

CONTENTS

<i>Foreword</i>	i
<i>Preface</i>	iii
<i>Contributors' Profile</i>	vii
<i>Table Of Cases</i>	xix
<i>Table Of Legislation</i>	xlix

CHAPTER 1 DISPUTE RESOLUTION: ADVERSARIAL SYSTEM AND INQUISITORIAL SYSTEM

Civil Law System	1
Common Law System	3
Adversarial System v. Inquisitorial System	6
Adversarial Procedure Of Civil Cases With Reference To The Rules Of Court 2012	10
Pleading	11
Service Of Documents	11
Discovery And Interrogation	12
Case Management	13
Hearing In Open Court	14
Evidence	15
Examination Of Witness	16
Judgment	17
Written Judgment	17
Costs	20
Decision Is Subsequently Open To Appeal	21
Stay Of Execution	21
Enforcement Of Judgment	24

Contents

CHAPTER 2

**ALTERNATIVE DISPUTE RESOLUTION:
DEFINITION AND ITS DEVELOPMENT**

Introduction	27
Why ADR?	29
Conceptual Delineation	32
Historical Development	36
Religious Aspects	37
Past Traditions Still In Use	42
Conclusion	48

CHAPTER 3

ALTERNATIVE DISPUTE RESOLUTION IN ISLAM

Introduction	49
Clarification Of Terms	53
ADR Processes In Islam	60
<i>Sulh</i> (Negotiation, Mediation/Conciliation And Compromise Of Action)	60
<i>Formula</i>	66
<i>Parties</i>	66
<i>The Substitute</i>	66
<i>The Subject-Matter</i>	67
<i>Tahkim</i> (Arbitration)	69
Med-Arb	72
<i>Muhtasib</i>	73
Informal Justice By <i>Wali Al-Mazalim</i> Or Chancellor	75
<i>Fatawa</i> Of <i>Mufti</i> Or Expert Determination	76
Overview Of The Practice Of ADR In The Formative Period Of Islam	76
Conclusion	78

Contents

CHAPTER 4

**CONFIDENTIALITY AND PUBLIC POLICY
IN ALTERNATIVE DISPUTE RESOLUTION**

Introduction	79
Confidentiality: Privilege	80
Why Confidentiality?	84
Law And Court	86
Position In India	87
Position In The United Kingdom	88
Position In Singapore	89
Position In Other Countries	92
Position In International ADR Institutions	96
Conclusion	100

CHAPTER 5

NEGOTIATION: TYPES AND ETHICAL ISSUES

Introduction	101
Types Of Negotiation	101
Competitive Negotiation	102
Accommodative Negotiation	103
Collaborative Negotiation	105
Ethics In Negotiation	106
Self-Determination Of The Parties (Party Autonomy)	107
Negotiation Skills	107
Confidentiality Of Information	107
Impartiality Of Negotiator	108
Conflicts Of Interest	108
Process Of Negotiation	108
Fees For Negotiation	109
Conclusion	110

Contents

CHAPTER 6
WITHOUT PREJUDICE NEGOTIATIONS

Introduction	111
Policy Behind The Rule	118
Setting Aside The Veil Of ‘Without Prejudice Negotiations’	121
Conclusion	122

CHAPTER 7
MEDIATION: DEFINITION, ORIGINS AND PROCESSES

Introduction	123
Definition Of Mediation	124
Traditional Mediation	125
Modern Mediation	130
Historical Background Of Mediation In Malaysia	136
Cornerstone Of Mediation	139
Voluntariness	139
Impartiality	140
Confidentiality	140
Flexibility	141
Process Of Mediation	142
Pre-Mediation Process	142
Preliminary Stage	143
Joint Session	143
Caucus (Separate Meeting) And Further Joint Meeting	144
Agreement Stage	145
Types Of Mediation	145
Facilitative Mediation	145
Evaluative Mediation	145
Transformative Mediation	146
Western Culture v. Asian Culture	146
Prevalence Of Face-Saving	147
Mediators Should Be Authoritative Figures	148
Mediators Should Assume Leadership Role	148
Communication Should Be At An Appropriate Level Of Formality	149
Base Of Trust In The Asian Context	149
Conclusion	151

Contents

CHAPTER 8

MEDIATORS: ACCREDITATION AND TRAINING REQUIREMENTS

Introduction	153
Accreditation Of Mediators	155
Accreditation Of Mediators In Selected Jurisdictions	161
Australia	161
United States	172
Canada	173
Singapore	174
United Kingdom	175
International Mediation Institute	176
Accreditation Of Mediators: Optional Or Obligatory?	180
Conclusion	182

CHAPTER 9

MEDIATION: STANDARDS OF CONDUCT

Introduction	183
Self-Determination	184
Competence	185
Confidentiality	187
Impartiality	189
Conflicts Of Interest	190
Quality Of Process	192
Fees For Service	195
Advertising And Solicitation	196
Advancement Of Mediation Practice	197
Conclusion	198

CHAPTER 10

MEDIATION: COURT ANNEXED

Introduction	199
Mediation Act 2012	200
Practice Direction No. 5 Of 2010	200
Practice Direction No. 2 Of 2013	203
Practice Direction No. 4 Of 2016	204

Contents

Referrals To Mediation	205
Judge-led Mediation	205
Mediation By The AIAC	206
Mediator Chosen By Parties	207
Mediation Agreement	209
Confidentiality	210
Period And Results Of Mediation	210
Settlement Agreement	211
Practice Direction To Be Followed Closely	212
Conclusion	213
Arahan Amalan Bil. 2 Tahun 2013	214
Practice Direction No. 4 Of 2016	219

CHAPTER 11 MEDIATION: COMMUNITY DISPUTES

Introduction	226
Position In Malaysia	229
Position In India	236
Position In Singapore	240
Conclusion	244

CHAPTER 12 MEDIATION: RELIGIOUS AND CULTURAL DISPUTES

Religious And Cultural Conflicts	245
Tolerance Of Other Religious And Cultural Practices	261
Mediation Of Religious And Cultural Conflicts	265
Conclusion	270

Contents

CHAPTER 13
MEDIATION: NATIVE DISPUTES

Introduction	271
A Brief History Of Sabah And Sarawak	272
Natives Of Sabah And Sarawak	273
Native Courts In Sabah	276
Native Court Of Appeal	277
District Native Court	278
Native Court	278
Representation In Native Courts Of Sabah	281
Native Courts In Sarawak	282
Native Court Of Appeal	284
Resident's Native Court	284
District Native Court	286
Chief's Superior Court	286
Chief's Court	288
Headman's Court	289
Power Of Sarawak Native Courts To Impose Penalties	289
Imprisonment In Default Of Penalty	289
Mediation In Native Courts	290
Interview Of Respondents	292
Sabah	293
Sarawak	294
Conclusion	297

CHAPTER 14
MEDIATION: MEDICAL DISPUTES

Introduction	299
The Importance Of Communication After The Occurrence Of Adverse Events	300
Mediation As The Most Feasible Method Of Alternative Dispute Resolution	301
Promoting The Use Of Apologies During Mediation	304
Conclusion	309

Contents

CHAPTER 15
MEDIATION: REAL ESTATE AND LAND DISPUTES

Introduction	311
Types Of Real Estate Disputes	312
Existing Dispute Resolution Mechanism	316
Homebuyers Tribunal	317
ADR Processes	318
<i>Arbitration</i>	320
<i>Mediation</i>	321
<i>Med-Arb</i>	321
<i>Mini Trial</i>	321
<i>Negotiation</i>	322
<i>Facilitation</i>	322
Rationale For Proposing Alternative Dispute Resolution For Resolving Real Estate Disputes	323
Cost Saving	326
Speedier	327
Representation Of Lawyers In Mediation	327
Making A Binding Decision	327
Able To Preserve Relationship Between Disputing Parties	328
Benefiting From The Valuable Procedural Characteristics Of Mediation	328
Important Roles Of A Mediator Unavailable To A Judge In Court Of Law	331
Establishing Communication Between Parties	332
Transmitter Of Information	332
Distinguisher Between Wants From Needs Of Parties	332
Generator Of Options	332
Organiser And Guide	333
Reality Check	333
Absorbing Negativity	333
Experienced And Ability To Drive The Discussion	334
Predictor Of Future Issues	334
Challenges In Promoting Mediation	334
Appointment Of A Suitable Mediator	334
Incorporation Of Clauses To Mediate Disputes In Agreements	336

Contents

Liberty To Find Other Means Of Dispute Resolution If Mediation Does Not Resolve The Dispute	336
Authority To Make Decisions	336
Settlement Is Not Binding Unless Parties Reach An Agreement	337
Communications During Mediation Are Confidential	337
Preparing A Mediation Brief	337
Finalise Settlement Agreement At Mediation	338
Limitations Of Mediation	338
Conclusion	339

CHAPTER 16 MEDIATION: SPORTS DISPUTES

Introduction	341
Sports Law And Mediation	341
Trend In Mediating Sports Disputes	344
Value Of Mediation In Sports Disputes	348
Notion Of Mediation	349
Common Misconceptions About Mediation	350
Relevance And Application Of Mediation To Sport Disputes	352
Conclusion	353

CHAPTER 17 MEDIATION: PLEA BARGAINING IN CRIMINAL CASES

Introduction	355
Mediation: Meaning And Scope	356
Power Of Public Prosecutor To Institute, Substitute And Discontinue Charge	357
Pre-Trial Conference	358
Case Management	359
Plea Bargaining	359
Sentencing Arising In Plea Bargaining	365
Conclusion	368

Contents

CHAPTER 18
MEDIATION INSTITUTIONS

Introduction	369
Financial Mediation Bureau (FMB)	370
Malaysian Mediation Centre (MMC)	372
Asian International Arbitration Centre (AIAC)	376
Legal Aid Bureau (LAB)	378
Conclusion	380

CHAPTER 19
SINGAPORE MEDIATION CONVENTION:
WHETHER RULE OF LAW INTACT?

Introduction	381
Bird's Eye View Of The Convention	383
Observations	386
Conclusion	387
Appendix	389

CHAPTER 20
CONCILIATION v. MEDIATION: SIMILARITIES AND DIFFERENCES

Introduction	401
Conciliation: Meaning	402
Conciliation And Mediation: Similarities And Differences	404
Differences: An Analysis From The Definition	404

CHAPTER 21
CONCILIATION: LABOUR DISPUTES

Introduction	407
Labour Disputes	409
Conciliation At Industrial Relations Department (IRD)	414
Enhancing Conciliator's Skills And Knowledge On Negotiation Process	422
Conclusion	424

Contents

CHAPTER 22

CONCILIATION: MATRIMONIAL DISPUTES

Reconciliation In Matrimonial Disputes	425
Reconciliation: A Prerequisite For Filing Of Divorce Petition	427
Conclusion	438

CHAPTER 23

CONCILIATION: APPLICATION IN SYARIAH COURT

Introduction	439
<i>Sulh</i> : Definition	440
<i>Sulh</i> : In <i>Qur'an</i> And <i>Sunnah</i>	441
Process Of Conciliation (<i>Sulh</i>)	444
Conciliation: Practice In <i>Syariah</i> Courts	446
Process Of <i>Hakam</i> For Dissolution Of Marriage	451
Ensuring Effectiveness Of <i>Sulh</i>	455
<i>Sulh</i> Work Manual	455
Practice Direction Of JKSM On Practice Of <i>Sulh</i>	457
Continuous Training For <i>Sulh</i> Officers	459
Conclusion	460

CHAPTER 24

ARBITRATION IN MALAYSIA: AN OVERVIEW

Introduction	461
Arbitration Agreement	466
Arbitrator	471
Appointment Of Arbitrator	473
Seat Of Arbitration And Choice Of Law	475
Arbitral Procedure	478
Conclusion	482

Contents

CHAPTER 25
INTERNATIONAL ARBITRATION

Introduction	483
The 1958 Convention	487
Arbitral Proceedings, Model Law And The Arbitration Act 2005: A Bird's Eye View	492
Appointment Of Arbitrator	493
Respondent's Objection To Arbitration Proceedings	494
Preliminary Conference	495
Powers Of The Arbitrator	498
Determination Of Rules Of Procedure	499
Challenge And/Or Termination Of Arbitrator	500
Award	500
Challenges In Arbitral Proceedings And Award	501

CHAPTER 26
ARBITRATION AGREEMENT

Introduction	503
Arbitration Agreement: Requirements As To Form	504
Arbitration: Definition	515
Permissive And Unilateral Arbitration Agreements	520

CHAPTER 27
ARBITRATOR: QUALIFICATION AND TRAINING

Introduction	523
Legal Position	523
Practical Position	524
CIArb London Fellowship	529
Other Grades Of CIArb Memberships	530

Contents

CHAPTER 28

ARBITRATORS: APPOINTMENT AND REMOVAL

Arbitrator: An Overview	531
Appointment Of Arbitrator	533
Revoking Authority Of Arbitrator: Application By Disputants	535
Revoking Authority Of Arbitrator: Application By Co-Arbitrator	543
Revoking Arbitrator's Authority: Required Challenge Procedure	551
Appointment Of Substitute Arbitrator	553
Conclusion	554

CHAPTER 29

ARBITRATORS: IMPARTIALITY AND INDEPENDENCE

Introduction	555
Impartiality And Independence	557
Duty Of Disclosure	558
Test For Apparent Bias	562
IBA Guidelines On Conflict Of Interest In International Arbitration	572
Conclusion	580

CHAPTER 30

STAY OF ARBITRAL PROCEEDINGS

Introduction	581
The Arbitration Act 1952	582
The Arbitration Act 2005 (Prior To The Amendment In 2011)	585
The Arbitration Act 2005 (As Amended In 2011)	588
Stay Under The Arbitration Act 2005: Arbitrability Of Subject Matter	591
Requirements Under The Arbitration Act 2005	603
Requirement As To The Seat Of Arbitration	604

Contents

CHAPTER 31
ANTI-SUIT INJUNCTION

Introduction	615
Anti-Suit Injunctions In Non-Contractual Context	618
Anti-Suit Injunctions To Prevent Breach Of Contract	622
The Narrow Approach	624
The Wide Approach	626
Considerations In Granting Anti-Suit Injunction	630
Conclusion	638

CHAPTER 32
ARBITRAL AWARD AND ENFORCEMENT

Arbitral Award	639
Setting Aside Award	642
Enforcement Of Award	650

CHAPTER 33
ARBITRAL AWARDS: GROUNDS FOR REVIEW

Introduction	655
Jurisdiction Of Supervisory Courts	658
Preconditioned Grounds For Review	663
<i>Provable Grounds For Review</i>	663
Judicially Discoverable Grounds For Review	667
Involvement Of Fraud Or Corruption	669
Breach Of Rules Of Natural Justice	669
Discretionary Power Of Courts And Its Criteria	672
Jurisdiction Of Enforcement Courts	675
Judicial Review In <i>Ex Parte</i> Proceedings	677
Validity Of Agreement	680
Form Of Agreement	680
Parties To The Agreement	682
Judicial Review In <i>Inter Partes</i> Proceedings	683
Arbitrability Of Dispute	687
Determination Of The Applicable Law	687
Validity Of The Arbitration Agreement	688
The Award Has Not Yet Become Binding	689
Conclusion	690

Contents

CHAPTER 34
INTERNATIONAL ARBITRAL INSTITUTIONS

Introduction	691
Evolution Of International Arbitration And Tribunals	693
Jay Treaty Arbitration	694
Alabama Claims Arbitration	695
Permanent Court Of Arbitration	697
Usage Of International Arbitration	701
Investment Arbitration	702
International Arbitration Rules	703
Conclusion	704

CHAPTER 35
ALTERNATIVE DISPUTE RESOLUTION IN FINTECH

Introduction	706
Blockchain Revolution	708
Blockchain In Financial Transactions	709
Blockchain In Law	710
Blockchain-Based Smart Contracts	711
Blockchain Platform For Dispute Resolution	712
Cryptocurrency Debate	713
Decentralised Dispute Resolution	719
Online Dispute Resolution	721
Private ODR Platforms	724
<i>Codelegit — Blockchain Arbitration Library</i>	724
<i>Kleros — Crypto Dispute Arbitration</i>	725
Blockchain Arbitration Forum (BAF)	727
<i>Jury.Online</i>	729
Public Solutions	730
Conclusion	731

Contents

CHAPTER 36
ALTERNATIVE DISPUTE RESOLUTION IN
ISLAMIC BANKING AND FINANCE

Introduction	735
Arbitration	736
Arbitration From Western And Islamic Perspective	736
Arbitration For Islamic Banking And Finance Disputes	741
Challenges In Implementation Of Arbitration Laws	742
Choice Of Laws	745
Qualifications Of Arbitrators For Islamic Banking And Finance Disputes	747
Arbitral Awards	749
Harmonisation Of <i>Syariah</i> And Civil Law On Arbitration	752
Mediation	754
<i>Syariah</i> Principles In Mediation Process	756
Mediation In Islamic Banking And Finance Disputes	757
Ombudsman	758
Ombudsman In Islamic Banking And Finance Disputes	760
Scope Of Ombudsman	761
Ombudsman: A Case Study	763
Conclusion	766

CHAPTER 37
ALTERNATIVE DISPUTE RESOLUTION
IN CONSTRUCTION DISPUTES

Introduction	767
Nature Of Construction Dispute	767
Emergence Of Construction Dispute Resolution	769
Dispute Avoidance Mechanisms In Construction Industry	771
Major Processes Of Construction Dispute Resolution	773
On-Site Dispute Resolution and Avoidance Mechanisms	773
<i>Dispute Review Board</i>	774
<i>Roles Of The Dispute Review Board</i>	776
<i>Dispute Adjudication Board</i>	778
Other Dispute Resolution Mechanisms	780

Contents

Off-Site Dispute Resolution And Avoidance Mechanisms	782
Expert Determination	783
Enforcement Of Expert Determination Decision	784
Statutory Adjudication	787
Construction Court	789
Conclusion	790

CHAPTER 38

STATUTORY ADJUDICATION UNDER CIPAA 2012

Statutory Adjudication	791
Appointment Of Adjudicator	796
Adjudication Process	798
Setting Aside Adjudication Decision	803
Enforcing Adjudication Decision	806

CHAPTER 39

BIRD'S EYE VIEW OF CIPAA 2012

Introduction	807
CIPAA 2012	809

CHAPTER 40

EARLY NEUTRAL EVALUATION IN INDUSTRIAL COURT

Introduction	815
Industrial Court Of Malaysia	817
Industrial Court's Early Evaluation Process	819
Early Evaluation Of Cases: Illustrations From Industrial Court Awards	825
Conclusion	829

Contents

CHAPTER 41
OMBUDSMAN

Introduction	831
Origin And Evolution Of Ombudsman	832
Ombudsman In Chinese Legal Tradition	833
The Greek/Roman <i>Agoranomos</i>	835
Ombudsman In Islamic Legal Tradition	837
Scandinavian Ombudsman	844
Contemporary Ombudsman And The Ottoman Turks	848
Modern Ombudsman: Definitions And Institutionalisation	849
Ombudsman, Ombudswoman, Ombudsperson, Ombudet And Others	854
Ombudsman: ADR Institution Or Mechanism	856
Trends In Ombudsman Classification	857
Classical/Traditional Ombudsman	860
Legislative Or Parliamentary Ombudsman	860
Executive Ombudsman	862
Organisational Ombudsman	863
Public Sector And Private Sector Ombudsman	865
Essential Characteristics Of Ombudsman Institutions	866
Establishment	869
Accessibility	869
Independence	870
Confidentiality/Reporting	871
Effect Of Decision/Enforcement	872
Jurisdiction And Scope	872
Reporting And Accountability	873
Review Process	873
Role Of Ombudsman In Modern Business Regulation	874
Conclusion	876

Contents

CHAPTER 42
EXPERT DETERMINATION: CONVENTIONAL
AND ISLAMIC APPROACH

Introduction	877
Expert Determination: Conventional Approach	878
Qualifications Of The Expert	879
<i>A Named Individual, Firm Or Company</i>	880
<i>An Individual, Firm Or Company Holding A Particular Position</i>	881
<i>Qualification By Profession Or Experience</i>	881
<i>Criteria For The Expert's Suitability</i>	882
The Expert Clause	883
Appointing The Expert	885
Absence Of Effective Appointment Mechanism	886
Challenging Decision Of The Experts	888
<i>Bringing A Claim Against Expert</i>	889
<i>Limitation</i>	890
Grounds Of Challenge	890
<i>Lack Of Independence</i>	891
<i>Unfairness In The Decision Procedure</i>	892
<i>Unfairness In The Decision</i>	894
Expert Determination: Islamic Approach	896
<i>Fatwa</i> And Its Significance	898
Principles of <i>Fatwa</i> Issuance	899
<i>Fatwa Issuance</i>	900
<i>Scholarly Aptitude And Character</i>	900
<i>Single Juristic View</i>	900
<i>Multiple Juristic View</i>	900
<i>Reliance On Authentic Juristic Work</i>	901
<i>Prioritisation</i>	901
<i>Competing Juristic Views</i>	901
<i>Adopting The View Of Zahir Al-Riwayah</i>	902
<i>Mafhum-Mukhalif As Principle Of Interpretation Of Juristic Text</i>	902
Similarities And Differences Between <i>Al-Qadha'</i> And <i>Al-Fatwa</i>	902
Appointment Of <i>Qadhi</i> And <i>Mufti</i>	903
Application Of <i>Fatwa</i>	904

Contents

Multiple Views	904
Approved Verdicts In <i>Fatwa</i> Sentence	905
The Preferred Verdict	905
The Verdict Which Is Equal To Another	906
Conclusion	906

CHAPTER 43

ONLINE DISPUTE RESOLUTION AND ITS APPLICATION IN FINANCIAL DISPUTES

Introduction	907
Concept Of ODR	908
Permutations Of ODR	912
Online Ombudsman	914
Online Negotiation	914
Online Mediation	915
Online Arbitration	915
Online Hybrid Processes	915
Best Practices Of ODR In Financial Dispute Resolution	916
<i>eBay/Square Trade</i> Experiment	917
<i>Cybersettle.com, SettlementOnline</i> and <i>clickNsettle</i>	919
ODR In Credit Reporting Disputes	920
Conclusion	923

CHAPTER 44

UNIVERSITY ARBITRATION

Introduction	925
Universities As Arbitration Centres	926
Emergence Of Modern Commercial Arbitration	927
Significance Of Arbitration	930
Empowering Universities As Arbitration Centres	932
Implementing University Arbitration	933
Benefit To Stakeholders	934
The 'Feeder' To University Arbitration	935
Regimes Of Islamic Finance And One Belt, One Road (OBOR)	938
Conclusion	939
<i>Index</i>	941