral objective person in negotiation sessions to help the parties reach an agreement more quickly. This neutral facilitator plays the role of advancing the discussions by ensuring that the parties understand each other's positions and by extracting settlement strategies. During negotiation, the primary function of a facilitator is communication rather than settlement. Thus, the facilitator encourages the parties to reach a settlement on their own without influencing their decision or make judgements on how the dispute should be settled under negotiation.

Options under ADR

Well, what is ADR? Alternative Dispute Resolution (ADR) may be defined as a range of procedures that serve as alternatives to court litigation for the resolution of disputes, which generally involves the intercession and assistance of a neutral and impartial third party. The academy of experts published a glossary on "The Language of ADR" (1992), which defines ADR as "any method of resolving an issue susceptible to normal legal process by agreement rather than an imposed binding decision." Some cultures regard mediators as sacred figures, worthy of particular respect in the society, such as traditional wise men or tribal chiefs. This was the practice of old Malays before the English invasion and the introduction of their court system via Charter of Justice. The Romans called their mediators by a variety of names, including internuncius, medium, interpres, and mediator. In Islam, mediation is known as sulh, which includes negotiation, mediation, conciliation and compromise. Other ways to settle dispute in Islam is through tahkim, i.e. Shariah arbitration. The Chinese call mediation xieshang, which means negotiation and consultation, while the Hindus call it panchayat, which signifies a village tribunal of five elders.

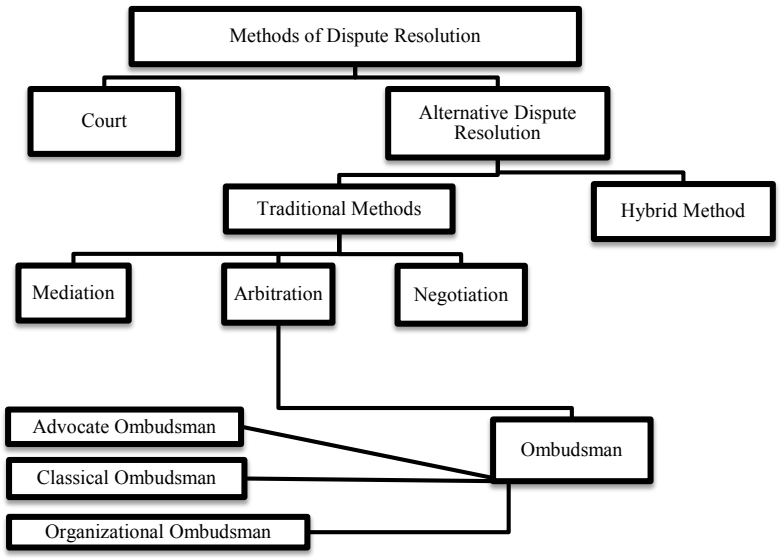
ADR give the parties more power and greater control in resolving the issues between them, it encourages practical problem-solving approaches, and facilitates for more effective settlements that take into account the nuance complexities of disputes. ADR tends to enhance cooperation between disputing parties and is conducive to the preservation of commercial relationships. ADR can also help heal underlying conflicts between parties by promoting mutual recognition within the interest of both parties. Moreover, the nature and values of ADR give emphasis to broader social goals, community development, justice, security and human rights. ADR is divided into two categories, traditional and hybrid. Traditional ADR consist of mediation, arbitration, negotiation and ombudsman. While the hybrid is the combination of traditional and other methods of ADR techniques like arbitration-mediation (also known as Med-Arb), Mediation-Expert Determination, etc.

Ombudsman is derived from the Swedish language, which literally means "representative". At the most fundamental level, an ombudsman is one who assists by investigating the complaints between the individuals or groups in the resolution of conflicts or concerns. Ombudsmen work in all types of organizations, including government agencies,

GLC's, Central Bank, colleges and universities, corporations, hospitals and other medical facilities, and news organizations. Ombuds services also "humanize" institutions for many constituents. The existence of an Ombuds office sends the message that the institution cares about its people and recognizes the value of providing informal dispute resolution for members of the campus community. Since Ombuds offices have no authority to sanction individuals or make official decisions or pronouncements of "right or wrong" for the institution, disputants who use an Ombuds office are empowered to decide for themselves how their concerns should be addressed.

Expert Determination is a dispute resolution process in that an independent expert in the subject matter of the dispute is appointed by the parties to resolve the matter. The expert's decision is - by prior agreement of the parties - legally binding on the parties. Like all ADR processes it is entirely confidential. Expert determination is ideally suitable to disputes involving technical issues like does the computer match the specification; is the malfunction due to a design or a manufacturing fault; valuations of shares; rent reviews, Shariah contract, construction project, turn key project, and contract performance matters. It can also easily be used in many other areas such as insurance wording disputes, takaful, sale of goods disputes, fitness for purpose and boundary disputes. Although expert determination is an alternative dispute resolution process, it can also be used when there is no dispute. This can be used in different issues which need to be resolved, for example the valuation of a private business. Due to its flexibility, expert determination is ideally suitable for multi-party disputes. For a better illustration of the entire concept of ADR see figure 1. below.

Figure 1: Methods of Dispute Resolution



Source: Author's own

Settling Dispute Via ADR in Islamic Contracts

How do we settle disputes involving Islamic contract? Do we opt for the court system or the ADR method? How do we determine the suitability of settling disputes on each contract? What are the most important elements to be considered when opting for a dispute settlement clause to be inserted into the contract? How do we treat the importance of contracts in the eyes of international and domestic law? How can these contracts trigger recognisiton in the eyes of judges, mediators, negotiators or arbitrators? How are these decision makers able to evaluate the importance of these contracts and consequently recognise the subject matters involved? What are the potential risks associated with these contracts which might consequently jeopardise their sanctity? These are among the questions that are necessary to be considered while drafting dispute settlement clauses. Most often the lawyers are given

this task. However, there is no harm for one to act diligently by asking for the consequences of inserting certain clauses into the contract. Eventhough the settlement of disputes are considered as a mere boilerplate clause; however, the importance of this clause cannot be underestimate, especially in Islamic contract. Not all jurisdictions, mediators or even the arbitrators can entertain the disputes due to their lack of knowledge in this area, i.e. Islamic contracts. The importance of understanding the intricacies of the underlying Islamic contracts is fundamental since it gives fair decision to both parties, which will then be in line with the objective of Shariah (maqasid al-Shariah). The sanctity of Islamic contracts must be upheld, which consequently necessitates the recognition of Shariah principles; whether it is in the court system or via ADR methods. Some of the international contract disputes litigants opt for the English court system to settle their disputes involving Islamic contracts under the glorious principles of English law, due to it being independent and meticulous in giving judgment. Accordingly, the cases are treated equally as other English commercial contract. Wakalah contract might be treated similar to agency contract, mudharabah contract might be held as English partnership based contract and sukuk might be held similar to conventional bonds.

Islamic Contract Drafting

Drafting an Islamic contract is something unique. One would need to be able to foresee the suitability and adaptability of the terms of the contract in line with the Shariah (Islamic law) as well as the existing legal framework of that locality. It has been accepted that, as far as few commonwealth countries are concerned, being that the governing law of these countries are conventional legal system, Islamic finance matters are decided within the governing legal framework, except in Brunei Darul Salam. There are at least two legal implications arising from this situation; first, there is a need for the Islamic contracts to comply with the requirements of both civil laws and Shariah. For instance, it is required for the Islamic contracts to comply with both the Shariah elements of Islamic contracts (arkan al-'aqd) as well as the elements provided under the national contract law, i.e. conventional law of contracts.

Second, Islamic contract is also required to comply with the requirements of validating the contract as provided under the civil laws or common laws, such as stamping the documents, registration of the Islamic finance instrument (for example, National Land Code, the Powers of Attorney Act and Housing Development (Control and Licensing) Act, and safekeeping of the documents (Trustees Act and the Companies Act). Other incidental laws are also applicable depending on the nature of the contract, enactments of each State, foreign exchange guidelines, foreign investment committee guidelines, and guidelines issued by the Central Bank from time to time.

Cross Border Contract

For cross border contract, the parties to the contract are subjected to the private international law and regional regime control. When there is a dispute, the parties are obliged to follow the treaties and conventions ratified by the state parties under which the contracts on choice of jurisdiction are governed. For example, given the wide array of structures and the evolving nature of the market, it may be difficult to fit these structures within the existing regulatory framework. The regulatory classification and treatment of sukuk should be subject to regulatory requirements and consistent with those applied to similar instruments to avoid any principles of non-discrimination

A well drafted contract will have a governing law clause that determines the substantive law, which will be applied to work out the rights and obligations of the parties to the contract. Generally, the English courts will uphold an express choice of law as a valid choice. However, while an express choice of law in relation to contractual obligations cannot be overturned, significant challenges can be made to it under the Rome Convention or the Rome I Regulation which affects the contract. The Rome Convention on the law, applicable to contractual obligations, was opened for signature in Rome on 19 June 1980 for the then nine European Community (EC) Member States. It entered into force on 1 April 1991. In due course, all the new members of the EC signed the Convention. When the Convention was signed by Austria, Finland and Sweden, a consolidated version was drawn up and published in the Official Journal in 1998. Most of the countries that issue sukuk are signatories to this Convention. A further consolidated version was later published in the Official Journal in 2005, following the accession of 10 new Member States to the Convention. The Convention applies to contractual obligations in situations involving choice of law - even when the law is designated to a non-contracting State - with the exception of:

- questions involving the status or legal capacity of natural persons;
- contractual obligations relating to wills, matrimonial property rights or other family relationships;
- Obligations arising under negotiable instruments (bills of exchange, cheques, promissory notes, etc.);
- arbitration agreements and agreements on the choice of court;

- questions governed by the law of companies and other corporate and unincorporated bodies;
- the question of whether an agent is able to bind a principal to a third party (or an organ to bind a company, or a corporate or unincorporated body);
- the constitution of trusts and questions relating to their organisation;
- evidence and procedure;
- contracts of insurance that cover risks situated in the territories of the Member States (excluding reinsurance contracts).

The signatories to a contract may choose the law applicable to the whole or a part of the contract, and select the court that will have jurisdiction over disputes. By mutual agreement they may change the law applicable to the contract at any time. The Court of Appeal, in the case of Beximco Pharmaceuticals Ltd and others v Shamil Bank of Bahrain EC [2004] EWCA Civ 19 held that:

A contract can only have one governing law. Parties to a contract can only agree to adopt the law of a country as the governing law of a contract. It is not open to the parties to adopt a non-national system of law (such as Sharia) as a governing law of a contract.

The English courts, like all courts within the EU, must apply the Rome regulation on the law applicable to contractual obligations to contracts entered into on or after 17 December 2009 in order to determine which law applies to contractual disputes between parties in most civil and commercial matters. This doctrine of incorporation of the foreign law provisions only operates where the parties have sufficiently identified the provisions of a foreign law or international code which are apt to be incorporated as terms of the contract. Thus a general reference to the provisions of Shariah law is insufficient. In Petroleum Development (Trucial Coasts) Ltd. v. Sheikh of Abu Dhabi, Lord Asquith acknowledged that Abu Dhabi's law, which was based on Islamic law, should be applied. However, he refused to apply the law during the arbitration because, quoting him: "it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments." He described the ruler of Abu Dhabi as an absolute monarch whose administers are "purely discretionary form of justice with some assistance from the Koran." After analyzing the choice of law issue, the arbitrator relied instead on principles of English law. In Ruler of Qatar v. International Marine Oil Co. Ltd., the arbitrator made a clear statement as to his belief concerning the inadequacy of Islamic law. After acknowledging that Islamic law was the proper law to apply, he stated that it does not "contain any principles which would be sufficient to interpret this particular contract." The opinions of the arbitrators' stated above does not attempt to give any significance to their decision of not applying Islamic law, but rather to highlight through their statement their lack of confindence in it. Looking into the above legislative regime, the choice-of-law in Shariah-compliant finance may be described in four key principles as follows:

(1) A combined-law clause (Shariah and English law) will likely be found to be repugnant to the laws of common law and civil law countries, especially in UK.

2) Shariah as a choice of law will likely be held to be of ineffective because it does not represent the law of a nation under the Rome Convention;

(3) The law of England is a popular choice of law for contracts involving Islamic financial services;

(4) Shariah ADR Forum is needed to ensure the rights of parties and sanctity of Islamic contract are upheld.

Conclusion

Parties in Islamic financial transactions must supplement Shariah to the choice of law clause to address and cater for the parties' preferences and the spirit of the Islamic transaction. The substance of applying Shariah is the very important part. Otherwise, the writing of the agreement may become unduly complicated by taking account of situations that may never arise and cannot be properly judged. Shariah-compliant transactions are not to be an issue which might act as a major impediment to the growth of Islamic finance.One thing for sure, in ensuring that cases are decided on fairly and deligently, parties must ensure that the one who is deciding the case is well equipped with Shariah knowledge. Indeed life is so beautiful when we have options. Abu Hurayrah reports: While the Prophet (peace be upon him) was saying something in a gathering, a Bedouin came and asked him, "When would the Hour (Doomsday) take place?" Allah's Apostle (peace be upon him) continued his talk, so some people said that Allah's Apostle (peace be upon him) had heard the question, but did not like what that Bedouin had asked. Some of them said that Allah's Apostle (peace be upon him) had not heard it. When the Prophet (peace be upon him) finished his speech, he said, "Where is the questioner, who inquired about the Hour (Doomsday)?" The Bedouin said, "I am here, O Allah's Apostle (peace be upon him)." Then the Prophet (peace be upon him) said, "When honesty is lost, then wait for the Hour (Doomsday)." The Bedouin said, "How will that be lost?" The Prophet (peace be upon him) said, "When the power or authority comes in the hands of unfit persons, then wait for the Hour (Doomsday)."

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