Chapter 41
Dispute Resolution in the Islamic Finance Industry

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ABSTRACT

A unique and independent legal framework is important to effectively adjudicate Islamic finance disputes, Sukuk bankruptcies, and Takaful disputes. Currently, these disputes are being adjudicated in common law courts or ineffective arbitration centres where often the Islamic finance transaction is inadvertently converted into a conventional transaction due to the common law nature of the dispute adjudication. In this chapter, a framework is proposed for Islamic finance dispute resolution in the form of the Dubai World Islamic Finance Arbitration Centre (DWIFAC), DWIFAC Jurisprudence Office, the Sukuk Bankruptcy Tribunal (SBT) and the Takaful Tribunal (TT).

INTRODUCTION

As the Islamic finance industry is growing annually at a rate of 10% to 15% per year, it is imperative that a unique, independent legal framework is established in order to effectively adjudicate Islamic finance disputes, Sukuk bankruptcies, and Takaful disputes. Currently, Islamic finance disputes, Sukuk bankruptcies, and Takaful disputes are being adjudicated in inadequate civil and common law courts and arbitration centres where the contracts in dispute are being transformed from Islamic to conventional transactions. It is important to form an effective dispute resolution mechanism, which not only upholds the intentions of the parties as evidenced by the Islamic finance agreement, however, one, which also recognizes and enforces the Shari’ah law of the Islamic finance transaction. (Trakic, Benson, Ahmed: 2019). Shari’ah compliance is not only producing products which conform to the Shari’ah, but also ensuring that the dispute resolution mechanism will uphold the Shari’ah compliance of the product and/or transaction. (Trakic, Benson, & Ahmed, 2019).

The aim of this chapter is to explore the role of the proposed Dubai World Islamic Finance Arbitration Center (“DWIFAC”) and its’ jurisprudence office (DWIFACJO) plus the proposed Sukuk Bankruptcy Tribunal (SBT) and Takaful Tribunal (TT) as the dispute resolution center of the Islamic

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Dispute Resolution in the Islamic Finance Industry

finance industry, fitting in with the recent 2013 Sheikh Mohammad ‘Dubai as the Capital of the Islamic Economy’ initiative. These arbitration centres are not yet in existence. The objective of the chapter is to show how using a common law jurisdiction inadvertently transforms Islamic financial transactions into conventional disputes. This is done through analysis of the cases Beximco Pharmaceuticals Ltd, Bangladesh Export Import Co. Ltd., Mr. Ahmad Solail Fasiuhur Rahman, Beximco (Holdings) Ltd. v. Shamil Bank of Bahrain E.C. [2004] EWCA Civ 19; Investment Dar Co KSCC v Blom Development Bank Sal [2009] EWHC 3545; Bank Islam Malaysia Bhd v Azhar Osman & Other Cases [2010] 5 CLJ 54 [2010] 1 LNS 251; and Cameron Partners L.P. v. Louisiana Offshore Holding LLC & Ors [2009]. Through case analysis combined with an exploration of the efficacy of existing arbitration centres and dispute resolution methods available to Islamic finance, this chapter will seek to reveal that the Islamic finance industry currently lacks an adequate dispute resolution mechanism and facility to adjudicate disputes arising from Islamic finance contracts including Sukuk and Takaful contracts.

This chapter proposes that Islamic finance, Sukuk, and Takaful contracts should include an additional standardized dispute resolution contract issued by DWIFACJO with a built-in dispute resolution procedure similar to FIDIC designating DWIFAC, SBT, or TT as the arbitration center. If the contractual dispute resolution procedure is exhausted, then the dispute may be referred to DWIFAC, SBT, or TT, which may utilize the Model Islamic Banking Law created by DWIFACJO as the substantive law of the arbitration, the procedural law of the seat of the arbitration, Dubai (Refer to Appendix A), and the DWIFAC, SBT, or TT arbitration rules, which includes Shari’ah and lex mercatoria. The arbitration center may be staffed with the worlds’ top Shari’ah scholars and Islamic finance lawyers, judges, and experts who can provide input about the Shari’ah aspects of the dispute through the use of an Islamic form of ex aqueo et bono, which allows disputes to be settled using commercial practice rather than purely legal devices. In the event of a Sukuk bankruptcy, the case may be referred to the Sukuk Bankruptcy Tribunal “SBT” dispute resolution mechanism attached to DWIFAC, which may use the DWIFACJO SBT standardized dispute resolution contract and will be staffed and regulated in the same manner as DWIFAC, however, which may utilize SBT arbitration rules. In the event of a Takaful dispute, the case may be referred to the Takaful Tribunal “TT” dispute resolution mechanism attached to DWIFAC, which may utilize the DWIFACJO TT standardized dispute resolution contract and will be staffed and regulated in the same manner as DWIFAC, however, which may utilize TT arbitration rules.

In addition, the author will examine the commercial dispute system of Malaysia, the UAE, and the UK, arbitration as a method of dispute resolution, and various regional arbitration centers in order to reveal the inadequacy of existing dispute resolution mechanisms for Islamic finance, which will further support the author’s argument for DWIFAC, DWIFACJO, and the SBT and TT.

Should Courts Be Used?

Asutay and Hasan (Asutay and Hasan, 2011) state that due to the common law, interpretational approach used to resolve Islamic finance cases in UK/common law courts, Shari’ah is denied as a valid source of law for governing a commercial dispute or Islamic finance transaction. When English/common law is designated as the governing jurisdiction of an Islamic finance contract, courts tend to sever any association with Shari’ah by recognizing conflict of laws and asserting that only a national law can govern the contract. Judges then strictly apply English law to the commercial dispute, further disassociating the Islamic aspects of the transaction from the adjudication process. Islamic finance dispute resolution