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Asian Journal On Mediation

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SINGAPORE MEDIATION CENTRE

FOREWORD

The study and practice of modern mediation is about 4 decades old but we often forget that mediation is deeply rooted in the Asian culture, and that mediation or conciliation or making peace, are all forms of dispute resolution that have been in ancient cultures for centuries. In forgetting this, we in Asia are in danger of forgetting that we have much to teach each other about how we live together as families, neighbours and citizens.

One of the aims of this Journal is to promote and encourage study, research and discussion of the theory and practice of mediation in Asia, by Asians, and about Asians. It is not an easy task, considering the multitude of languages and cultures that make up the rich tapestry of Asia and Asian culture. We at the Journal are constrained by language – the English language – which is not even the language most commonly spoken in Asia. Even the consideration of what constitutes Asia is a topic for debate : whether we consider it geographically, historically or politically.

In this issue, we savour some of the diversity that is Asian mediation. The three articles in this issue cover mediation in Asia from three very different perspectives. One documents the experiences and views of four mediators in Singapore, another deals with dispute resolution in Islamic law, including mediation, and another deals with mediation in the Courts.

Asian culture is not given to sharing and airing of views and disputes. This is why mediation works so well in Asia, and at the same time, it is also why it is hard to write about mediation and mediation experiences in Asia. Despite this however, in this issue of the Journal, we are fortunate to have an article which shares the views, experiences and preferences of four experienced mediators in Singapore. The article describes a modest study on four mediators but provides good insight into what makes good mediators tick. It is descriptive and anecdotal, but makes interesting reading for those of us who want to learn from the masters.

Some Asian cultures are deeply connected to religion. The Islamic culture predominates in Asia, and Islamic law is rooted in the Qu'ran. Islamic law promotes harmony and for this reason, there are a range of mechanisms available for the resolution of Islamic disputes, even in commercial law. In this issue of the Journal, we carry an article that is more Asian than mediation, which serves to introduce readers to the basic ideas that pervade the resolution of commercials disputes in Islamic law. Mediation is introduced in that article, and this Journal hopes to publish more papers describing unique approaches to mediation in Asian cultures.

The introduction of mediation into the court system is dealt with in the final article. This examines and compares court mediation in Canada and Singapore, giving us an interesting perspective of how pervasive mediation can be – to the extent that it is incorporated into the hallowed halls of justice.

As always, we welcome enquiries for submissions and ideas for articles. We hope you find this an eye-opening read.

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THE RESOLUTION OF ISLAMIC COMMERCIAL DISPUTES IN MALAYSIA : COURTS, MEDIATION AND ARBITRATION

By

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Islam is the second largest religion in the world and most muslims live in Asia. In some countries in Asia, Islamic or Shariah law prevails in commercial dealings. This article provides a brief overview of Islamic commercial law and then examines the processes by which commercial disputes can be resolved under Shariah law in Malaysia. While this article does not strictly focus on mediation, it sets the context in which mediation is conducted under Shariah law. This Journal hopes to publish an article focusing on such mediation in a future issue.

Introduction

It is a general principle of Islamic commercial law (*fiqh al-muamalat*) that a contract is concluded in the expectation that the obligor will fulfill his promise in good faith. The fulfillment or performance of the contract is important as it preserves the stability of human transactions. Compliance with contractual obligations protects the integrity of dealings among people and meets their interests.

However, not all contractual obligations are or can be performed. There are cases where the parties breach a promise to perform, or where the performance does not reach the standard expected, or where the performance of the contract becomes impossible. As a result, parties may disagree and disputes may arise.

Disputes are unwarranted and often unanticipated consequences of ordinary commercial activities. Disputes may be caused by delayed shipment or delivery, complaints about quality of merchandise, disagreements over the performance of obligations or other misunderstandings. Even when parties act with the best of intentions, their contractual performance can fall below what was originally promised.

Disputes are inevitable. In recognition of this, the Shariah provides several alternative methods of dispute resolution which enable parties to deal with their commercial disputes in the most harmonious way. These will be introduced in turn.

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[2]

Dispute resolution by operation of law

Tajdid al-mujabat / Hiwalah (Novation or Assignment)

Under the Shariah, conflicting parties may choose to resolve their dispute by extinguishing the original contract and replacing it with new obligations. This exercise is known as *tajdid al-mujabat* (novation).

Under the Islamic law of obligations, *tajdid al-mujabat* refers to a procedure of extinguishing an obligation by transforming it into a new one. It occurs when the parties have agreed to discharge the original obligation. In its stead, a new obligation is created. The exercise of *tajdid* involves the substitution of the nature of the original contract. This can be done, for example, by changing a sale contract into a gift (*hibah*), loan (*qard*), or lease (*ijarah*); substituting the subject matter of the original contract for a new subject matter; or replacing the contracting parties in the contract. The contracting parties might be the same individuals who shared a contractual relationship in the previous contract (such as debtor and creditor) or a new party altogether.

The purpose of *tajdid al-mujabat* is to avoid the inconvenience, uncertainty and risk inherent in the original obligation. By resorting to a new obligation, the interests of the parties are better protected.

To effect *tajdid al-mujabat,* the disputing parties must have an intention to replace an existing obligation with another (*animus novandi*) and enter into a new contract[3]. The two processes should be contemporaneous. There is no limitation as to the nature or quantity of the subject matter exchanged and parties are free to substitute any type of commodity[4]. The parties may also agree to assign a new party to the obligation or change the relationship between the original parties. Since the substitution is unqualified, the original obligation is extinguished regardless of the subsequent fulfillment or failure of the substituted obligation.

Other than *tajdid*, parties can also effect a *hiwalah*, or an assignment of debt. The *hiwalah* is regarded as a highly advanced commercial instrument dealing with credit. A debtor may assign his obligation to another person without the creditor's consent as long as the assignee is solvent[5]. This is eminently practical as it makes the process of transfer extremely simple. Assignments may even be made for or against third parties who are neither debtors nor creditors of the assignor, in which case the transfer operates as an agency (*wakalah*). In addition, nowhere do the rules of *hiwalah* mention a restriction as to the location of the contracting parties, which is considered as a "brick" in the logical structure demonstrating the practical application of *hiwalah*, thereby ensuring the smooth functioning of the exchange.

There are some differences between *tajdid* and *hiwalah*. The main distinction is that *tajdid* releases pledges and securities and results in the discharge of sureties (*kafalah*) whereas in *hiwalah*, the transfer does not release the sureties - they transfer together with the obligation or debt.

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[3] Al-Sanhuri, al-Wasit, Vol. 3, pp. 817-820; Rida Mutawalli Wahdan, Tajdid al-Iltizam,p. 203.

[4] Mawsuah al-Fiqh al-Islami, Vol. 5, p. 176; Rida Mutawalli Wahdan, Tajdid al-Iltizam, p. 348; Rushdi Shahatah, Inqida' al-Iltizam, p. 473.

[5] This view is adopted by the *Hanbalis* who state that a debtor may assign his obligation to another person without the creditor's consent as long as the assigneee is solvent. Abd al-Wadud Yahya, Hiwalah al-Dayn, p. 114; Nicholas Dylan Ray, "The Medieval Islamic System of Credit and Banking: Legal and Historical

The comprehensive application of *tajdid* and / or *hiwalah* provides an alternative to parties who wish to settle an impending dispute which may arise from the dissatisfaction of a contract. Both processes are allowed under the Shariah to enable a contract to be concluded in the most harmonious way that pleases all parties.

Al-Muqassahi (Set-Off)

Another method by which parties may resolve their commercial disputes is by way of set-off (*al-Muqassah*). *Al-Muqassah* is applicable only in cases where parties are indebted to each other. *Al-Muqassah* can either be an automatic extinction of debts or obligations by the operation of law, also known as *al-Muqassah al-Qanuniyyah*, or a dispositive act whereby one or both parties effect the extinction of debts by means of set-off, known as *al-Muqassah al-Talabiyyah* and *al-Muqassah al-Ittifaqiyyah* respectively[6].

The settlement of disputes by way of set-off requires that the debts or obligations of both parties are *ejusdem generis* (of the same kind). When the subject matter, i.e. the debt in question, is not of the same kind or its amount is different, set-off is possible but with prior agreement of the parties concerned. In such a case a balance is struck and the smaller debt extinguishes the larger[7].

Al-Muqassah operates automatically, *ipso jure*, when all the extinguishing requirements are met. Thus the effect is that the debts or obligations of the parties mutually cancel one another from the moment they are capable of being set-off[8]. However, for the sake of clarity and to avoid any possible dispute, the Accounting and Auditing Organisation for Islamic Financial Institutions suggests that in the operation of such set-off in banking agreements, a specific agreement relating to the set-off should be made between the bank and the customer. There are many reasons for requiring a separate agreement allowing the exercise of set-off. Among the advantages of having such a separate agreement are the ability to (i) make certain that one claim can be set-off against the other – particularly when essential conditions allowing the exercise of *al-Muqassah* are fulfilled; (ii) standardize the terms of the contract; (iii) define precisely the meanings of terms and expressions employed in set-off provisions and identify accounts or amounts from which deductions may be made; and (iv) set up procedures to be followed in setting off operations. This list is by no means exhaustive, but it is sufficient to illustrate that separate contract provisions as regards set-off may be useful to both parties.

The purpose of the operation of *al-Muqassah* is to ensure prompt payment and to avoid repetition of payment or performance of an obligation. This procedure enhances the efficiency of commercial dealings by promoting speedy settlement of debts without the need for a costly and cumbersome duplication of performance. Furthermore, *al-Muqassah* protects

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[6] Yusuf Husin Ahmad, al-Muqassah, pp. 146; Muhammad Salam Madkur, "al-Muqassah fi al-Fiqh al-Islami", Majallah al-Qanun wa al-Iqtisad, 1958, Vol. 1&2, pp. 30-62.

[7] All Muslim jurists agree that when both parties are subject to concurrent debts which are similar, the automatic set-off is effective even without the consent of the parties concerned. However, in cases where the debts or obligations are of a different nature, there is no agreement amongst jurists. The Malikis and Hanbalis view that set-off in these situations is effective even without the parties' consent. On the other hand, the Hanafis and Shafiis argue that the consent of the parties is essential to the validity of such set-off.

[8] See the Guideline for Settlements of Debts by Set-Off, prepared by the Accounting and Auditing Organisation

a creditor from the risk that his debtor, who is indebted to him, may subsequently become insolvent or otherwise unable to perform his contractual obligations.

The Regulatory and Institutional Regime for Islamic Commercial Disputes in Malaysia

Legal Regime

In Malaysia, the laws specifically governing Islamic banking and Islamic commercial transactions are the Islamic Banking Act 1983; the Takaful Act 1984 (on Islamic insurance); the Government Investment Act 1983; and the Banking and Financial Institutions Act 1989. In addition to these laws, general law on contracts and transactions applicable in Malaysia also apply. Further, the Central Bank of Malaysia has the supervisory power to monitor all banking and commercial activities to ensure that the activities are Shariah compliant. All banks and financial institutions are subject to guidelines, directives and regulations of the Central Bank in carrying out their operations.

The Islamic Banking Act 1983 provides a very general definition of Islamic banking (and / or commercial) activities. Section 2 provides that Islamic banking is

> "*banking business whose aims and operations do not involve any element which is not approved by the religion of Islam*".

There is no definition of what elements are "*not approved by the religion of Islam*".

The Act allows an Islamic bank or financial institution to conduct all types of business such as commercial banking, merchant banking and financing. There is a mechanism which allows for innovations in business and product development in Islamic commercial law which involves a process of acceptance and validation of existing practices and products as being compatible with the Shariah practice of *muamalat* (Islamic rules on transactions). Banking practices are allowed in the Shariah under the principle of "*permissible unless otherwise prohibited*".

The Shariah Advisory Council

In view of complicated issues of *muamalat*, differences in opinions among Muslim jurists, and the vast and fast-paced development, modification and innovation in the products and operation of the Islamic commercial system, it is inevitable that disputes will arise between the practitioners of Islamic commercial activities and customers. For this reason, in 1997, Bank Negara Malaysia (BNM), the Central Bank of Malaysia, by virtue of section 16B of the Central Bank of Malaysia Act 1958, established a Shariah Advisory Council to be the authority in ascertaining the standard rules and regulations on Islamic banking (and / or commercial activities), takaful as well as Islamic finance activities.

The intention in setting up the Shariah Advisory Council was to establish a body or an institution as the final authority in matters relating to Islamic commercial law and banking.

This body is also intended to provide a standard or unified practice and guidelines to be followed by all the players in the trading and commercial sectors. It also acts as an authority to determine the parameters and limitations imposed by the Shariah for operation of Islamic banking and products issues as well as to settle disputes in Islamic commercial law according to the Shariah[9].

The BNM has issued guidelines requiring all Islamic banking and financial institutions in Malaysia to appoint their own Shariah Committees to advise them on Shariah law and Shariah principles in their operations. An Islamic bank or financial institution must refer disputes concerning Islamic banking and *muamalat* in general to their Shariah Advisory Committee or to the Central Shariah Advisory Council under the BNM.

The BNM has the power to issue directives on Shariah matters after consultation with the Shariah Advisory Council. As a final authority on Islamic banking disputes, the Shariah Advisory Council's view must be taken into account by courts and arbitrators in deciding matters before them.

The Court

In Malaysia, two courts have jurisdiction over commercial disputes – the Civil Courts and the Syariah Courts[10]. The Syriah Courts are presided over by persons qualified in Islamic law. The existence of two courts that can exercise their powers over commercial disputes can result in some difficulties in the resolution of commercial disputes.

While it should be expected that disputes involving Islamic commercial law should go to the Syariah Court where judges with the requisite expertise in Islamic law preside and where decisions are made according to the Shariah principles, the Malaysian Federal Constitution provides in Paragraph 4 of List 1 that commercial matters come under Federal jurisdiction. Such jurisdiction is exercised by the Civil Courts. Civil Court judges are bound by the Civil Law Act, the Court of Judicature Act and the Rules of the High Court. None of these provide for the application of Islamic law by the Civil Courts. For this reason, the jurisdiction of the Civil Courts to adjudicate disputes involving and applying Islamic commercial law comes into doubt. Furthermore, judges of the Civil Courts are not required to have expertise in *muamalat*, do they necessarily have the requisite knowledge of Shariah in general, both essential requirements to adjudicate according to Islamic commercial law.

On the other hand, Article 121(1A) of the Federal Constitution provides for the exclusive jurisdiction of the Syariah Court in all matters involving the religion of Islam and the life of Muslims. This excludes the jurisdiction of the Civil Courts. There is no doubt that the exclusion extends to matters relating to Islamic commercial law. However, no provision has been made for judges of the Syariah Court to be trained in civil laws relating to banking and finance. Despite restructuring and continuous upgrading of the competency of the personnel of the Syariah Court, the capability of Syar'i judges (as well as syar'i lawyers) in handling Islamic commercial law disputes is not assured. While there can be the utmost confidence in

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[9] Rohana Yusuf, "Regulatory and Supervisory Aspects of Islamic Banking and Finance", paper presented in Workshop on Islamic Banking and Finance organized by Insitut Kefahaman Islam Malaysia (IKIM) on 16-17th March 2004.

[10] For further explanation on the power and jurisdiction of Syariah Court in Malaysia, see Farid Sufian Shuaib,

their ability to expound on Islamic law, their lack of expertise or training in civil law related to banking and finance may be an issue.

Sulh (Mediation)

Another alternative mechanism for the settlement of Islamic commercial disputes is through mediation or *sulh*. *Sulh* in Shariah law refers to an amicable settlement between the parties either by way of negotiation, mediation, compromise or conciliation. The aim is to eliminate the dispute between parties. The legality of *sulh* in Islamic law can be found in al-Quran which says

> "*The believers are but a single brotherhood, so make peace and reconciliation (*sulh*) between two (contending) brothers; and fear Allah, that ye may receive mercy.*"[11]

The Prophet gave much importance to *sulh* and he himself personally settled many disputes. This can be found in a *hadith* narrated by Sahl ibn Sa'd.

> "*There was a dispute amongst the people of the tribe of Bani Amr ibn Auf. The Prophet went to them along with some of his companions in order to make peace (*sulh*) between them.*"[12].

Sulh or mediation facilitates the resolution of a dispute by promoting agreement between the parties concerned. In the process of mediation, the mediator acts as a counselor and conciliator who encourages communication and promotes understanding among the disputing parties. A mediator also helps the parties to explore options whereby they can move towards settlement and suitable accommodation of each party's needs.

In Malaysia, the development of institutionalized mediation started with the establishment of an Alternative Dispute Resolution Committee in 1977 by the Malaysian Bar Council. The Committee introduced mediation in courts and promoted dispute settlement through mediation.

There is no specific law in Malaysia governing mediation or *sulh*. However the following provide guidelines on mediation :

(a) Sections 18 and 19, Industrial Relations Act 1967;

(b) Articles 28-35, Convention on the Settlement of Investment Disputes Act, 1966;

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[11] Surah al-Hujurat 49:10.

[12] [illegible]

(c) Section 106, Law Reform (Marriage and Divorce) Act 1976;

(d) Conciliation/Mediation Rules (Model Clauses), 1998 of the Regional Centre For Arbitration, Kuala Lumpur;

(e) Rules 35.1 & 35.2, PAM (Pertubuhan Akitek Malaysia);

(f) Rules of the Insurance Mediation Bureau;

(g) Rules of the Banking Mediation Bereau; and

(h) Rules of the Bar Council's Malaysian Mediation Centre.

At present, professional mediation bodies conducting financial dispute resolution include the the Banking Mediation Bureau, Insurance Mediation Bureau, the Bar Council's Malaysian Mediation Centre, and Kuala Lumpur Regional Centre for Arbitration.

The Banking Mediation Bureau

The Banking Mediation Bureau is the mediation authority for banks or finance companies carrying out banking business, finance company business or merchant banking business in Malaysia. To use their services, the banks and financing institutions must first be members of the Bureau. The Bureau was set up with the objective of providing a simple mechanism for dispute resolution without any cost to the customers. The Bureau receives complaints from customers who are not satisfied with the decisions of the banks or finance companies relating to claims monetary loss. The Bureau also entertains complaints or claims relating to excessive fees, interest and penalty charged by a bank or financial institution; misleading advertisements; claims relating to automatic teller machine withdrawals; unauthorized use of credit cards and unfair practices in pursuing actions against guarantors[13].

The Insurance Mediation Bureau

The Insurance Mediation Bereau (IMB) is a mediation authority for insurance companies. Nearly all insurance companies operating in Malaysia are the members of the Bureau. Any policy-holder who is not satisfied with the decision of a member company may file their complains with IMB. For member companies, the outcome of the mediation is final. The policy-holder can choose to accept the outcome or reject it. If he rejects the outcome of the mediation, he is free to institute proceeding against the company or refer the matter to arbitration[14].

[13] Syed Khalid Rashid, Alternative Dispute Resolution in Malaysia, Kulliyyah of Laws IIUM, 2000, pp. 130-131.

[14] Ibid at 138-146.

The Malaysian Mediation Centre

The Malaysian Mediation Centre is funded the Malaysian Bar Council. It was set up to encourage Malaysians to settle their disputes through mediation. All types of civil and commercial disputes may be referred to the Centre. The mediation process is conducted by mediators from a panel consisting of accredited lawyers trained as mediators. Anyone may approach the Centre to request mediation. Parties are given a choice whether to present their cases by themselves or to be represented by lawyers. Since confidentiality is a well established principle of mediation, no records are kept. The parties are not allowed to use any information given during mediation in any subsequent legal proceeding[15].

Tahkim (Arbitration)

Islamic law allows parties to a dispute relating to property or similar private rights to go for arbitration. Arbitration is the reference of a dispute or difference between not less than two persons for determination after hearing both sides in a judicial manner by another person or persons, other than a court of competent jurisdiction.

The authority on the legality of *tahkim* (arbitration) from al-Quran is in Surah al-Nisa 4:35 which provides for the appointment of *hakam* (arbitrators) in marriage cases.

> "*If you fear a breach between them, appoint (two) arbitrators, one from his family and the other from hers. If they both wish for peace, Allah will cause their reconciliation.*"

Article 1850 of The Mejelle, the Civil Code of the Ottoman Caliphate and considered to be the first attempt to codify Islamic law, provides that

> "*if the two parties who have appointed arbitrators, authorize them also to arrange by compromise, if they think fit, an arrangement by way of compromise, made by the arbitrators is good.*"

The Shariah views arbitration as an attempt at reconciliation. One of the earliest records of an arbitration in Islamic history was between Ali, the fourth Caliph of Islam, and Muawiyah, the Governor of Syria. Muawiyah refused to submit to the Caliphate of Ali. This resulted in the battle of Siffin during 36-37 AH and there was much bloodshed between the two Muslim armies. During the course of battle, both the parties expressed a wish to settle the matter through arbitration. Each side nominated its arbitrator. Abu Musa represented Ali and Amr al-As represented Muawiyah. The arbitration agreement that was drafted looks amazingly similar to similar documents today, setting out, *inter alia*, the place of arbitration, applicable

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[15] Ibid at p. 147.

law, rules of procedure, and provision for the appointment of a substitute arbitrator if the one of the appointed died[16].

The arbitrator's position is similar to that of a *qadi* in Islamic court; in so far as his power of giving an award is concerned and he has to have the same qualifications as that of a qadi[17]. The arbitrator has the right to give decision or award after hearing all the evidence, examining witnesses, if any, and administers oaths, if necessary. The award is enforceable. If necessary the award may be filed in a court of law and once the court issues a decree based on it, it can be enforced as a court order.

The parties may also enforce the award through mutual understanding. The arbitrator is empowered to correct any mistake in the award and to interpret it if necessary, but only before it is registered in a court of law. Once the award is registered in a court of competent jurisdiction, then the award assumes the status of a court decree and enforceable under State's sanction. The court cannot, however, sit in judgement over the merits of award, except in cases of flagrant violation of justice or Shariah principle, when the award may even be set aside. The usual grounds for setting aside an arbitral award are where the arbitrator:

(i) has failed to consider the claims of the parties;

(ii) has made some defunct clause in the agreement to start arbitration proceedings basis of his award;

(iii) has given an award which is unjust and contravenes some Shariah provisions;

(iv) has failed to notice that in the circumstances, parties were not entitled to start arbitration proceedings;

(v) has committed an error which is apparent on the face of the award; or

(vi) has failed to take into account the interests of a third party[18].

Rules on arbitration in Malaysia can be found in the following :

(a) Arbitration Act 1952 (Act 93);

(b) Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Act 320);

(c) Convention on the Settlement of Investment Disputes Act 1966 (Act 392);

(d) Reciprocal Enforcement of Judgement Act 1958;

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[16] Abdul Hamid El-Ahdab, "Moslem Arbitration Law", Proceedings of the International Bar Association First Arab Regional Conference, Cairo, 15-19 Feb 1987 cited in Vincent Powell-Smith, Aspects of Arbitration: Common Law and Shariah Compared, Kuala Lumpur, 1995, p. 10-11.

[17] Syed Khalid Rashid, *Supra.* note 13, p. 34.

[18] For detail discussion on arbitration rules and procedure see Siddiqullah Ahmadullah, Arbitration as a Tool in Settlement of International Commercial Disputes: A Comparative Study of International Law and Islamic Law With Reference to Iran and Malaysia, Kulliyyah of Laws, IIUM, 1994/95.

(e) Sections 27-40, Workmen's Compensation Act 1952;

(f) Order 69, Rules of the High Court 1980;

(g) Arbitration Rules – Model Clauses – 1998 of the Regional Centre for Arbitration, Kuala Lumpur;

(h) Clause 34 of the Agreement and Schedule of Conditions of Building Contract, Association of Architects Malaysia (PAM) and Institution of Surveyors (1998);

(i) Clause 55of Institute of Engineers, Malaysia (IEM) Conditions of Contract for Work, Mainly of Civil Engineering Construction 1990;

(j) Clause 54 PWD Standard Form of Contract, Form 203A (Rev. 10/83), Government of Malaysia;

(k) Malaysian Rubber Board (MRB);

(l) The Palm Oul Refiners Association of Malaysia (PORAM).

The Kuala Lumpur Regional Centre for Arbitration

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) is an active arbitration institution in Malaysia which has gained much popularity among the business community in the region. More than 5,000 international contracts concluded by the private sector, government departments and agencies in Malaysia are known to have incorporated the KLRCA's model arbitration clause. Courts have held that arbitral awards made under the rules of KLRCA are exempted from the supervisory jurisdiction of the High Court by virtue of section 34 of the Arbitration Act, 1952[19].

The KLRCA is an autonomous international institution under the International Organisation (Privileges and Immunities) Act 1992 which recognizes the independent functioning of the KLRCA. The arbitration rules of the KLRCA are based on the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Rules 1976 with slight modifications. As these rules are universally known and followed, this gives to the proceedings of the KLRCA a universal familiarity and uniformity. Both international and domestic arbitrations are conducted under the rules.

If parties to a contract have included an arbitration clause agreeing to be subject to the rules of KLRCA, any future dispute would thereby be automatically governed by the KLRCA. The parties may also specify the number of arbitrators, the place of arbitration, the language and the applicable law. They may also authorize the KLRCA to decide on these matters.

[19] Soilchem Sdn Bhd v Standard-Elektrik Locenz AG (1993) 3 MLJ 68; and Klockner Industries – Analgen Gmbtt v Kien Tat Sdn Bhad (1990) 3 MLJ 183.

The Way Forward

Considering the procedures of arbitration both in Islamic law as well as the procedures adopted by the institutions of arbitration such as KLRCA, there are many positive attributes to arbitration. The process of arbitration is very flexible. Parties have considerable freedom in establishing the procedure and logistics for arbitration. They determine the number of arbitrators, their qualifications, mode of their selection, language used in the arbitral proceedings, the time and place of the arbitral sessions and the language to be used in conducting the proceedings.

It is natural to expect that parties to a commercial dispute wish to avoid the gaze of the press and the adverse publicity it usually brings. The fact that arbitrators are not allowed to disclose information about arbitration proceedings helps in maintaining confidentiality. No person is allowed to attend arbitration proceedings unless he is connected with it, or is allowed either by one or both the parties.

In comparison, mediation is even more favourable. It is less formal and far less adversarial than court proceedings and arbitration. It is therefore far less likely to damage business relations. It also provides greater participation by the parties in the settlement of the dispute compared to adjudication in court or arbitration, where parties are generally represented by lawyers. Mediation's informality also provides intangible benefits. When there is a dispute involving a large institution such as a banking or financial institution, there is a tendency on the part of its 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.

Given the benefits of mediation, the Syariah Advisory Committees in banks and financial institutions can act as a mediator in commercial matters. As a reference point in disputes and as an forum for Shariah rulings in related issues of commerce, they are well placed to be able to expand their role to become a mediation centre. The advantage of the Syariah Advisory Committees is that the panel members have expertise in Shariah law. This allows them to use Shariah principles in their mediations. At the same time, they can promote the application of Shariah rulings in all aspects, from the type of commercial products to be introduced in the market, standardization of commercial polices and practices to dispute settlement. Given sufficient time and proper training, the Syariah Advisory Committees may well succeed in promoting mediation in Islamic commercial disputes.