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Dispute Settlement through Arbitration in Islamic Banking Industry:

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FINAL APPROVAL

It is certified that we have gone through and evaluated the dissertation submitted by Mr. Yahya Yousef Atta Omar, a student of LL.M. Corporate Law under University Registration No. 505-FSL/LLMCL/S16 titled “**Dispute Settlement through Arbitration in Islamic Banking Industry**” in partial fulfillment for the award of degree of LL.M. Corporate Law. We have evaluated the dissertation and found it up to the requirement in its scope and quality for the award of degree.

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ABBREVIATIONS

ADR	alternative dispute resolution
DIB	Dubai Islamic Bank
AAOIFI	Accounting and Auditing Organization for Islamic Finance Institutions
IFSB	Islamic Financial Service Board
IIFM	International Islamic Financial market
IIRA	International Islamic Rating Agency
EJIF	European Journal of Islamic Finance
PCA	permanent court of Arbitration
AALSO	The Asian-African Legal Consultative Organization
IIFA	The International Islamic Fiqh Academy
SSB	Shariah supervisory board
DIAC	Dubai International Arbitration center
ADCCAC	the Abu Dhabi Commercial Conciliation and Arbitration Centre
IICRCA Arbitration	the International Islamic Centre for Reconciliation and Commercial Arbitration
SABIC	Saudi basic industries corporation
ENE	Early Natural Evaluation ADR
WTO	world trade organization
UNCITRAL	United Nations Commission on International Trade Law
UK	United Kingdom
UAE	United Arab Emirates

ICSIED	The international center for settlement of investment dispute
LCIA	London court of international arbitration
DICA	Dubai international arbitration center
ICDR	The international center for dispute resolution

Thesis Statement

Lack of detailed legislation in Islamic banking industries and redundant litigation in courts makes Settlement of dispute through alternative dispute resolution mechanism especially arbitration seems to be the most viable option for Islamic banking having some extra advantages like privacy, speed, cost and availability of experts on the subject i.e. sharia.

Research Methodology:

This is a descriptive research in which many articles, researches and cases regarding the relative topic (arbitration of Islamic banking) will be analysed pointing out the negative and positive effect on the sector from legal perspective. Hence this research will analyse, review and evaluate the data of the research topic: **Dispute Settlement through Arbitration in Islamic Banking Industry.**

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CHAPTER I: INTRODUCTION, SIGNIFICANCE AND OBJECTIVES OF THE STUDY:

1.1.1 Background:

Islamic banking system is having a very fast growth during the last 20 years not only in Pakistan and other Muslim countries but all over the world, and there must be a huge consideration for improving and supporting Islamic banking system and regulations by Muslims all over the globe.

Almost 70 countries including most of the Muslim world have Islamic banking system since the mid of 1970s¹, in 1940s Islamic banking took place in Malaysia, in Pakistan 1950s the Islamic banking system started and the first Islamic banking experience in the Arab world took place in Egypt at 1963 by MIT GHAMR BANK².

Islamic banking system also has been established in many countries of a non-Muslims jurisdictions with a common law and civil law system on a wide scale where the Muslims are minority in the society like United Kingdom, Australia, Canada and almost everywhere, even we can see that the conventional banks and finance industries are having an Islamic window which can show the fast growing of Islamic finance system, where the demand for Shariah compliant services is increased day after another for resolving the Shariah conflicts with the legal system of such jurisdictions.

While the Islamic finance is expected to keep up its growth the certain challenges to its development should be addressed clearly.

Firstly and the most important issue is about the competency of the common or civil law system court to deal with the Islamic finance contracts, many cases of Islamic finance industries which were decided by the courts shows that the court did not appreciate the principles of Islamic financial contracts in its judgments.

¹ (Islamic Finance: Its Sustainability and Challenges CLOSING), Georgetown University, Washington, by Dr. Shamshad Akhtar Governor, State Bank of Pakistan October 18, 2007, available at : <http://www.sbp.org.pk/about/speech/governors/dr.shamshad/2007/Islamic-Finance-25-Oct-07.pdf>, last accessed (12-5-2017).

² Saidat.A.Otiti, Evolution of Islamic Banking & Finance, available at <http://www.mpac-ng.org/archived-article/636-evolution-of-islamic-banking-a-finance.pdf> last accessed (12-4-2017)

In Bank Kerjasama Rabat Malaysia v Emcee Corporation Sdn. Bhd. [2003] 1 CLJ 625, the appeal court said that even if the facility which was provided to the respondent is an Islamic banking facility it did not mean that there is any different in the law applicable if the facility was given under conventional banking.³

It has been a common practice for Islamic finance- related transactions to be governed by English law. In fact, as part of the business strategy, many Islamic finance deals, especially those involving cross-border transactions, are governed by English law.⁴

With the growing of Islamic finance system every day the number of disputes between the contractors will be increasing where the need of Islamic finance frame work is more required and important.⁵

Historically the industries preferred litigation over adjudicating and non-Islamic law to govern the subject of the disputes⁶at the same time many legal and financial experts advised to refer disputes

³ See W binti Mohd, A binti Ahmad, MA bin Abdul Halim, THLH bin Hj, SUSTAINABILITY OF ISLAMIC FINANCE INDUSTRY : ARBITRATION AS FORUM FOR DISPUTE RESOLUTION, Univirsiti Sains Malaysia, available at: https://www.google.jo/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjXh4_Bi4XXAhVrJcAKHSIOCMAQFggmMAA&url=http%3A%2F%2Fddms.usim.edu.my%2Fbitstream%2F123456789%2F10000%2F1%2FDiskusi%2520Syariah%2520dan%2520Undang-Undang%2520Part%25205.pdf&usq=AOvVaw1L5tV41K1cWbUVkwLzQPtI, last accessed: 22-10-2017.

⁴ Hasan, Zulkifil and Asutay, Mehmet (2011) 'An analysis of the Courts' decisions on Islamicfinance disputes.', ISRA International journal of Islamic finance., 3 (2). pp. 41-71, available at https://www.researchgate.net/publication/256022326_An_Analysis_of_the_Courts%27_Decisions_on_Islamic_Finance_Disputes, last accessed (8/5/2017)

⁵ Global Islamic banking assets under management are currently estimated at just over \$1 trillion and are expected to reach \$4 trillion by 2020. See "The Rise and Rise of Islamic Finance" Written by *African Business Magazine* Monday, November 19. 2012, available at <http://africanbusinessmagazine.com/uncategorised/the-rise-and-rise-of-islamic-finance/>, last accessed (10/5/2017). Also see 'Financing on faith: The rise of Islamic finance' Article by Arabian Business. March 25. 2012, available at <http://www.arabianbusiness.com/financing-on-faith--rise-of-islamic-finance-450983.html>, last accessed (10/5/2017)

⁶ Islamic Finance and Investment Alert (Resolving Islamic Finance Disputes) by Jonathan Lawrence, Peter R. Morton, Hussain Shah Khan 23 September 2013, available at <http://www.klgates.com/resolving-islamic-finance-disputes-09-19-2013/>, last accessed (25-4-2017)

to alternative dispute resolution (ADR) methods⁷, particularly arbitration, and provide arbitration clause, procedures and practices more in line with Shariah law.

Nowadays using arbitration for resolving Islamic finance disputes is popular in many Muslim countries as well as in south-east Asia and Africa, many studies and articles which are presented on Islamic finance experts proven it.⁸

The main reason of that is generally there are no competent courts for settlement of the dispute arises from Islamic finance contracts and divergence of opinion among jurists of the various school of Islamic law.

Even in early ages of Islamic worlds there was an opinion that the arbitrator's decision which were chosen by the party without coercion were binding on the parties and required judicial enforcement, such idea had more traction recently along with statements of jurists that it is binding upon the parties.⁹

⁷ (The Advantages and Disadvantages of Arbitration vs. Court Litigation) , Posted on February 13, 2015, posted on Tuckerlaw website, Contributed by Matthew M. Hoffman and available at <http://www.tuckerlaw.com/2015/02/13/advantages-disadvantages-arbitration-vs-court-litigation> ,last accessed (10-5-2017).

⁸ For example; see "Dispute Resolution in Islamic Finance: A case analysis of Malaysia" by Umar A. Oseni presented in the 8th International Conference on Islamic Economics and Finance of 2011 in Qatar, available at https://www.researchgate.net/publication/265143356_DISPUTE_RESOLUTION_IN_ISLAMIC_FINANCE_A_CASE_ANALYSIS_OF_MALAYSIA , last accessed (25-4-2017), Also the 3rd Annual World Islamic Banking Conference in summer of 2012 in Singapore had a full session on "Governance, Legal and Risk Management Priorities for the Global Islamic Finance Industry." Also see "Dispute Resolution in Islamic Finance" By Jonathan Lawrence, Peter Morton and Hussain Khan Gates LLP. Published first in the "Global Islamic Finance Report 2012," available at; www.klgates.com/files/Publication/0b2f56b0-d738-4217-85ee-6670f2101659/Presentation/PublicationAttachment/3e2c3cd0-43fd-4ef4-ac96-700e33340e6a/Dispute_Resolution_in_Islamic_Finance.pdf , last accessed (25-4-2017). Also Dr. Aida Maita (2014) "Arbitration of Islamic Financial Disputes," *Annual Survey of International & Comparative Law*: Vol. 20 : Iss. 1 , Article 7. Available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol20/iss1/7> , last accessed (25-4-2017)

⁹ Julio C. Colon, (Choice of Law and Islamic Finance), *TEXAS INTERNATIONAL LAW JOURNAL* [VOL. 46:411, available at: <http://www.tilj.org/content/journal/46/num2/Colon411.pdf>, (last accessed 3-8-2017).

1.1.2 Research Gap:

The Islamic finance system had been recognized in its existence and importance internationally but still there is no uniform regulatory and legal framework yet been developed, even in the Islamic countries the Islamic finance regulations are based on western secular model, similarly Islamic finance industries in non-Muslim jurisdictions are facing difficulties in operating because of the absence of regulatory buddy that operates according to Shariah principles.

Absence of proper regulatory framework to deal with every kind of Islamic finance contracts disputes is one of the main problems facing the emerging industry of Islamic finance, where such contracts is governed by a national law of a specific country (any) that parties agrees to deal with in the contract which is secular law system (common law or civil law system), Rather than the Shariah law which provide the guiding principles of the subject matter of the agreement, Where replicating the conventional industries risk management practices is not possible in this case and does not have clear and precise legal procedure for remedies to disputes of Islamic finance contracts when things go wrong , like loan and default, therefore, conventional remedies continue to be used for this non convictional industries.

Islamic finance industries will always struggle by trying to harmonize the Shariah law and foreign law which is (common or civil law), used by most nations of the world¹⁰, there are some abstracts facing the Islamic finance institution with its fast growing and progress, which can highlight the importance of this research.

The unique characteristics of Islamic finance need scholars with a proper knowledge and background for adjudicating its issues, therefore many authors and legal practitioner recommended the using alternative dispute resolution (ADR) to resolve international disputes emanating from Islamic finance.

¹⁰ Professor Andrew White, associate professor at the International Islamic Law and Finance Center in Singapore, recently stated at the Asia Pacific Regional Arbitration Group Conference 2011 that litigation is not geared towards solving Islamic finance disputes as judges often lack the education in many industry principles "Dispute Resolution in Islamic Finance" By Jonathan Lawrence, Peter Morton and Hussain Khan Gates LLP. Published first in the "Global Islamic Finance Report 2012." Available at: http://www.klgates.com/files/Publication/0b2f56b0-d738-4217-85ee-6670f2101659/Presentation/PublicationAttachment/3e2c3cd0-43fd-4ef4-ac96-700e33340e6a/Dispute_Resolution_in_Islamic_Finance.pdf , last accessed (3-5-2017)

CEO of the Bahrain chamber for dispute resolution (BCDR-AAA), MR. AHMAD HUSAN said that :

(The Islamic finance industry is currently valued at \$1 trillion and is growing at a significant rate of 10 per cent per year. With this growth comes the demand for alternative solutions to traditional means of settling legal disputes. As such, arbitration and mediation have an increasingly important role to play in the financial and legal sectors).¹¹

Furthermore international law students produced many research's on the subject of Islamic arbitration.¹²

If proper legal framework will not be established for resolving the disputes arising from Islamic finance industry as alternative to litigation were judges are not familiar with Islamic finance terms and principles, the economic balance which is in favor of Muslim nowadays may imperil.

This research is focusing in Arbitration of Islamic banking and finance disputes by analyzing some of the previous cases of Islamic finance disputes in Muslim and Non-Muslim countries, and trying to find some solutions for the abstracts facing Islamic banking and finance disputes settlements.

1.1.3 Objectives of the research

The main objectives of this research is to analyse the most appropriate method (Arbitration) for resolving the disputes of Islamic banking and finance industry contracts to be in complaint with shariah principles at both domestic level (Pakistan & other Muslim countries) and internationally in such a way that it should not be contending with the governing law of the contract as an alternative to litigation system and the challenges that Islamic contracts are facing by it.

¹¹ BCDR-AAA press release "Increase in demand for alternative dispute resolution mirrors growth of the \$1 Trillion Islamic finance industry," June 10, 2012, available at: <http://www.islamic-wealth-management.net/2012/06/demand-for-alternative-dispute.html?m=1> , last accessed (14-5-2017)

¹² For example: "Saudi Law and Judicial Practice in Commercial and Banking Arbitration," 2008, By A. Y. Baamir School of Law, Brunel University. "COMMERCIAL ARBITRATION IN ISLAMIC JURISPRUDENCE: A study of its role in the Saudi Arabia Context," By M.A. Al Jabra. Thesis submitted for the Degree of Doctor of Philosophy in Law of the University of Wales, Aberystwyth. 2001. "Distinction between the Concepts Mediation, Conciliation, Sulh and Arbitration in Shari'a Law, Essam A. Alsheikh, Portsmouth University, Portsmouth, United Kingdom. "HARMONISATION OF INTERNATIONAL COMMERCIAL ARBITRATION LAW AND SHARI'A," 2009 Mary B. Ayad, Ph. D candidate Macquarie University. "Choice of Law and Islamic Finance," by Julio C. Colon, J.D. candidate at The University of Texas School of Law (2011).

The research will discuss the following topics in detail:

- The concept of alternative dispute resolution ADR will be studied at both domestic (Pakistan & other Muslim countries) level and internationally.
- The major challenges that faces the Islamic banking and finance dispute resolution system such as the governing law of Islamic contract, the codification of Shariah principles etc. will be studied in the research.
- The features and advantages of arbitration over litigation for disputes resolution contracts will be analyzed and litigation of Islamic finance disputes will be criticized.
- The proposed solution of the problem will be using alternative dispute resolution, specifically arbitration by making a codified Islamic law system recognized internationally for the purpose of resolving Islamic banking and finance disputes (in detail).

1.1.4 Research Questions

The research will answer the following questions

1. What is arbitration?
2. What is mediation? And what is the different between arbitration and mediation?
3. What is the relation of arbitration and litigation and how can arbitration be enforced in the court?
4. What is the advantage of arbitration that makes it better than litigation for dispute resolution in the Islamic finance disputes?
5. Can arbitration make a solution for the diverse views of the different Shariah school of thought, which continue to persist in Islamic world?
6. How can the modern arbitration rules provide added features that make the process a natural resolution mechanism for the Islamic finance disputes?
7. Can Arbitration give the parties to Islamic finance agreement or contract a freely willing to conduct their business in a manner that is in compliance with shariah principles? And can the parties of arbitration subject the disputes to its principles in general?
8. What are the unique challenges that Islamic industries is facing regarding compliance with Islamic law? And can arbitration make a different in this regard?

9. How can the Islamic finance industries provide a comprehensive industries standard with exceptional assistance in terms of quick and cost-effective dispute resolution by arbitration?
10. How do arbitration and litigation contribute to good governance in a dispute resolution mechanism?
11. What need to be done in order to help arbitration strengthen the Islamic dispute resolution?
12. What measures should be taken for the development of dispute resolution of Islamic finance internationally?

1.1.5 Organization of the Thesis

The thesis comprises of seven chapters. Chapter I is divided into five sections, section one analysis a brief introduction and overview about the Islamic finance and banking industry, section two discuss the Islamic finance institutions, where the kinds of dispute resolutions are discussed in the third sections and types of alternative dispute resolutions are discussed in the forth section, and last section of the first chapter is about alternative dispute resolution in Pakistan.

Chapter II is divided into five sections generally analysing arbitration, the definition of arbitration is discussed in the first section, and the origin of arbitration even before the existence of the Islamic era is discussed in the second section, where the types of arbitration is discussed in the third section, the forth section is about using arbitration for dispute settlement in the Islamic law and the different Islamic schools opinion about arbitration weather it is binding on the parties or not and weather it is similar to adjudication or it is similar to conciliation, the significance of arbitration for resolving the disputes in general and specifically in the Islamic industry is discussed in the last section of chapter II.

Chapter III is about modes of dispute settlement in Islamic law, starting from analysing the history of dispute settlement in the Islam in the first section of the chapter discussing the modes of dispute settlement process of the Islamic law in the second section, talking about Islamic law dispute resolution mechanism internationally and analysing the composed dispute settlement process in Islamic finance at the third and last section of the chapter.

Chapter IV is about the emergence industry of Islamic banking and finance in Pakistan and other countries, it contains four sections, the first section is about the Islamic banking and finance principles and instruments and how these principles cover all the transactions of the Islamic institutions, second sections is describing the historical background for Islamic finance and banking industry in the Muslim world and internationally, the development stages of these industry, and how these industry make a deference for arbitration of Islamic finance contract, section three is about arbitration and the importance of the arbitration clause for the shariah complain contract and the Islamic finance industry where the arbitration future in the industry of Islamic banking and finance are discussed in the last section of the chapter.

Chapter V is discussing the current modes of Islamic banking and finance dispute resolution in detail.

Chapter VI is about arbitration considering it as a viable solution for resolution of Islamic finance industry, in the first section of the chapter the arbitration clause in the Islamic finance contract is analysed from shariah perspective, where in the second section of the chapter the importance of arbitration for the settlement of Islamic finance dispute are discussed from deferent perspective, resolving Islamic finance disputes by litigation are criticized in the last section of the chapter.

Chapter VII is the last section of the thesis, it is a conclusion of the research, starting from analyzing why using alternative dispute resolution ADR is better than litigation for Islamic finance and banking disputes internationally considering ADR specifically arbitration more flexible than litigation to deal with the cases of shariah complaint, the capability of shariah and Islamic principles to perform an applicable Islamic finance system and dispute resolution mechanism, how the dispute resolution for shariah complaint contract can play an important role in the success of Islamic finance and banking industry, the importance of the standardized law and Islamic principles published by the Islamic finance institutions for the success of the industry, ending with analyzing the current practice of the arbitration institutions for the purpose of resolving Islamic finance disputes.

1.1 Islamic Financial Institutions:

Generally, the term Islamic finance institution is used for every institution that provide monetary services in accordance to the provisions and principles of Shariah, weather it is a bank, investment or insurance company(takaful) etc.

Islamic financial institutions are available almost everywhere around the world, the main reason of that is the increase of Muslims clients internationally, even some non-Muslim jurisdictions is considered as a leader in Islamic banking and finance field, for example United Kingdom ranks number nine in the world in holding Shariah complaint assets, and United States of America is having almost 19 providers of Islamic finance assorted products.¹³

According to report from the World Bank, Islamic banking institutions are developing in a very fast and effective way more than the conventional one in the Islamic countries, even several non Islamic jurisdictions like Hong Kong and UK shown large interest to the Islamic banking institutions, the reason is that Islamic finance institutions are considered as an effective tool for development of the monetary and banking institutions around the world for eradication of poverty and prosperity sharing.

'Islamic finance is equity-based, asset-backed, ethical, sustainable, environmentally- and socially-responsible finance. It promotes risk sharing, connects the financial sector with the real economy, and emphasizes financial inclusion and social welfare'.¹⁴

Criticizing Islamic banking and finance industry by different scholars dose not mean that it is not following Islamic principles at all, the Islamic banking and finance industry can be considered as a new born industry that facing different challenges (such as the effective risk management in Islamic banks)¹⁵ and needs a lot of practice and experience to be perfect in following shariah principles.

¹³ ibed

¹⁴ See the world bank report for Islamic finance, available at:

<http://www.worldbank.org/en/topic/financialsector/brief/islamic-finance>, last accessed:16-12-2017.

¹⁵ V. Sundararajan and Luca Errico, Islamic Financial Institutions and Products in the Global Financial System: Key Issues in Risk Management and Challenges Ahead, 2002, published by: International Monetary Fund, available at:

In Pakistan there are several Islamic industry following shariah complaint principles such as Islamic banking and Islamic insurance company(takaful),such as Al Baraka Islamic Bank, Bank Islami, Dubai Islamic bank(Pakistan), Dawood family takaful limited, pak Qatar family takaful and Takaful Pakistan Limited, also there are some leading scholars in the Islamic banking and finance field such as **Mufti Muhammad Tariq Usman** and **Dr. Muhammad Tahir Mansori** that can always help in supporting and improving the Islamic banking and finance system in the country.

1.2 Kinds of Dispute Resolution: Litigation and ADR:

Resolving the disputes by the legal system of a country or international courts or in other worlds the process of taking legal action is called litigation where Alternative dispute resolution 'ADR' means resolving and settling the disputes of the parties out of the traditional legal system and courts.

Dispute settlement is practiced by different generations, because there is always disputes between parties and people in every aspects of life, this is the nature of human being, generally ADR means resolving disputes amicably away from the formal procedure as an alternative to the court legal system.

There are different kinds of alternative dispute resolution like mediation, conciliation and arbitration while every kind from these ADR have its own characteristics, advantage and disadvantages that will be detailed bellow , but arbitration can be considered as the best kind of ADR for dispute resolution of the Islamic banking and finance industry because of its recognition internationally by many treaties and agreement (that most of the respected countries in the world including Pakistan and United kingdom are a member to it) such as the New York Convention 1958 which make arbitral award having much power and enforceability internationally that can attract the Islamic banking institutions and there

trust as an alternative to the litigation process (court) more than other ADR like Mediation and Conciliation which are not binding on the parties etc.

Alternative dispute resolution is a well recognized process in the history, even the holy Quran encouraged using ADR for dispute resolution.¹⁶but according to some scholars of Islamic law arbitration and litigation is the same thing and there is no any different between them in shariah, while according to others the following are some of the main differences between them:

- Consent of the parties is compulsory in arbitration while it is not in litigation.
- The jurisdiction in the arbitration procedure is limited to the prior agreement of the case while in litigation the jurisdiction of the court is not.
- The authority of the arbitrator is limited to the parties of the dispute (like the authority of making an injunction to a third-party other than the party of the dispute).
- The arbitration award can be enforced in other country and it have international recognition more than litigation.¹⁷

There are many differences between arbitrator and judge as well such as the decision of the arbitrator is binding on the parties and there is no appeal for arbitrator decision while the judge's one can be appealed in the higher court.

The parties of the dispute can chose an arbitrator to settle their dispute and the arbitrator cannot be changed to other arbitrator without the consent of the parties of the dispute , while in case of litigation the parties well submit the case to the court directly without choosing the judges of the case.

¹⁶ DR Said Bouheraoua and Ahmad Ibrahim, FOUNDATION OF MEDIATION IN ISLAMIC LAW AND ITS CONTEMPORARY APPLICATION, International Islamic University Malaysia (IIUM), available at: <http://www.asiapacificmediationforum.org/resources/2008/11-Said.pdf>, last accessed: 30-09-2017.

¹⁷ Abdulrahman Yahya Baamir, Shari'a Law in commercial and banking arbitration(law and practice in Saudi Arabia),page 58, Ashgate Publishing Limited, England.2010

1.3 Types of ADR (Alternative Dispute Resolution):

There are different types of alternative dispute resolution that the parties to a contract can use for resolving their disputes with regard to the type of the contract and other things that cover the needs of the party, even the court may order the parties to pursue these alternative for dispute resolution before litigating¹⁸.

Mediation, conciliation and arbitration is the most common types of ADR but there are many other types of ADR and some time there is different names used for the same ADR.

1.3.1 Mediation:

Mediation is an alternative dispute resolution process that having an independent third party (mediator) who meets with parties of the disputes and helps them to reach some mutual agreement.

In the mediation process the third party have no any authority on the parties to enforce any thing on them, his job is only to convince them for an agreement regarding the dispute which is not bending on them until a final agreement is reached and signed if the parties are willing to sign, so in many cases parties pursue litigation after mediation process if they did not agree on the mediation outcome.¹⁹

There are many advantages of mediation such as helping the parties of the dispute by assets of a third party to choose their own decision not like arbitrator who can impose a binding decision on the parties of a dispute²⁰.

It can also help the parties to find the proper solution that both parties agrees on without wasting time and money and long procedure at court.

¹⁸ See types of alternative dispute resolution (ADR), authored by: Pavel Leshchinskiy, available at: <https://www.legalmatch.com/law-library/article/types-of-alternative-dispute-resolution-adr.html>, last accessed: 30-09-2017.

¹⁹ Muhammad Sarfraz Khan, dispute resolution in Islamic finance, case analysis of Pakistan(2014), faculty of shariah and law, international Islamic university, Islamabad.

²⁰ See ' what is mediation, published by: agree dispute resolution, member of ADR institute of Ontario, available at: <http://www.agreeinc.com/mediation.html>, last accessed:01-09-2017.

1.3.2 Arbitration:

Arbitration is a type of alternative dispute resolution(ADR) that involve an independent third party for a private judicial determination of a dispute.

Such arbitrator (third party) can be an individual or tribunal that may consist many arbitrator, with the full power to settle the dispute between the parties.

The coming chapter is about arbitration definition, origin, types, and the significance of arbitration for dispute settlement of Islamic banking and finance sector.

1.3.3 Conciliation:

Conciliation is a voluntary process of alternative dispute resolution (ADR), just like mediation, it is (conciliation) an amicabl process of dispute resolution with the consent of the parties of the dispute to get a help or assistant of a third party (conciliator) to determine the dispute.

The main different between mediation and conciliation is that the parties of the dispute will request the conciliator to submit a voluntary proposal for the dispute settlement, a mediator will abstain from providing such a proposal because of the matter of principles.²¹The conciliator will bring more dominant rule than mediator in bringing the parties of the dispute together.

Conciliation is practiced in civil law countries like France and Italy, and it is more popular than mediation there, and usually it is used for the labor disputes.²² The main duty of the conciliator is to help and support the parties by guiding their negotiation of the dispute and helping them to reach an agreeable agreement regarding their dispute.

1.3.4 Natural Evaluation:

Natural Evaluation or Early Natural Evaluation(ENE) is an ADR process that both parties present their dispute to a natural person called 'evaluator', after hearing both parties' arguments and evidence, the evaluator who is usually an expert of the subject

²¹ See What is conciliation, published by, Rechtssandort Hamburg e.v., available at: <http://www.dispute-resolution-hamburg.com/conciliation/what-is-conciliation/>, last accessed:02-10-2017.

²² Alessandra Sgubini, Mara Priditis and Andrea Marighetto, Arbitration, Mediation and Conciliation: difference and similarities from an International and Italian business perspective, available at: <http://www.mediate.com/articles/sgubinia2.cfm>, last accessed:02-10-2017.

matter of the dispute will give his opinion on the case and how the dispute can be resolved.

The opinion of the evaluator about the case is voluntary for the parties or we can say (ADR technique of choice), and the parties usually go in evaluation process for reaching a negotiation that may reach to resolution in the likely outcome or in a point of law.

One of the main advantages for early natural evaluation is to reduce the cost of litigation on the parties by making a communication between the parties and having analysis of the case and also pointing out the weak points of their cases that may reduce the cost and litigation period of the case in the court²³.

1.4 Alternative Dispute Resolution in Pakistan:

Alternative dispute resolution is a very old process in Pakistan as the age of the country itself, respected elders of the tribes use to resolve the dispute between the parties and their decision use to be very respected among the tribes, these kinds of dispute resolution were practiced in family dispute, such practiced is called Jirga or Panchaiats.²⁴

There are no direct and clear mentioning of ADR in the constitution of Pakistan but reference to financial activities can be point out in the constitution, this is an indirect evidence leads to the ADR practice in Pakistan.²⁵

Arbitration is the most common ADR in Pakistan, the reason of the arbitration reputation in the country is coming from the country's law itself (Pakistan law).

There are two main legislature Act dealing with arbitration in Pakistan (Arbitration Act 1940 and foreign award act 2011) for dealing with the domestic arbitration and enforcement of foreign arbitral award in Pakistani courts, arbitration is considered more

²³ Muhammad Sarfraz Khan, dispute resolution in Islamic finance, case analysis of Pakistan(2014), faculty of shariah and law, international Islamic university, Islamabad.

²⁴ See ANCHAYAT, LOCAL GOVERNMENT SYSTEM, AND ADR, available at: http://www.zcepedia.com/read.php?panchayat_local_government_system_and_adr_definitions_of_panchayat_definition_of_jirga_conflict_management&b=30&c=44, last accessed:03-10-2017

²⁵ Salman Raval, alternative dispute resolution in Pakistan, New York University School of Law (2008), available at: http://www.nyu-lawglobal.org/global/Pakistan_ADR.html# I. Note_on, last accessed:03-10-2017.

applicable and flexible in the law more than other ADR process such as mediation and conciliation etc.

This flexibility can give the contractors and investors in Pakistan much confidentiality and trust in dealing with arbitration for resolving any future disputes and by how the law of arbitration in the country protect their rights and serve their interest that may not be the same in other ADR process.

Adding to that the abstracts that contractors may face in the other ADR process such as mediation, conciliation and negotiation.²⁶

Pakistan also participated in different trade organizations like World Trade Organization(WTO), and United Nations Commission on International Trade Law (UNCITRAL) and it is a member of different treaties and trade agreement such as Multilateral Investment guarantee Agency(MIGA), the International center for Settlement of Investment dispute(ICSID) and New York Convention for recognition and enforcement of foreign arbitral award²⁷.

These treaties is a an evidence for Pakistan participation in ADR process internationally and the effect of ADR in Pakistan legal system.

In the domestic level, there are some domestic law of Pakistan that support using ADR for resolving of the dispute, the small claims and minor offences courts ordinance 2002²⁸ intending to establish a court for small cases that do not exceed 3 years imprisonment and less than 100,000 RS value.

The purpose of this ordinance is to make a legal cover and to support amicable dispute resolution like arbitration, mediation and other Alternative dispute resolution²⁹.

²⁶ See, A Study of the Arbitration Law Regime in Pakistan, published by: RIAA Barker Gillette(London law firm), available at: <https://www.riabarkergillette.com/usa/wp-content/uploads/insight-Article-A-Study-of-the-Arbitration-Law-in-Pakistan.pdf>, last accessed:17-12-2017.

²⁷ Ibid

²⁸ See The Pakistan code government website, available at: <https://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-apaUY2Frbpw=-sg-iiiiiiiiiii?apaUY2Fqa=apaUY2Frbpw=&sg=iiiiiiiiiii>, last accessed :04-10-2017.

²⁹ See report of Dawn news, Govt ask to enforce small claims ordinance, available at: <https://www.dawn.com/news/394503/govt-asked-to-enforce-small-claims-ordinance>

Section 103(Encouragement for amicable settlements of disputes) of the local government ordinance 2001(SBNP) is supporting resolving the disputes through mediation, arbitration and conciliation whether there is any proceeding have been instituted in the court or not³⁰. There are many other acts and provisions in the Pakistan legal system in generally support and Encourage using alternative dispute resolution in both international and domestic level³¹

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³⁰ See THE SBNP LOCAL GOVERNMENT ORDINANC 2001, available at:

<http://www.humanrightsinitiative.org/programs/ACT/Pakistan/Local%20Government%20Ordinance%202001.pdf>, last accessed:05-10-2017.

³¹ See the discussion paper, Alternate dispute resolution, authored by: Mr. Shahid Hamid and published by: Pakistan Institute of Legislative Development and Transparency, available at:

http://www.pildat.org/publications/publication/ROLR/AlternateDisputeResolution_PositionPaper.pdf, last accessed: 05-10-2017.

CHAPTER II: ARBITRATION

2.1 Definition of Arbitration:

Arbitration is a type of alternative dispute resolution, where the dispute is resolved out of the courts by one or more arbitrators giving a reward (judgment or decree) for the parties of the dispute that will be enforceable in the court.

Usually arbitration is used in the commercial disputes specially internationally and between parties of different states.

Arbitration can be voluntary or mandatory on the parties, it will be mandatory in the parties when the parties agree to enter a contract voluntary that in case of any disputes the parties will resolve the disputes by arbitration and they will be bound for his decision, while if there was no such contract it will be the choice of the parties to resolve the disputes arise between them by arbitration or litigation in the court.

There are different definitions for arbitration, according to the free dictionary website the definition of arbitration is:

*'The submission of a dispute to an unbiased third person designated by the parties to the controversy, who agree in advance to comply with the award, a decision to be issued after a hearing at which both parties have an opportunity to be heard'*³².

The BusinessDictionary define arbitration as following:

*'settlement of a dispute (whether of fact, law or procedure) between parties to a contract by natural third party (the arbitrator) without resorting to court action'*³³

Another dictionary defined arbitration as the following:

*'the action of arbitrating; especially :the hearing and determination of a disputed case by an arbiter, a case that is in arbitration they agreed to settle the dispute by arbitration'*³⁴.

³² See the free dictionary website, available at: <http://legal-dictionary.thefreedictionary.com/arbitration>, last accessed: 06-19-2017.

³³ See BusinessDictionary, available at: <http://www.businessdictionary.com/definition/arbitration.html>, last accessed:06-10-2017.

³⁴ Merriam-webster Dictionary, available at: <https://www.merriam-webster.com/dictionary/arbitration>, last accessed :25-09-2017.

Majallah Al-Ahkam Al-Adlyyah defined arbitration as following:

*'The action where two adversaries with their consent bring a referee to resolve their dispute'*³⁵

From all the above definitions of arbitration we can see that all the definitions are rounding for the same content as: resolving the dispute between the parties with their consent to do by a third natural person (maybe one or more) without going to court for litigation.

Generally arbitration is recognized in Islamic law (Shariah) , but at the early ages of Islam there was no big attention for arbitration and its definition specifically for many reasons, at that early time there was no difference between arbitration and litigation and there was no such complicated transaction and commercial activity that require a codified procedure to resolve the dispute and maybe at that early age the judge who is known as (qadi) in shariah term was sufficient to deal with social issues and dispute of the people.

The four different school of law gave a different definition for arbitration with accordance to the scope that every school give to it, but in general we can realise that the four schools definition are similar to each other, saying that *arbitration is a procedure were two or more parties to a dispute pass their case to a third party known as Hakam or Mauhakkem (arbitrator) to resolve their dispute*, the definitions did not describe arbitration as a specific procedure for commercial disputes only but it is for every kind of dispute generally.³⁶

2.2 Origin of Arbitration

The disputes had been there between people since the emergence of the life, there was no courts or any legal procedure to resolve the disputes between the parties at the early ages and the people use to resolve their disputes by a third person (maybe head of family or tribal leader etc.) that his judgement will be accepted for the parties of the dispute.

³⁵ Commission of ottoman Justice, Majallah Al-Ahkam Al-Adlyyah, article (1790), available at: <http://www.farrajlawyer.com/viewTopic.php?topicId=641>, last accessed: 15-09-2017.

³⁶ See the definition of the four fiqh school (Hanafi, Hanbali, Shafee and Maliki) at: Abdulrahman Yahya Baamir, Shari'a Law in commercial and banking arbitration(law and practice in Saudi Arabia),page 59, Ashgate Publishing Limited, England.2010

Using ADR for dispute resolution is not something new, it is hundreds years elder than litigation, there is some evidence that in the time of ancient civilization of Mesopotamia, Egypt, ancient Greeks and Romans ADR for dispute resolution were in practice.³⁷

According to a research the first mediation were conducted more than 4000 year ago in Mesopotamia period and it was about two neighborhood groups having disputes regarding a land where a Sumerian ruler avoided a war between them by an agreement³⁸.

In the sub-continent alternative dispute resolution were also used 2000 year ago even after the people republic of china was established in 1949 the mediation were developed together with the litigation legal system³⁹.

Some people may argue that the ADR process is not modern alternative for current period, the court system itself was an ADR process that have been developed by the time till it is in the current trend nowadays.

The Yoruba⁴⁰ people in Nigeria which are one of the biggest African ethnic grope used to resolve their disputes by mediation, even they believe that the court is the last choice they have for resolving the disputes and going to the court for resolving the dispute is a mark of shame, the conflict resolution process in Yoruba is known as Agba were the eldest person (senior) use to resolve the conflict between the parties by having some skills and asking the parties some question as investigation.⁴¹

³⁷ See Arbitration overview, published by, Robert M. Smith, London. Available at:

<http://robertmsmith.com/about-adr-arbitration-overview>, last accessed: 27-9-2017

³⁸ MARIA CARMELINA LONDOÑO LAZARO, THE EFFECTIVENESS OF INTERNATIONAL MEDIATION, available at : <http://revistas.javeriana.edu.co/index.php/internationallaw/article/viewFile/14158/11412>, last accessed: 29-09-2017.

³⁹ Guillermo Kleinlein, **Intercultural Mediation**, available at: <http://www.mediate.com/articles/KleinleinG2.cfm>, last accessed: 30-9-1017.

⁴⁰ Yoruba is a member of an African people that live in sw Nigeria and Benin, it is the name of there language having a 16 million speakers.

⁴¹ Adrian POP, TRADITIONAL APPROACHES IN ALTERNATIVE DISPUTE RESOLUTION: A BRIEF OVERVIEW, available at: <http://www.csq.ro/wp-content/uploads/CSQ-7.-Pop.pdf>, last accessed:29-09-2017.

Every celestial religion is supporting conciliation and peace between neighbors, brothers and people over all⁴² even earliest communities like Greeks, Romans they used conciliation for resolving disputes and prefer that more than litigation⁴³.

The Arabic tribal and society tradition as well where to solve there dispute privately through mediation, conciliation, and arbitration away from public litigation by a respected elder of a tribe that his reward will be accepted by the parties. ⁴⁴

According to many researches there is no a specific and clear period were the arbitration started from⁴⁵, other research⁴⁶ explained the emergence of arbitration step by step finding a ground in UK, USA, and how arbitration developed in the last 100 years generally (1915 - 2015) form an academic subject institute to a practiced mechanism for dispute resolution internationally.

The reason for development of arbitration is to find alternative dispute resolution other than litigation, maybe because of the high cost of litigation and long procedure etc⁴⁷ in the modern time and because of the absence of legal procedure to resolve the dispute at the early ages.

⁴² الإصلاح بين الناس من عمل المرسلين. (the conciliation between the people is the work of massagers), published by: islam way website, available at:

<https://ar.islamway.net/article/9261/%D8%A7%D9%84%D8%A5%D8%B5%D9%84%D8%A7%D8%AD-%D8%A8%D9%8A%D9%86-%D8%A7%D9%84%D9%86%D8%A7%D8%B3-%D9%85%D9%86-%D8%B9%D9%85%D9%84-%D8%A7%D9%84%D9%85%D8%B1%D8%B3%D9%84%D9%8A%D9%86>, last accessed:8-10-2017.

⁴³ EARL S. WOLAVER, The Historical Back Ground of Commercial Arbitration, 1934, available at: http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=8693&context=penn_law_review, last accessed:10-09-2017.

⁴⁴ Abdulrahman Yahya Baamir, Shari'a Law in commercial and banking arbitration(law and practice in Saudi Arabia) page 45, Ashgate Publishing Limited, England.2010

⁴⁵ Derek Roebuck, sources for the history of arbitration: A bibliographical introduction, arbitration intrnational, volume 14, issue3, 1998.

⁴⁶ Julio César Betancourt, The Chartered institute of Arbitration(1915-2015): the first 100 years, available at: <https://poseidon01.ssrn.com/delivery.php?ID=429022106021126113086112122067003120116034070035005055097071019030067095066075002077124004061061006108028026114112125075102030008087047000081001030119118126112031015089042066100110082116065121122102099091115065007066103086069116103082088080006083099003&EXT=pdf>, last accessed: 10-10-2017.

⁴⁷ Garth, Bryant; Cappelletti, Mauro; and Trocker, Nicolo, "Access to Justice: Comparative General Report" (1976). Articles by Maurer Faculty. 2485, available at: <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=3482&context=facpub>, last accessed: 10-10-2017.

The Mecelle⁴⁸ can be considered as one of the first attempt for codifying Islamic law and representing it as a set of rules and principles, there is a separate section in Mecelle about arbitration and its application stating that the decree of the arbitrators is binding for the parties of the contract if it is consistent to Islamic principles⁴⁹.

The first appearance of arbitration as a systematic legal system for resolving the dispute was in UK, where arbitration was promoted to academic and provisional practice for resolving dispute as an ADR⁵⁰.

Geneva protocol can be considered as the first international legislative for the commerce which support arbitration and give strangeness for it was adopted in (1923), followed by Geneva convention in (1927) and New York convention (1958) adopted by united nation diplomatic conference also played a big role in international arbitration with 157 parties (states) all over the world.

2.3 Types of Arbitration

Historically arbitration is one of the oldest methods for dispute resolution, it was there even before the establishment of the modern judicial system, in the modern life when there is a dispute between the parties and they are unable to resolve the dispute amicably they refer the case to a legal process that resolve the dispute between them by a neutral third party.

⁴⁸ Mecelle is the name of Majallat al Ahkam Al Adleya , which means (magazine of judicial provisions) , it was the civil code of the Ottoman empire in the late 19th and early 20th centuries, available at <https://www.google.io/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwi6IMDmicHWAhXBPRoKHbwyAf8QFggvMAE&url=http%3A%2F%2Facademic.ju.edu.jo%2Fa.hayajneh%2FLists%2FAnnouncements%2FAttachments%2F78%2F%25D9%2585%25D8%25AC%25D9%2584%25D8%25A9%2520%25D8%25A7%25D9%2584%25D8%25A3%25D8%25AD%25D9%2583%25D8%25A7%25D9%2585%2520%25D8%25A7%25D9%2584%25D8%25B9%25D8%25AF%25D9%2584%25D9%258A%25D8%25A9.doc&usq=AFQjCNFoJ-PZX8V3lQcsApmwhEHlwHbFZw>, last accessed: 25-9-2017.

⁴⁹Commission of ottoman Justice, Majallah Al-Ahkam Al-Adlyyah,(Attoman Crvrl code), section 16, chapter 4, article 1484.

⁵⁰ Julio César Betancourt, The Chartered institute of Arbitration(1915-2015): the first 100 years, available at: <https://poseidon01.ssrn.com/delivery.php?ID=42902210602112611308611212206700312011603407003500505509707101903006709506607500207712400406106100610802802611411212507510203000808704700008100103011911812611203101508904206610011008211606512112210209909111506500706610308606911610308208808006083099003&EXT=pdf>, last accessed: 10-10-2017.

Arbitration is considered as one of the best legal process for resolving the dispute specially in the case of commercial transaction of Shariah complaint contract and international contracts, as Aristotle said:

*'Equity is justice in that it goes beyond the written law. And it is equitable to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail'*⁵¹

The main reason for that is the recognition of arbitration internationally as a legal process and its power of enforcing foreign award adding to that the unique features of arbitration that makes it better than litigating the case such as flexibility, privacy, time and cost saving etc.

there are different types of arbitration based on being local or international, voluntary or compulsory and the subject matter of the dispute etc. as following:

➤ **Ad-hoc and Institutional Arbitration:**

- **Ad-hoc Arbitration:**

Ad-hoc arbitration is the arbitration conducted by the parties themselves by rules agreed by them, without referring to an arbitration institution and without following a specific institution rules, the parties in ad-hoc arbitration may also follow an established set of rules such as UNCITRAL rules to resolve their dispute.⁵²

In other worlds, the parties of the dispute in Ad-hoc arbitration is responsible for determining every aspect of the arbitration such as how many arbitrators should be there, the governing law and the procedure that should be followed in the process of arbitration because the parties themselves are managing the arbitration without any institution.⁵³

⁵¹ Robert S. Clemente & Karen Kupersmith, Pillars of Civilization: Attorneys and Arbitration, published by: Fordham Journal of Corporate & Financial Law, Volume 4, Number 1, Article 9, 1999.

⁵² NIGEL BLACKABY & CONSTANTINE PARTASIDES with ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER IN INTERNATIONAL ARBITRATION, oxford university press, New York, 2009

⁵³ See Institutional vs. 'ad hoc' arbitration, available at: <https://www.out-law.com/en/topics/projects--construction/international-arbitration/institutional-vs-ad-hoc-arbitration/>, last accessed: 10-12-2017.

- **Institutional Arbitration:**

Institutional arbitration is based on a previous agreement (arbitration clause in the contract) between the parties that in case of any dispute in the future such dispute will be resolved by a specific arbitration institution, the institution will administrate the arbitration process and resolve the dispute between the parties regarding to its own principles and rules for resolving the disputes.

There are some leading institutions for resolving disputes through arbitration like London court for international arbitration (LCIA), Dubai international arbitration center(DIAC), The international center for settlement of investment dispute(ICSIED) and the international center for dispute resolution,⁵⁴ there is around 1200 arbitration center for arbitration worldwide offering arbitration services.⁵⁵

Resolving the dispute through institutional arbitration have some advantages like the experience of the institution in the field of arbitration that can save the time and maintain the process of resolving the dispute between the parties, where there is some disadvantages ass will like the high cost of the arbitration fees.

➤ **Domestic and International Arbitration:**

Arbitration agreement between the parties can be domestic or international, for example the American arbitration association AAA consider arbitration as international if:

- The parties having an arbitration agreement in case of any future dispute are conducting their businesses in different countries.
- The place of arbitration (in the arbitration agreement) or the obligation of the commercial relationship of any party to the contract is situated outside the country.

⁵⁴ NIGEL BLACKABY & CONSTANTINE PARTASIDES with ALAN RFEREN & MARTIN HUNTER, REDFEREN AND HUNTER IN INTERNATIONAL ARBITRATION, oxford university press, New York, 2009

⁵⁵ See Institutional vs. 'ad hoc' arbitration, available at: <https://www.out-law.com/en/topics/projects--construction/international-arbitration/institutional-vs-ad-hoc-arbitration/>, last accessed: 10-12-2017.

- Consensus of the parties to the contract that the subject matter of the arbitration is related to more than one country.⁵⁶

Usually every country is regulating the principles and rules of domestic arbitration in its own law, for example in India the arbitration is considered domestic if the proceeding, subject matter of the contract and merits of the disputes are governed by the Indian law⁵⁷.

In Pakistan the arbitration Act 1940 deals with every aspect relates to arbitration cases in the country, according to Pakistani law the parties to a contract having a freedom and flexibility to choose the arbitration process they prefer to deal with their case like the procedure of arbitration, taking the evidence, the time limit for the final award of the case and choosing the arbitrator etc. covering all the needed requirements for the domestic and international parties in the arbitration.⁵⁸ Generally, we can say that arbitration is considered domestic when the parties, subject matter of the case and the arbitration process is located in the same country, otherwise it is international.

➤ **Statutory Arbitration:**

It is a compulsory type of arbitration where the parties to a dispute are enforced by law to refer their case to arbitration in accordance to the provision or law related to the case, the parties have no choice of litigation in statutory arbitration.

Generally, When the case is referred to arbitration by applying provisions of a specific statute it is called statutory arbitration.

➤ **Foreign Arbitration:**

Generally, when the arbitration process is conducted outside the country (Pakistan as an example), and the award have to be enforced in the same country's courts (Pakistan's courts) it is called foreign arbitration.

⁵⁶ P. Jean Baker, Young Lawyers: Is the Arbitration Domestic or International in Scope?, available at: http://apps.americanbar.org/abastore/products/books/abstracts/5310425_chap1_abs.pdf, last accessed, 12-12-2017.

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⁵⁸ See 'a study of the arbitration law regime in Pakistan', published by: RIAA Barker Gillette, available at: <https://www.riabarkergillette.com/usa/wp-content/uploads/Insight-Article-A-Study-of-the-Arbitration-Law-in-Pakistan.pdf>, last accessed: 12-12-2017.

The foreign arbitration award is enforceable in Pakistan under the provisions of arbitration agreement and foreign arbitral award Act 2011.⁵⁹

➤ **Binding and Non-Binding Arbitration:**

The decision of the arbitration agreement can be binding or non-binding decision, the decision is considered binding in case that there is a previous agreement between the parties that in case of any dispute in the future it will be referred to arbitration (arbitration clause), in this case the parties to the contract oblige themselves to arbitration and it is binding, enforceable as a court judgment and non-rejectable by any party of the dispute.

If the arbitration is non-binding the parties have the right to reject the award and claim for litigating the case in the court.

Non-binding arbitration is the process where the arbitrator determines the rights and duties of the parties of the dispute where both parties have the right to accept or refuse arbitrator decision.

Usually non-binding arbitration is conducted when there is no previous arbitration agreement but the parties are desiring to resolve the dispute smoothly and away from legal process of the court if possible but still having the right to reject the arbitrator decision.

(non-binding arbitration award can be considered as a non-binding advisory opinion of the arbitrators view of the respected merits of the party's case).⁶⁰

2.4 Arbitration for Dispute Settlement in The Islamic Law:

There is different opinion about arbitration between Islamic schools considering it (Arbitration) like litigation in its characteristics or it is similar to some ADR like conciliation, mediation or agency and do arbitrator similar to judge in his power and duty or there is different between them?

⁵⁹ Faryal Nazir, Untangling Arbitration, available at: <https://www.dawn.com/news/1338941>, last accessed: 15-12-2017.

⁶⁰ See Non-binding arbitration, available at: https://en.wikipedia.org/wiki/Non-binding_arbitration, last accessed: 15-12-2017.

First school (Hanafi's) is considering that arbitration is different from litigation and it is similar to conciliation and agency.

According to this school the arbitrator is an agent for the parties in resolving their disputes and he have no power same like the judge have in the court but the arbitrator decision is binding on the parties of the dispute because of the arbitration agreement.

Second school (Hanbalies) is considering that arbitration is similar to litigation with no any difference between them, meaning that the arbitrator power is similar to the power of the judge in resolving the dispute and binding of his decree.

The third school (Shaf'ies) is considering arbitration as lower part than litigation and the parties can revoke the appointment of the arbitrator at any time or stage of the resolution process before the issuance of the final award⁶¹.

This kind of different opinion of the Islamic school can be considered as an advantage in the Islamic banking and finance system, meaning that the parties may use or apply any one of them without breaching the Islamic law because all these schools are correct but the interpretation of the same legal text is different.

modern Islamic law provided a set of rules for arbitration similar to the legal procedure for settlement the dispute by litigation with all the requirements steps for resolving the disputes starting from the agreement of resolving the disputes to the last step of enforcing the award of the arbitration.

Saudi Arabia for example passed a rule to codify an arbitration in Islamic law in the code of commercial court of 1931, and passed an arbitration code in 1983 resolving many problems of the previous commercial code.

Generally, the parties to a contract have specific condition and characteristics according to Islamic law and the person cannot inter into a valid contract or agreement if he is contract to these conditions and characteristics required according to Islamic law.

In order to enter any kind of contract or agreement you must be a capable person to enter the contract, this term is called in shariah (al-ahliyah) in the Islamic law⁶² meaning the

⁶¹ Abdulrahman Yahya Baamir, Shari'a Law in commercial and banking arbitration (law and practice in Saudi Arabia), page 60, Ashgate Publishing Limited, England.2010

⁶² Wahba al zuhaylee, Islamic law and its testimony (الفقه الإسلامي وأدلته), volume 4, page 2432.

capability of a person to enter a contract or agreement, such person is classified again in Islamic law to natural personality, and legal personality.

Islamic law described the capacity of the contractual person as he must reach a specific age and have a mind ability (not insane) to be able to enter arbitration or any other agreement and contract.

Restriction was made to the capacity of the human being to make a contract or agreement in case of intoxication and mortal illness. even in case of insolvency the Islamic law or judge can restrict the debtor from doing anything or use his assets if he feels that the debtor is trying to hide his assets from his creditor by claiming insolvency.⁶³

From legal perspective arbitration seems to be the most suitable method for dispute settlement of Islamic banking and finance industry, Shamil bank case for example highlighted very important points that support using arbitration for dispute resolution of Islamic banking and finance contracts because of the problems it may face by using litigation for the cases governed by two laws (Shariah and common law), the court held in the Shamil case that according to Rome convention the law governing the contract must be a law of a country and only one country can govern the contract, where in Islamic finance the contract is governed by country law and principles of Shariah are incorporated in the contract, where it is possible in arbitration to subject the contract to a specific law and at the same time subject the agreement to Shariah,⁶⁴ making Arbitration more suitable for Islamic commercial contract than litigation for the purpose of avoiding conflicts between the governing law of the contract and Shariah principles.

⁶³ Decision on Insolvency and Bankruptcy Provisions in Islamic Shari'a , international Islamic fqih academy, available at: <http://www.lifa-aifi.org/2343.html>, last accessed:17-10-2017

⁶⁴ Julio C. Colon, (Choice of Law and Islamic Finance), TEXAS INTERNATIONAL LAW JOURNAL [VOL. 46:411, available at: <http://www.tilj.org/content/journal/46/num2/Colon411.pdf>, (last accessed 3-8-2017).

2.5 Significance of Arbitration for Dispute Resolution:

Nowadays Islamic banking and finance industries are moving toward arbitration for the purpose of dispute resolution⁶⁵, the arbitration institutions are receiving more cases of Islamic finance disputes this can be a very big sign that how much the arbitration and ADR in general are much effective for the disputes resolution of Islamic finance contract and the commercial one, There can be many reasons for that such as the governing law clause, and the freedom of the parties in formatting the contract to their interest and appointment of the arbitrator.

There are many differences between litigation and arbitration process, that can clear the questions of why arbitration is better than litigation for business activities in general.

Litigation is a very old process that one party use to go for court asking for their rights which are violated by any other party, in any civil or criminal matter, or we can say that one party is seeking their rights from the law breaker party, but arbitration is a process of dispute resolution that is agreed between two parties that in case of any dispute a third party will adjudicate the disputes.⁶⁶

There are so many reasons make arbitration better than litigation for dispute resolution of business contracts such as the enforcement of the award, speed of the procedural, cost, choosing of the arbitrator and choosing of the applicable law and rules etc.

2.5.1 Enforcement of The Award:

When there is an international business contract, in case of any disputes if the parties have no arbitration agreement and they start litigation in the court, the award of the court that adjudicate the case may got reject to be enforce by the foreign court of the other party in his homeland or were his business is registered.

⁶⁵ Jonathan Lawrence , Hussain Khan , "Dispute Resolution in Islamic Finance" the Global Islamic Finance Report 2012, available at http://www.klgates.com/files/Publication/0b2f56b0-d738-4217-85ee-6670f2101659/Presentation/PublicationAttachment/3e2c3cd0-43fd-4ef4-ac96-700e33340e6a/Dispute_Resolution_in_Islamic_Finance.pdf, last accessed 20-7-2017.

⁶⁶ Jean Murray, Arbitration vs. Litigation - What is the Difference?(2017), available at: <https://www.thebalance.com/arbitration-vs-litigation-what-is-the-difference-398747>, (last accessed: 13-7-2017)

In case of arbitration the case is different because according to new York convention (1958) the court of any country participated to this convention must enforce the foreign arbitral award in its jurisdiction.⁶⁷

2.5.2 Speed of The Process

There are two main points that make the process of arbitration more fast than litigation, first thing is that there is no appeal in arbitration decision which make it final while in court the same issue may have more than one appeal which may take a lot of time, second thing is that in the court the huge amount of cases that should be heard by the court make the process of hearing each case is very slow and it will take allot of time to finalize the issue where in litigation the hearing of the case can be more fast.

Arbitration is 33% faster than litigation for dispute resolution, the average time for reaching the judgment in a dispute is 16.5 months while it is 25 months in litigation process to conclude.⁶⁸

2.5.3 A Choice of Natural Form and Natural Tribunals:

Parties to an international business contract in case of litigation they have to refer the case to the court of any party's country which is a foreign court to other party, where every country have its own procedure for litigation and own rules which may be different from the rules of the other party courts.

In case of litigation the country language may be different from the language of the contract which may create a lot of problems and Complexities for litigation of the case, but in arbitrations the party's to the contract the place were the disputes must be resolved and which tribunals to resolve the dispute is secured , also the parties will have the same

⁶⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, from Wikipedia, available at: https://en.wikipedia.org/wiki/Convention_on_the_Recognition_and_Enforcement_of_Foreign_Arbitral_Awards, (last accessed 15-7-2017)

⁶⁸ Michael Delikat and Morris M. Kleine, "An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?" 2003; available at, <http://connection.ebscohost.com/c/articles/11785754/empirical-study-dispute-resolution-mechanisms-where-do-plaintiffs-better-vindicate-their-rights>, (last accessed 1-7- 2017).

opportunities to participate in the case and equally without any priority to any side by his country.⁶⁹

Aida Maita⁷⁰ on her research article (**Arbitration of Islamic Financial Disputes**) had summarized the main advantages of arbitration over litigations for Islamic finance disputes in these five points:

- 1: Parties abilities to appoint the expert arbitrators on the subject matter of the case (such as Shariah law), in litigation the national judges will adjudicate the case who have no experience of Shariah and finance.
- 2: Freedom of the parties to chose the rules of arbitration and the institution that will adjudicate the case.
- 3: Freedom of the parties to incorporate Shariah law in the governing law clause of the contract with accordance to there needs.
- 4: The arbitration tribunals award is final, and the award can be enforced in any other jurisdiction very easy because of the new York convention treatise.
- 5: The arbitration proceeding can be conducted close to home in case that the governing law was English law and both parties were in Musliin countries specially in the cases of Islamic finance.⁷¹

The main porous or goal of Islamic banking and finance is to run the business with accordance to Shariah law and principles, and in litigation it seems impossible to incorporate Shariah law in the governing law clause, because two laws cannot govern one contract at the same time.

⁶⁹ Redfern Alan, Hunter Marten, Redfern And Hunter on International Arbitration, New York, Oxford University press(2009),p 32

⁷⁰ Aida Maita is a legal advisor and Doctorate of international legal study , united states of ammerica.

⁷¹ Aida Maita, (2014) "Arbitration of Islamic Financial Disputes," Annual Survey of International & Comparative Law: Vol. 20: Iss. 1, Article 7

By using arbitration in the Islamic finance contract, we can incorporate Shariah law to the contract like for example making the governing law of the contract is the England law to the extent that it should not conflict with Sharia principles.

Most of the Islamic transactions like Murabaha, Mudarabah and Musharakah etc. are not recognized in the financial system of many countries, even Islamic countries did not codify the extent of these instruments, these things give the parties the freedom for making their own rules and shariah principles may be kept in mind when dispute do arise.⁷²

After the publication of (Shamil Bank Case) on 2002, The arbitration process became more respected and valued for Islamic banking and finance purpose internationally, especially in Muslim countries of Asia and Africa because of its flexibility for corporation of Shariah law in the contract.

Many studies and researches from all over the world were presented in the subject of Islamic finance dispute resolution which support arbitration, even international students shows a very huge interest for Islamic arbitration.

The result of this international intention that many experts considered arbitration to be the perfect solutions for the Islamic industry to incorporate shariah law in the governing clause of the contract, and to resolve their disputes with accordance to Shariah principles.⁷³

An article about arbitration ⁷⁴ summarized the characteristics of arbitration in the following words:

⁷² Julio C. Colon, (Choice of Law and Islamic Finance), TEXAS INTERNATIONAL LAW JOURNAL [VOL. 46:411, available at: <http://www.tilj.org/content/journal/46/num2/Colon411.pdf>, (last accessed 3-8-2017).

⁷³ Aida Maita, (2014) "Arbitration of Islamic Financial Disputes," Annual Survey of International & Comparative Law: Vol. 20: Iss. 1, Article 7

⁷⁴ W binti Mohd, A binti Ahmad, MA bin Abdul Halim, THLH bin Hj, SUSTAINABILITY OF ISLAMIC FINANCE INDUSTRY : ARBITRATION AS FORUM FOR DISPUTE RESOLUTION, Univirsiti Sains Malaysia, available at:

https://www.google.jo/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjXh4_Bi4XXAh_VrJcAKHSIOCMAQFggmMAA&url=http%3A%2F%2Fddms.usim.edu.my%2Fbitstream%2F123456789%2F10000%2F1%2FDiskusi%2520Syariah%2520dan%2520Undang-Undang%2520Part%25205.pdf&usg=AOvVaw1L5tV41K1cWbUVkwLzQPtT, last accessed: 22-10-2017.

'Arbitration is appropriate in the following circumstances and for the following reasons. First, where the parties are from different countries and neither wish to submit to jurisdiction of some foreign court. Second, the parties want to exercise some degree of control over the constitution of the tribunal. Third, the parties may choose arbitrator who is expert in the relevant trade. Fourth, the matter is private and awards are not as a general rule published. Fifth, the parties chose to have some degree of informality.'

CHAPTER III: MODES OF DISPUTE SETTLEMENT IN ISLAMIC LAW:

3.1 Modes of Dispute Settlement Processes in Islamic Law:

Islam always support resolving disputes between mankind generally, it is one of the fundamental affairs in Islam as we are ordered to resolve the disputes between each other's, considering all the Muslim community as one part:

*"The parable of the believers in their affection, mercy, and compassion for each other is that of a body. When any limb aches, the whole body reacts with sleeplessness and fever."*⁷⁵

There are many verses in the Qur'an supporting and ordering dispute resolution between Muslims and mankind generally, almighty Allah said:

*{the believers are nothing else than brothers so make reconciliation between your brothers}*⁷⁶

Even though Allah promise who resolve disputes between mankind a great reward:

*{there is no good in most of their secret save in him who order Sadaqat (charity in Allah cause), Ma'aruf (Islamic monotheism and all good and righteous which Allah has ordained) or conciliation between mankind and he who dose this, seeking the good pleasure of Allah, we shall give him a great reward}*⁷⁷

The prophet Mohammad peace be upon him resolve dispute between people himself:

*[Once the people of Quba fought with each other till they threw stones on each other. When Allah's Apostle was informed about it, he said, "Let us go to bring about a reconciliation between them.]"*⁷⁸.

According to Islam tilling lie for resolving dispute between people is allowed:

⁷⁵ Şaḥīḥ al-Bukhārī, 5665

⁷⁶ Qur'an, 49.10

⁷⁷ Qur'an, 4.114

⁷⁸ See Al Bukhari, 2693

*{He who makes peace between the people by inventing good information or saying good things, is not a liar}*⁷⁹

There are different types of dispute resolution process in Islam as the following:

3.1.1 Sulh (Mediation):

The general meaning of Sulh is finishing the dispute between the controversy and it is taken from the word Salah which is contrary to FASAD (corruption) in its meaning.

It is (mediation) a very old tool for dispute resolution even before Islamic era, where dispute use to be resolved by the chief of the tribes where his decision use to be final⁸⁰, even prophet Muhammad (peace be upon him), resolved disputes by mediation before Islam in the dispute of the black stone⁸¹.

In mediation process both parties agree to resolve their disputes by a third person out of the court and litigation process, it is considered more effective and faster in dispute resolution process than litigation in the court.

Mediation can be more flexible than litigation in finishing the problems between the parties of the dispute before and after the dispute resolution because it is practiced with the consent of the parties contrary to litigation where it is binding for both the parties with or without their consent.

There are conditions and characteristics in Islam before and during the process of resolving the dispute by Sulh (mediation), for example the mediator between the parties used to be the imam, an elder person in the place (Mukhtar) or a professional person in the field of mediation and he (the mediator) must be sure that parties of a dispute are agree to resolve the dispute by mediation with their consent, also the

⁷⁹ See Al Bukhari, 2692

⁸⁰ Aseel Al-Ramahi, Sulh: A Crucial Part of Islamic Arbitration, LSE Law, Society and Economy Working Papers 12/2008, available at: <http://www.lse.ac.uk/law/working-paper-series/2007-08/WPS2008-12-AI-Ramahi.pdf>, last accessed:25-10-2016.

⁸¹ Tamim Multaheb, Truth behind black stone of Mecca?, available at: <https://www.quora.com/Truth-behind-black-stone-of-Mecca>, last accessed:26-11-2017.

process of mediation used to be private except if the parties agrees contrary to this etc.⁸²

Mediation are similar to arbitration in some points for example both mediation and arbitration are used to be resolved by a third party (arbitrator or mediator), but they have differences as well, the decision of arbitrator is binding for the parties where in mediation parties have choice to accept or deny arbitrator decision.

3.1.2 Tahkim (Arbitration):

In the pre Islamic era the middle east was a consists of tribal that rely generally on arbitration, mediation and conciliation for resolving of the disputes between the opponents.

The legal system at that era was a sum of traditions in the form of an unwritten legal system rules and principles used to be follow in the procedure of resolving the disputes such as respecting the award considering it as a final decision, usually made by elders of the tribes etc⁸³.

At that time arbitration was not considered as an alternative dispute resolution mechanism for dispute resolution as it is nowadays, it was considered as the best method for the controversy parties to resolve their dispute if all other methods such as mediation, negotiation and conciliation failed to resolve it, the reason is that people used to believe that the arbitrator is like diviner who owes the best solution for their dispute.⁸⁴

Later on Islam did not deny these pre Islamic rules and principles but admit them with some modification to be in comply with shariah rules and principles.

⁸² Khalid Iqbal, Islamic mediation , Rahmaa institute, available at: <http://www.rahmaa.org/domestic-violence/islamic-mediation/>, last accessed: 25-10-2017.

⁸³ Md. Shahadat Hossain, Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview, Senior Lecturer, Journal of Philosophy, Culture and Religion, Vol.1 2013, available at: <http://www.iiste.org/Journals/index.php/JPCR/article/view/9231>, last accessed:27-10-2017.

⁸⁴ GEORGE SAYEN, ARBITRATION, CONCILIATION, AND THE ISLAMIC LEGAL TRADITION IN SAUDI ARABIA, available at: [https://www.law.upenn.edu/journals/jil/articles/volume24/issue4/Sayen24U.Pa.J.Int%27IEcon.L.905\(2003\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume24/issue4/Sayen24U.Pa.J.Int%27IEcon.L.905(2003).pdf), last accessed:28-10-2017

Arbitration is called in Arabic (Tahkeem), and arbitrator is called (hakam), the textual meaning of Tahkeem is *appointing someone to be a judge in the disputing matter.*

the legality and the jurisdiction of arbitration is coming directly from the Holy Quran, Almighty Allah said:

(And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted [with all things]).⁸⁵

Imam Qurtubi said in his Tafseer that this verse is the proof that arbitration is part of the religion (Islam).⁸⁶

There are some similarities between arbitration and litigation generally, in both arbitration and litigation the dispute is resolved by a third party and both have a binding decision on the parties, but there are differences as well, litigation process is public process where arbitration is private, arbitrator can be chosen by the parties where judge can not.

3.1.3 Muhtasib (Ombudsman):

Generally, the duty of Muhtasib in Islam is promotion of virtue and prevention of vice (Al Amr Belmaarof Wal nahi an almonkar), for example ordering people for praying five times a day, punish them if they don't and preventing propel from doing vice things like lying, cheating and dealing with prohibited contracts such as interest (Riba) and uncertainty (Gharar).

Hisba (the origin of Muhtasib) means in Islam the religious seignior were the magistrate appoint someone to practice the duty of Muhtasib to keep the society safe

⁸⁵ Quran, 4, 35.

⁸⁶ Md. Shahadat Hossain, Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview, Senior Lecturer, Journal of Philosophy, Culture and Religion, Vol.1 2013, available at: <http://www.iiste.org/Journals/index.php/JPCR/article/view/9231>, last accessed:27-10-2017.

from deviation, protecting religion from being lost and to achieve the interest of the people in their religion and life according to Allah's orders.⁸⁷

The origin of Muhtasib started from the Abbasid caliphate after the expansion of the state and the expansion of its markets, the importance of having some monitors to keep an eye on the traders and the quality of their merchandise in the market⁸⁸.

At that time it was practiced voluntary were nowadays it is converted to an official job, the committee for the promotion of virtue and prevention of vice in KSA is an example for Muhtasib to some extent.

The legality of Muhtasib in Islam is mentioned in the Quran, as almighty Allah said:

*"And let there be [arising] from you a nation inviting to [all that is] good, enjoining what is right and forbidding what is wrong, and those will be the successful."*⁸⁹

Meaning that there must be some people doing Muhtasib duty in the society which can clear the importance of Muhtasib duty in the Muslim society, Evenhe prophet himself appointed Saad ibn Alaa as a Muhtasib for Mecca and appointed Omar Bin al Khattab for Medina.

The main duty of Muhtasib is to investigate the complaints regarding weight, measure, adulteration in the items in the market, and for the complaints of not paying the debts where the debtor is able to Pay⁹⁰.

In the modern age life it is more complicated than before and there should be Muhtasib for different aspects of the life not only to the markets and trades adulteration, for example one of the most important sectors that should have monitors for it is the public health, because the health is one of the fundamental basics of human life.

⁸⁷ Abdul Rahman Ben Mualla Allweheq, the concept of Hisba in Islam, available at: <http://www.alukah.net/web/lwaiheq/0/96658/>, last accessed:2-11-2017

⁸⁸ see the meaning of Muhtasib in Wikipedia, available at: <https://ar.wikipedia.org/wiki/%D9%85%D8%AD%D8%AA%D8%B3%D8%A8>, last accessed:3-11-2017

⁸⁹ Quran, 3, 104.

⁹⁰ Is Conventional ADR is Alien to Islamic law, published by, LAW TEACHER(the law essay professionals), available at: <https://www.lawteacher.net/free-law-essays/contract-law/is-conventional-adr-alien-to-islamic-law-contract-law-essay.php>, last accessed:29-10-2017.

There should be monitors on the doctors practicing medication generally that they are qualified in there proficient, there should monitors in the medicine in the market even there should be monitors in the restaurants and food shops for the cleanness of the food and the place that they are preparing the food in and the most important is having monitors for the cleanness of the city or the area generally.

3.1.4 Wali al Mazalim (Chancellor):

Wali al Mazalim is a public officer that is appointed by the ruler of the state (king or president) and his duty in general is to settle the dispute between the people and the government.

He is (Wali Al Mazalim) a mixture of a judge and ombudsman where he has both the authority of the ruler and the function of the judge, the reason is to have the power to resolve the disputes between weak people and the strong one (government and its officers).

Originally Wali al Mazalim functions and practice was not organized before as it is today, the ruler of the state use to practice this duty in the society by himself.

The first organization even before the Islamic era was issued for this purpose were known as helf-al-fodool, in this organization the people of Makkah united with each other to support the oppress people in Makkah and return them back their right from the unjust.⁹¹

The first caliph Abu Bakr Al Siddiq announce his intention to an oppress judiciary in the first speech he made⁹² after he was appointed as a caliph of the Muslim state, where the second caliph Omar Ben Al Khattab was the first caliph that practice the

⁹¹ Muhammad ben shaker alshareef, wilayat almazalim(state ombudsman), available at: <http://www.saaaid.net/Doat/alshareef/70.htm>, last accessed:5-11-2017

⁹²see Raghیب Al Serjani, office of ombudsman in the Islamic ages(deewan al mazalim fe al osoor al islamiyah), available at: <https://islamstory.com/-/%D8%AF%D9%8A%D9%88%D8%A7%D9%86-%D8%A7%D9%84%D9%85%D8%B8%D8%A7%D9%84%D9%85-%D9%81%D9%8A-%D8%A7%D9%84%D8%B9%D8%B5%D9%88%D8%B1-%D8%A7%D9%84%D8%A5%D8%B3%D9%84%D8%A7%D9%85%D9%8A%D8%A9>, last accessed:3-11-2017.

duty of Wali Al Mazalim as he was calling all his governors every year at the hajj season and listen to people compliant against them and punish them,⁹³ even he recommends people to submit complaint against their rulers if they oppress them or prevent them their rights.

The first ombudsman office launched officially in the Islamic era was at the Abbasid caliphs, it became a unique judiciary system, as the office began to look into grievances throughout the week in a distinct place in the limits of the specific jurisdiction of his jurisdiction.⁹⁴ Were the Caliph Haroon Al Rasheed appointed Ibn Khaldoon and Jaafar Ibn yahya as an ombudsman.

The procedure for resolving the disputes by Wali Al Mazalim is totally different from the procedure followed by the judges in the courts, Wali Al Mazalim can receive any kind of dispute without exceptions as he have a Wider jurisdictions than a judge in the court, where in litigation there are different categories of civil criminal and family cases, and he can (Wali Al Mazalim) start a case or investigation even without receiving a complaint.

We can also say that the procedure of resolving the dispute through Wali Al Mazalim can be considered informal procedure from different aspects, for example Wali Al Mazalim can decide a case according to his personal knowledge without referring to a specific law or article as litigation procedure, even he can call someone as a witness in a case that he can be considered disqualified to act as a witness in the court.⁹⁵

⁹³ See the ombudsman office, published at Wikipedia website, available at: https://ar.wikipedia.org/wiki/%D8%AF%D9%8A%D9%88%D8%A7%D9%86_%D8%A7%D9%84%D9%85%D8%B8%D8%A7%D9%84%D9%85, last accessed:2-11-2017.

⁹⁴ D. Muhammad Waleed Al Abbadi, The Grievances Judiciary is a means of suppressing injustice and achieving justice, Aal Al Bayt University, available at: <http://www.aliftaa.io/Research.aspx?ResearchId=43#.WhBVxsaWY2w>, last accessed:2-11-2017.

⁹⁵ Is Conventional ADR is Alien to Islamic law, published by, LAW TEACHER(the law essay professionals), available at: <https://www.lawteacher.net/free-law-essays/contract-law/is-conventional-adr-alien-to-islamic-law-contract-law-essay.php>, last accessed:29-10-2017.

The main duty of Wali Al Mazalim is to take the right of the oppressed people from the unjust, where the main thing makes the Ombudsman duty unique and different from the duty of the judge in the court is the wide jurisdiction that Wali Al Mazalim is having that gives him the authority to resolve the dispute that the court cannot resolve, for example if the dispute was between people from different level or if the unjust party was the government or a public officer that the court cannot deal with or afraid to deal with.

It is clear from what Al-Mawdoodi said about Wali Al Mazalim that these kinds of judges (mean wali al mazalim) are specialized in the cases that fall in the following two categories;

- One party of the dispute is having power and influence that no one can stop him from his unjust except a person having strongest hand and order that require a person(Wali) having this kind of judiciary power.
- On party of the dispute is an aggressor ruler that unjust his people and take their rights, or a public officer that make an unjust rules and force the people to obey.⁹⁶

Generally, the above-mentioned rules can be considered as the Basic standards for Wali Al Mazalim and the cases that must be referred to Ombudsman.

In the modern time ombudsman have been given a big intention not only in the middle east but internationally, as it is considered a part of human rights and a protection for the people from the governments unjust.⁹⁷

⁹⁶ D. Muhammad Waleed Al Abbadi, The Grievances Judiciary is a means of suppressing injustice and achieving justice, Aal Al Bayt University, available at: <http://www.aliftaa.jo/Research.aspx?ResearchId=43#.WhBVxsaWY2w>, last accessed:2-11-2017.

⁹⁷ See the ombudsman office, published at Wikipedia website, available at: <https://ar.wikipedia.org/wiki/%D8%AF%D9%8A%D9%88%D8%A7%D9%86%D8%A7%D9%84%D9%85%D8%B8%D8%A7%D9%84%D9%85>, last accessed:2-11-2017.

3.1.5 Fatwa of Muftis:

The fatwa can be defined generally as an Islamic religious ruling a scholarly opinion on a matter of Islamic law⁹⁸, in other words it is an evaluation by a scholar (mufti) regarding a matter or a dispute when the matter or the way to resolve the dispute is not clear.

The fatwa of mufti in some of its characteristics is similar to other kinds of alternative dispute resolution like mediation and conciliation, for example they are similar in appointing a third party to resolve the dispute (mediator, mufti) by deciding the rights and duties of the parties, and all of them are considered non-binding to the party of the dispute, except arbitration as it have a binding decision and similar to litigation.

According to a valuable research the definition of the fatwa of mufti is the following:

*The Fatwa of Mufti is a non-binding evaluation opinion offered by a mufti (jurist consult) in answer to issues raised by a questioner (Mustafti) concerning a dispute or an unresolved issue.*⁹⁹

Mufti used to have his respect in the society at the early Islamic ages, even rulers and governors use to give him a special status, the muftis at that time use to be a neutral judiciary consultant, where nowadays the Islamic countries appoint a mufti of the state as an official duty,¹⁰⁰ even some non-Islamic countries appoint a mufti if the population of Muslim is high in the country.

⁹⁸Rakesh Kumar Singh, Textbook on Muslim Law, page 42, Universal Publishing co, India.

⁹⁹ Lukman Ayinla A, MUHTASIB (OMBUDSMAN) AND FATWA OF MUFTI IN NIGERIA: AN ANALYSIS OF THE IDEAL APPROACH, University of Ilorin, Nigeria, available at: <http://admin.umat.edu.pk/Media/Site/UMT/SubSites/jitc/FileManager/Spring%202016/1..MUHTASIB.pdf>, last accessed:5-11-2017.

¹⁰⁰ Is Conventional ADR is Alien to Islamic law, published by, LAW TEACHER(the law essay professionals), available at: <https://www.lawteacher.net/free-law-essays/contract-law/is-conventional-adr-alien-to-islamic-law-contract-law-essay.php>, last accessed:29-10-2017.

The fatwa of mufti is always valuable to the Muslim societies generally even it is non-binding, and no one in the state have the authority to change the fatwa of the mufti except the mufti himself and according to a specific circumstance.

Historically the effectiveness of the fatwa and its ability in resolving and decreasing the disputes between the parties is proved, the mufti usually resolve the dispute between the parties relying on a similar previous cases or by diligence, and reasoning for making new rules and decision based on Quran and Sunnah.¹⁰¹

Fatwa of Mufti can also help in decreasing the disputes that may arise in the future by publishing new fatwas to the conflicting issues arise in the society continuously by the mufti or fatwa institutions that hold a respect in the society such as al-Azhar in Egypt.

The main different between litigation and fatwa of mufti is that in litigation the judge declare the hokum (judgement) as a binding decision and it is limited to a specific person or people, where the fatwa of mufti is non-binding and general to everyone.

3.2 Interuational Dispute Resolution Mechanism for Islamic Law:

Dispute resolution of the Islamic finance contract is considered one of the biggest challenges facing Islamic finance institutions and Islamic banking internationally, the main reason is the nature of Islamic finance contracts that it must be in correspondence with Islamic rules and principles, flexible, legal, and in accordance to the law governing the contract, meaning that Islamic finance contract must be drafted in such a way that it must be comply with Islamic principles and the civil law of the governing law of the contract to be valid and forcible in the civil court.

¹⁰¹ Md. Zahidul Islam, Provision of Alternative Dispute Resolution Process in Islam, IOSR Journal of Business and Management, available at: <http://iosrjournals.org/iosr-jbm/papers/Vol6-issue3/E0633136.pdf>, last accessed: 1-11-2017

3.2.1 Making International Legal Framework for Dispute Resolution:

Making successful international legal framework for Islamic banking dispute resolution depends on the types of the dispute resolution required by the clients of Islamic banking in general.

Islamic banking and finance industry which is one of the fastest growing industry¹⁰² constitute many clients which make the demand for Shariah based dispute resolution mechanism increased day after another.

Islamic finance industry all over the world need a united authority that can make a codified Islamic principle in the form of law to be applied internationally, different school of thought can have a different opinion for the same issue or the subject matter and this can be a hindrance for making international legal framework for Islamic finance.

The ruling of secondary issues in Islam is not definitive in nature¹⁰³ even the opinion of (AL-AZHAR)¹⁰⁴ is considered as unbinding religious opinion, where it is one of the most respected Islamic institution in the Muslim world and it have a very respected scholar.

Usually every Islamic banking and finance industry are having their own Shariah advisory board, and by this board the industry justify that its transaction is with accordance to Islamic principles, this will cause a contrary ruling about the Shariah compliance of the same transaction from one industry to another, also some time the industry may have lack of competent Shariah board members which may cause to inadequate rolling for the industry shariah compliance transaction¹⁰⁵,

¹⁰² Global Islamic banking assets under management are currently estimated at just over \$1 trillion and are expected to reach \$4 trillion by 2020. See "The Rise and Rise of Islamic Finance" Written by African Business Magazine Monday, November 19, 2012, available at <http://africanbusinessmagazine.com/uncategorised/the-rise-and-rise-of-islamic-finance/>.

¹⁰³ Wikipedia, (Sources of sharia), available at: https://en.wikipedia.org/wiki/Sources_of_sharia, last accessed: 10-7-2017.

¹⁰⁴ It is a religious university in Cairo, Egypt. Founded in 970 or 972 as a madrasa, or center of Islamic learning, its students studied the Qur'an and Islamic law in detail, along with logic, grammar and rhetoric.

¹⁰⁵ Prof. Dr. Mohamad Akram Laldin DUTIES AND RESPONSIBILITIES OF SHARIAH BOARDS FROM A LEGAL AND REGULATORY PERSPECTIVE, Available at : <http://amanjeacademy.com/articles/item/duties-and-responsibilities-of-shari-ah-boards-from-a-legal-and-regulatory-perspective>, last accessed: 25-7-2017.

The interpretation of Islamic principles is considered the most important and basic tools for strengthen the Islamic finance industry according to some leading banks in the sector¹⁰⁶ these kinds of problems make some uncertainty about how business works in Islamic banking institutions.

Shariah can be interpreted by different scholars who are from different school of thoughts, this interpretation will result in different fatwas on the same subject matter, in result every Islamic finance industry will have some transactions that are prohibited according to another Islamic finance industry, these things will result in many conflict in Islamic finance dispute resolution regulatory frame work.

There are many research paper and authors are saying that there must be an international legal frame work for Islamic finance¹⁰⁷, this is one of the main Islamic finance issues that is usually presented in every conference, and discussed in so many research papers of Islamic banking and finance.

The main purpose of Islamic banking and finance institutions is to run the business in compliance with Shariah , by avoiding every kind of transaction that include interest (Riba) or any other prohibition in Islam.

This can be done by making an international legal frame work, that is recognized around the world for the purpose of Islamic finance litigation and dispute resolution , and this frame work to be in the form of codified and standardized form that can be used in the court or arbitration tribunals without any conflict on the interpretation of the same, a leading example for the same is Shariah Advisory council (SAC) which was proved by Central Bank of Malaysia (Bank Nigara) for harmonizing Islamic banking function and in case of any dispute or matter regarding Islamic business the central bank of Malaysia will consult the SAC for the issue and other Islamic institutions can also refer to SAC for advice

¹⁰⁶Abdulkarim Al Dohni , *The legal and regulatory aspects of Islamic banking, a comparative look at the united kingdom and Malaysia* , Routledge research in finance and banking law, 2017, London.

¹⁰⁷ Shanmugam, B. and Zahari, Z. R. (2009). *A Primer on Islamic Finance*, (Charlottesville, VA: Research Foundation of CFA Institute), p. 93.

or ruling of Islamic finance issues, making SAC binding for the parties, arbitrator, and court in Islamic finance disputes.¹⁰⁸

There are many international industry that are made for the purpose of developing the regulatory frame work and services of Islamic finance such as Islamic Financial Services Board(IFSB), The International Islamic Financial Market(IIFM), The International Islamic Rating Agency and The Accounting and Auditing Organization for Islamic Financial Institutions(AAOIFI)¹⁰⁹, These Organizations played a very important roles for development of the Islamic finance industry by making different legal frame work for the activity of the industry in compliance with Shariah in every corner of Islamic finance business.

3.3 Composed Dispute Settlement Process in Islamic Finance:

3.3.1 Med-Arb (a combination of Sulh and Tahkim):

The Med-Arb is a kind of alternative dispute resolution that includes a combination of arbitration and mediation process were the third party (mediator or arbitrator) starts resolving the dispute by mediation and if all issues are not resolved, it converts to arbitration to resolve the remaining issues by arbitration with a binding decision on the parties.

Almighty Allah bring together arbitration along with mediation in the same verse of Surat Al-Nisa at the holy Quran:

'And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people, if they both desire reconciliation, allah will cause it between them, indeed. Allah is ever knowing and acquainted (with all things)'¹¹⁰

¹⁰⁸ Abdulkarim Al Dohni , The legal and regulatory aspects of Islamic banking, a comparative look at the united kingdom and Malaysia , Routledge research in finance and banking law, 2017, London, page 202.

¹⁰⁹ Aida Maïta, Dr, Aida (2014) "Arbitration of Islamic Financial Disputes,"Annual Survey of International & Comparative Law: Vol. 20: Iss. 1, Article 7, available at : <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1183&context=annlsurvey>, last accessed: 3-8-2017.

¹¹⁰ Quran, 4,35.

The Commission of ottoman Justice, Majallah Al-Ahkam Al-Adlyyah, (Attoman civil code) which is considered as the first attempt to codify Islamic law, admit Med-Arb as a legal dispute resolution mechanism¹¹¹

There are many differences between mediation and arbitration generally and one of the fundamental differences regards to the person or the party that responsible to take the final decision on the dispute resolution, the arbitrator usually have the power of the judge in resolving the dispute between the parties and the process of resolving the dispute is similar to litigation process in hearing the case, providing evidence, hearing the witnesses and having a binding process over the party, in contrast mediator is a third party that that used to regulate the conciliation and negotiation process between the parties for helping both parties to reach a proper solution to the dispute by themselves were all what he can is to give them suggestions and solutions which is not binding over the parties and they have the right to accept or refuse.

We can say that resolving the dispute throw litigation which is similar to arbitration is much complicated and costly than mediation between the parties without going throw the long legal procedure even the big amount of cases in the court is another reason, this can always support the parties of the dispute restoring to alternative dispute resolution generally.

The marked development to mediation in the 70th of the last century for resolution of the commercial and other disputes resulted to a growing interaction to Med-Arb mechanism, even a large number of commercial industries said that in combining

¹¹¹ Commission of ottoman Justice, Majallah Al-Ahkam Al-Adlyyah,(Attoman Crvrl code), article 1851, Istanbul,

Turkey, 1305, available at:

<https://www.google.jo/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwi6IMDmicHWAhXBPRoKHbwyAf8QFggvMAE&url=http%3A%2F%2Facademic.ju.edu.jo%2Fa.hayajneh%2FLists%2FAnnouncements%2FAttachments%2F78%2F%25D9%2585%25D8%25AC%25D9%2584%25D8%25A9%2520%25D8%25A7%25D9%2584%25D8%25A3%25D8%25AD%25D9%2583%25D8%25A7%25D9%2585%2520%25D8%25A7%25D9%2584%25D8%25B9%25D8%25AF%25D9%2584%25D9%258A%25D8%25A9.doc&usq=AFQjCNFoJ-PZX8V3IQcsApmwhEHlwHbFZw>, last accessed:19-10-2017

mediation with arbitration for dispute resolution is a good thing and it results to an effective sequels like less costs and much justice.¹¹²

Med-Arb is characterized in its combination between arbitration and mediation in such a way that when the parties start to resolve their dispute by mediation in case the dispute is not resolved the parties don't need to appoint a new arbitrator to resolve the dispute that have no idea about the dispute and need to study the case again costing more money and time in this issue, but the mediator of the case will act as an arbitrator and resolve the dispute in less time and cost to the parties.

Still this does not mean that using Med-Arb for resolving the dispute have no risk at all, the third party that resolve the dispute (mediator and arbitrator) may not be able to practice the job of mediator and arbitrator effectively and properly that can guarantee the success of the process, the third party can be sympathies in the process of mediation to one side of the dispute parties which can effect when he acts as an arbitrator later and when he have to rely on the legal procedure and the evidence of the case to decide the case away from the negotiation that have been made between the parties in the mediation process.¹¹³

3.3.2 Med Muh :(Sulh and Muhtasib Combination):

Med-Muh is a combined alternative dispute resolution that consists of a mixture of Mediation (Sulh) and Ombudsman (Muhtasib).

It is used usually to resolve the dispute arises between the financial institutions (bank) and its clients (customer)¹¹⁴, where in Med-Muh the neutral third-party start resolving

¹¹² Mark Batson Baril and Donald Dickey, MED-ARB: The Best of Both Worlds or Just A Limited ADR Option?, available at: <https://www.mediate.com/pdf/V2%20MED-ARB%20The%20Best%20of%20Both%20Worlds%20or%20Just%20a%20Limited%20ADR%20Option.pdf>, last accessed:29-10-2017.

¹¹³ Laura luzano, can a Med-Arb serve in tow processes?, available at: <http://www.mediate.com/articles/LozanoL1.cfm>, last accessed:1-11-2017

¹¹⁴ Umar A. Oseni Dispute Resolution in Islamic Banking and Finance: Current trends and Future Perspectives, International Islamic University of Malaysia (IIUM), 2009, available at: <https://poseidon01.ssrn.com/delivery.php?ID=735105085006005013089072127008066106120009055009062036075097126085093102127076083094009013096038009044113127094127084107117077031087>

the dispute by trying to facilitate the mediation process between the parties to resolve the dispute amicably and in case he failed to do (to resolve the dispute by mediation) he act as an ombudsman to resolve the dispute.

The neutral third party must be an expert in Islamic alternative dispute resolution mechanism and to have enough knowledge in Islamic banking law and principles to be able to solve the dispute in comply to shariah.

The mechanism of Med-Mub is similar to the mechanism of Med-Arb in resolving the dispute meaning that in case that the natural third party failed to resolve the dispute by mediation his judgment or decision as an Ombudsman (Muhtasib) will be similar to Arbitrators one, meaning that it is binding to the party, irrevocable and there is no appeal in the court against it.

CHAPTER IV: THE EMERGENCE OF ISLAMIC BANKING AND FINANCE INDUSTRY IN PAKISTAN AND OTHER COUNTRIES:

4.1 Islamic Banking and Finance Principles and Instruments

Islamic finance means in general, the financial transactions and activities which are convenient to shariah law.

Islamic financial system is totally different from the classical financial system in a way that it (the Islamic financial system) take its rules and principles from the Shariah (different Islamic sources), and to understand Islamic financial institutions rules and principles and how it works we must refer to the history of Islamic financial system to understand how it works and what are the objective and principles of the Islamic financial system by understanding the way that Shariah resolve ideological and religious issues of the economic in the society to regulate people life and there monetary dealing in the society.¹¹⁵by a solid principles like prohibition of Reba(interest), Gharar (uncertainty), loss-profit sharing etc.

Islamic finance system is based on a noble humanity principles that are unavailable in the classical financial system such as collecting Zakat from rich people and give it to the poor to make balance in the society.

The main principle of Islamic banking industry is avoiding prohibited transactions according to shariah such as transactions having Riba (interest) and gharar (uncertainties in the contract) which is not limited to usury but comprises interest at any form of debt according to the unanimity of Islamic scholars.¹¹⁶

Principles of shariah law are involved in the current Islamic banking principles over the years in order to control the business of Islamic banking and replace conventional

¹¹⁵ Nailya Akhtyamova, Mikhail Panasyuk and Rustam Azitov, *The Descriptive Feature of Teaching of Islamic Economics: Philosophy, Principles and Practice*, Kazan Federal University, 2015, available at: <http://www.sciencedirect.com/science/article/pii/S1877042815029821>, last accessed: 19-12-2017.

¹¹⁶ Mahmoud El-Gamal, *Islamic Finance: Law, Economics, and Practice*(49-62). CAMBRIDGE UNIVERSITY PRESS. Rice University. Available at:(<http://jugg.vofasite.com/resources/Reference%20Book%2004%20-%20Islamic%20finance,%20law%20economics%20and%20practice,%20M.%20E1%20Gamal.pdf>), last accessed 1-7-2017

banking system with a shariah compliant services. The general principles of Islamic banking and finance are the following:¹¹⁷

- 1- Pure debt security is prohibited in Islamic finance and interest is replaced with a rate of return after contract is completed.
- 2- Every contract must be backed by assets in the real economic sector.
- 3- Bank deposits to be collected in profit and sharing base, not by fix predetermined rate.
- 4- Agency accomplishment and consecration contracts of trade in goods and services as well as transfer of ownership and respect obligation of debt.
- 5- Making the principles of morality and ethics core of the business conduct, and prohibit all the activity which are prohibited according to shariah by making all the Islamic banking activity under fair and equality rules.¹¹⁸

By these major principles Islamic banking has developed its system and build a wide in range system with all kinds of contract that cover every kind of financial transactions and fulfill the needs of the clients according to Islamic way.

In general, the modern Islamic banking industry are having a flexible in making the Islamic jurisprudence (Fiqh) for the financial transaction applicable to cover all the institution transactions according to shariah that cover all financial needs and transactions of conventional banks services, because the Islamic banking is link to real economic activities.¹¹⁹

AAOIFI is one of the most successful institutions in offering Islamic finance principles in compliance with Shariah law, Where till today AAOIFI published around 45 Shariah

¹¹⁷ Ibrahim Warde, ISLAMIC FINANCE IN THE GLOBAL ECONOMY 55 (Edinburgh University Press, 2000), available at: <http://www.iefpedia.com/english/wp-content/uploads/2011/03/Islamic-finance-in-the-global-economy-Ibrahim-Warde.pdf>, last accessed 3-7-2017

¹¹⁸These points were mentioned at : Maita, Dr. Aida (2014) "Arbitration of Islamic Financial Disputes," Annual Survey of International & Comparative Law: Vol. 20: Iss. 1, Article 7

¹¹⁹ Religion, flexibility and reduced risk push Islamic finance growth, published by: malaymail online(20014), available at: <http://www.themalaymailonline.com/money/article/religion-flexibility-and-reduced-risk-push-islamic-finance-growth>, last accessed: 22-7-2017.

legal standards that are accepted in Europe that such standards is capable for governing Islamic banking and finance contracts.

However such standards are not complete¹²⁰, and there must be more effort for creating standards or a set of principles that can be considered as a complete system for Islamic banking transactions, regulation, dispute resolution and anything related to the sector in compliance with Shariah law.

4.2 The Emergence of Islamic Banking and Finance Industry:

Islamic banking and finance began to appear in the global sense as indispensable new events. It has grown from a small domestic bank (Mit Ghamr)¹²¹ at Egypt to a global industry with a capital of 1.4 trillion dollar in 2011 and expected to reach more than 4 trillion dollars by 2020¹²².

Formally the first Islamic banking industry were emerged in 1975 when the development Islamic bank and Dubai Islamic Bank were established. While the first Takaful company was established in 1979.¹²³ Pakistan, Bahrain, Malaysia, and Iran apply Islamic banking in their system in 1980.¹²⁴

¹²⁰ Maita, Dr. Alda (2014) "Arbitration of Islamic Financial Disputes," *Annual Survey of International & Comparative Law*: Vol. 20: Iss. 1, Article 7

¹²¹In 1963, in Mit Ghamr, in Egypt, the first Islamic interest-free bank came into being. Mt Ghamr was a rural area and the people were religious. They did not place their savings in any bank, knowing that interest was forbidden in Islam. The Bank operated on profit sharing bases and provided interest free savings accounts, investment accounts and zakat (an obligatory Islamic tax) accounts. The Mit Ghamr project was successful, as deposits increased from 1963 to 1966. The bank was cautious, rejecting about 60% of loan applications and the default ratio was zero in economically good times. But project was eventually abandoned for political reasons. Nevertheless, it had shown that commercial banking could be organized on a non-interest basis. The Institute of Islamic Banking and Insurance, available at: (https://en.wikipedia.org/wiki/Mit_Ghamr) last accessed 5-7-2017.

¹²² (Expectations of higher volume of Islamic banking to \$ 4 trillion in 2020), reported by Economy News Baghdad, available at: <http://dinarvets.com/forums/index.php?/topic/239780-expectations-of-higher-volume-of-islamic-banking-to-4-trillion-in-2020/>, last accessed 5-7-2017

¹²³ The Fiqh Academy (Islamic Jurisprudence Academy) in 1975 set out objections to conventional insurance practice and provided the grounds for an alternative structure (Takaful).

¹²⁴ Academic activities launched with the first international conference on Islamic Economics in Makah in 1976. The first specialized academic financial research institution, the King Abdul Aziz University Jeddah, established the Center for Research in Islamic Economics in 1978. In the 1980s, Islamic banking received significant recognition and progressed in several States. Pakistan, Iran, and Sudan undertook initiatives to transform their overall financial systems to comply with Shari'a. Due to these transformations and breakthroughs in economies, in March 1981 the

After the establishment of Accounting and auditing organization for Islamic financial institutions (AAOIFI) in nineteen centuries¹²⁵ the International Islamic Fiqh Academy(IIFA)¹²⁶ and Shariah supervisory board (SSB)¹²⁷ of Islamic financial institutions started participating discussion and reviewing the financial transactions to develop Islamic financial services . The Islamic financial services started to increase significantly since that time and by 1999 there was 70 states having Islamic financial services in their system with more than 200\$ billion dollar assets¹²⁸.

The corporate sukuk bounds were establish in 2001-2002 and it made a market of billion dollars only after 3 years the first Sukuk deal was lunched the global sukuk market worth billions of dollars and attracted the investors internationally,¹²⁹making the Islamic banking industry attractive for investment by the people from other faith all over the world.

Many international arbitration center established a special branches for arbitration of Islamic finance disputes, for example the Kuala Lumpur Regional Center for Arbitration (KLRCA) which were established by The Asian-African Legal Consultative Organization

governors of the central banks and monetary authorities of the Organization of Islamic Cooperation States jointly called for further strengthening and proper implementation of the regulation, close supervision, and monitoring of Islamic financial institutions, also see (Islamic banking in Iran and Pakistan), written by Muhammad anwar, available at: (<http://www.pide.org.pk/pdf/PDR/1992/Volume4/1089-1097.pdf>), last accessed (5-7-2017).

¹²⁵ AAOIFI was established the Islamic Financial Institutions in 1990, it prepares accounting, auditing, governance, ethics and Shari'a standards for Islamic financial institutions and the industry. Professional qualification programs (notably CIPA, the Shari'a Adviser and Auditor, "CSAA," and the corporate compliance program) are presented to enhance the industry's human resources base and governance. also see <http://www.aaofi.com/aaoifirTheOrganization/Overview/tabid/62/language/enUS/Default.aspx>, last accessed; 5-7-2017.

¹²⁶ An Academy for advanced study of Islam based in Jeddah, Saudi Arabia. It was created at the decision of the second summit of the Organization of the Islamic Conference (OIC) 1974.

¹²⁷ This board may have different name in different States however, Islamic financial institutions that offer products and services conforming to Islamic principles usually have a religious board that act as an independent Shari'a Supervisory Board comprising of at least three Shari'a scholars with specialized knowledge of the Islamic laws for transacting (Fiqh al mu'amalat), in addition to knowledge of modern business, finance and economics. The SSBs study proposed financial transaction, and issue an opinion as to the compliance of the transaction to Islamic law in the form of a fatwa, which is a non-binding jurist's opinion, Institute of Islamic Banking and Insurance (IIBI).

¹²⁸ Ibrahim Warde, 2000, Islamic Finance in the Global Economy, Edinburgh University Press, p 6.

¹²⁹ Nathif J. Adam, Abdulkader S. Thomas Islamic Bonds: Your Guide to Issuing, Structuring and Investing in Sukuk.

(AALCO) in 1978 has formed a specialized department for arbitration of Islamic finance disputes between 47 members states including Bahrain, UAE, KSA, Malaysia.¹³⁰

This can prove that Islamic banking and finance industries are increasing day after another since it was emerge where the disputes of the same are increasing in such a manner that it attract the intention of the international commercial organizations around the world .

4.3 Arbitration and Governing Law Clause in Islamic Finance Contract

Nowadays arbitration is becoming familiar for the propose of Islamic finance dispute resolution in both international and domestic level, every institution established for ADR purpose are responsible for resolving the financial disputes weather these institutions are Islamic or not, and weather they are resolving Shariah compliance disputes or conventional one.

Nowadays there are many institutions for dispute resolution in the middle east and south east Asia region that are resolving Islamic finance disputes and commercial contracts, most of these institutions are having their own rules and procedures which are taken from UNICITRAL arbitration rules that are giving freedom to parties to choose their arbitrator and for the governing law purpose, and because these institutions are located in the Islamic region they have more knowledge and expert in Shariah which is helpful for resolving the dispute with more compliance to Shariah in less time and effort and it is also effected for the purpose of enforcement the arbitral award without challenging it in the court.¹³¹

These Privileges make these institutions more applicable for the propose of Islamic finance disputes resolution and for better improvement for the governing law clause in the contract, such as making the contract to be governed by the national law of the country or by English law, subject to Shariah principles in case that there is any conflict between Shariah principles and the governing law, for example in the case of National Bonds Corporation

¹³⁰ Julio C. Colon, (Choice of Law and Islamic Finance), TEXAS INTERNATIONAL LAW JOURNAL [VOL. 46:411, available at: <http://www.tilj.org/content/journal/46/num2/Colon411.pdf>, (last accessed 3-8-2017).

¹³¹ Aida Maita, (2014) "Arbitration of Islamic Financial Disputes," Annual Survey of International & Comparative Law: Vol. 20: Iss. 1, Article 7

PJSC v (1) Taaleem PJSC and (2) Deyaar Development PJSC [2011] DIFC CA 001¹³², the governing law clause was the following:

“This Agreement is governed by the laws of Dubai, UAE to the extent these laws are not inconsistent with the principles of Sharia (as set out in the Sharia Standards published by Accounting and Auditing Organization of Islamic Financial Institutions and/or Islamic Fiqh Academy of Organization of Islamic Conference), in which case the principles of Sharia will prevail”.

These kinds of governing law clause are helping the arbitrators and the judges in case of any disputes to find out the Shariah principles related to the contract from a specific source like AAOIFI and also provide more certainty in the application of Shariah principles for resolving Islamic finance disputes.

Some cases like Shamil Bank Case had provided a very strong material for further research about the Shariah compliance and the governing law clause in Islamic banking contracts in such a manner that Shariah will not cause any conflict to the constitution or to the national law of the country governing the contract, many scholars and researchers all over the world made different articles and researches about Islamic finance and governing law clause of Islamic finance¹³³

Many authors suggested that there must be some standardization for Islamic finance industry, still it is not one of the major problems of Islamic finance but it can play a very important position in development of the sector, they argue that when Islamic finance industry in the same jurisdictions will have a different decision for the same subject matter there will be uncertainty and confusion

¹³² Available at: <http://difccourts.ae/ca-0012011-national-bonds-corporation-pjsc-v-1-taaleem-pjsc-and-2-deyaar-development-pjsc/>, (last accessed 22-7-2017)

¹³³ See The implications for the Islamic finance market of The Investment Dar Company KSCC v Blom Developments Bank Sal [2009] EWHC 3545 (Ch) also see Islamic Finance Litigation written by, Kilian Bälz, published by, Qfinance. Also see Alison Wirtz, "Resolving Islamic finance disputes through international commercial arbitration in the Gulf Region", University of Chicago Law School Chicago Unbound (Law School International Immersion Program Papers No. 24, 2016).

for the scholars and investors, it will also cause a confusion for the practitioner of Islamic finance sector, for example some Islamic bank may be unable to use the product of other Islamic bank because of the different interpretation by the banks for Shariah issues.¹³⁴

According to Islamic school's appointment of arbitrator is revocable at any time before the announcement of the award, only if they made a condition that the arbitration agreement is not revocable then it is binding, except the Maliki school considering arbitration agreement as an irrevocable, claiming that the almighty Allah ordered us in Quran to fulfil the contracts¹³⁵ considering the arbitration as a binding contract.¹³⁶

This can be a base stone that clear the importance of arbitration clause or agreement, meaning that there should be written clause in the agreement or a specific agreement for arbitration that in case of any dispute between the parties the resolution of the same will be by arbitration, to make the arbitration binding to the contract.

4.4 Arbitration Future in The Industry of Islamic Banking and Finance

Since the first Islamic banking DIB was established on 1975¹³⁷ till today it is developing in a very clear since by having more capital Islamic products and attracting more investors not only from Muslim world but internationally, The World Bank has mentioned the important of Islamic Banking and finance by reporting the following:

'Islamic finance has emerged as an effective tool for financing development worldwide, including in non-Muslim countries. Major financial markets are

¹³⁴ see Research paper (no: 29/2011), INTERNATIONAL CONVENTION FOR ISLAMIC FINANCE: TOWARDS STANDARDISATION, by: HAKIMAH YAACOB, MARJAN MUHAMMAD and EDIB SMOLO, published by: ISRA Research, available at: <http://www.ifikr.isra.my/documents/10180/16168/29.pdf>, (last accessed: 24-7-2017)

¹³⁵ The Holy Quran, 5:1.

¹³⁶ Abdulrahman Yahya Baamir, Shari'a Law in commercial and banking arbitration (law and practice in Saudi Arabia) page 73, Ashgate Publishing Limited, England.2010

¹³⁷ Dubai Islamic bank (DIB) Is the first Islamic bank established at 1975 and till today it is one of the leading Islamic banking industry, see (World's first Islamic bank continues to drive industry) available at: <https://www.worldfinance.com/banking/worlds-first-islamic-bank-continues-to-drive-industry>, last accessed: 12-7-2017.

*discovering solid evidence that Islamic finance has already been mainstreamed within the global financial system – and that it has the potential to help address the challenges of ending extreme poverty and boosting shared prosperity’.*¹³⁸

Islamic banking and finance institutions are having annually growth of 16%¹³⁹, the number of Islamic banking contracts and agreements will keep in increasing also, and the disputes arising from the same will be increasing as will.

Using litigation for Islamic finance disputes resolution seems to be not that much effective for achieving the target of Islamic banking as to make Islamic banking in compliance with Shariah principles:

‘Litigation, under the foreign law of any jurisdiction, presents various challenges to Islamic finance parties, including lack of enforcement mechanisms, non-conformance with Shari'a principles and a questionable level of judicial competence with regard to the subject matter. At the same time, religious constraints will likely continue to impede the Islamic financial development in relation to Shari'a codification, meaning that industry will continue to struggle as it attempts to harmonize the Shari'a Islamic Law with the Civil or Common Law systems that are used by most nations of the world’.¹⁴⁰

Islamic banking institutions are different from conventional banks that it have its own system and characteristics which are compliance with Shariah and adjudicating its disputes by litigation of a national law will create conflicts with Shariah principles and the purpose of Islamic banking will be dismissed, if the litigation will give a contrary judgments to Shariah.

¹³⁸ See (Brief Islamic finance), world Bank report(2015) available at: <http://www.worldbank.org/en/topic/financialsector/brief/islamic-finance>, last accessed: 12-7-2017.

¹³⁹ Muhammad Aqib Ali, (Evolution & Development of Islamic Banking – The Case of Pakistan), available at: <http://www.ojs.unito.it/index.php/EJIF/article/view/777/764>, last accessed; 12-7-2017.

¹⁴⁰ Aida Maita, (2014) "Arbitration of Islamic Financial Disputes," Annual Survey of International & Comparative Law: Vol. 20: Iss. 1, Article 7

Using alternative dispute resolution(ADR) seems to be the most effective mechanism for Islamic banking disputes, the arbitration procedure have many points that are making it more good than litigation for adjudicating Islamic banking disputes.

ADR have many advantages that make it more suitable for Shariah compliance dispute , for example the parties can chose there preferred arbitrator in the time of contract so in case of any dispute arising , there will be no many risks that will face the parties such as the competency of the judges in the fields of Islamic law and many other advantages that make ADR generally and specially arbitration a very great option and will play a very Important round in the future of Islamic banking and finance development and future.

Many authors recommended using alternative dispute resolution specially arbitration for Islamic banking and finance cases¹⁴¹, the use of that is it can face the abstracts that always face Islamic banking such as different of common and civil law with Shariah , and some other issues related for the choice of law in the contract.

Other points make arbitration better than litigation for the future of Islamic banking and finance is the enforceability of the foreign judgement¹⁴² , the decision of the court can be challenged in the higher court by appeal, were in arbitration the decision is final and must be enforced.

There are so many international arbitration treaties having legal frame work for insuring that the arbitration agreement can save the rights of the parties, where the parties can chose there preferred way of arbitration, and appoint the arbitrator they like.

The first treaties for this purpose is New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) , and according to this convention the court can refuse arbitral award in a very limited circumstance, and for gulf countries the

¹⁴¹ MARY B. AYAD, HARMONISATION OF INTERNATIONAL COMMERCIAL ARBITRATION LAW AND SHARIA,

Macquarie University. Department of Business Law(2009), available at :

<http://www.researchonline.mq.edu.au/vital/access/manager/Repository/mq:19917>, last accessed: 13-7-2015

¹⁴² Alison Wirtz, "Resolving Islamic finance disputes through international commercial arbitration in the Gulf Region", University of Chicago Law School Chicago Unbound (Law School International Immersion Program Papers No. 24, 2016), available at:

http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1031&context=international_immersion_program_papers, last accessed: 13-7-2017

gulf corporation council had enacted a convention for the enforcement of foreign courts judgments, but the court can refuse to enforce the same if it is contrary to Shariah¹⁴³, at the same time if the disputes were resolved by arbitration the arbitral tribunals can be more expert in Shariah principles to insure the enforcement.

Arbitration can insure Shariah compliance resolution for Islamic finance disputes, in the case of **Sanghi Polyesters Ltd (India) V. The International Investor KCSC(Kuwait)[2001] C.L.C**, having an Islamic finance contract and using arbitration as dispute resolution mechanism and London as a place of arbitration , the agreement contains the following:

“This dispute shall be governed by the Laws of England except to the extent it may conflict with Islamic Shari'a, which shall prevail”.¹⁴⁴

The arbitrators was expert of Islamic finance and the dispute was governed by English law to the extent that it should not have any conflict with Islamic law, the judgment of the arbitral tribunals where challenged in the English court, but the court held that there is no any issue regarding the law of England and Wales.¹⁴⁵

Arbitration is more effective for the growth of Islamic banking and finance by avoiding one of the main abstracts that facing the Islamic finance issue (governing law and Shariah compliance), with giving the parties of the agreement the choice of preferable law they want chose in there agreement.

¹⁴³ ibed

¹⁴⁴ Aida Maita, (2014) "Arbitration of Islamic Financial Disputes," Annual Survey of International & Comparative Law: Vol. 20: Iss. 1, Article 7

¹⁴⁵ See summary of the case at : <http://www.internationallawoffice.com/Newsletters/Arbitration-ADR/United-Kingdom/CMS-Cameron-McKenna/Appeal-on-Points-of-Islamic-Law-outside-English-Courts-Jurisdiction>, last accessed: 14-7-2017.

CHAPTER V: ISLAMIC BANKING AND FINANCE DISPUTE RESOLUTION

CURRENT MODE:

The current practice of dispute resolution in many countries practicing Islamic finance including Pakistan prove that it is inadequate specially in interpretation of shariah and application of its principles.¹⁴⁶

Pakistan's law is a common law system which is adopted from the English law and such law are practiced in all the courts and tribunals of the country, but at the same time Pakistan had taken different steps towards Islamization of the country legal system such as : article 2(A) of the constitution stating that Islam is the state religion of Pakistan¹⁴⁷, and creation of federal Shariah court at 1973 etc.

Nowadays Islamic finance industry are coming more global day after another, the disputes which are arising from an international Shariah compliant contracts are increased as well. There are many challenges that are facing the Islamic industry like lack of legal frame work for resolution of the Islamic finance disputes, this problem compel the Shariah complaint contract to be governed by the national law which is secular (common or civil law system).¹⁴⁸

In this case the Islamic finance industry will not be able to avoid the risk management practices of the conventional industries in the time of crises and the conventional remedies will continue to be used for Islamic (non-conventional) industry because it have no legal procedure for dispute remedies.

At the beginning when the Islamic industry where emerging the disputes of Islamic banking where heard by the court which have jurisdiction to hear the case, and the court use to deal

¹⁴⁶ Umar A. Oseni, "Dispute Resolution in Islamic Finance: A case analysis of Malaysia", 8th International Conference on Islamic Economics and Finance, Qatar, 2011, available at:

https://www.researchgate.net/publication/265143356_DISPUTE_RESOLUTION_IN_ISLAMIC_FINANCE_A_CASE_ANALYSIS_OF_MALAYSIA , last accessed (25-4-2017)

¹⁴⁷ See. Art 2-A of the Constitution of the Islamic republic of Pakistan.

¹⁴⁸ English Common Law and the French Civil Law have been accepted as the most common legal systems in the world including most Middle Eastern States where Shariah regulates limited aspects of the law. Islamic financial contracts are treated no different than any other commercial contracts which are not regulated by Shariah in most Middle Eastern jurisdiction.

with the dispute as any other case by adjudicating it by the domestic or international related law without giving any interest or attention to Islamic rules and principles for adjudicating the dispute where there was no any regulatory framework for Islamic banking dispute resolution.

Malaysia is one of the first states that started Islamic banking¹⁴⁹, most of the Islamic banking disputes in that early age of Islamic banking industry in Malaysia were litigated and published, and there is a very interesting case study¹⁵⁰ that point out how the Islamic banking disputes were developed.

The courts of Malaysia were dealing with the dispute as a conventional one by applying the common law system of the country without looking to the Islamic principles in relation with the case, most of the time the court is in favor of the bank when they apply the classic common law, in result a question to the court were raised that weather the Islamic banking practices is compliant to Shariah principles or not?.

In the case of (**Arab-Malaysia v Taman Ihsan Jaya Sdn. Bhd. & Onor [2008] 5 MLJ 631**) the high court said that the contract of Bay Bithaman Ajil¹⁵¹ in this case was null and void according to Shariah but the appeal court in 2009 revoked that decision and further that the matter of Shariah principles should not be decide by the civil judges and it should be decided by the Shariah judges who are expert in the field¹⁵².

This case was a very important in the development of Islamic banking in Malaysia because it concluded that there should be an expert judge for Islamic banking and finance disputes and such disputes should not be adjudicated by the conventional manner.

¹⁴⁹ Malaysia was one of the first Muslim States to commit to Islamic banking and is exceptional among other Muslim jurisdictions where Islamic banking cases have been published in various law reports such as the Malayan Law Journal and the Current Law Journal.

¹⁵⁰ Hasan, Zulkifli and Asutay, Mehmet (2011) 'An analysis of the Courts decisions on Islamic finance disputes.', *ISRA International journal of Islamic finance.*, 3 (2). pp. 41-71.

¹⁵¹ This concept refers to the sale of goods on a deferred payment basis at a price, which includes a profit margin agreed to by both parties. Like Bai' al 'inah, this concept is also used under an Islamic financing facility. Interest payment can be avoided as the customer is paying the sale price which is not the same as interest charged on a loan. The problem here is that this includes linking two transactions in one which is forbidden in Islam. The common perception is that this is simply straightforward charging of interest disguised as a sale.

¹⁵² For more information about this case it is available at : <https://zulkiflihasan.files.wordpress.com/2008/11/arab-malaysian-finance-bhd-2008-5-mlj.pdf>, last accessed 7-7-2017

After this case in 2009 a Shariah advisory council was established after the central bank of Malaysia passed act No.701 and held that every court or arbitration center is obliged to refer to the council before passing any judgment with regard to Shariah matters.¹⁵³

In the case of United Arab Emirates there are three main centers for Arbitration of Islamic finance disputes: Dubai International Arbitration center(DIAC), the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) and the International Islamic Centre for Reconciliation and Commercial Arbitration (IICRCA).

Such arbitration centers are governed by experts of Islamic finance and Shariah in general were the parties are allowed to choose the law they prefer for governing the contract in a conditions that the rules of the contract must not be in contrivance with shariah principles.¹⁵⁴

5.1 Litigation Current Mode:

English and New York law is the preferable law for the parties of Islamic finance contract since the emergence of the industry,¹⁵⁵ even the Islamic finance institutions are having the same in the case of international contracts which is a good evidence for the lack of regulatory frame work for dispute resolution in Islamic banking and finance sector from one side and it also prove that the conventional banks and finance are having a very good rules and regulation for disputes resolution, were both English and New York law are very good in enforcement of final decree on the parties of the contract.

Some Islamic finance institutions prefer litigation process in case of any disputes rather than alternative dispute resolution (ADR), the reason of that maybe because of the doubt

¹⁵³ Section 56 of Central Bank 2009 Act give an important jurisdiction to Shari'a Advisory Council to refer to Shari'a Advisory Council for ruling from court or arbitrator:(1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shari'a matter, the court or the arbitrator, as the case may be, shall-(a) Take into consideration any published rulings of the SAC; or (b) Refer such question to the SAC for its ruling.

¹⁵⁴ Julio C. Colon, (Choice of Law and Islamic Finance), TEXAS INTERNATIONAL LAW JOURNAL [VOL. 46:411, available at: <http://www.tilj.org/content/journal/46/num2/Colon411.pdf>, (last accessed 3-8-2017).

¹⁵⁵ The Global Islamic Finance Report 2011: p. 238.

they have on it as they believe that ADR have a legal uncertainty and they believe that litigation is better.¹⁵⁶

The parties to Islamic finance contract in order to make the contract is subject to Shariah principles they make a reference to Shariah in the part specified for the governing law clause in the contract, one of the most famous cases is the case of **Shamil Bank of Bahrain v. Beximco Pharmaceuticals (the shamil case)**¹⁵⁷ in this case the choice of law agreement contain the following:

*Subject to the principles of the Glorious Shariah, this agreement shall be governed by and construed in accordance with the laws of England.*¹⁵⁸

In this case because of the Shariah non-compliance both high court and the court of appeal held that the agreement is null and void and the argument of the defendant was dismissed by the courts, the courts held that the Shariah principles cannot be applied in the agreement.

After this judgement and some other judgments for similar cases after that like the decision of high court in *Dar v. Blom*¹⁵⁹ case, the Islamic finance institutions started to remove shariah reference from there contract and they include a (waiver of Shariah defense) to

¹⁵⁶ At the Asia Pacific Regional Arbitration Group Conference 2011, Hakimah Yaakob, of the International Shari'a Research Academy for Islamic Finance in Kuala Lumpur, stated that, following a survey that she conducted of 10 Islamic banks and 12 takaful operators (Islamic insurance providers) in Malaysia, she found that there was a 'credit policy' in many of these institutions not to include alternative dispute resolution clauses in their contracts, but to opt for litigation instead. This was said by the financial institutions to have been done, in many cases, in order to avoid credit risks for legal uncertainty. The preference for litigation was further confirmed by enquiries made of arbitration centers in Malaysia for the purpose of this report. See "Dispute Resolution in Islamic Finance" the Global Islamic Finance Report 2012, available at http://www.klgates.com/files/Publication/0b2f56b0-d738-4217-85ee-6670f2101659/Presentation/PublicationAttachment/3e2c3cd0-43fd-4ef4-ac96-700e33340e6a/Dispute_Resolution_in_Islamic_Finance.pdf, last accessed 20-7-2017.

¹⁵⁷ *Shamil Bank of Bahrain v Beximco Pharmaceuticals Limited and Others* [2004] 1 Lloyd's Rep 1 28. In this case the defendant Beximco Pharmaceuticals Ltd and the other borrowers entered into a murabahah agreement with the plaintiff in 1995. After the defendants defaulted and after a series of various termination events under the agreements, the plaintiff finally brought the case to court and made an application for summary judgment.

¹⁵⁸ See Ismaeel Elnasri, (Shariah Law in the English Courts), available at <https://www.linkedin.com/pulse/shariah-law-english-courts-shamil-bank-bahrain-vs-beximco-elnasri>, last accessed : 23-7-2017

¹⁵⁹ See *The implications for the Islamic finance market of The Investment Dar Company KSCC v Blom Developments Bank Sa* [2009] EWHC 3545 (Ch), available at: <http://www.nortonrosefulbright.com/knowledge/publications/27334/the-implications-for-the-islamic-finance-market-of-the-investment-dar-company-kscc-v-blom-developments-bank-sa>, last accessed at 22-07-2-17.

their contracts meaning that if the agreement is invalid under shariah law the parties agree to waive any argument in case of any dispute.¹⁶⁰

5.1 Arbitration Current Mode

Most of the states that heavily involved in the Islamic finance are having a consensus that arbitration is binding among the parties of the contract if the agreement was to arbitrate in case of any disputes, this can be seen clearly in Saudi Arabia Arbitration law ¹⁶¹, UAE Law¹⁶², and Bank Nigari Malaysia Act passed at 2009.

For the purpose of Islamic finance institution dispute resolution there is no any consensus among these institutions for a specific regulatory arbitration framework that is followed,¹⁶³ One of the most valued research regarding this is (The Shari'a Factor in International Commercial Arbitration) writing by Fiasal Kutty, in this research he highlighted the acceptance and development of the commercial arbitration in the middle east and what are the main facts that create concern towards Shariah in the international commercial arbitration, by exploring the international commercial arbitration regulations and the current mode of arbitration for international commercial arbitration in the middle east specially in KSA and UAE, with explaining the current differences by the international arbitrations with these Muslim countries from different prospective like public policy and capacity of the arbitrator.¹⁶⁴

Nowadays Islamic arbitration institutions is trying to correspond with international commercial arbitration specially UNCITRAL rules and regulation for making Islamic

¹⁶⁰ See Islamic Finance Litigation written by, Kilian Bälz, published by, Qfinance, available at : <http://www.financepractitioner.com/contentFiles/QF02/gpflqc6p/1b/0/islamic-finance-litigation.pdf>, last accessed 3-8-2017

¹⁶¹ Royal decree no. m46, Saudi Arabia Law of Arbitration, 03-07-1983, available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=207347, last accessed: 26-9-2017.

¹⁶² UAE civil procedural code , federal law no 11, 1992, article: 203. Available at: <https://legaladvice.com/legislation/143/uae-federal-law-11-of-1992-concerning-issuance-of-civil-procedures-code>, last accessed:26-9-2017.

¹⁶³ Aida Maita, (2014) "Arbitration of Islamic Financial Disputes," Annual Survey of International & Comparative Law: Vol. 20: Iss. 1, Article 7.

¹⁶⁴ Faisal Kutty, The Shari'a Factor in International Commercial Arbitration, 28 Loy. L.A. Int'l & Comp. L. Rev. 565 (2006). Available at: <http://digitalcommons.lmu.edu/ilr/vol28/iss3/4>, (last accessed 15-7-2017)

arbitration acceptable internationally, and avoiding many abstracts that are facing it such as the decision of the court in the case of (Shamil Bank).

In the old arbitration law of Saudi Arabia 1983(for example) the arbitrator must be male and Muslim, this rule will cause conflict with international commercial arbitration,¹⁶⁵ but in the new arbitration law of (2012) the condition is that the arbitrator must be adult, having a Shariah or law degree and the arbitrator must be of good conduct.¹⁶⁶

The new Saudi law can show more correspond to the international arbitration procedure to make the Islamic law more applicable internationally for the purpose of resolving the disputes internationally.

One of the main issues that still facing the Islamic world for the purpose of arbitration is the different school of law that may lead to different provisions for the same subject matter.

The main sources of Islamic law (The Holy Quran and the Sunnah) is silent about the procedure of arbitration that should be followed such as the place of arbitration, the number of arbitrators etc. the reason is that the current trend in Muslim jurisdiction is considering Shariah principles as the law a substance rather than the law of procedures.¹⁶⁷

DR Balz, is a well-known scholar in Islamic finance and banking in one of his speech¹⁶⁸ stated that there should be no any intention for Islamization of the law in the contract of Islamic finance, but we should insert the Islamic ethics to the contract to ensure that the contract is permissible (halal) according to Shariah principles, he stated the following:

‘In Islamic finance, Sharia principles are applied as ethical principles and not as legal principles. Whereas the so-called Islamization of the law normally results in a secularization of Islamic legal rules, that is, they are codified in state-enacted laws, with

¹⁶⁵ ibed

¹⁶⁶ Aida Maita, (2014) "Arbitration of Islamic Financial Disputes," Annual Survey of International & Comparative Law: Vol. 20: Iss. 1, Article 7.

¹⁶⁷ ibed

¹⁶⁸ Kilian Bälz, Sharia Risk? How Islamic Finance Has Transformed Islamic Contract Law, this paper is based on a public lecture delivered at the Islamic Legal Studies Program of Harvard Law School (USA) on May 1, 2008. available at: <http://ilsp.law.harvard.edu/wp-content/uploads/2014/08/balz.pdf>, (last accessed 26-7-2017).

regard to Islamic finance the contrary holds true: Islamic ethics are applied to financial transactions governed by some other law¹⁶⁹

¹⁶⁹ ibed

CHAPTER VI: ARBITRATION, A VIABLE SOLUTION FOR DISPUTE IN ISLAMIC FINANCIAL INDUSTRIES:

Islamic finance industries will always struggle by trying to harmonize the Shariah law and foreign law (which is common or civil law), used by most nations of the world¹⁷⁰, there are some abstracts facing the Islamic finance institution with its fast growing and progress, which can highlight the importance of this research.

The unique characteristics of Islamic finance needs experts with a proper knowledge and background for adjudicating its issues, therefore many authors and legal practitioner recommended using alternative dispute resolution (ADR) to resolve international disputes emanating from Islamic banking and finance.

CEO of the Bahrain chamber for dispute resolution (BCDR-AAA), MR. AHMAD HUSAN said that :

(The Islamic finance industry is currently valued at \$1 trillion and is growing at a significant rate of 10 per cent per year. With this growth comes the demand for alternative solutions to traditional means of settling legal disputes. As such, arbitration and mediation have an increasingly important role to play in the financial and legal sectors).¹⁷¹

Furthermore, international law students produced many researches on the subject of Islamic arbitration.¹⁷²

¹⁷⁰ Professor Andrew White, associate professor at the International Islamic Law and Finance Center in Singapore, recently stated at the Asia Pacific Regional Arbitration Group Conference 2011 that litigation is not geared towards solving Islamic finance disputes as judges often lack the education in many industry principles "Dispute Resolution in Islamic Finance" By Jonathan Lawrence, Peter Morton and Hussain Khan Gates LLP. Published first in the "Global Islamic Finance Report 2012." Available at: http://www.klgates.com/files/Publication/0b2f56b0-d738-4217-85ee-6670f2101659/Presentation/PublicationAttachment/3e2c3cd0-43fd-4ef4-ac96-700e33340e6a/Dispute_Resolution_in_Islamic_Finance.pdf, last accessed (3-5-2017)

¹⁷¹ BCDR-AAA press release "Increase in demand for alternative dispute resolution mirrors growth of the \$1 Trillion Islamic finance industry," June 10, 2012, available at: <http://www.islamic-wealth-management.net/2012/06/demand-for-alternative-dispute.html?m=1>, last accessed (14-5-2017)

¹⁷² For example: "Saudi Law and Judicial Practice in Commercial and Banking Arbitration," 2008, By A. Y. Baanir School of Law, Brunel University. "COMMERCIAL ARBITRATION IN ISLAMIC JURISPRUDENCE: A study of its role in the Saudi Arabia Context," By M.A. Al Jabra. Thesis submitted for the Degree of Doctor of Philosophy in Law of the University of Wales, Aberystwyth. 2001. "Distinction between the Concepts Mediation, Conciliation, Sulh and Arbitration in Shari'a Law, Essam A. Alsheikh, Portsmouth University, Portsmouth, United Kingdom. "HARMONISATION OF INTERNATIONAL COMMERCIAL ARBITRATION LAW AND SHARIA," 2009 Mary B. Ayad, Ph. D candidate Macquarie University. "Choice of Law and Islamic Finance," by Julio C. Colon, J.D. candidate at The University of Texas School of Law (2011).

This chapter is focusing in Arbitration of Islamic banking and finance disputes by analyzing some of the previous cases of Islamic finance disputes in Muslim and non-muslim countries, and trying to find some solutions for the abstracts facing Islamic banking and finance disputes settlements.

6.1 Arbitration Clause for Islamic Commercial Contract:

According to the four Islamic school the arbitration contract is considered as the corner stone that the arbitrators gets its power from in making the decision or the award of the arbitration binding on the parties, as it can be an evidence that parties are resolving the dispute by arbitration with their consent.

In the famous dispute case between (the fourth caliph) Ali bin Abi Talib and Muawya bin Abi Sofian both parties made an written agreement to resolve the dispute by arbitration, the agreement was to resolve the dispute by two arbitrators including the arbitrators name, the time limit for giving the final award, the place that the award should be given in and the law that govern the dispute resolution process (Shariah) ¹⁷³, in this case the parties resolve their dispute by an arbitration contract hut there is no any sign or thing regarding arbitration clause in the contract (the condition in the contract to resolve the dispute between the parties if there will be any dispute in the future) in the pre Islamic era.

The four Islamic school didn't say anything regarding arbitration clause even¹⁷⁴, but this does not mean that arhitration clause is prohibited according to Shariah for many reasons, **firstly** one of the Islamic legal maxims is that The norm in regard to things is that of permissibility (Al-aslu fil-ashyaa' al-Ibahah), meaning that permissibility is the natural status of everything till there is an evidence that such thing is prohibited according to Islam.

¹⁷³ Zeyad Alqurashi, Arbitration Under the Islamic Sharia, available at: <http://nigerianlawguru.com/articles/arbitration/ARBITRATION%20UNDER%20THE%20ISLAMIC%20SHARIA.pdf>, last accessed: 29-10-2017.

¹⁷⁴ Zeyad Alqurashi, Arbitration Under the Islamic Sharia, available at: <http://nigerianlawguru.com/articles/arbitration/ARBITRATION%20UNDER%20THE%20ISLAMIC%20SHARIA.pdf>, last accessed: 29-10-2017.

Secondly the prophet Muhammad (peace be upon him) said: Conciliation between Muslims is permissible. The narrator Ahmad added in his version: "except the conciliation which makes lawful unlawful and unlawful lawful." Sulayman ibn Dawud added: The Messenger of Allah (ﷺ) said: Muslims are on (i.e. stick to) their conditions.¹⁷⁵

Thirdly the reason that there is no any existence for arbitration clause in the pre Islamic era could be that there was no importance for these king of contract and conditions where there was no complicated international trade exchanges like today, and there was no legal and law complications that may highlight the importance of such clauses and oblige the parties for the same.

Almighty Allah said: (you who have believed, fulfill [all] contracts)¹⁷⁶ meaning that to fulfill the obligations on you and arbitration clause can be an obligations or conditions that have been imposed in the trade contract, if the arbitration clause is not in contrary to shariah principles there is no issue of using it in the Islamic commercial contract.

6.2 The Important of Arbitration for Dispute Settlement of Islamic Finance Institutions.

6.2.1 Expert Arbitrator:

Arbitration forum having experience in resolution of dispute arising from Shariah based transactions have accommodate combined-law contract, such forum should discover how will the judge of the specific state will decide the question, when the judge and arbitrators are asked for making a decision regarding Shariah law some of them (party to a dispute) are un-willing to proceed for different reasons like the forum is secular or the judge is willing some time to transfer the case to an expert on the field.

For this and some other reasons some Islamic finance professionals conclude that the Islamic ADR forum is the only way that can assure that the divergence of the industry practice is reconciled¹⁷⁷.

¹⁷⁵ Sunan Abi Dawud, book 25, Hadith 24, (3594)

¹⁷⁶ Quran, 5, 1.

¹⁷⁷ Julio C. Colon, (Choice of Law and Islamic Finance), TEXAS INTERNATIONAL LAW JOURNAL [VOL. 46:411, available at: <http://www.tilj.org/content/journal/46/num2/Colon411.pdf>, (last accessed 3-8-2017).

6.2.2 Variation Opinions of Islamic Jurists

Islamic law are taken from two main sources, the first one is primary source which is basically the Quran and Sunnah and the second one is the secondary sources like analogy, independent reasoning etc.¹⁷⁸

Rules that are based on primary sources cannot ever be changed, it is Fixed provisions but secondary provisions can be changed according to the interpretation, consensus and situation of the society.

Islamic banking industry are facing a big challenge regarding the Shariah compliance procedure for many reasons that can be considered as an abstracts in the development of Islamic banking industry in the domestic and international levels, such as the different opinion of the jurists and Islamic schools that can result in having the same product permissible and prohibited at the same time for example (bay al-ina)¹⁷⁹, which leads to a confusion and uncertainty regarding the Islamic banking regulation in general.

It is unimaginable that Islamic banking industry with its advisory board will be able to resolve this issue and maintain a system that can gather all the school of thoughts and fill the gaps between them by itself for the purpose of dispute resolution without the help of national and international organization that are specialist in this field.

6.2.3 General Advantage of Arbitration

Generally, there are many advantages for reliance on arbitration rather than resorting to litigation in the court for dispute resolution, in litigation some time there are more than one procedure for resolving the dispute in accordance to

¹⁷⁸ Javaid Rehman and Aibek Ahmedov, Sources of Islamic law, UK Center for Legal Education, 2011, available at: <http://pgil.pk/wp-content/uploads/2014/04/Sources-of-Islamic-Law.pdf>, (last accessed: 5-8-2017).

¹⁷⁹ See Muhammad A. El-Gamal, Islamic Finance: Law, Economic and Practice, New York, Cambridge University press(2006),page 44, available at: <http://iugc.yolasite.com/resources/Reference%20Book%2004%20-%20Islamic%20finance,%20law%20economics%20and%20practice,%20M.%20El%20Gamal.pdf>, (last accessed 26-7-2017).

different laws in the same country which may have different result in the same case while resorting to arbitration for dispute resolution have no any procedure except one in accordance to the law that is chosen by the parties of the contract.

The procedure of the court in litigation is slow in compare to arbitration procedure were the parties of the contract can speed the process of the arbitration.

Using Arbitration for resolving Islamic finance disputes have several advantages that can support Islamic finance industries by resolving many abstracts the institution is facing with litigation process generally.

The Islamic law (shariah) is having a set of rules and conditions for regulating the legality of arbitration, the qualifications of arbitrator and the appointment of the arbitrator process ending with the enforcement of the arbitration award¹⁸⁰ that can insure the best arbitration process for the Islamic finance institutions without any conflict with the national law of different countries which is one of the biggest abstracts facing the institution in resolving its disputes.

There is a rule of evidence in Islamic law (Shariah) that govern the process of providing the evidence in arbitration and litigation as will, such as admission by the parties, oral testimony, oath, and circumstantial evidence etc¹⁸¹.

What makes arbitration more applicable and having more advantages over litigation is that in litigation there may be some conflicts in governing law of the contract and also the freedom of the parties to choose the arbitrators they prefer to resolve the dispute, also the arbitrators maybe expert in Islamic law or in the subject matter of the case to resolve the dispute faster and flexible than litigation.

¹⁸⁰ See Abdulrahman Yahya Baamir, *Shari'a Law in commercial and bankiug arbitration(law and practice in Saudi Arabia)*, Ashgate Publishing Limited, England.2010

¹⁸¹ Mohd. Nasran Bin Mohamad, *Islamic law of evidence in confession (Iqrar): Definition and Conditions*, *islamyat* 15, 1994 available at: <http://journalarticle.ukm.my/7632/1/4035-9303-1-SM.pdf>, last accessed: 19-10-2017.

6.3 Critical Observation for Litigating Islamic Finance Disputes:

6.3.1 Governing Law

Increasing number of shariah complaint contracts and the demand for the same in common or civil law system(secular) result in shariah issues and conflict with the legal system of the governing law court, especially in the terms that are used for describing the shariah complaint transactions in the contract.¹⁸²

Some countries have made a shariah compliance bedrock for resolution of Islamic finance dispute, were they can control some aspects about the governing law in the contract, for example as I mentioned in chapter 4 that Malaysia have created (the central bank Shariah advisory council)¹⁸³ to control the arbitration tribunal and courts in Shariah disputes, Indonesia is another example as the created a tribunal called (Basyarnas)¹⁸⁴ or the national Shariah arbitration buddy which is specialized in hearing Islamic finance disputes in the domestic level.

For international level the question is can Shariah or Islamic law govern the contract of Islamic finance or not? Or can the contract to be a Shariah complaint contract?

Some previous cases shows that Islamic principles are not maintained as a set of rules that can serve for resolution of Islamic finance disputes and such principles cannot be strong enough to face the knotty commercial transaction and law.

In the case of **petroleum development Ltd. v. Sheikh Abu Dhabi**, Lord Asquith acted as an arbitrator for the dispute arises at Abu Dhabi , the arbitrator held that the law of Abu Dhabi should be applied for resolution of the dispute but he again

¹⁸² Julio C. Colon, (Choice of Law and Islamic Finance), TEXAS INTERNATIONAL LAW JOURNAL [VOL. 46:411, available at: <http://www.tilj.org/content/journal/46/num2/Colon411.pdf>, (last accessed 3-8-2017).

¹⁸³ See Islamic Finance Litigation written by, Kilian Bälz, published by, Qfinance, available at : <http://www.financepractitioner.com/contentFiles/QF02/gpflqc6p/1b/0/islamic-finance-litigation.pdf>, last accessed 3-8-2017

¹⁸⁴ The Basyarnas was created to use "Islamic law ... as the basic principle" in settling disputes arising from financial disagreements that also invoked the civil laws. Eventually, the competence of religious courts was increased to hear "any act or business activity which is undertaken in accordance with Islamic principles which include all Islamic finance institutions. See ABDUL RASYID, SETTLEMENT OF ISLAMIC BANKING DISPUTES IN INDONESIA: OPPORTUNITIES AND CHALLENGES, 1-2 (2008) .

refuse to because he said that the law of UAE which is Islamic law are having no any set of principles or regulation that can deal with the case and he refer to English principles for resolution of the dispute.¹⁸⁵

The Shamil Bank Case which is mentioned before gives us a very clear image for the attitude of the western court in the issue that why shariah was not acceptable as a governing law, the court decision¹⁸⁶ had these important points for reasoning that:

- 1- Meaning of this sentence in the governing law contract (Subject to the principles of glorious shariah law) means that: the bank is running all his business and affairs with accordance to shariah, and it didn't mean to change the governing law of the contract from English law to Islamic law.
- 2- The judge said that it is improbable that the parties of the disputes are asking the court to deal with some shariah matters and it is the duty of the bank by his boards to deal with this matters
- 3- According to Roma convention¹⁸⁷ there should be only one law governing the contract and such law must be a national law of a country and it should not be a non-national law like Shariah, also if the parties want add some provisions of any other law in there agreement such provisions or laws should be mentioned and specified clearly but in this case the general reference to Shariah did not specify any aspects for shariah that it should be incorporated in the contract, so the judge said that the principle of Shariah is incorporated in this case.
- 4- The court held that the Shariah principles is controversial not only because of the Sharia the Shariah text that should be translated and

¹⁸⁵ Julio C. Colon, (Choice of Law and Islamic Finance), TEXAS INTERNATIONAL LAW JOURNAL [VOL. 46:411, available at: <http://www.tilj.org/content/journal/46/num2/Colon411.pdf>, (last accessed 3-8-2017).

¹⁸⁶ Full information about the case available at : <http://www.nadr.co.uk/articles/published/ArbitLawReports/Beximco%20v%20Shamil%202004.pdf>, last accessed: 5-8-2017

¹⁸⁷ The 1980 Rome Convention on the law applicable to contractual obligations, Art.1.1, Art.3. 1. Available at : http://www.secola.org/db/1_01/dir_en.pdf, last accessed: 15-08-2017

converted modern legal provisions, but because of different school of thoughts that it can have different decisions for the same case.

- 5- The court mentioned that before the proceeding of the court started there was no any sign that the parties of the contract were concerned about the principles of Shariah so the court refused to go against any thing that may defeat the commercial propose of the document.¹⁸⁸

As a result of all mentioned before the supreme court in (Shamil case) confirmed the decree of the high court and said that Shariah cannot adjudicate the Islamic finance disputes, and it further held that Shariah is not a form of law which can be recognize at United Kingdom for settlement of disputes.¹⁸⁹

From the previous case many problems can be pointed out for using Shariah as a governing law for the contract:

- Shariah is religion principles, and it is not a law of specific nation.
- Shariah rules is not made in body of law that can be accepted as a set of rule.
- In Shariah there are deferent school of thought that may lead to contrary decision for the same matter.
- There is lack of regulatory frame work for dispute resolution of Islamic finance.
- The decision in Shariah can be different from the decision made by some other scholar previously and it is not like other laws which are bound by precedence judgment or legal opinion.

¹⁸⁸Aida Maita, Dr. Aida (2014) "Arbitration of Islamic Financial Disputes,"Annual Survey of International & Comparative Law: Vol. 20: Iss. 1, Article 7, available at : <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1183&context=annlsurvey>, last accessed: 3-8-2017.

¹⁸⁹ Full information about the case available at : <http://www.nadr.co.uk/articles/published/ArbitLawReports/Beximco%20v%20Shamil%202004.pdf>, last accessed: 5-8-2017

- Shariah governance is a risk management,¹⁹⁰ when shariah advisory boards is always in question when anything wrong happens.

These problems specially the lack of regulatory for Shariah disputes resolution is the main reason for the weak acceptance of Islamic finance internationally, some industry advocate said that it is improbable for the industry to have parties who wants to have a contract governed by Shariah principles , because in case of disputes the parties may enforce by the court to pay or receive a remedies which is incompatible with Islamic law such like usury , and the problem will increase when the place of enforcement will not enforce any thing which is contravene to Shariah ,were the party to the contract is registered, for example Saudi Arabia.

6.3.2 Shariah Issue as a Legal Defence:

One of the main different between the Islamic and conventional banking system is that in conventional banks the main target of the industry is making profit in any possible way without following any revealed religion that restrict the activities of the bank or make some limit to it(secular system), even if some time such activity will cause imbalance in the society , but Compliance to Shariah rules is the foundation stone that islamic banking built on and all its activities must be according to the same, it is restricted to the activities that are allowed according to Shariah.

This thing make a big challenge to Islamic banking for producing all kind of services and products already exists in conventional banks that are needed by the clients with harmony to Shariah principles, Elwaleed M. Ahmed, an Islamic finance consultant stated the following:

¹⁹⁰ See SHARIAH GOVERNANCE FRAMEWORK-SHARIAH COMPLIANCE RISK MANAGEMENT, made by, MOHD NAZRI BIN CHIK, Assistant General Manager, Shariah, presented at, 4thAsia Islamic Banking Conference, June 2013, available at : <http://www.bankislam.com.my/en/Documents/cinfo/2013-4thAsiaIslamicBankingConference-CRM.pdf>, last accessed 3-8-2017

'Conventional finance bows to one master, 'profit'. Islamic finance however, has two masters, 'profit' as well as 'Shari'ah principles'. Obedience to two masters is no easy task.'¹⁹¹

According to this (applying both approach profit and Shariah principles in the same system) the industry will face many challenges with regard to Shariah issues and legal defence like lack of regulatory framework and lack of standard Shariah rules as a set of law to be used internationally for Islamic finance dispute resolution.

In Islamic banking and finance dispute resolution the choice of law is a very important, cause the parties of the contract tries not to ignore the national governing law of the contract but to choose a law that they have confidence on its ability for resolving the disputes of a Shariah-based contract.

6.3.3 Constitutional Issue:

When there is a dispute of Islamic finance transaction is on process in the court of any country, the subject matter of the dispute will fall in one status of these five main status : obligatory, recommended, merely permissible, ill-advised and unlawful.¹⁹²

The question that will be arisen that weather the court of the country will be able to solve the dispute by the civil law and weather the court have the jurisdiction to solve the dispute or not?

For example the matters relates to Islamic banking and finance industry in Malaysia comes within the jurisdiction of the civil court in accordance to the federal constitution of the country, even though there are several contravercy and questioning that why the Shariah courts of Malaysia is are not having jurisdiction and control over the matters relating to islamic finance, were some say that according to the federal law of Malaysia

¹⁹¹ Elwaheed M. Almed, challenges facing sector's growth; Global Islamic finance (2011), available at: <http://www.sudaneseconomist.com/?p=270>, (last accessed: 25-7-2017).

¹⁹² Julio C. Colon, (Choice of Law and Islamic Finance), TEXAS INTERNATIONAL LAW JOURNAL [VOL. 46:411, available at: <http://www.tilj.org/content/journal/46/num2/Colon411.pdf>, (last accessed 3-8-2017).

(Constitution), the jurisdiction of the Shariah courts are limited to the matters related to Islamic law and family law such as divorce, inheritance and wakf etc.¹⁹³

Meaning that the civil court will apply the common law and the mercantile law which is applicable on the conventional banks without differentiating them with the Islamic banking and financial industry, and without taking into consideration the Islamic rules and principles relating to the subject matter of the dispute, resulting in uncertainty in resolution of Islamic finance disputes by litigation.

The case of [Bank Kerjasama Rakyat Malaysia V. Emcee Corporation Sdn. Bhd] is an example, the court in the case applied the principles of the conventional banks in resolving Islamic finance dispute.¹⁹⁴

6.3.4 Judges Understanding of Islamic Law and Principles:

Usually judges in the courts dealing with Islamic banking and finance cases are expert in the international and domestic laws of the governing law countries only, which is an abstract for resolution of the Islamic banking and finance disputes, JULIO C. COLÓN in his article¹⁹⁵ mentioned this abstract by saying that in the current practice of Islamic banking and finance disputes there is no scholars are called for interpretation of Islamic law.

¹⁹³ See W binti Mohd, A binti Ahmad, MA bin Abdul Halim, THLH bin Hj, SUSTAINABILITY OF ISLAMIC FINANCE INDUSTRY : ARBITRATION AS FORUM FOR DISPUTE RESOLUTION, Univirsiti Sains Malaysia, available at: https://www.google.io/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjXh4_Bi4XXAhVrJcAKHSIOCMAQFggmMAA&url=http%3A%2F%2Fddms.usim.edu.my%2Fbitstream%2F123456789%2F10000%2F1%2FDiskusi%2520Syariah%2520dan%2520Undang-Undang%2520Part%25205.pdf&usg=AOvVaw1L5tV41K1cWbUVkwLzQPtT, last accessed: 22-10-2017.

¹⁹⁴ The case is Reported by Usha Thiagarajah, published at [yasminbaharilegalnews](https://yasminbaharilegalnews.wordpress.com/2010/08/27/bank-kerjasama-rakyat-malaysia-bhd-v-emcee-corporation), available at <https://yasminbaharilegalnews.wordpress.com/2010/08/27/bank-kerjasama-rakyat-malaysia-bhd-v-emcee-corporation>, last accessed (7/5/2017)

¹⁹⁵ Julio C. Colon, (Choice of Law and Islamic Finance), TEXAS INTERNATIONAL LAW JOURNAL [VOL. 46:411, available at: <http://www.tilj.org/content/journal/46/num2/Colon411.pdf>, (last accessed 3-8-2017).

This abstract shows that using ADR for Islamic banking and finance disputes resolution much reasonable were these institutions arbitrators are specialized in national law and Islamic finance and Shariah law¹⁹⁶ for reaching fair judgement of the disputes in relates with Islamic principles without any antagonism with national law.

JULIO C. COLÓN in his article¹⁹⁷ summarized it in the following words:

“It is standard practice for better-established arbitral tribunals to utilize a combined-law approach to hear cases involving Islamic finance. Indeed, acceptance of a mixed choice of law is written into the rules of many of these specialized bodies”.

In the other hand, the judges in Islamic countries like KSA and Pakistan are Muslim and they have background to some extent about these Ahkam (provisions) of Islam. In general that can be a positive point in understanding the disputes and resolving it , but at the same time this do not mean that these judges are expert in Islamic commercial transactions rules , but when the governing law of the contract is a foreign law(non-Muslim jurisdiction) like UK (which is considered as the most preferable place for resolution of Islamic finance disputes) the judges cannot understand Islamic rules and provisions in proper way, which is a negative point for resolution of Islamic banking and finance disputes by litigation.

6.3.5 Competency of Lawyers:

If we look in a general image to the legal defense that lawyers use to argue in the disputes related to Islamic finance transaction we can reach to a clear result saying that these defense rely mainly on lawyers construct and lawyers understanding of Islamic finance principles specially those principles related to the Islamic

¹⁹⁶ ibed

¹⁹⁷ Julio C. Colon, (Choice of Law and Islamic Finance), TEXAS INTERNATIONAL LAW JOURNAL [VOL. 46:411, available at: <http://www.tilj.org/content/journal/46/num2/Colon411.pdf>, (last accessed 3-8-2017).

transactions like Murabaha and Mudarab, where some of those lawyers are having lack of knowledge about these Islamic principles.¹⁹⁸

Most of the Islamic countries laws are taken from foreign countries specially those countries that occupied them previously and the lawyers of these countries are having knowledge and experience in these laws except cases related to family law like marriage, divorce and legacy where these rules and principles are taken from Islamic law directly, for example Pakistan's law are taken from the British law as it was a British colony previously and the lawyers in the country are not expert in Islamic law and principles in general specially the principles related to Islamic finance and banking principles and transactions.

This can show the importance of arbitration recompense litigation for Islamic finance disputes resolution because of the experts of arbitrators in Islamic finance disputes usually, the arbitration institutions all over the world that are expert in Islamic finance arbitration and the international treaties that can enforce the arbitral award of Islamic finance dispute internationally.

According to a research made by Kilian Balz Shariah Risk means challenging the Islamic finance transaction in a ground that it is not in comply with shariah principles and the duty of the lawyers is to make such transactions inforceable in the court,¹⁹⁹ where if the lawyers are not expert in Islamic finance transactions and principles they will be unable to perform their duty perfectly.

¹⁹⁸ Mashood A. Baderin, Islamic Law in Practice, Volume 3, available at:

<https://books.google.jo/books?id=c2tBDgAAQBAJ&pg=PT415&lpg=PT415&dq=competency+of+lawyers+for+islamic+finance+disputes&source=bl&ots=KMnkbbAswi&sig=muK5kj4YN4elSLnFV9ihZTpuBq4&hl=en&sa=X&ved=0ahUKEwiBhMHv193XAhWELVAKHa2aCOIQ6AEIKzAB#v=onepage&q=competency%20of%20lawyers%20for%20islamic%20finance%20disputes&f=false>, last accessed: 22-11-2017

¹⁹⁹ Kilian Bälz, Sharia Risk? How Islamic Finance Has Transformed Islamic Contract Law, this paper is based on a public lecture delivered at the Islamic Legal Studies Program of Harvard Law School (USA) on May 1, 2008. available at: <http://ilsp.law.harvard.edu/wp-content/uploads/2014/08/balz.pdf>, (last accessed 26-7-2017).

CHAPTER VII: CONCLUSION:

6.1 Conclusion:

The reason for the well-seen development in using alternative dispute resolution is the dissatisfaction of using litigation and its inability to give the required results which effect negatively in the global since, the people are referring to ADR nowadays for its flexibility and ability to resolve the disputes by different tools that can be appropriate for every kind of dispute , making a big possibility that the world will start to rely in ADR for resolving their dispute in a vast range in the future specially in the cases that relates to international trade and shariah complaint contracts.

Resolving disputes by ADR is not considered as a new invention, Muslims, Hindu, Chinese and other nations use to resolve their disputes hundreds of years before by using different ADR modes like arbitration, conciliation and mediation, the modern world start to realize the effectiveness of ADR moods in resolving the disputes over litigation so they prefer it.²⁰⁰

The dispute resolution mechanism in the middle east can be considered as a collective result of family, tribe and community traditions and history in resolving the dispute in the early ages were there was no any legal system to resolve these disputes by a codified legal system and different tools were followed like conciliation by the chief of the tribe etc. in addition to the Islamic principles which maintain these traditions and rules to insure a fair legal system for everyone.

Because of the current situation of the 21 centuries and the globalization, every Islamic industry is trying to find the most profitable ways that it can assure for its clients and customers, Islamic banking industry as an international industry must always guarantee the best profitable way for its clients weather its clients are Muslim, Cristian etc.

Islamic law (Shariah) is having a set of principles for preforming a valid and legal contract according to shariah principles, starting from the capability of the parties to perform the

²⁰⁰ Is Conventional ADR is Alien to Islamic law, published by, LAW TEACHER(the law essay professionals), available at: <https://www.lawteacher.net/free-law-essays/contract-law/is-conventional-adr-alien-to-islamic-law-contract-law-essay.php>, last accessed:29-10-2017.

contract (al-ahliyah) , stipulating that the terms and conditions of the contract must be in accordance with shariah principles and prohibiting uncertainty (gharar) in the contract, codifying set of rules for fairness and equality between the parties no matter to their religion, nationalism etc, as a foundation stone to applicable Islamic financial system and dispute resolutions .

The success of any institution depends to some extent on the people leading the institution or decision maker in the institution, Islamic banking institution believe in every kind of financial transactions and services that is not contrary to Islamic principles and providing different services and product that cover all the needs of clients.

I may say that dispute resolution for shariah complaint contract can play a very important rule in the success of the institution, it is very important for the client to be sure that in case of any dispute there will be a well codified legal system, expert judges and accepted costs, expenses for the procedure to be sure that his rights will never be lost because of legal system issues.

ADR specially arbitration proved to be the most valuable mechanism for resolving Islamic Banking and finance disputes and shariah complaint disputes in general, this is because the flexibility of ADR and Arbitration in dealing with the combined law contract and many other advantages like the expert of arbitrator to deal with the case and the choice of parties for choosing the number and kind of the arbitrator they prefer, the law to govern the contract etc.

The Islamic banking institution must be developed and improved in such a way that it is not only specified for Muslims clients, but it should be a business of every one that is willing to participate in a profit and loosing sharing partnership which is a Shariah complaint.

Publishing a clear and comprehensive industry standards as a set of law for Islamic banking and finance industry that can be followed in application of the industry transaction internationally can be one of the best solution for the current situation of Islamic banking industry and the legal issues that are keeping the industry from developing such as shariah

compliance and different school of law having different decisions for the same subject matter(transaction).

This can help for resolving the Islamic banking disputes in the court or tribunal by applying these standard set of rules (which is taken from the Islamic law) if these rules are recognized internationally and harmonized with international law and treatments for the dispute resolution and having a consensus among all school of thoughts for its compliance with Shariah. This clear and complete standard can also effect positively in the issue of time and cost that the parties will spend in the dispute resolution.

The current practice of the arbitration institutions for the purpose of resolving Islamic finance disputes in general focus in resolving the disputes by the national law of the governing law country in the contract to the extent that such governing law is not in contravene with the Islamic principles, meaning that Islamic principles will be applied in resolving some specific issues in the disputes, but such tribunals may face difficulties in interpretation of these principles , which can be considered as abstract in the developing of Islamic banking sectors.

In other words, we can say that current practice of the Islamic finance institutions is working as a gap-filler provisions for the law governing the contract, cause many Islamic transactions like Murabaha, Mudarabah and Musharakah etc. are not identified in the financial system of many countries, even the Islamic countries did not codified such transactions, which means that in case of any dispute national or international law governing the contract will be applied to the extent that it is contravene to the islamic principles.

Such difficulties can be resolved by choosing an expert arbitration institution or arbitrator for Islamic principles and its interpretation for avoiding any kind of conflicts which cannot be assured in the national law of any country where the judges most of the time are not expert in Shariah issues.

Also having an international codified system for Islamic banking and finance is a very important for resolving the dispute and avoiding any conflicts with national laws of any country and other difficulties like governing law issues, were using some institutions

codified Islamic principles for dispute resolution like AAOIFI can be a temporal solution for some time till an international system for Islamic banking and finance is prepared and recognized.

7.2 Literature Review

The Islamic finance and arbitration for disputes resolution have been a topic of discussion since the Islamic finance system arises in the world for the first time, many writers have done their analysis in the field and have been criticized and appreciated. It is with the help of these articles that the idea of the field begins, many writers have ventured to write articles, many reports and surveys have been done on the subject of Islamic finance disputes. Some of the work that is directly related to the research topic is analyzed below.

- 1- Very essential piece of work written on the subject is (**An Analysis of the court decisions on Islamic finance disputes**) written by **Zulkifli Hasan and Mehmet Asutay**²⁰¹.

In this article the writer reviews the court decisions in four different jurisdiction (Malaysia, UK, India, united states) this paper is highlighting the distinctive approaches of courts in making decisions pertaining to Islamic finance issues, the author has given a very elaborative discussion about cases of islamic finance in the four different jurisdictions mentioned above, however the author failed to give a sole solution for the problems arises in the court dictions in the fore jurisdiction were he advised to have legal frame work for dispute resolution but he did not proposed the features of such legal framework he proposed. The author provide a descriptive analysis of the litigation of islamic finance disputes in his article but he didi not talk about the arbitration of the same in Islamic finance cases which are one of the most common features that Islamic finance agreement is having nowadays.

²⁰¹Published on ISRA International Journal of Islamic Finance • Vol. 3 • Issue 2 • 2011, <https://zulkiflihasan.files.wordpress.com/2012/01/an-analysis-of-the-courts-decisions-on-islamic-finance-disputes.pdf> 27-4-2017

- 2- In 2014 an article of **(arbitration of Islamic financial dispute)** was published on Annual survey of international & comparative law written by DR. Aida Maita.²⁰²

The author mentioned all the arbitration procedure and practices in islamic financial disputes in line with Shariah law with mentioning that how the demand for the specialized dispute resolution of Shariah based products are increased. The author presents arbitration related aspects of Islamic financial transactions with providing a brief overview of Islamic finance and discuss how current disputes and arbitration clauses are being handled , the author also analyzes relevant court precedents and make suggestion that encourage arbitrations that are more in accordance with Shariah requirements. The author also mentioned existing centers that have published their own specialized arbitration rules regulating the islamic finance such as the Kuala Lumpur regional center for arbitration (KLRCA), islamic banking and financial service for arbitration and the dubai international islamic center for Reconciliation and Arbitration (IICRA). The author also presents some of the challenges that the industry are facing in regard of providing a standard legal framework in different jurisdiction regarding the governing law of Islamic financial transactions. This article is an important part of islamic financial dispute but it do not cover the subject because arbitration cannot be enforceable in the court without the litigation and recognition by the court , and the article did not give a clear answer that how will the arbitration decree will be recognized in the international level , and how such arbitration will judge according to civil or common law of the country according to Shariah?

- 3- Another very essential piece of work is written on the subject of **(choice of law and Islamic finance)** written by JULIO C. COLON and published by Texas international law journal²⁰³. In this research the author focus in the disputes that islamic law, as the author said:

²⁰² (arbitration of Islamic financial dispute) was published on Annual survey of international & comparative law written by DR. Aida Maita .Available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol20/iss1/7>, last accessed 26-4-2017

²⁰³ Colon, Julio C., Choice of Law and Islamic Finance. Texas International Law Journal, Vol. 46, No. 2, 2011. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856351 & http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856351

(If judges and law maker do not understand the reasoning of islamic finance professionals in the incorporating Shariah law, the result could be precedent and codes that hamper the growth of a multi-trillion dollar industry).

The author compares the reasoning of the English court in its litigation to the practice of forums specializing in Islamic finance dispute resolution, the author also addressed some difficulties in applying Islamic law in civil law and common law courts, he also analyses the practice of Islamic finance alternative dispute resolution (ADR) with conclusion that it is not unreasonable to the western court to adjudicate a case if it arises from an islamic finance disputes.

The author concentrate on his research in the type of agreement in Islamic finance practice as it is a combined law contract (common law or civil law system with Sahriah principles) but he fail to adjudicate the Islamic banking disputes from every aspects and find a solution for the challenges faces the Islamic banking disputes from every aspects.

- 4- An article titled (**dispute resolution in Islamic banking and finance: current trends and future perspectives**) written by **Umar A. Oseni** and presented at the international conference on Islamic financial services university of Ilorin, kwara state. Nigeria²⁰⁴.

The author explored the current practice of dispute resolution in Islamic banking and finance as well as the future perspective with case analyses of selected Muslim countries , and the re-emergence of the Islamic banking in the modern world , matter arising from litigating Islamic banking and finance disputes and the re-emergence of alternative dispute resolution processes in the modern world, the classical methods available within the ambits of Islamic law, and proposes an international legal framework for resolution of Islamic banking and finance disputes , claims and complaints. He contrasted the current situation by stating that:

²⁰⁴ Umar Aimhanosi Oseni . Dispute Resolution In Islamic Banking And Finance. International Islamic University of Malaysia (IIUM) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461895, last accessed (12-5-2017)

From our findings, disputes emanating from this industry (Islamic banking) are heard by the conventional courts and tribunals which, in most cases, do not have the requisite expertise. It is argued that since Islamic banking and finance disputes are sui generis, the panel of judges must be composed of experts in the field.

However, the author discusses the cases of some Muslim countries without giving much important to Islamic banking situation in the international level, like the current situation of Islamic banking in the west were most of the Islamic banking transactions nowadays in case of disputes are adjudicated under the English law (UK) which can show that this research is having so much loophole to adjudicate the islamic banking disputes in the international level.

- 5- The article of (**The Shari'a Factor in International Commercial Arbitration**) written by **Faisal Kutty** published in 2006 at Loyola Marymount University and Loyola Law School .

In this article the author had made a great overview of different classic and ideas about the sharia law in the modern arbitration like public policy , choice of law in islamic finance contract and capacity of the arbitrators, the author suggest that: There is a need to reform Islamic law from within to deal with contemporary norms, transactions and institutions, but there is an equal need to better accommodate and address the issues of Concern from an Islamic perspective²⁰⁵.

This research will try to explore the development and acceptance of international commercial arbitration in the Middle East and analyzes the issues and areas which create tension between international commercial arbitration and Sharia law.

- 6- The article of (**Islamic finance litigation**), written by Kilian Balz , published by Qfinance (an ultimate resource that offer a lot of articles written by expert in the finance field).

In this article the author discussed and criticized resolving Islamic finance contract by litigation, the choice of shariah law and its validity in the western court and litigated relation aspects of Islamic financial transaction.

²⁰⁵ Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 Loy. L.A. Int'l & Comp. L. Rev. 565 (2006). Available at: <http://digitalcommons.lmu.edu/ilr/vol28/iss3/4>

Kilian Balz in his research explained how the Shariah-compliance can not be enforced in the court in many leading cases in the field of Islamic finance transaction dispute resolution by the court proving the effectiveness of arbitration instead and analysing some of the Islamic finance issues like loan agreements and capital market documents.

The author stated many important issues in the Islamic finance dispute resolution that can not be achieved by litigation and courts such as the interpretation of Shariah by the judges and reaching the base stone of Islamic finance agreement such as preserving the interest of the clients to have a pure shariah complaint contract.

- 7- The article of (Evolution & Development of Islamic Banking – The Case of Pakistan), written by Muhammad Aqib Ali, published by – European Journal of Islamic Finance, this paper is discussing the origin and growth of Islamic banking system in the domestic level of Pakistan and internationally.

The author after a brief introduction about the legality of Islamic banking in Islam and the motivation of Islamic system to practice business, presumed that the origin and roots of the Islamic banking is 14th century when the Islamic system settled a set of principles that are considered as the base stone to the Islamic banking and finance nowadays.

the Islamic banking system in its modern form came to existence after the conventional banking system where established in the Muslim countries and the importance of a legal and codified Islamic banking system arise.

According to this research the major challenge that faces the Islamic banking system at the early ages of its establishment is having a Shariah complaint product and services:

A major challenge in the establishment of Islamic banking set-up was to develop Shariah compliant products and services, for which Islamic banks established Shariah Advisory Committees and Religious Boards, who authenticated the products and services of the Islamic banks and whose main objective was to judge, whether these products and offerings conform to the tenets of Shariah.

According to this research the intention of creating the Islamic banking system where in Pakistan since the country were separated from India in 1947 with the intention of the Muslim Indians at that time to have there own country where they can practice there natural

life according to Shariah and Islamic principles where the process for utilizing Islamic banking system in Pakistan came to existence in 1970s with the movement of Islamic finance in the world.

There is two point of view regarding the concept of Riba (interest) in Pakistan are discussed in the research:

The conceptual debate on the meaning of Riba in Pakistan revolves around two important points of view. The first, and by far the most influential, is the one propagated by the religious scholars and commonly believed by the general public. According to this, the prevalent commercial interest in financial institutions is the riba prohibited by the Islamic law. The other view propagated by some modernist scholars such as Fazalur Rahman, Ja'afar Shah Phalwarwi, Mirza Ahmad Ali, Syed Yaqub Shah in sixties of this century argued that the prohibited riba pertained to interest on consumption loans and not on commercial loans as in vogue in the financial institutions.

The development of this concept and the process of applying these concepts in the Islamic banking and finance system in Pakistan are discussed in the research briefly.

7.3 Bibliography:

A- BOOKS:

Aldohni Abdul Karim, *The Legal and Regulatory Aspects of Islamic Banking*, Routledge Research in Finance and Banking Law, 2011.

Andrew Tweeddale & Keren Tweeddale. *Arbitration of Commercial Disputes, International and English Law Practices and Practice*. First Edition 2005. Oxford University press Lndon.

El-Gamal, Mahmoud. *Islamic Finance: Law, Economics, and Practice* . CAMBRIDGE UNIVERSITY PRESS. Rice University. 2006

Ibrahim Warde, *Islamic Finance in the Global Economy*, Edinburgh, Edinburgh University Press (2000).

Murtuza Athar, "Muhtasib's Role: Safeguarding the Public Interest during the Islamic Middle Ages" (2004). American Accounting Association 2004

Nathif J. Adam, Abdulkader S. Thomas *Islamic Bonds: Your Guide to Issuing, Structuring and Investing in Sukuk*, London, Euromoney books, 2005

Olson, Walter. *The Litigation Explosion: What Happened When America Unleashed the Law suit*. Dutton, New york: Turmana Tally books,1991.

Redfern, Alan, and Hunter, Martin. *Redfern and Hunter on International Arbitration 2005* .London Oxford University Press London.

Singh, Avatar. *Law of Arbitration and Conciliation*. Seventh Edition 2005. Eastern Book Company Lucknow.

Warde, Ibrahim. *Islamic Finance in the Global Economy*. Baskerville. Edinburgh University Press, 2000.

Wilson, Rodney. *Banking and Finance in the Arab Middle East*, England: Macmillan Publisher Ltd, 1983.

B- ARTICLES:

A. Oseni, Umar. dispute resolution in Islamic banking and finance: current trends and future perspectives. international conference on Islamic financial services university of Ilorin, kwara state. Nigeria, 2009.

COLON, JULIO. choice of law and Islamic finance. Texas international law journal,2011.

Hasan, Zulkifli and Asutay Mehmet. An Analysis of the court decisions on Islamic finance disputes, 2011.

Kutty, Faisal. **The Shari'a Factor in International Commercial Arbitration.** Loyola Marymount University and Loyola Law School,2006 .

Laldin, Prof. Dr. Mohammad Akram DUTIES AND RESPONSIBILITIES OF SHARI'AH BOARDS FROM A LEGAL AND REGULATORY PERSPECTIVE, AMANIE ACADEMY,

Maita, DR. Aida. arbitration of Islamic financial dispute. Annual survey of international & comparative law.2014

Michael Delikat and Morris M. Kleine, "An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?" 2003.

Muhammad Anwar, Islamic banking in Iran and Pakistan a comparative study, the Pakistan development review 31:4 part 2 (winter 1992) pp. 1089-1097

C- STATUTES:

ICSID Rules on Arbitration-2012

The Arbitration Act-1940

The English Arbitration Act-1996

The New York Convention-1958

The Recognition and Enforcement Act-2011

The UNICITRAL Arbitration Rules-1976

The UNICITRAL Model Law-1985

