12 Dispute Resolution and Specialized ADR for Islamic Finance
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I. Introduction 12.01

Although assets under management by Islamic financial institutions may only total about US$1 trillion at present, the Islamic finance industry worldwide is enjoying an annual growth rate estimated conservatively at between 15–20 per cent. Even the most unlikely enthusiasts for Islamic finance have come to the fore, as the Vatican itself recently pronounced that the ‘ethical principles on which Islamic finance is based may bring banks closer to their clients and to the true spirit which should mark every financial service’.

12.02 In tandem with the exponential growth of Islamic finance, there is emerging a still nascent but fast growing movement from existing conventional dispute resolution practices (especially litigation) towards reviving a classical Islamic dispute resolution process. Simply referred to as ‘IDR’ (Islamic Dispute Resolution), this Shari’a-based form of ADR not only provides desperately needed subject matter expertise in Islamic finance dispute resolution, but at the same time accommodates Islamic legal values and traditions in resolving the disputes that inevitably arise in the context of Islamic finance. This chapter outlines the substantive and procedural distinctions of IDR. The chapter examines especially how IDR differs from conventional ADR utilized in industries such as construction and labour, resurrecting the traditional Islamic concept of dispute settlement (sulh), and subsuming notions of non-binding mediation (wasata) and binding arbitration (tahkim) into a single IDR process. Finally, Shari’a and other important legal considerations in IDR, including practitioners’ concerns when drafting a dispute resolution clause in an Islamic finance contract, are discussed in this chapter.
II. IDR is Necessary to Support the Growth of Islamic Finance

12.03 In conventional commercial markets, creating a favourable regulatory environment, well-educated and trained human capital, and the ready availability and liquidity of financial capital is crucial to investment and growth. Islamic financial markets are no exception. Investors and other market participants seek stability and reliability, and avoid volatility and risk. But a strong rule of law is also essential to encourage commercial growth in both conventional as well as Islamic markets—including a reliable, predictable, just, fair system of dispute resolution. Such a system must have clear authority and legitimacy amongst those who seek redress. This legitimacy is particularly important in the context of Islamic commercial transactions and disputes, as Islam is a nomothetic or law centric religious tradition, in which all areas of its adherents’ lives are governed by Islamic legal values.5

12.04 A number of countries with significant Muslim populations have established Shari’a courts as an alternative to conventional civil courts for Muslims. The jurisdiction of these Shari’a courts generally is limited to personal law matters involving Muslims, such as matters arising out of marital relationships, inheritance, and administration of trust properties. For Muslims who seek to conduct their business transactions in compliance with the Shari’a, however, recourse for resolving any disputes arising from those transactions must be obtained in secular courts. This is an increasing cause for concern especially amongst more orthodox Muslims, leading some scholars to suggest that, in an Islamic finance contract, a ‘conservative’ Islamic forum should be designated in favour of a secular forum for dispute resolution. These scholars even contend that any award based upon reference to secular fora or secular law is in violation of the Shari’a.6

12.05 Another significant concern is that a secular forum will not render judicial determinations consistent with the letter, and especially the more nuanced spirit, of the Shari’a. As recently observed by a prominent Islamic finance lawyer,

[L]itigation, which is the most popular mode of dispute resolution in Islamic finance, has proven everywhere to be woefully inadequate particularly in its application and interpretation of the Shariah. While judges have no problem deciding on the civil law issues relating to Islamic finance, they are glaringly unsuited for adjudicating the Shariah issues. They seldom hold any qualifications in Islamic law. Considering the recent history of Islamic finance, rarely do they have any experience in Islamic finance transactions.7

Importantly, in surveying both Islamic as well as firmly secular countries worldwide,

Islamic law is not applied in toto by any national system, can be known only from scholarly texts in Arabic or by expert testimony, is often in dispute, and does not possess analogues to many institutions in modern law. Indeed, courts might declare some of the law’s provisions unenforceable and against public policy ...8

(p. 309) As one moves along the continuum from essentially Islamic states towards firmly secular states like most Western democracies, in fact, the concerns increasingly may range from more than mere ignorance of the Shari’a and Islamic finance, to legal (usually constitutional) limitations and even outright hostility toward giving scope to Islamic jurisprudence.9

12.06 Increasingly, it is being recognized that Shari’a-based IDR helps ameliorate the tensions that naturally occur at the intersection of the State and Islam. In addition, creating new frameworks for IDR will be quicker and simpler, with greater flexibility and fewer political obstacles, than trying to fit new Shari’a courts into existing legal systems or reworking established Shari’a court/civil court dichotomies. Indeed, a ‘pretty good way to
generate an outcry, as the Archbishop of Canterbury learned in Britain recently, is to say that a Western legal system should make room for Shariah, or Islamic law'.

III. Existing Models of Commercial ADR

12.07 Existing models of commercial ADR, regardless of geography or culture, currently emulate Western models of arbitration and mediation. Even in many non-Western countries, balanced between a desire to create a secure commercial environment, on the one hand, and a desire to maintain distance from any semblance of Western institutions (identified with past colonial dominance), on the other, formalized and rooted acceptance of Western-style ADR is a noted phenomenon. In this context, arbitration is generally characterized as a form of private adjudication, based on a well-entrenched tradition of highly adversarial dispute resolution—the very genesis (p. 310) and basis of the common law system. Mediation, in similar fashion, is generally seen as the antithesis to arbitration. It is a lightly structured facilitative process, avoiding any possible resemblance to adversarial proceedings, such as especially any evaluation or direction by the mediator. The mediator simply assists the disputants in resolving their dispute according to their own individual interests, with as little interference as possible. In both forms of ADR, moreover, the intermediary in the dispute—whether arbitrator or mediator—is seen as dispassionately neutral and impartial, again following the Western notion of ‘blind justice’.

IV. IDR as an Islamic Model of Commercial ADR

12.08 In sharp distinction to current ‘neutral’ and ‘impartial’ models of ADR in Western cultures, an Islamic model for commercial dispute resolution utilizes a much more directive approach. Rather than an impartial facilitator with no real stake in resolving a dispute, an IDR intermediary should have a more hands-on approach to resolving a dispute. Significantly, notwithstanding his technical expertise in both the Shari’a and the relevant industry involved, he should also have a focus broader than the issues in dispute immediately before him. While more forcefully directing the parties toward an amicable resolution of their dispute, an IDR intermediary should also strive towards preserving their long-term relationship, as well as the good of the overall community. As a nascent though rapidly growing industry with only a handful of significant participants, Islamic finance especially can benefit tremendously from the more relationship-preserving approach inherent in IDR. As put forth by proponents of mediation in Islamic finance disputes, an approach which is ‘less formal and far less adversarial than court proceedings and arbitration ... is far less likely to damage business relations’. The value of maintaining good will in a relatively small industry, with a relatively small group of players, cannot be overestimated. Moreover, there is also likely to be a dividend paid in terms of good public relations. It is anticipated that in disputes involving a large institution such as a banking or financial institution, there is a tendency on the part of the customer to feel that the large institution was uncaring and unsympathetic towards him or her. If this sort of feeling can be removed by the institution’s representative manifesting a caring and sympathetic attitude, the customer may be willing to settle the dispute.

Importantly, the less formal and less adversarial approach of IDR also finds its authority in Islamic law and traditions of reconciliation inherent in Islamic culture, and in combination with the unique substantive knowledge of IDR practitioners in the field of Islamic finance, IDR is an effective, legitimate model for Islamic finance dispute resolution.

A. IDR is Based upon the Qur’an and Sunna
12.09 Islamic finance is distinct from conventional concepts of finance, of course, in that its primary and paramount legal authority is derived from Islamic law. All Islamic finance products and structures must not only make good business sense, in the same sense that conventional finance products must be financially sensible, but above all else they must not violate the various legal proscriptions embodied in the Shari’a. In the same manner, and consistent with Islamic finance, it is the end-goal of Islamic commercial dispute resolution that it also be entirely based upon and bound by the Shari’a. Without the authority of the Shari’a, even if it otherwise might appear to be an effective mode of ADR, IDR risks limited acceptance in resolving Islamic finance disputes, especially amongst Muslims and in those countries in which Islam is effectively the state religion.

12.10 Although only a few of the 6,616 verses that make up the Qur’an specifically address legal issues per se, the Qur’an repeatedly recognizes and, indeed, mandates two essential elements for resolving disputes. All dispute resolution (even adjudication), firstly, must include true conciliation beyond mere obedience to a judgment. The Qur’an also mandates that dispute resolution ultimately must be consistent with the body of law constituting the Shari’a. In fact, disputants are harshly warned in the Qur’an against choosing any way inconsistent with that of the Shari’a in resolving their disputes.

12.11 While the Qur’an does generally address reconciliation and adjudication of disputes, it provides no specific authority or guidance regarding dispute resolution in commercial matters. For such matters, more direct legal authority for IDR is found in the Sunna. The Prophet is said to have promoted dispute resolution in a commercial context, including establishment of an expedited process of debtor/creditor conciliation. In al-Bukhari’s Sahih there is a hadith describing an event in which the Prophet summarily achieved a compromise settlement between two disputants:

Narrated [by] ‘Abdullah ibn Ka’b bin Malik [d. ca. 716–CE/98 AH] from Ka’b ibn Malik [d. 670 CE/50AH]: ‘Abdullah ibn Abu Hadrad al-Aslami [n.d.] owed Ka’b ibn Malik some money. One day the latter met the former and demanded his right, and their voices grew very loud. The Prophet . . . passed by them and said, “O K’ab,” (p. 312) beckoning with his hand as if intending to say, “Deduct half the debts.” So, Ka’b took half what the other owed him and remitted the other half.

12.12 In another debtor–creditor dispute, the Prophet undertook an unusual step in achieving reconciliation. When the creditors refused to accept a harvest of dates in lieu of a debt owed, contending that ‘it would not cover the full debt’, the Prophet ‘sat on the (collected and dried) dates and invoked Allah to bless them’. He then instructed the debtor to call upon the creditors and pay them in full with the dates. The debtor was delighted to find that he was not only able to pay the creditors in full, but he had a substantial surplus of high-quality dates, as well.

B. IDR is Grounded in the Islamic Tradition of Sulh

12.13 The overall process of Islamic dispute resolution is encompassed by the concept of sulh. The common thread that runs through all forms of dispute resolution in Islam, sulh generally refers to a process of conciliation and resolution, as well as the ultimate agreement to relinquish some asserted rights, following contention. Sulh is the preferred method of dispute resolution in Islam, and as discussed in the immediately preceding section of this chapter, Islamic legal authority abounds with imperatives for Muslims to promote sulh as part of any dispute resolution.
12.14 Within the socio-cultural and religious/legal frameworks of Islam, *sulh*, as a broad concept of dispute resolution, generally subsumes two main avenues of dispute resolution: non-binding mediation (*wasata*) and binding arbitration (*tahkim*). As *sulh* connotes reconciliation and settlement (both the process as well as the actual agreement), this term is often interchanged with *wasata* in contemporary literature discussing Islamic mediation processes. Characterizing *sulh* as mediation, however, is inaccurate. Instead, as some contemporary scholars have begun to realize, mediation or *wasata* is only one of the means by which *sulh* is accomplished, the other being *tahkim*.

(p. 313) 12.15 Just as *sulh* is often mischaracterized as being the same as conventional mediation, characterizing *tahkim* in Western terms as arbitration is also somewhat confusing and inaccurate. In contrast to *wasata*, it does result in a binding ruling in which the parties have not themselves voluntarily waived any rights against each other. The actual process of *tahkim* (as an essential part of *sulh*), however, always includes a strenuous attempt by the arbitrator to get the parties to settle their dispute amicably—traditionally so important that reportedly ‘[s]ome arbitrators would go to a great extent to produce the necessary compensation or inducement out of their own pockets in order to persuade the feuding parties to agree to a sulh’.

12.16 It cannot be overstated that *sulh* is always the preferred outcome of all disputes in Islam. Disputants are reminded in the Qur’an that ‘neither of them will be blamed if they come to a peaceful settlement, for peace is best’. And they are admonished that ‘if two groups of believers fight, you [believers] should try to reconcile them. … The believers are brothers, so make peace between your two brothers and be mindful of God, so that you may be given mercy.’

12.17 Various reliable *ahadith* also underscore the importance of *sulh*. According to al-Bukhari, for example, it was reported that:

[n]arrated [by] 'Aisha . . .: The Prophet . . . said, ‘The most hated person in the sight of Allah is the most quarrelsome person.’

It is reported not only that the Prophet disliked endless, especially verbose, litigation but also that he imposed harsh sanctions on litigants who did not abide by his rulings in reaching conciliation. Indeed, it is emphasized by another very well-known *hadith* that the Prophet also had a clear preference for avoiding making a judgment, wherever possible:

Narrated [by] Umm Salama [d. 676 CE/57 AH]. . .: the wife of the Prophet . . .: Allah’s Messenger . . . heard some people quarrelling at the door of his dwelling. He came out and said, ‘I am only a human being, and opponents come to me (to settle their problems); maybe someone amongst you can present his case more eloquently than the other, whereby I may consider him true and give him a verdict in his favour. (p. 314) So, if I give the right of a Muslim to another by mistake, then it is really a portion of (Hell) Fire, he has the option to take or give up (before the Day of Resurrection).

C. IDR Provides Unique Expertise to Resolving Islamic Finance Disputes

12.18 Because Islamic finance is *Islamic*, after all, transactions and resulting disputes in the Islamic finance industry are also subject to an overlay of the *Shari’a* and *fiqh al-mu’amalat*, including a thorough knowledge of the doctrine of the various *madhahib* that might govern any given transaction and dispute. Confronted with complex Islamic finance products and structures, it is not sufficient that civil judges, arbitrators, or mediators simply understand basic concepts of conventional finance, their ostensibly analogous counterparts in Islamic finance, and the secular commercial law of the given jurisdiction.
Indeed, even the fundamental principles of Islamic law are quite elusive to conventional legal scholars and jurists lacking in-depth education and experience in the subject. Contemporary Islamic finance transactions significantly transcend a simple set of clearly defined rules based on what is *halal* and what is *haram*, and even in-house *Shari'a* advisors charged with determining the permissibility of certain financial products and structures often find themselves in a quandary. Secular civil judges may be even more overwhelmed in their efforts: a dispute arising in the context of a simple diminishing *musharaka* involving securitization of liquid and non-liquid assets, for example, could easily lead to a result that is neither jurisprudentially sound nor consistent with the parties’ intentions, if decided solely in reliance upon secular (such as common law) legal principles of contract, finance, investment, and partnership.\(^{31}\)

12.19 One of the primary attractions of all ADR, regardless of the actual form or subject matter involved, is that it provides a specialized forum for the resolution of disputes arising in a given subject matter context. Prior to the modern revival of ADR in the latter half of the twentieth century, courts of law were the only meaningful avenue for dispute resolution. The courts, in turn, relied upon judges who were legal generalists individually tasked with adjudicating disputes involving a wide variety of subject matters, in the context of a formal judicial system of litigation that gradually became more costly in terms of time and money and generally less likely to satisfy (p. 315) the disputants.\(^{32}\) A familiar refrain by many observers of judicial processes is that, at the conclusion of litigation (especially when lengthy multiple appeals are pursued), the only winners are the lawyers.\(^{33}\)

12.20 Somewhat in response to the generalist and increasingly overburdened State-sponsored system of dispute resolution by litigation, arbitration and mediation rapidly grew in popularity as an avenue for resolving civil disputes which involved a particular, specialized area of law.\(^{34}\) In addition, disputants could engage intermediaries who provided more than merely specialized legal knowledge, also possessing highly technical knowledge of a specific industry. This combined expertise was especially important in the burgeoning fields of labour/management relations, securities regulation, insurance, sports contracts, and construction. In a typical commercial construction arbitration in the US in the 1980s, for example, a panel of three arbitrators would be agreed upon by the parties: an experienced lawyer familiar with construction law, together with a design professional and a contractor familiar with the type of construction project involved.\(^{35}\) The result of such combined expertise, whether by an individual arbitrator or collectively by a panel of arbitrators, generally led to a much greater level of outcome satisfaction by disputants, as compared to litigation.\(^{36}\)

12.21 As with other areas of ADR that rely upon experienced and specialized ADR professionals, resolution of Islamic finance disputes utilizing IDR also relies upon specialized intermediaries with expertise not only in the applicable secular law, but also broad subjects of the *Shari'a* and Islamic finance. Much more complex and multi-layered than other industry-specific areas of substantive law, disputes in the (p. 316) area of Islamic finance inherently involve much more than knowledge of a specialized industry with unique terms and concepts, governed by a body of secular civil law. As discussed previously in this chapter, intermediaries who may ‘have no problem deciding on the civil law issues relating to Islamic finance’ may be ‘glaringly unsuited for adjudicating the Shariah issues’, ‘seldom hold any qualifications in Islamic law’, and ‘rarely do they have any experience in Islamic finance transactions’.\(^{37}\) Resolution of disputes arising in the context of Islamic finance needs the unique substantive knowledge which is provided by IDR intermediaries.
D. IDR Provides a Unique Procedural Approach to Resolving Islamic Finance Disputes

12.22 When applied consistently with classical Islamic traditions of dispute resolution, IDR also provides procedural benefits for resolution of Islamic finance disputes, particularly in sharp contrast with most commonly accepted models of litigation, arbitration, and mediation. In conventional arbitration (especially as influenced by the common law), the process is not much different from the adversarial system of litigation and, significantly, the arbitrator dispassionately and quite impartially considers the submissions by the parties and testimony of witnesses, rendering a binding and final decision upon the parties. In conventional mediation, as well, the mediator also acts dispassionately and impartially. While facilitating a mediated settlement, if possible, he generally will not proffer any significant evaluation or direction in resolving the dispute. He does not take a position one way or another on any issue, and the parties see him as a peer, not as possessing any superior status or authority.

12.23 In Islamic approaches to dispute resolution, on the other hand, the procedural distinctions between processes of arbitration and mediation are blurred. This is best demonstrated in the divergent historical roles of an arbitrator in Islamic disputes, along two different, though not sharply distinct, paths of tradition. In some classical Islamic traditions, the role of an arbitrator was as a conciliatory intermediary whose decision must be acceptable to all parties and would not otherwise be binding upon them; in others, it was argued that he should be more of a final decision-maker who renders a binding decision with which the parties need not be in agreement. But regardless of whichever tradition was dominant at a particular place or time, in accord with the underlying concept of *sulh*, he would be simultaneously evaluating the best outcome for the dispute, pressing the parties to reach an agreement on that outcome, and ultimately providing a resolution to the dispute.

(p. 317) 12.24 This unique approach of Islamic dispute resolution is based significantly upon the cultures and traditions in which Islam developed. Still today, patriarchy (and the concomitant social hierarchy of rigid top-down authority) predominates even in business and commerce, rituals of hospitality and courtesy between people are integrated throughout all facets of interpersonal relations—often characterized in terms of honour and respect—and the aspirations and demands of the individual may often be sacrificed to the greater needs of society. While most non-Islamic (especially Western) cultures seek to establish *imposed* order through rule of law, Islamic cultures still exhibit a strong preference toward *accepted* order, in which social order and harmony are promoted by avoiding divergence from established social (and religious) norms. As such, even contemporary Muslims commonly yield priority to the collective interests of the community (which may be defined in terms of a family, tribe, nation, or even a broader *umma wahida* of Muslims worldwide).

12.25 Indeed, it is only when the prospects of conciliation and mutually agreeable settlement have been fully explored and exhausted that a binding decision should be rendered in any Islamic dispute. As noted by leading Islamic legal scholar and historian, Wael Hallaq,

[t]he legal maxim ‘amicable settlement is the best verdict’ (*al-sulh sayyid al-ahkam*) has a long-standing tradition in Islamic societies and in the Shari‘a, and reflects the deep-rooted perception, both legal and social, that mediation is not only integral to the legal system and the legal process but also accorded precedence over court litigation, which was usually seen as the last resort. This is particularly true in closely knit social structures where groups tended to manage conflicts before they were brought before a wider forum, mainly the law court. It was within these
groups, from Malaya to Morocco, that the initial operation of the (Islamic) legal system began ...

This is evident not only in the Qur’an, as discussed above in this chapter, but also in hadith literature and the earliest legal manuals and texts for Islamic jurists. For example, it is reported that the Caliph ‘Umar ibn al-Khattab (d. 644 CE/23 AH) instructed his judges to ‘[s]end back the disputants until they reconcile, for verily litigation causes rancour between men’. Further, in Durar al-Hukkam fi Sharh (p. 318) Ghurar al-Ahkam, an important treatise written more than six centuries ago setting forth the principles of Islamic legal practice, the eminent scholar Mulla Khusraw (d. 1480 CE/885 AH) explains that the reason he placed the materials regarding adjudication after those regarding reconciliation is that adjudication is needed only if reconciliation does not occur between the disputants.

12.26 An amicable, yet highly directive, settlement process for disputes, including Islamic commercial disputes, which generally are perceived more in terms of relationships than in Western legal terms, is therefore an essential overlay of an effective Islamic dispute resolution process. And, unique to IDR, only when a settlement cannot be reached by any means, as an absolute last resort, should a final adjudication be rendered by the IDR intermediary.

V. Drafting Dispute Resolution Clauses and Agreements for Islamic Finance Disputes

12.27 As indicated throughout this chapter, the desire to utilize IDR stems foremost from the desire to have qualified intermediaries mediate and/or arbitrate Islamic finance disputes, coupled with a preference by Muslim parties, in particular, to have such disputes decided in accordance with the Shari‘a as well as national law. As mediation and arbitration are entirely voluntary proceedings in most disputes involving Islamic finance, it is important that these concerns by the parties be fully addressed in drafting dispute resolution clauses and agreements for Islamic finance; otherwise, the parties have little incentive to utilize IDR and worse still, may seek to avoid an agreement to utilize IDR or a resulting arbitral award.

12.28 In drafting an IDR clause in a contract, or a standalone agreement to submit an Islamic finance dispute to IDR, it is important that the following three threshold issues be carefully addressed:

(1) The qualifications of the intermediary should be set forth with detailed explanation, not only as to subject matter expertise but also justifying any Shari‘a-based preferences by the parties as to the intermediaries’ gender and religion;

(2) If a choice of the Shari‘a as governing law is desired by the parties, then the choice of law clause must be carefully drafted with consideration for most jurisdictions’ strong preference for recognizing only national law (and not religious law), (p. 319) including specific reference to and delineation of the scope of Shari‘a principles and fiqh procedures to be applied; and

(3) The potential Shari‘a defence of gharar (uncertainty) must be anticipated.

The bases for these concerns in the Shari‘a as well as secular law are discussed below. Further, suggested language for an IDR clause or agreement that accommodates these concerns is provided.

A. Qualifications of IDR Intermediaries in Islamic Finance

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12.29 As with all dispute resolution, whether litigation, ADR, or IDR, the satisfaction of the parties with the result and its consequent finality, will depend at least in part upon the legitimacy of the adjudicator or other intermediary between the parties. Only an intermediary upon whom the parties agree as qualified to adjudicate and/or mediate their dispute will have necessary authority to press the parties to reach a lasting settlement or to accept an adjudication without subsequently challenging it in court.

12.30 As a starting point, the intermediary must be an expert in Islamic finance and, if relevant, an expert in the particular sub-category in dispute. Such sub-categories from which a number of disputes have recently been more prominent, for example, are Islamic capital markets (especially sukuk) and treasury; Islamic project finance structures; Shari’a compliance in banking operations; and Shari’a compliance of information systems. An IDR intermediary attempting to resolve disputes arising in any of these areas should be, at a minimum, well-versed in the underlying structures, legal concerns, and practical issues with which the parties would typically be confronted. As with all ADR proceedings, IDR is an opportunity to utilize intermediaries who do not first need to be educated by the parties about the underlying industry, so that they can more efficiently focus on the unique facts in a given case and the more nuanced legal arguments presented by each side.

12.31 Apart from subject matter expertise, other desired qualifications of an intermediary are subjectively determined by the parties. Some of these, moreover, may lend themselves to controversy, especially in a secular context. For example, do the parties want the intermediary to be a Muslim, or a male, or Sunni or Shi’i, or an adherent of a particular madhhab? And do such stipulations potentially run afoul of anti-discrimination laws, explicit constitutional law, or even simply generally recognized public policy?

12.32 In order to create a dispute resolution process that is as much Shari’a-based as possible, an IDR intermediary at least should be held to the same standards and qualifications as a qadi, or Islamic judge: ‘[i]t is conditional upon an hakam[48] to possess the same conditional characteristics as the qadi ...’. As explained by the eminent tenth century Shafi’i scholar al-Mawardi (d. 1058 CE/448 AH) in his seminal treatise on Islamic governance, such an intermediary ‘should be from those of jurisprudential knowledge and could also be a judge, because by arbitrating he has become a person who judges between people’.50

12.33 Fortunately, the qualifications in Islam for one to serve as a judge, and therefore as an IDR intermediary, differ only slightly across the several madhahib. All Sunni madhahib agree, for example, that the IDR intermediary must be mentally competent, adult, and able to use his intellect sufficiently to clarify and solve issues raised in a dispute. Especially as he is being asked to intermediate and possibly adjudicate in a legal dispute, he should have an appropriate degree of relevant legal expertise, with ‘a certain knowledge of the Shari’a and the capacity to define legal rules’. In addition to intellectual capacity, the intermediary in an Islamic dispute must also be morally upright. Often characterized as ‘adala, this generally is described as moral probity, being honourable and moderate, and ‘according to the jurists, abstaining from the great sins and not persisting in the smaller ones’. Finally, the intermediary should ideally possess the ability to actually see the evidence, as well as to hear the testimony and speak with the witnesses and the disputants, although there have been instances historically of very well-respected and competent blind Islamic jurists.

12.34 All but the Hanafis prefer the intermediary be a Muslim, unless doing so would create a hardship to the disputants or in a case where the disputants are all non-Muslims themselves. This is in part because an intermediary is being called upon to apply Shari’a principles and fiqh procedures in the IDR process; if he does not believe in the very rules he is applying, as a matter of faith, the disputants (and others) may perceive a compromise in the interpretation and application of the Shari’a principles and fiqh.
58 Moreover, a preference for Muslim intermediaries may also arise, in part, because the Qur’an states that Allah does not give power to disbelievers over believers:

The [hypocrites] wait to see what happens to you and, if God brings you success, they say, ‘Were were not on your side?’ but if the disbelievers have some success, they say to them, ‘Did we not have the upper hand over you, and [yet] protect you from the believers?’ God will judge between you all on the Day of Resurrection, and He will give the disbelievers no means of overcoming the believers.\textsuperscript{59}

12.35 The majority of \textit{madhahib} prefer an arbitrator be a man, based upon the preference that a \textit{qadi} be a man, and there is no indication in the \textit{fiqh} literature that they would hold otherwise with respect to any sort of IDR intermediary. Different sources are often cited as authority for this requirement:

Most modern jurists and practitioners ... often cite a verse of the Qur’an to exclude women from judicial and arbitral functions: ‘Men have authority over women because God has conferred on the one more strength than the other.’\textsuperscript{60} Masculinity is a condition according to the majority of jurists. The appointment of a female as a \textit{qadi} is not permissible according to them and their proof for it is the prophetic \textit{hadith}: ‘Not successful is a nation who appoints their leadership to a woman.’ ... Also a \textit{qadi} would be required to mingle with men from amongst the jurists and witnesses and disputants and it is forbidden, in the first place, for a woman to mingle with men fearing \textit{fitnah} as a result of this mingling which no necessity.\textsuperscript{61}

12.36 Notwithstanding this general preference for men, however, a few early and prominent jurists also clearly supported the qualification of women as \textit{qadis}, and their reasoning would even more clearly extend to appointment of women as intermediaries in Islamic finance disputes. For example, Abu Ja’far Muhammad ibn (p. 322) Jarir al-Tabari (d. 923 CE/310 AH) reportedly argued that women could act as \textit{qadis}, by drawing an analogy with the giving of a \textit{fatwa}, in essence a legal opinion or ruling on a particular issue.\textsuperscript{62} As women can give \textit{fatawa}, reasoned al-Tabari, they also may act as \textit{qadis} in civil cases.\textsuperscript{63} Similarly, the Hanafi \textit{madhhab}, much like al-Tabari, also supports the qualification of women as \textit{qadis} in civil cases. It links the qualification to hold office as a \textit{qadi} with the qualification of testimony as a witness. While in criminal cases involving \textit{hudud} or \textit{qisas},\textsuperscript{64} a woman’s testimony may not be admitted and, therefore, she may not act as a \textit{qadi},\textsuperscript{65} in civil cases a woman’s testimony is permitted and so by the same logic the Hanafi \textit{madhhab} reasons that she also may act as a \textit{qadi}.\textsuperscript{67}

12.37 Apart from whether a particular \textit{madhhab} indicates a preference for IDR intermediaries who are men or Muslim, it should be noted that practical consideration of local (secular) law and public policy may restrict the parties’ preferences. While this issue has not yet been directly litigated in the courts, the recent English case of \textit{Jivraj v Hashwani},\textsuperscript{68} may be highly instructive. In that case, the parties (Isma’ili Muslims) entered into a joint venture agreement for real estate investment worldwide, which included an otherwise unremarkable dispute resolution clause providing, however, that ‘[a]ll arbitrators shall be respected members of the Isma’ili community and holders of high office within the community’. When a subsequent dispute arose, one of the parties sought to appoint a non-Isma’ili as an arbitrator. In the resulting court action, he argued that while the arbitration agreement requiring only Isma’ili arbitrators was lawful when made, it had been rendered unlawful and was void in contravention of the Employment Equality (Religion and Belief) Regulations 2003,\textsuperscript{69} as well as the Human Rights Act 1998 and public policy considerations. The High Court disagreed with that argument, on the basis that an arbitrator (much like a
judge) is not an employee of the litigants, and thus beyond the scope of the regulations’ proscriptions.\textsuperscript{70}

(p. 323) \textbf{12.38} On appeal, however, the Court of Appeal held that an arbitrator is an employee within the definition of employment as set forth in the regulations, and that deliberately avoiding offering work to someone who is willing and able to do it, on purely religious grounds, constitutes impermissible discrimination.\textsuperscript{71} The Court of Appeal did not find applicable in this case the ‘genuine occupational requirement’ exception under the regulations. Most significant in this case, the result might have been quite different if the parties had drafted their arbitration clause slightly differently. In the court’s view,

If the arbitration clause had empowered the tribunal to act ex aequo et bono it might have been possible to show that only an Ismaili could be expected to apply the moral principles and understanding of justice and fairness that are generally recognised within that community as applicable between its members, but the arbitrators’ function under clause 8 is to determine the dispute between the parties in accordance with the principles of English law. That requires some knowledge of the law itself, including the provisions of the Arbitration Act 1996, and an ability to conduct the proceedings fairly in accordance with the rules of natural justice, but it does not call for any particular ethos. Membership of the Ismaili community is clearly not necessary for the discharge of the arbitrator’s functions under an agreement of this kind and we are unable to accept, therefore, that the [genuine occupational requirement] exception provided in regulation 7 can be invoked in this case.\textsuperscript{72}

\textbf{12.39} While the dicta of the Court of Appeal in \textit{Jivraj v Hashwani} indicate that the parties’ stipulated preference for IDR intermediaries who are Muslim or male or any other similar qualification would be beyond the ambit of anti-discrimination laws or regulations, this exception only arises if the parties carefully describe such requirements as being essential to the ability of the arbitrator to apply certain Islamic principles and understandings, and with a particular ethos needed for making a proper decision in the dispute. Suggested language for a carefully drafted dispute resolution agreement to that effect is provided below.

\textbf{B. Choice of Governing Law}

\textbf{12.40} All financial transactions and resultant disputes, whether Islamic or otherwise, are based upon fundamental finance concepts and secular legal (including regulatory) frameworks. As with all dispute resolution, the starting point for any IDR dispute in Islamic finance, and that which should guide the intermediary and parties in trying to resolve the dispute, is the relevant and controlling law of the State. In turn, Islamic finance further is based upon the \textit{Shari’a}. Including a clear choice of \textit{Shari’a} principles in determining any disputes also may be wise from a practical perspective as well (p. 324) as meeting the personal (religious) interests of the parties. As discussed below, however, choice of law rules generally permit only one legal system to govern a contract, and then only the law of a country and not non-national law; IDR is likely the only context in which a choice of the \textit{Shari’a} may be successfully made by the parties.

\textbf{12.41} The Qur’an states that Muslims, in addition to following the mandates of the \textit{Shari’a}, must also follow ‘those in authority among you’.\textsuperscript{73} Moreover, it has been observed that there is a category of \textit{ahadith} instructing Muslims to obey those in power, and that
Muslims must obey rulers under all circumstances. A typical form for this genre is the following: It is reported that the Prophet said, ‘Listen and obey, in hardship and in good, in what is pleasant or unpleasant, and prefer them [the rulers] over yourself even if they usurp your wealth or strike your backs’ ... [see Al-Shaybani, Kitab al-Sunnah, 1993, pp. 478–9]. Some reports provide a justification for this methodical imperative of obedience by claiming that the Prophet said: ‘Who obeys me [the Prophet], he has obeyed God, and who disobeys me, he has disobeyed God. Who obeys the ruler (al-amir), he has obeyed me and who disobeys the ruler, he has disobeyed me’ (ibid., pp. 492–4). Several traditions attributed to the Prophet create a moral distance between the actions of rulers and their followers. As long as Muslims are obedient, they will not be held responsible before God for the indiscretions or injustices of rulers. Rulers are solely liable for their own injustices, Muslims are responsible for a separate religious imperative of obedience (ibid., pp. 485, 496).

12.42 Notwithstanding the mandate to obey the ruler and follow his law, of course, Muslims must ultimately follow and obey the Shari’ā in all respects. A reliable hadith included in al-Bukhari’s hadith collection for example, attributes to the Prophet the declaration that ‘[a] Muslim has to listen to and obey [the order of his ruler] whether he likes it or not, as long as his orders involve not one in disobedience [to Allah]’ [emphasis added]. Indeed, as well as obedience to more worldly authority, the Qur’an itself underscores the importance of resolving disputes according to the law of Allah:

You who believe, obey God and the Messenger, and those in authority among you. If you are in dispute over any matter, refer it to God and the Messengers, if you truly believe in God and the Last Day: that is better and fairer in the end.

12.43 In choosing to incorporate the Shari’ā as governing law, either on its own or together with the state law of the relevant jurisdiction, parties must give careful regard to (p. 325) most jurisdictions’ strong preference for recognizing only national law (and not religious law). The following two landmark English cases underscore the importance of carefully specifying the precise scope of Shari’ā principles and fiqh procedures to be applied, as well as the benefits of choosing an IDR forum for resolving Islamic finance disputes, instead of the courts.

12.44 In Beximco Pharmaceuticals Ltd & Ors v Shamal Bank of Bahrain EC, the parties unsuccessfully sought to reference somewhat vaguely and broadly ‘the principles of the Glorious Sharia’a’ together with the laws of England as governing their contract. In considering the purported choice of laws, the Court of Appeal in Beximco held the clause was not effective as choosing the Shari’ā as a governing legal system (either alone or coupled with English law), and in fact neither was the Shari’ā even incorporated thereby as a term of contractual reference. The court reasoned that under both English common law and the Rome Convention (as applicable in England pursuant to the Contracts (Applicable Law) Act 1990), contracts may be governed by only one legal system and only by the law of a country, not a non-national legal system. Indeed, the court went further to find the parties’ choice of the Shari’ā was intended simply to reflect the Islamic religious principles according to which the Bank holds itself out as doing business rather than a system of law intended to ‘trump’ the application of English law as the law to be applied in ascertaining the liability of the parties under the terms of the agreement. English law is a law commonly adopted internationally as the governing law for banking and commercial contracts, having a well-known and well developed jurisprudence in that respect which is not open to doubt or disputation on the basis of religious or philosophical
principle. I share the [trial court] judge’s view that, having chosen English law as
the governing law, it would be both unusual and improbable for the parties to intend
that the English court should proceed to determine and apply the Sharia in relation
to the legality or enforceability of the obligations clearly set out in the contract.\textsuperscript{78}

It is significant also that the vagueness of the clause was a considerable factor in the
court’s decision:

The general reference to principles of [the] Sharia in this case affords no reference
to, or identification of, those aspects of Sharia law which are intended to be
incorporated into the contract, let alone the terms in which they are framed. It is
plainly insufficient for the defendants to contend that the basic rules of the Sharia
applicable \textit{in this case} are not controversial. Such ‘basic rules’ are neither referred
to nor identified. Thus the reference to the ‘principles of … Sharia’ stand
unqualified as a reference to the body of Sharia law generally. As such, they are
inevitably repugnant to the choice of English law as the law of the contract and
render the clause self-contradictory and therefore meaningless.\textsuperscript{79}

(p. 326) Moreover, the court found that

\textbf{12.45} Three years after \textit{Beximco} was decided, in \textit{Musawi v RE International (UK) Ltd &
Ors},\textsuperscript{81} the English courts signalled their willingness to allow the \textit{Shari’a} to be applied to the
subject matter and resolution of a dispute, although in this case only in the limited context
of arbitration. In so doing, the High Court in \textit{Musawi} was unequivocal in following \textit{Beximco}
and holding that under the common law as well as the Contracts (Applicable Law) 1990,
‘the only law which the courts may apply is the law of a country’.\textsuperscript{82} But the court also noted
that the parties entered into an agreement for arbitration of their dispute, and further by
their agreement that ‘Shia Sharia law’ must apply.\textsuperscript{83} The court held that ‘[t]his was an
agreement which the parties were entitled to make’ under the Arbitration Act, and that
although only English law could govern the interpretation of the agreement itself,
resolution of the actual dispute between the parties was to be in accordance with the
\textit{Shari’a}.\textsuperscript{84} As the court explained:

It was accepted that the applicable law for the arbitration agreement, as opposed to
the law or principles to be applied by the arbitrator, was English law. Although the
Rome Convention, incorporated into English law by the Contracts (Applicable Law)
Act 1990, does not apply to arbitration agreements, the common law requires in my
view the applicable law to be the law of a country, for the reasons which I have
already given. In the case of this arbitration agreement, there is no country other
than England whose law could arguably apply to it. Accordingly, issues concerning
the arbitration agreement itself are governed by English law.\textsuperscript{85}
However, the Arbitration Act 1996 also ‘enables parties to choose principles other than the law of a country as the basis on which the dispute is to be decided by the arbitrators’, expressly stating that:

1. The arbitral tribunal shall decide the dispute—
   a. in accordance with the law chosen by the parties as applicable to the substance of the dispute, or
   b. if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.  
(p. 327) The court pointed out that the language of the Act permitting ‘other considerations’ allows the parties the freedom to apply a set of rules or principles which do not in themselves constitute a legal system. Such a choice may thus include a non-national set of legal principles (such as the 1994 UNIDROIT Principles of International Commercial Contracts) or, more broadly, general principles of commercial law or the lex mercatoria.

12.46 Read together, Beximco and Musawi indicate that a choice of the Shari’a in resolution of a dispute should be carefully described in the parties’ agreement, and further demonstrate the flexibility obtained by choosing IDR over conventional litigation in resolving Islamic finance disputes. Parties wishing to have their disputes decided in accordance with the Shari’a should identify in detail those aspects of the Shari’a that are intended to be incorporated into the contract and the terms in which they are framed. Moreover, it would be wise to avoid as much confusion as possible by setting forth clear reference to specific fiqh procedures, as well as the madhhab which the parties wish to follow in ascertaining and applying those rules. Moreover, the parties should consider specific reference to applicable fatwas or similar legal opinions by Shari’a scholars and committees, as well as contemporary legal treatises and published industry standards, avoiding what the Beximco court saw as ‘considerable controversy and difficulty’ in translating traditional fiqh into propositions of modern law, as well as the ‘existence of a variety of schools of thought with which the court may have to concern itself’ before a case can be decided. Finally, both cases unequivocally underscore the general perspective of the courts that a given country’s law, and not religious or other non-state legal principles, will be applied as the governing law in interpreting contracts, with the only possible exception being in the case of arbitration proceedings which expressly incorporate ‘other considerations’ for deciding the parties’ dispute.

C. Avoiding Gharar as a Shari’a Defence

12.47 Although there is an unequivocal mandate for sulh in the Shari’a, discussion of contractual provisions for dispute resolution is virtually absent from Islamic law treatises. Yet, the validity and enforceability of an IDR clause or contract could be crucial to a party’s efforts to compel the other parties’ participation in an agreed-upon IDR process, as well as to subsequently enforce a settlement agreement or (p. 328) adjudication resulting from the proceeding. Where the parties voluntarily use IDR to resolve a dispute after it arises, of course, this is an easy issue. But it is not unheard of that a party who ostensibly has agreed to forgo litigation in favour of some form of ADR, when actually faced with a dispute, then resists efforts to compel his participation in an ADR proceeding or subsequently to enforce an unfavourable result.
12.48 In virtually all early legal systems, contract law consisted of a set of rules or
templates for specific types of contracts—and Islamic contract law, too, lacked any general
type of contract, instead relying upon a basic sales (bay') contract, from which other
contracts are derived. In fact, classical Islamic jurisprudence ‘rarely even discussed the
idea of contractual freedom outside the standard contract types’, resulting in more
modern debate regarding whether various contracts, if not clearly authorized by the
Shari’a, are valid and enforceable.91 This is a subject of much recent attention in the
Islamic finance industry, as Shari’a advisors and industry leaders seek to develop new
structures that compete favourably with conventional markets and at the same time
facilitate financing in accordance with the Shari’a.

12.49 Fortunately, a general presumption in favour of enforceability of all contracts, as
well as the stipulations or conditions within them, is an important concept in Islamic law
and jurisprudence. A contract in Islam creates a strong legal and moral bond between the
parties.92 There are many verses in the Qur’an that command Muslims to fulfil their
obligations fully and as an obligation of faith (‘You who believe, fulfill your obligations’),
and a reliable hadith quotes the Prophet as reminding that ‘Muslims are bound by their
stipulations’.94

12.50 Building upon these basic principles of the Shari’a, the leading Hanbali Islamic
scholar Ibn Taymiyya (d. 1328 CE/728 AH) expressed the opinion nearly 700 years ago, that

the underlying principle in contracts and stipulations is permissibility (ibaha) and
validity. Any [contract or stipulation] is prohibited and void only if there is an
explicit text [from the Qur’an, the Sunna or the consensus] or a qiyas [analogy] (for
those who accept qiyas) proving its prohibition and voiding.95

(p. 329) Today, most Islamic legal scholars take the same position as Ibn Taymiyya, arguing
that various agreements entered into within the ambit of Islamic finance are valid and
enforceable unless they directly conflict with the Shari’a. With respect to agreements for
dispute resolution entered into after a dispute arises, as such, the issue appears without
contention. There is no explicit text or qiyas proving their prohibition or voiding; to the
contrary, the Qur’an and Sunna are abundantly clear that IDR would not only be legally
supported but, further, encouraged.

12.51 Significantly, the issue is slightly more complicated with respect to clauses which
prospectively mandate procedures for resolving disputes which have not—and in fact may
not—actually come into existence. The problem arises from various prohibitions expressed
in Islamic law against risk or uncertainty at the inception of a contract.97 Especially in trade
contracts, this concern about risk or uncertainty—referred to as gharar—is to ensure that
contracting parties know fully the terms and scope of their agreements, and that there is no
‘risk between the parties which is built into the contract at its inception and which must
result in a profit for one party and a corresponding loss for the other’.98 The classical jurists
defined gharar in various terms, ranging from ‘something which in its consequence is
undetermined’; ‘an uncontrolled subject-matter’; ‘something which in its manner and
consequence is hidden’.99 Accordingly, some contemporary scholars voice a concern that
dispute resolution clauses which contemplate events not yet in existence (a dispute), and
about which there is uncertainty as to whether they will even arise at all, run afoul of the
rules against gharar.100

12.52 Again, the classical position of Ibn Taymiyya (as well as modern Islamic scholars)
with respect to gharar supports the validity of IDR clauses governing resolution of
prospective disputes. Ibn Taymiyya related the concept of gharar to the prohibition of
gambling. As every contract inherently involves some degree of uncertainty, he instead
focused on whether the degree of risk ultimately rises to the level of gambling on outcomes.
Indeed, Ibn Taymiyya reasoned that ‘rendering the gharar rules as barring nonexistence
and lack of knowledge restricts contractual freedom too much, resulting in blind legalism and undue obstacles to people’s welfare’.\textsuperscript{101}

12.53 In the case of an IDR clause or stipulation in an Islamic finance contract, drawing from Ibn Taymiyya’s arguments and more modern perspectives in the industry, it is suggested that such a provision contemplating future disputes be articulated (p. 330) carefully to minimize the appearance of gambling on whether future events might arise, and instead focused on an overall interest in reducing uncertainty in the contract by the use of IDR. Most conventional ADR provisions specifically reference ‘disputes, controversies, or differences’ which might arise between the parties.\textsuperscript{102} A subtle change in language to help avoid the problem of gharar, yet still reflecting the desire for both conciliation, consistency with the Shari’a and, if needed, enforceability of an arbitral award under secular laws and conventions, is suggested.

12.54 Notwithstanding a carefully drafted IDR clause, it may still be advisable to reiterate the agreement to use IDR once a dispute has arisen. A party seeking to nullify an award or decision rendered in accordance with an IDR agreement may challenge the prospective agreement in court as being in violation of the Shari’a. By entering into a new agreement to engage in IDR once the dispute is in existence, any possible objection based on gharar would be avoided, the proceedings would become clearly legitimate, and the award would become enforceable.\textsuperscript{103}

D. Proposed IDR Clause or Agreement

12.55 Most legal practitioners devote relatively little attention to the procedural provisions for dispute resolution in Islamic finance agreements, focusing instead on more substantive provisions structuring the transactions and spelling out the parties’ respective duties and liabilities. Very often, in contemplating ADR, the parties will merely include a standard clause that provides for arbitration and/or mediation in accordance with applicable statutory law, if any, and incorporating by reference a particular ADR institution’s rules or other procedural framework. As the Islamic finance industry continues to grow and mature, and as increasing defaults are arising in the context of Islamic finance, dispute resolution clauses and agreements need be more of a forethought than an afterthought, and greater innovation in drafting will be needed.

12.56 In those situations where the parties desire to clearly mandate a Shari’a-based dispute resolution process, including choice of the Shari’a as governing law and avoiding later claims of gharar, the parties’ legal counsel should consider drafting language substantially like the following in their dispute resolution clause or agreement:

**Dispute Resolution:**

1. This contract shall be binding and enforceable as to the parties hereto, according to the terms expressed in this contract, as interpreted according to the laws of (p. 331) England and according to the Shari’a, as further described below; to the extent of inconsistency between the laws of England and the Shari’a, moreover, it is the parties’ intention that Shari’a shall prevail as to that inconsistency, unless doing so would render this agreement or any part of it void or otherwise unenforceable.

2. Interpretation of this contract, an interpretation of all applicable secular law, an interpretation of the Shari’a (in accordance with the principles of fiqh al-mu’amalat commonly accepted by the Hanafi madhhab), and an interpretation of all rights and obligations by and between the parties, shall be as mutually agreed upon by the parties, with the assistance of an
intermediary or a panel of intermediaries appointed by the parties in accordance with the further provisions of this contract.

(3) Notwithstanding the foregoing provision, upon request by any of the parties to this contract, the appointed intermediary or panel of intermediaries shall also have final authority to fully arbitrate between the parties and render an interpretation of this contract; an interpretation of all applicable secular law; an interpretation of the Shari’a (in accordance with the principles of fiqh al-mu’amalat commonly accepted by the Hanafi madhhab); and an interpretation and final binding decision of all rights and obligations by and between the parties.

(4) In rendering such above referenced interpretations and final decision, the parties and the appointed intermediary or panel of intermediaries shall consider without limitation the following specified portions of the Qur’an, hadith of the Prophet Muhammad, fatawa, texts and treatises, and industry standards promulgated by AAOIFI, IFSB and other international standard setting bodies, as listed here:

(5) [list all applicable texts, standards, etc]

(6) In rendering their interpretations and decisions, and/or otherwise arbitrating between the parties, the appointed intermediary or panel of intermediaries also may exercise the power of an amiable compositeur and make such interpretation ex aequo et bono.

(7) Arbitration pursuant to paragraph 3. above shall be administered by the [insert name of arbitral institution] and conducted in accordance with the published rules of the [arbitral institution]. All parties to this contract shall be finally bound by that arbitration and shall perform fully in accordance with it. Further, the written interpretation and decision hereunder by the intermediary or panel of intermediaries shall be deemed the equivalent of an arbitral decision and award under the laws of the seat and place of the arbitration.

12.57 In addition, if the parties desire the intermediary be a male and/or Muslim, the parties should also consider adding substantially the following provision:

The parties agree that in order to obtain an interpretation, arbitration, and decision which is consistent with the principles, understandings, and particular ethos of Islam, particularly as commonly accepted by the Hanafi madhhab,

(a) all intermediaries chosen hereunder shall be Muslim, with expertise in principles of fiqh al-mu’amalat commonly accepted by the Hanafi madhhab; and

(b) all intermediaries chosen hereunder shall be male.

12.58 Finally, although the rules of the selected arbitral institution and laws of the relevant jurisdiction will likely provide further terms and conditions for the IDR proceedings, (p. 332) in addition to the language above, the parties should consider adding commonly used provisions often found in conventional ADR agreements. These may include provisions, for example, specifying the number of intermediaries to be selected, the process of selection, and in the case of a multi-member panel, selection of a chairman; confidentiality of submissions and statements made in proceedings; immunity of the intermediaries; all timelines for the process of dispute resolution; the physical location, often based upon convenience to the parties, and the juridical place (‘seat’) of the dispute.
resolution process; the official language in which all proceedings are to be conducted; use of expert determinations; and other provisions which may be incorporated by reference to local law as well as the rules of the arbitral institution administering the proceedings.

VI. Conclusion

12.59 As currently occurs with regard to all things Islamic in a secular context, there is a popular anxiety in most parts of the world regarding the establishment of Islamic dispute resolution frameworks. But unlike the widespread ‘outcry’ it is anticipated would be generated by establishment of Shari’a courts and similar Government-sponsored tribunals, however, IDR in the context of Islamic finance has generally flown under the radar of popular resistance. As with construction arbitration, or labour arbitration, or any other subject-specific ADR process, IDR for Islamic finance is simply another mode of private commercial adjudication. Moreover, from the viewpoint of the State, as well, it is much less threatening than a parallel system of Shari’a courts, which may reach decisions over which the State has no ultimate say. In fact, contrasted with such a parallel system, absent an amicable settlement (in which case the State would have no stake or direct interest anyway), the ultimate adjudication by an IDR intermediary would be subject to review and affirmation by the courts as an arbitral award.

12.60 Rather than popular or state resistance to the idea of IDR, currently the greatest obstacle to increased and more widespread implementation of IDR for Islamic finance disputes is insufficient expertise and extremely limited facilitative legal and institutional frameworks. Fortunately, the shortage of experts with education, training, and experience in the Shari’a, applicable secular commercial law, and Islamic finance, is currently being addressed in the interest of increasing overall ‘human capital’ available to the Islamic finance industry. This increased expertise in the Shari’a and its interplay with secular commercial law and Islamic finance not only benefits the growth of the Islamic finance industry, but is also a tremendous boon to IDR for Islamic finance disputes. The absence of facilitative legal and institutional frameworks, however, remains largely unaddressed, even in countries with significant Muslim populations. While it does not appear there are any laws currently which preclude IDR in Islamic finance disputes, especially on an ad hoc basis, there significantly is little legal framework in place that would either encourage or even simply facilitate it.

12.61 Finally, it should be noted that a number of issues raised in summary fashion in this chapter are excellent topics for further research and writing by legal practitioners and academics. Most notable amongst them are conflict of laws (private international law) issues which are beginning to arise not only in the context of cross-border Islamic finance transactions, but which will also unavoidably arise even more significantly in the context of cross-border Islamic finance dispute resolution, as jurists are increasingly faced with the complex interplay of multiple states’ laws and the Shari’a. It is hoped that such scholarly research and writing will be forthcoming sooner rather than later, as the need is already present.(p. 334)

Footnotes:

1 The term ‘Islamic finance’ in this chapter encompasses broadly Shari’a-compliant and Shari’a-based products and industries, as well as those which are an outgrowth of basic Islamic finance, such as Islamic retail and investment banking, takaful (a form of mutual assurance, often simply but inaccurately referred to as Islamic insurance), and even so-called ‘retakaful’. Notably, a distinction is increasingly being made between Shari’a-compliant conventional concepts and structures which have been reverse-engineered or otherwise altered to bring them ostensibly into compliance the Shari’a, and
Shari’a-based concepts and structures more stringently based upon the spirit and philosophy, as well as legal rulings, of Shari’a and Islamic commercial jurisprudence.

2 It is important to note that some countries are enjoying far greater growth in Islamic finance: Indonesia, for example, often referred to in the industry as a ‘sleeping giant’ with about 10 per cent of the world’s Muslim population, already has the largest number of Islamic financial institutions in the world and (unofficially) predicts growth of its Shari’a finance sector at a rate of 55 per cent by the end of 2011, following approximately 47 per cent growth in 2010. It is also expected to grow increasingly amongst the region’s non-Muslims who are attracted to perceived higher standards of disclosure and ethics by Islamic financial institutions, as well as a perception (though not necessarily accurate) amongst many non-Muslims that Islamic financial institutions are more flexible and willing to commit funds to trade and project financing than conventional financial institutions whose funding guidelines may be more restrictive in the wake of the financial crisis.


4 ADR or ‘Alternative Dispute Resolution’ generally comprises myriad forms of dispute resolution used as an alternative to traditional litigation procedures. The two most common forms of conventional ADR, arbitration and mediation, are discussed in Section III and Section IV.C.

5 Although it should be noted that the term ‘legal’ is understood more broadly in the context of Islam than in its conventional Western sense. See Chapter 2 ‘Sources and Principles of Islamic Law’.


9 See, eg, Irshad Abd al-Haqq, ‘The Role of the Muslim Lawyer in Establishing Islamic Community Life’ (Fall/Winter 1998) 3 Journal of Islamic Law 105, 133: while the American judicial system, for example, is an obvious forum for resolving disputes, he notes ‘the chief concern that many Muslims have with it is its inability to address Islamic issues and concerns for reasons ranging from hostility and ignorance to jurisprudential and constitutional constraints’.


11 This term is used in a cultural and non-geographic sense, to include Australia and New Zealand, as well as the Americas and Europe.


14 Ibid.

15 See Q4:65 and Q42:36–40.

16 See Q4:105 and Q5:48.

17 The only area in which the Qur’an provides specific guidance on dispute resolution is with regard to marital disputes. See Q4:128 and Q4:35.


20 Ibid, p 545.

21 Ibid.

22 The terms musalaha and even maslaha occasionally appear in relevant literature interchangeably with sulh and also (incorrectly) as if they each represent a third subcategory of sulh along with wasata and tahkim. The words musalaha and maslaha are etymologically related to the word sulh. Musalaha is synonymous with sulh, generally used in the sense of peace or reconciliation and, sometimes, agreement. Maslaha, on the other hand, refers to an occasion of virtuous and good purpose or result, or something conducive to or causing good—arguably reflecting in its common linguistic ancestry with sulh and musalaha the deeply rooted view in Islamic tradition that processes of peace and reconciliation are strongly favoured as virtuous and good. See Edward W Lane, An Arabic-English Lexicon (rpt Beirut: Libraire du Liban, 1968), Book 1, Part 8, pp 1714–15.

23 Wasta also appears in some writings to be used synonymously with wasata. Both words are linked to the word, wasit, which refers to a mediator or intercessor between people. See Lane, An Arabic-English Lexicon, pp 2940–2.


25 Q4:128. Two suras upon which Shari‘a scholars often rely in this regard are Q4: 128 and Q4:35, although these specifically address marital discord.

26 Q49:9–10: ‘if two groups of believers fight, you [believers] should try to reconcile them; if one of them oppresses the other, fight the oppressors until they submit to God’s command, then make a just and even-handed reconciliation between the two of them: God loves those who are even-handed. The believers are brothers, so make peace between your two brothers and be mindful of God, so that you may be given mercy.’

27 Khan, p 381.
A *musharaka* structure is an ideal vehicle for securitization, but conflicting views may occur among the various *madhab* as to the legal sale price of securities, according to the proportion of liquid and non-liquid assets involved. And yet another illustration in the United States recently has involved a federal bankruptcy judge in trying to sort out extremely complex questions of investors rights in a *musharaka*-structured *sukuk* default, such as whether the *Shari’a*-compliant ‘sale’ of certain interests was in fact a true sale or actually a secured loan: *East Cameron Partners, No 08-51207 (US Bankruptcy Court WD La, 16 October 2008)*. While bankruptcy proceedings would not be the subject of IDR, the East Cameron bankruptcy proceeding is a prescient example of the legal conundrums that increasingly face secular judges as the Islamic finance industry further matures and grows.

Especially in many US jurisdictions, limited specialized civil courts also had been established for resolving family law and probate matters, drawing from the focused expertise of a specialized Bench and Bar in those respective areas of law. The author’s direct observation during the late 1970s to date is that experience with these specialized courts has been generally positive, and likely encouraged the increased interest in specialized ADR fora as well.

Assuming, of course, that the lawyers fully collect all fees earned from disgruntled clients, do not incur significant opportunity costs in being committed to a very limited case load for months or even years at a time, and do not suffer reputational costs in being unable to quickly and cost-effectively resolve their case load.

Of course, arbitration and mediation have existed in various forms throughout recorded history, evolving from processes for resolving disputes between members of a particular community (including even the microcosmic community of a clan or tribe), to broader application in resolving disputes between members of different communities. Both forms of ADR began with the recognition that negotiations by disputants between themselves may fail and need the assistance of an intermediary—either as a mediator or as a final adjudicator.

This arrangement was typical of construction arbitrations administered by the predominant commercial ADR institution of the last century, the American Arbitration Association (AAA). It is also interesting that in most of these AAA arbitrations, based upon the author’s observations and discussions with AAA administrators, the lawyer was designated by the disputants as the chair of the arbitration panel, perhaps indicating that legal knowledge remained of paramount priority.

There have been no meaningful empirical studies on this point; however, the author’s experience as a trial lawyer, arbitrator, and mediator—as well as innumerable discussions with other trial lawyers and ADR professionals over the past more than 30 years—has clearly borne out this conclusion.

Seyed Ibrahim, p 20.

See, eg, Antaki, ‘Chapter 11: Cultural Diversity and ADR Practices in the World’, p 269: ‘two main approaches to mediation: intuitive or informal mediation ... practiced in Arab and Muslim countries ... and cognitive or scientific mediation as it has developed in the United States and from where it has been spreading worldwide’.

Antaki, ibid, pp 268–9.
Often referred to simply as the umma, the unified community of Muslims, transcending geo-political boundaries and structures.


‘Umar’s rule began just two years after the death of Prophet Muhammad and though he reigned only for ten years he is credited within the Islamic tradition with having established many of the political and financial structures which underpinned the Islamic Empire for centuries to come. See, eg, Giorgio Levi Della Vida and Michael Bonner, ‘Umar b. al-Khattab’ Encyclopaedia of Islam, 2nd edn, Vol X, pp 818–21.


Kitab al-Qada or book on the judiciary.

Mulla Khusraw, p 404: ‘I mention it after reconciliation (sulh) because it is needed only if reconciliation does not occur between the disputants.’

See Chapter 2 ‘Sources and Principles of Islamic Law’ at paragraphs 2.36 and 2.43.

The hakam is analogous to a contemporary arbitrator, chosen freely by the parties. It is the position of hakam that gradually was subsumed by the office of qadi. In the pre-Islamic Middle East, disputants generally would turn to a hakam to resolve their disputes. An excellent discussion of the role of the hakam in pre-Islamic Arabia is provided by Emile Tyan, Histoire de L’Organisation Judiciaire en Pays d’Islam (Paris: Librairie du Recueil Sirey, 1938), especially at pp 60–65.


But not too intelligent, perhaps: ‘the Maliki school, while requiring this condition, expresses its distrust of too much “cleverness”’. Saleh, p 30.

Zaidan, Nizam, at paragraph 25; Al-Qari, p 601; Saleh, ibid, p 28; El-Ahdab, pp 29–30; ibid, p 40.

El-Ahdab, ibid. See also Saleh, ibid, p 31.

Zaidan, at paragraph 33. See also, eg Saleh, p 30.

Al-Qari, p 601, Chapter 2061: ‘it is not valid to appoint a deaf, blind or mute’; Saleh, p 30.

The Qur’an assures Muslims that Allah does not intend hardship for them. See, eg, Q2:185; Q5: 6. Indeed, there is even a well-known legal maxim in Islam that ‘necessity knows no laws [lit. “restrictions”]’(al-darurat tubihu al-muhzhurat), related in part to those verses in the Qur’an.
The Hanafi madhhab permits non-Muslims to adjudicate over non-Muslims. See, eg, Zaidan, paragraph 28. Moreover, it has been observed that ‘[m]odern Muslim scholars of the Hanafi school even go so far as to accept the jurisdiction of a non-Muslim judge over Muslim litigants as valid in financial, civil or commercial cases’. Saleh, p 29.

Zaidan, ibid, at paragraph 26.

Q4: 141. See Zaidan, ibid; El-Ahdab, Arbitration with the Arab Countries, p 40.

Saleh, p 29, referring to controversial Sura 4:34:

Husbands should take good care of their wives, with [the bounties] God has given to some more than others and with what they spend out of their own money. Righteous wives are devout and guard what God would have them guard in their husband’s absence. If you fear high-handedness from your wives, remind them [of the teachings of the God], then ignore them when you go to bed, then hit them. If they obey you, you have no right to act against them: God is most high and great.

Zaidan, paragraph 37.

See Chapter 2 ‘Sources and Principles of Islamic Law’.

Zaidan, paragraph 39.

Hudud are fixed criminal punishments mandated by the Shari’a, in contrast to punishments over which the judge has discretion (tazir).

Qisas is retribution permitted under Shari’a for a criminal offence.

Zaidan, paragraph 38; Saleh, p 29.


[2010] EWCA Civ 712 (22 June 2010), In the Court Of Appeal (Civil Division), on appeal from the High Court of Justice, Queen’s Bench Division (Commercial Court) (Mr Justice David Steel) [2009] EWHC 1364 (Comm).

Promulgated to give effect to EU anti-discrimination regulations, to wit, Council Directive 2000/78/EC.

The Human Rights Act also did not apply, as the parties were not public authorities within the ambit of the Act, and court also rejected the challenge on the basis of public policy, holding that it was not appropriate to fill any arguable gaps in the regulations by resorting to public policy.

The Supreme Court heard the appeal in this matter in an expedited two-day hearing in April 2011, with the ICC International Court of Arbitration (ICC) and the London Court of International Arbitration (LCIA) as interveners. As at this writing, a decision has not been handed down. Whatever that decision, however, careful drafting will still require consideration of the decision of the Court of Appeals decision in this case.

[2010] EWCA Civ 712 (22 June 2010), paragraph 29.

Q4: 59.


75 See Zaidan, paragraph 109.

76 Q4: 59. Similarly, in Q3:23, the Qur’an points out the folly of those who do not settle disputes between them by the word of Allah:

> Have you considered those who were given a share of the Scripture? When they are asked to accept judgement from God’s Scripture, some of them turn their backs and walk away.

See also, Q49: 9; Q5: 47; Q5: 49.

77 [2004] EWCA Civ 19 (28 January 2004), in the Supreme Court of Judicature, Court of Appeal (Civil Division), on appeal from the High Court of Justice Queen’s Bench Division (Morison J).

78 Ibid, paragraph 54.

79 Ibid, paragraph 52.

80 Ibid, paragraph 55.

81 [2007] EWHC 2981 (Ch) (14 December 2007), in the High Court of Justice (Chancery Division).

82 Ibid, paragraph 23.

83 Ibid, paragraph 82.

84 Ibid.

85 Ibid, paragraph 81.

86 Ibid, paragraph 22.

87 Ibid.

88 Examples include not only private Shari’a committees, such as those of various financial institutions and private consultancies, but also national committees, such as the Shariah Advisory Council of Bank Negara Malaysia, and international organizations such as the International Islamic Fiqh Academy of the Organisation of the Islamic Conference.

89 These include standards published by well-respected international industry standard setting bodies such as the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) and the Islamic Financial Services Board (IFSB).

90 Vogel and Hayes, p 98.

91 Ibid.

92 The secular legal concept of a ‘contract’ is generally equivalent to the Arabic ‘*aqd*, which literally means to tie or fasten together, such as tying the ends of a rope (‘*aqd al-habl*), and refers to a legal as well as religious undertaking or covenant.

93 Q5:1. See also, eg, Q4:58; Q16:91; Q16:92; Q16:94; Q17:34.


95 Taqi al-Din Ahmad Ibn Taymiyya, *al-Fatawa al-Kubra*, (Beirut: Dar al-Ma’rifa, undated) 3:474, quoted in Vogel and Hayes, p 98. It should be noted that this view has been significantly challenged throughout Islamic history by various *madhahib*, including...
especially the ‘literalist’ Zahiri madhhab, arguing that contracts are only permitted to the extent they derive from divine authority. Ibid.

96 Chapter 2 ‘Sources and Principles of Islamic Law’ at paragraphs 2.24–2.25.

97 Vogel and Hayes, p 88. The entire industry of takaful was, in fact, born out of this concern, in that it has been argued that conventional insurance involves elements of gharar, as well as maysir (gambling). See Chapter 11 ‘Takaful’.


100 See generally, El-Ahdab, pp 26–28; Saleh, pp 39–42.

101 Vogel and Hayes, pp 92–3.

102 See, eg, ‘Standard Mediation Clauses’ published by the Singapore Mediation Centre: ‘All disputes, controversies, or differences arising out of or in connection with this agreement ...’ <http://www.mediation.com.sg/mediation_clauses.htm>.


104 See Liptak, n 10.