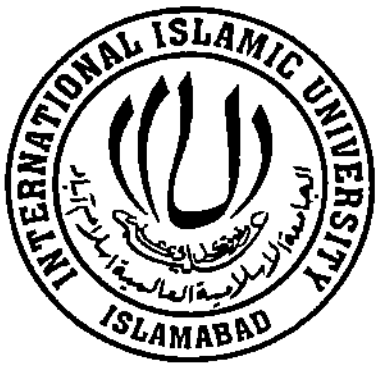
DISPUTE RESOLUTION IN ISLAMIC FINANCE: A CASE ANALYSIS OF PAKISTAN [CURRENT PRACTICES AND FUTURE PERSPECTIVES]

A DISSERTATION SUBMITTED TO THE DEPARTMENT OF SHARIAH, INTERNATIONAL ISLAMIC UNIVERSITY, ISLAMABAD

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF THE DEGREE OF MASTER OF LAWS (LL.M ISLAMIC COMMERCIAL LAW)



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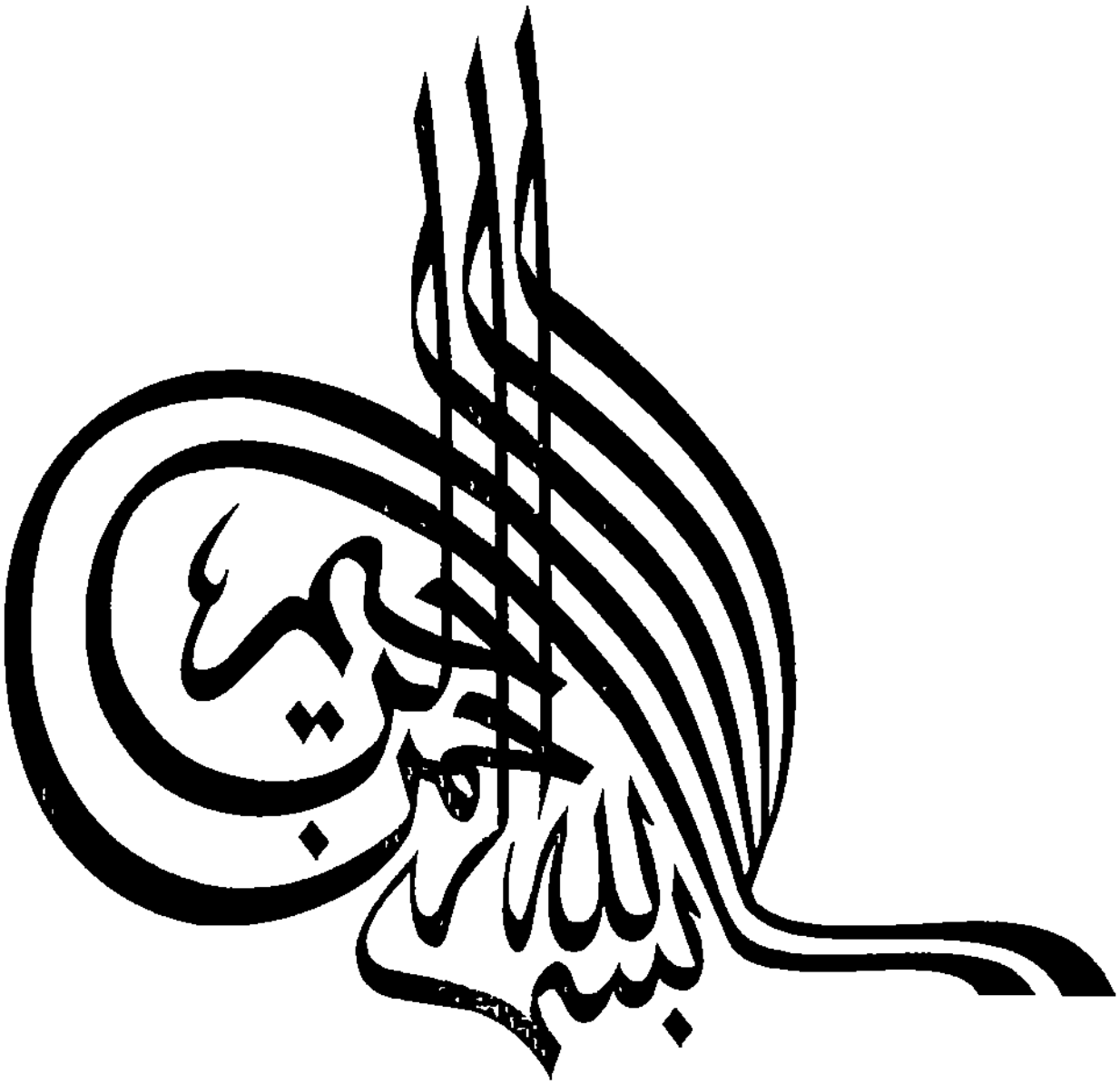

In the name of Allah,
the Most Beneficent,
the Most Merciful

FINAL APPROVAL

It is certified that we have gone through and evaluated the dissertation submitted by Mr Muhammad Sarfraz Khan, a student of LLM Islamic Commercial Law having University Registration No 96-FSL/LLMICL/F11 titled "**Dispute Resolution in Islamic Finance: A Case Analysis of Pakistan; Current Practices and Future Perspectives**" in partial fulfillment for the award of degree of LLM Islamic Commercial 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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DEDICATION

To my parents and those who love Humanity

DECLARATION

I, **Muhammad Sarfraz Khan**, hereby declare that this dissertation is original and has never been presented in any other institution. Moreover, I declare that any secondary information used in this dissertation has been duly acknowledged.

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Praise is to ALLAH, the exalted, omnipresent and sustainer of this Universe.

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List of Acronyms

AAOIFI	Accounting and Auditing Organization for Islamic Financial Institutions
ADR	Alternative Dispute Resolution
BOD	Board of Directors
CCP	Committee on Consumer Policy
CII	Council of Islamic Ideology
CPR	Civil Procedural Rules
CTFS	Commission for Transformation of Financial System
DFIs	Development of Financial Institutions
EM	Executive Management
EU	European Commission
FSC	Federal Shariat Court
HBFC	House Building Finance Corporation
IBD	Islamic Banking Department
IBI	Islamic Banking Institutions
ICP	Investment Corporation of Pakistan
MBL	Meezan Bank Limited

Med-Arb	Mediation and Arbitration
NIT	National Investment Trust
OECD	Organization for Economic Co-operation and Development
PTC	Participation Term Certificate
SAB	Shariat Appellate Banch
SB	Shariah Boards
SBP	State Bank of Pakistan
SC	Supreme Court
SCP	Supreme Court of Pakistan
UK	United Kingdom

Table of Contents

Chapter II: Concept of ADR in Islamic Law with reference to Islamic Finance

Chapter :3 Current situation, practices and settlement of Islamic finance disputes in Pakistan

Thesis Statement

The present system of dispute settlement in the form of litigation in civil courts, for Islamic Finance Disputes in Pakistan is inadequate, leading to many problems and technical issues Therefore an alternative and appropriate dispute resolution mechanism for the disputes emanating from Islamic finance transactions should be established.

Thesis Introduction

The overwhelming growth and continuous expansion of the Islamic finance in the world during the last decade has been beyond comparison The faith based finance, which spurns the activities prohibited by Islam, is applicable ethical alternative to conventional and interest based financing In addition to being cost efficient and asset based Islamic finance is also Shariah compliant

The dispute settlement frame work as practiced in most of the jurisdictions where Islamic finance is in practice, including Pakistan, has proven to be inadequate, particularly in its application and interpretation of the Shariah [1] Pakistan, despite of being an ideological country based solely upon the ideology of Islam, had adopted the common law as a governing law from the very beginning. It is the English common law which is still being practiced in almost all the courts and legal tribunals across the country Pakistan is among those few countries that have taken major steps towards the Islamization of their legal system, particularly in economic and finance sector. The most important measures taken for Islamization in Pakistan are as follows

- As per Art 2 of the constitution of Pakistan, Islam is the state religion of Pakistan. The objectives resolution was passed by the first constitution Assembly in 1949 In the

[1] Umar A Oseni and Dr Abu Umar Faruq Ahmad, Dispute Resolution in Islamic Finance, A case analysis of Malaysia, 8th Islamic Conference on Islamic economics and Finance, Doha, Qatar - December 19-21, 2011

beginning objected resolution was inserted in preamble Later on it was made substantive part of the constitution in 1985 [2] It has provided that no law shall be enacted that is repugnant to the injunctions of Islam.

- The eighth amendment of 1973 constitution, adopted by the National Assembly, made room for creation of Federal shariat court (FSC)[3]

- Creation of the council of Islamic ideology (CII) in 1962.[4] The report of (IIC) on elimination of interest (June, 1980) genuinely considered as first comprehensive work in the world undertaken on Islamic banking and finance

- Practically, measures taken included the introduction of Zakat and Ushr[5] and the elimination of interest from the specialized Financial Institutions (July, 1979 to July, 1985)

- Commercial banks transformed their nomenclature during January 1981 to June 1985 based on the 12 modes. From July 1, 1985 all commercial banking were made interest free yet, foreign currency deposits in Pakistan and on lending of foreign loans continued as before.[6]

- The procedure adopted by banks was declared un-Islamic by the Federal Shariat Court (FSC) in November 1991 [7] Some banks/DFIs preferred appeal to the Shariat Appellate Bench (SAB) of Supreme Court of Pakistan

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[1] See Art 2-A of the Constitution of the Islamic Republic of Pakistan
[3] Constitution (Eight amendment) Act, 1985 (Gazette of Pakistan, extraordinary, 11th November, 1985)
[4] See Constitution of the Islamic Republic of Pakistan 1962, 3 13
[5] See Zakat and Ushr Ordinance, 1980
[6] See State Bank of Pakistan Annual Report FY02
[7] Mahmood ul Rahman Faisal vs Secretary , Ministry of Law, Justice and Parliamentary Affairs, Government of Pakistan, Islamabad etc PLD 1992 FSC 1

- SAB delivered its judgment of December 23, 1999[8] rejecting the appeals and directing that the laws involving interest would cease to have effect finally by June 30, 2001.[9]

As a result of above mentioned historical measures and steps taken towards islamization of financial system a parallel system of Islamic Banking and finance was introduced and developed in the country. Though the actual target of these efforts was a total and immediate change of the system into Islamic principles based economy but unfortunately due to some reasons and hurdles it could not have been achieved However, a parallel system to the conventional banking and finance came into existence

In the last decade Islamic finance industry experienced a fast growth not only in Pakistan but also at global level Islamic banking and finance sector has attracted special attention and emerged as an appropriate alternative system to the current interest based banking due to collapses of financial giants in different jurisdictions working under conventional banking system. Pakistan as one among worldwide pioneers of Islamic finance sector contributed major part and played a significant role in this sector and introduced different structural changes. But there are still vacant spaces which need to be filled Absence of Sharia-compliant legal framework, weak regulation and issues in corporate governance are posing questions on future targets of this industry

These are major obstacles in Islamic banking and finance industry which are causing low level of penetration not only at global level but also in the overall financial industry of Pakistan. Pakistan as a leader has main responsibility to eliminate these hurdles and to present adequate strong Islamic banking model before other jurisdictions The most important issue among other

[8] Dr M. Aslam Khaki and others vs Syed Muhammad Hashim and Others, PLD 2000 SC 225

[9] Dr Ishrat Husain, Governor SBP, Evolution of Islamic Banking, presented his paper at a seminar on Islamic Banking held recently at the Islamic Chamber of Commerce & Industry building, Karachi sponsored by Meezan Bank Limited, 2007

above mentioned issues, which affect the efficiency of Islamic finance industry and impose the question on the Shariah compliance of the industry as a whole, are the Islamic finance litigation in civil courts under English common law

The litigation clause in Islamic financial contracts is itself an issue leading to many other issues. Disputes emanating from this industry are heard in the conventional courts where, in most of the cases, particularly where Shariah expert determination is required, the judges do not have the requisite expertise and a sufficient knowledge of the principles and modes of Islamic finance. Therefore a strong and viable legal framework should be established for the settlement of the disputes regarding Islamic banking and finance in the countries like Pakistan where Islamic banking and finance is being implemented

Structure of Thesis

The study comprises of three chapters. Chapter I is divided into three sections Section I analyses the brief historical background and modern development of ADR Classifications and kinds of ADR are discussed under section II Salient features are analyzed in section III In the end a brief conclusion will be drawn.

Chapter II is devided into four sections Section I analyses the basis of ADR in Islamic law Section II analyses different forms of ADR in Islamic legal history Section III discusses the relevance of ADR in Islamc Finance Disputes Section IV will conduct a brief Comparison between ADR and ordinary litigation Finally a brief conclusion will be drawn

Chapter III is divided into five sections Section I discusses about Islamization of financial system in Pakistan Section II analyses legal and regulatory issues facing Islamic finance industry in Pakistan Section III describes current practices of litigating Islamic finance disputes in Civil

Courts and issues therein Section IV analyses in detail the land mark English case titled: Beximco Pharmaticals Ltd. & Ors Vs Shamil Bank of Bahrain EC At the end of the chapter a brief conclusion will be drawn.

Literature Review

So for as the ADR is concerned, much has been written about the different aspects of an alternative dispute resolution outside the courts as an independent forum for resolution of disputes Likewise some work has also been done about the Islamic finance litigation in civil courts and issues in the current system of dispute resolution for Islamic finance. However, since my topic is a specific area of study there is a need of work on the analysis of present practices of dispute settlement system regarding Islamic finance disputes in Pakistani context and critical issues therein, and exploring the feasibility of an alternative, appropriate and adequate forum for the settlement of Islamic finance disputes In the following a critical evaluation of the important work on related areas of my topic will be conducted

1. "Islamic Finance Litigation" by Kilian Balz:

In this Article the writer discussed the issues regarding Islamic finance litigation, in the light of Beximco Case10 and suggested the separate dispute resolution bodies for Islamic financing transactions However, his discussion is in general and not in the context of the practices of any specific Islamic country.

2 Dispute Resolution in Islamic Finance: A Case analyses of Malaysia:[11]

[10] Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd and Others (known as the Beximco Case), heard by the London Court of Appeal in 2004, is still considered to be a landmark judgment in the field of Islamic finance litigation EWCA Civ 19, [2004] 4 All ER 1072

[11] Oseni, Umar A Oseni and Dr Abu Umar Faruq Ahmad, Dispute Resolution in Islamic Finance, A case analysis of Malaysia, 8th Islamic Conference on Islamic economics and Finance, Doha, Qatar - December 19-21, 2011

Writer states in the abstract of the paper: "The past decade has seen the rapid growth of Islamic finance on both international and domestic levels. Accompanying that growth is a rise in the number of disputes that implicate Islamic law This remains true even when the primary law of the contract is that of common law or civil law. If judges and lawmakers do not understand the reasoning of Islamic finance professionals in incorporating Shariah law, the result could be precedents and codes that hamper the growth of a multi-trillion dollar industry".

He further says " Theoretically, contracting parties to a shariah compliant transaction may choose from three options that the contract be (1) subject exclusively to Islamic law, (2) subject solely to a state legal system, whether or not said system be based on Shariah law, or (3) subject to a combine system with Islamic principles A combine system of state legal system and general principles of Shariah would be a better characterized as cumulative, meaning that the state system of law is subject to Shariah Disputes under the contract may be analyzed under state system, and in cases of conflict, Shariah will prevail"

This work though point outs the practical issues pertaining to Islamic finance litigation but the solution proposed by the researcher is totally different from what would be my suggested solution

As mentioned above, the preferable way to solve the problem is to make the contract subject to a combine system of conventional law with Islamic principles, whereas the solution proposed by my research is to establish a separate legal frame work where Islamic financing disputes would be resolved according to Sulh,(Reconciliation) Tahkim(Arbitration) and other Islamic modes of dispute settlement outside the courts Thus there would be no need of any combination of legal system regarding governing law of the contract

[14] Julio C Colon Choice of Law in Islamic Finance, paper was published in Taxes International Law Journal, vol 46 411

6 اشتراط التحاكم الى القانون الوضعى فى عقود المؤسسات المالية الاسلامية by Dr. Saleh bin Abullah Al-Lhidan:[15] The small but a comprehensive paper is about the mandatory clause of litigation in conventional courts and the governing law of the contract in the contracts of Islamic financial institutions. The issue has been discussed in detail from the shariah perspective and in the end some solutions have been suggested to overcome the issue. The important solutions given by the paper are as follows

- All the Islamic financial institutions should draft the clause in each and every contract which expressly states that the governing law of the contract is the Islamic law and the disputes arising out from the contract shall be decided in shariah courts under Islamic law.
- There should be a consensus of all the Islamic financial institutions on replacing the litigation clause with arbitration clause whereby the dispute would be settled by an arbitrator in a just and equitable manner without mentioning any specific law to be governing law in the contract.
- Including a clause of choice of forum in the contract for the settlement of dispute
- Creation of an International Islamic financial court to be the forum for all the financial disputes of Islamic finance industry

Though all the above mentioned solutions are valuable, but my study area is different as I would suggest a full fledge legal and institutional mechanism of an alternative dispute resolution which shall settle the disputes under Islamic law of contract and financial transactions

[15] Director-General of Sharia Group Al Rajhi Bank, and member of Shariah Board of AAIOFI

In this paper, though the issues in current dispute resolution were highlighted, and the establishing a separate legal framework was suggested, but the study was confined to the Malaysian practices Therefore there is still a room for work about the current practices of Islamic finance litigation in Pakistan and the need of an alternative dispute settlement mechanism to overcome the issues pertaining to the practices in Pakistan

3. Islamic Finance Dispute Resolution: The need to compliment litigation with Expert Determination by Mohamad Illiayas Seyed Ibrhim:[12]

He says: "However, there is a need to complement the civil court scheme with the hybrid ADR feature of expert determination whereby the court would refer all issues pertaining to Islamic law to a recognized body of Shari'ah experts for an opinion which would bind the court In Malaysia the SAC is perhaps the most appropriate body" It is apparent from the last line of the above mentioned statement that the work was done in the Malaysian context and in the light of Malaysian landmark cases about Islamic finance litigation.

4 Dispute Resolution in Islamic Finance By Jonathan Lawrence, Peter Morton and Hussain Khan of K&L Gates LLP.13

It says "The number of Sharia compliant products that are available has grown enormously over the past few years. Many Islamic finance transactions are governed by English law or the law of another country, instead of Sharia law" However, since my area of study is confined to Islamic finance in pakistan there is still a need to fill this gape.

5. Choice of Law and Islamic Finance by Julio C. Colon[14]:

[12] Written under Azmi & Associates
Banking & Financial Services Group 14th Floor, Menara Keck Seng 203, Jalan Bukit Bintang 55100 Kuala Lumpur, Malaysia Tel (603) 2118 5000 Fax (603) 2118 5111 Email illiayas@azmilaw com www azmilaw com
[13] Published in the " Global Islamic Finance Report 2012" in April 2012

Scope and Limitations of the Study

- In this study the concept of ADR with both the Islamic and modern approaches will be studied
- The analysis of Islamization of finance will be limited to Pakistan However, the analyses of current practices of litigating Islamic finance disputes and issues therein will be open to Islamic finance at large
- The proposed solution of the problems analyzed will be the establishment of a recognized appropriate alternative dispute resolution forum for Islamic financial disputes.

Methodology:

This is basically an analytical and library based study. The primary source of my study, however, will be the books, statutes, and case laws while the secondary source of my study will be the different Articles, research papers and reports related to my topic

The study comprises of three chapters Chapter I is descriptive in nature Chapter II analyses the concept of ADR in Islamic law Descriptive approach will be followed. Chapter III analyses the application of ADR and Islamic finance as a well established industry. In this context, analytical method will be followed

Chapter I

Origin, History, Modern Development & Kinds of ADR

Introduction

Right from the time immemorial, dispute settlement has been practiced by different generations of human because disputes are unavoidable in human relationships ADR is a series of processes for amicable settlement of disputes outside the formal court litigation where a neutral and impartial third party mediates to resolve the dispute Though, its definition seems to be simple, but there is an ongoing controversy on the actual meaning of ADR, the acronym often used for Alternative Dispute Resolution, while some refer the term ADR to "Appropriate Dispute Resolution "

The alternative dispute resolution processes give the idea of alternative to Court litigation system When disputes are channeled through the formal Court system, the parties likely to be farther from each other after the judgment because the judgment of the Court often leads to a win-lose situation where one of the parties rejoices with pomp while the other party wallow in anguish In order to avoid a situation where winner-takes-all syndrome as generally happened in litigation, an effective alternative was formed which satisfies the needs of many litigants

The remarkable turn of events now shows the complementary nature of ADR in litigation ADR facilitates the administration of justice system and ensure speedy justice without compromising the rights and liabilities of the parties In essence, ADR leads to a win-win settlement where the parties settle the subsequent dispute amicably and secure the ongoing relationship

Moreover, ADR has come to represent not only a body of processes for resolution of disputes but also a body of processes for dispute avoidance and dispute management This is increasingly manifested in the employment sector. Recognizing this, it has been argued that the letter should be seen in their own right as describing "a holistic concept of a consensus-oriented approach to dealing with potential and actual disputes The concept comprises the dispute avoidance, dispute management and dispute resolution [16] This chapter is divided into three sections. Section I analyses the brief historical background and modern development of ADR Classifications and kinds of ADR are discussed under section II Salient features are analyzed in section III In the end a brief conclusion will be drawn

1.1 Historical Background of ADR and its Modern Development·

The concept of ADR is not a new trend For centuries, societies have been developing informal and non-adversarial process for settling disputes In fact, archaeologists have discovered evidence of the use of ADR processes in the ancient civilization of Mesopotamia, Egypt, and Assyria [17] Moreover, it can be argued that many of the methods of ADR are not modern alternatives, but simply a return of earlier ways of dealing with such disputes in traditional societies The Court system itself was once an ADR process, in the sense that it replaced the older forms of dispute resolution, including trial by battle and trial by ordeal The most important periods of the development of ADR are as follows·

[16] Street, ADR Terminology Responses to NADRAC Discussion Paper (National Alternative Dispute Resolution Advisory Council, 24 June 2005)

[17] Nelson "Adopting AOR to different cultures" (Dec 15, 2001) online article available at http // www gowlings com/resources/publications asp? Pubid=776 (Last accessed 13 October, 2013)

1.1.1 ADR in Classical Times

One of the earliest mediation was occasioned more than 4, 000 years ago in the ancient society of Mesopotamia when a Sumerian ruler helped avoids a war and developed an agreement in a dispute over land [18] Further evidence discloses that the concept of conciliation among disputants was very important in Mesopotamia society[19] During the first century BC a merchant organization advocated that commercial disputes be settled outside the court process through a confrontation between the creditor and debtor with the presence of a third party referee The role of the referee was to facilitate the conciliation In the way that referees would suggest alternative resolution, if the option put forward by the parties themselves was rejected If the dispute was not resolved by this manner it could be brought before the Court

The development of the ADR in the Western world can be traced back to the ancient Greeks. As Athenian court became overcrowded, the city state introduced a public arbitrator around 4, 00 BC [20] The arbitral procedures were structured and formal The arbitrator for a given case was selected by lottery His first duty was to attempt to settle the dispute amicably. If he would not succeed he would call witness and require the submission of evidence in writing This can be described as the modern day method of med arb The parties often engaged in elaborate scheme to postpone ruling or challenge the arbitrator decision Appeal would be brought before the college of arbitrators, who would refer the matter to the traditional courts.

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[18] See fuller "Mediation Its forms and functions" (1971) 44 S Cal L Rev 305 at 305

[19] Nelson "Adopting ADR to different cultures" (Dec 15, 2001) online article available at http // www.gowlings.com/resources/publications.asp? Pubid=776 (Last accessed 20 October, 2013)

[20] Barret A history of Alternative Dispute Resolution (Jossey-Bass San Francisco 2004) p 7

The classical Greek epic poem the Iliad contains several examples of mediation and arbitration in Greek culture One such example concerns the negotiation of an agreement between a murderer and victim's family The traditional law requires that the accused make an offer to the victim's family which was laid out in public view for all to assess Some negotiation regarding the offer was occasioned However, the final assessment of the offer was made by a respected elder whose decision would be acceptable for all [21] This example incorporates the modern process of restorative justice and arbitration

1.1.2 ADR in traditional societies

There are many examples of ADR processes which have developed in traditional societies as a mechanism for settling disputes Hawaiian islanders of Polynesian ancestry use a form of mediation called "ho, opnopono' for resolving disputes This process involves a family coming together to discuss interpersonal problems under the guidance of a respected leader [22] Similarly the Abkhazian people of the Caucasus Mountains of Georgia have long practiced mediation to settling disputes within their groups and among tribes in surrounding areas [23]

In Nigeria, the Yoruba live in modern cities but continue to return to traditional methods of resolving disputes Courts are seen as the last resort as it is generally considered a mark of shame on the disputants when a matter ends up in the courts. They are viewed as "bad people" who should favor reconciliation Family disputes are generally brought before the "baale"who is an elderly head of district After both disputant states their case, the elders ask questions and try to make a compromise in which both parties accept some of the blame. The elders have a variety of techniques to reach the agreement, such as, subtle blackmail, precedents, proverbs

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[21] Nelson "Adopting ADR to different cultures" (Dec 15, 2001) online article available at http // www gowlings com/resources/publications asp? Pubid=776#N_2_ (Last accessed 2, September, 2013)

[22] [22] Barret A history of Alternative Dispute Resolution (Jossey-Bass San Francisco 2004) p 3

[23] Ibid at 4

and even magic The only real power behind the elder's decisions is cultural They can threaten social boycott or emotional blackmail

ADR in Sub-Continent

Subcontinent also has a long tradition of using ADR processes The most popular method of dispute resolution 'panchayt' began 2500 years ago and widely used for commercial and non-commercial disputes Similarly, since the Western Zhou dynasty in China 2,000 years ago, the post of Mediator has been included in all governmental administration Today in China it is estimated that there are 950,000 mediation committees with 6 million mediators. Article 111 of the constitution of the people Republic of China states

> People mediation committees are a working committee under the grassroots autonomous organizations – Resident committee, Villagers committee, whose mission is to mediate civil disputes

Today these committees handle 10 and 15 million cases per year, ranging from family disputes to minor property disputes Chinese citizens are not forced to use PMCs and can bypass them for the court But since the committees are tasked to settling matters in, no longer than a month PMCs can be an efficient way to administer justice Judgments can also be appealed to the Courts.[24] It is well recognized that mediation has a long and varied history in all the major cultures of the world Bothe Quran and Bible[25] provide the references to the resolution of dispute through mediation and arbitration

1.2 Development of civil and commercial ADR

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[24] Watcher "Overwhelmed Legal System in China Leads to Grassroots Mediation" (February 2008) Columbia Law School Press Release Online article available at http //www law columbia edu/media inquiries/news events/2008/china mediation.(Last accessed 22 June, 2013)

[25] Mathew 5 9-1, Timothy 2 5-6, Corinthians 6 1-4

Civil and commercial ADR has been in practice in various jurisdictions, particularly in developed countries. In Pakistan, the main problem is lack of implementation Therefore, to develop ADR in Civil and Commercial sector in Pakistan, it is necessary to analyze few examples of states where it is fully in practice. Such examples may help to consider development of Civil and Commercial ADR in Pakistan. The exemplary states in this regard are following:

1.2.1 United States

In United States, Chamber of Commerce created arbitral tribunals in New York in 1768 In New Haven in 1794 and in Philadelphia in 1801 These early panels were primarily used to settle disputes in clothing, printing and merchant seaman industries Arbitration received a full endorsement of Supreme Court in 1854, when the Supreme Court specifically upheld the right of arbitrator to issue binding judgment in Burchell V Marshal.[26] Writing for the Court, Justice Grier stated that Arbitrators are judges chosen by the parties to decide the matter submitted to them, final and without appeal As a mode of dispute settlement it should receive every encouragement from the courts of equity.[27]

The federal government promoted commercial arbitration since as early as 1887, when it passed the Interstate Commercial Act 1887 The Act set up a mechanism for the voluntary submission of labor disputes by the railroad companies and their employees. In 1898, Congress followed initiatives that began a few years earlier in Massachusetts and New York, and authorized mediation for collective bargaining disputes. The Newlands Act, 1913 and later legislation reflected the belief that stable industrial peace could be achieved through the settlement of collective bargaining disputes Settlement in turn could be advanced through

[26] Burchell v Marsh 58 US 344 344 (1854)
[27] Ibid at 349

conciliation, mediation and voluntary arbitration Special mediation agencies are formed and founded to carry out the Mediation and Collective Bargaining Disputes These agencies are

1 Board of mediation and conciliation for Railway Labor,

2. Federal Mediation Conciliation for Railway Labor 1913[28] and,

3. Federal Mediation and Conciliation Service 1947

Beginning in late 1960's American society witnessed the start of a significant movement in ADR, in a climate of criticism of the adversarial nature of litigation, and perhaps loss of faith in traditional adjudication and the competence and professionalism of lawyers [29] It is, however, the Pond Conference held in 1976, which is recognized as being the birthplace of modern ADR movement The Pond Conference full title was the 'National conference on the causes of popular dissatisfaction with the administration of justice' The Pond Conference picked up on the dissatisfaction with the adversarial system [30] According to Subrin,

> There was an unmistakable tone on the conference that the underlying ideology of liberality of pleading, wide-open discovery and attorney latitude was no longer feasible The alleged litigation explosion would have to be controlled; the few bad lawyers could not be trusted to control themselves.[31]

Professor Frank Sander's speech entitled 'Varieties of disputes processing', urged American lawyers and judges to re-imagine the civil courts as collection of dispute resolution

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[28] This was later renamed as National Mediation Board in 1943

[29] See Shone "Law Reform and ADR Pulling strands in the Civil Justice Web" Paper presented at the Australian Law Reform Agencies Conference 2006 Wellington New Zealand at 3 Available at http //www lawcom govt nz/UploadFiles/SpeachPaper (Last accessed 10, august, 2013)

[30] Stempel "Reflections on Judicial ADR and Multi-door Court houses at Twenty, Fait Accompli, Failed Overture, or Fledging adulthood?" 1996

[31] Subrin "Teaching Civil Procedure while you watch it disintegrate" (1993) 59 Brook L Rev 115 at 1158

procedures tailored to fit the variety of disputes that parties bring to the justice system [32] The goal, Sander argued, should be, to 'let the forum fit for fuss' Sander criticized lawyers for tending 'to assume that the courts are the natural and obvious dispute resolvers, when in point of fact there is a rich variety of a different process that may provide for more effective conflict resolution [33] He advocated flexible and diverse panoply of dispute resolution processes, with particular type of cases being assigned to different processes [34] Sander then outlined the spectrum of dispute resolution methods, he regarded as apt, these included

I Adjudication,

II Arbitration,

III Problem solving efforts by a government ombudsman,

IV. Mediation or Conciliation,

V Negotiation,

VI Avoidance of dispute

He stated that we should reserve the courts for those activities for which they are best suited and to avoid swamping and paralyzing them with cases that do require their unique capabilities. He envisioned that "not simply a court house, but Dispute Resolution Center, where a grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to type of his case.

[32] Hensler "Our Courts, Ourselves How the Alternative Dispute Resolution Movement us Re-Shaping our Legal System" (2003-2004) 108 penn St L Rev at 165

[33] Sander "Varieties of Dispute Processing" (1976) 70 Federal Rules Decisions 79 at 112-113

[34] Ibid at 131

Sander idea was a catalyst for what later became known as "Multi-Door Courthouse" Multi-door courthouse were established, initially on a pilot basis, in Tulsa (Oklahoma), Houston (Texas); and in the superior court of the District of Columbia From these experiments the idea spread throughout the world [35] In a relatively short amount of time the use of ADR processes in American has increased to the extent that this once unusual process is now commonplace and hailed as the most important tool available to the courts [36]

1 2.2 England & Wales

Sander concerns for the future of civil justice were echoed in the Woolf Report on the civil justice system 1990's when the system In England and Wales was viewed as

> Too expensive in that the cost often exceeds the value of the claim, too slow in bringing cases to a conclusion and too unequal, there is a lack of equality between powerful and wealthy litigant and the under resourced litigant. It is too uncertain, the difficulty of forecasting of what litigation will cost and how long it will last induces the fear of unknown, and it is incomprehensive to many litigants [37]

Then, the Lord Chancellor appointed Lard Woolf in 1994 to review the rules of civil procedure with a view to improving access to justice and to reducing the cost and time of litigation The aims of the review were "to improve the access of justice and reduce the cost of litigation, to reduce the complexity of rules and modernize terminology, to remove

[35] Including Singapore and Nigeria (Lagos, Kano and Abuja)

[36] Benham & Boyd Barton "Alternative Dispute Resolution Ancient Models provide Modern Inspiration" (1995-1996)12 Ga St U L Rev 623 at 635

[37] See Lord Woolf, Access to Justice, Interim Report (1995) and Lord Woolf, Access to Justice, Final Report (1996)

unnecessary distinction of practice and procedure "[38] perceived the problems within the existing civil justice system, summed up by Lord Woolf in England and Wales as the "key problems facing civil justice system today cost, delay and complexity "[39]

The Woolf Report led to the enactment of the UK Civil Procedure Act, 1997 and the Civil Procedure Rules, 1998 (CPR) The new CPR rules apply both to proceedings in the High Court and in the Country Court. The CPR vests in the courts the responsibility of active case management by encouraging the parties to co-operate and use ADR. Under the CPR a court may either at the request of parties or at its own initiative stay proceedings while the parties try to settle the case by ADR or other means

Since the introduction of CPR, ADR has significantly developed in England and Wales and the judiciary also strongly encouraged the use of ADR The judgments in the Court of appeal in Cowl v Plymouth City Council[40] and Dennett v Rail track Plc.[41] Both indicated that unreasonable failure to use ADR may be subject to cost sanctions Indeed the CPR has also introduced the possibility of cost sanctions if a party does not comply with the court's directions regarding ADR.

The English judge, Light man J who is a strong supporter of incorporating mediation into the justice system, summarized the main developments in relation to ADR since the introduction of the CPR Rules as follows·

- The abandonment of the nation that mediation is appropriate in only a limited category of cases, it is now recognized that there is no civil case in which mediation cannot have a role to play in resolving some(if not all) of the issues involved,

[38] Lord Woolf, Access to Justice, Interim Report (1995) and Lord Woolf, Access to Justice, Final Report (1996)
[39] Ibid
[40] Cowl v Plymouth City Council [2001] EWCA Civ 1935, [2002] 1 W L R 803
[41] Dennett v Rail track Plc [2002] EWCA Civ 303, [2002] 2 All E R 850

- Practitioners generally no longer perceive mediation as threat to their livelihoods, but rather a satisfying and fulfilling livelihood of its own,
- Practitioners recognize that a failure on their part without the express and informed instructions of their clients to make an effort to resolve disputes by mediation exposes them to the risk of a claim in negligence,
- The government itself adopts a policy of willingness to proceed to mediation in dispute to which it is a party,[42]
- Judges at all stages in proceedings are urging parties to proceed to mediation if a practical method of achieving a settlement and imposing sanctions when there is unreasonable refusal to give mediation a chance, and
- Mediation now a respectable legal study and research at institutes of learning[43]

1.2.3 European Developments

(a) Council of Europe

In 1998 committee of ministers of the council of Europe adopted a recommendation on the family mediation of Europe[44] The recommendation focused on the use of mediation in resolving family disputes It sets out the principles on the organization of mediation services, the status of mediated agreements, the relationships between mediation and the proceedings in the Courts and other competent authorities, the promotion of, and access to mediation and

[42] In March 2001, the Lord Chancellor published a pledge committing Government Departments and agencies to settle dispute by ADR techniques
See http //www ogc gov uk/documents/0077 pdf (Last visited 6, November, 2013)
[43] Speech by Mr. Justice Lightman Mediation An Approximation to justice 28, June 2007, available at http //www judiciary gov uk/ docs/speeches/berwin mediation Pdf (Last visited 10 September, 2012)
[44] Family Mediation in Europe Recommendation No R (98) 1

the use of mediation in international matters In addition, it calls all the member states to introduce or promote family mediation and to take or reinforce measures for this purpose, and to promote family mediation as an appropriate means for resolving family disputes

(b) European Commission

Green Paper on ADR in Civil and Commercial Law 2002[15]

As a follow-up to the conclusions of the 1999 Tampere European Council, the Council of justice and home affairs asked the European Commission to present a green paper on ADR in civil and commercial law other than arbitration Priority was to be given to examining the possibility of laying down basic principles, either in general or specific areas, which would provides the necessary guarantees to ensure that out of Court settlements offer the same guarantee of certainty as Court settlements.

In 2002, the European Commission published a Green Paper on Alternative Dispute Resolution in Civil and Commercial Law It deals with promotion of EU wide basis of ADR as an alternative to litigation primarily of promoting a framework to ensure that dispute can be dealt with in an efficient and cost effective manner The question in the Green Paper related to the essence of the various means of alternative dispute resolution such as clauses in contracts, limitation period, confidentiality, the validity of consent given, and the effectiveness of contracts generated by the process, the training of third parties, their accreditation and the rules governing their liability

European Code of Conduct for mediation 2004

[15] Green Paper in on alternative dispute resolution in civil and commercial matters Com/2002/0196 Final Available at htpp //eurlex europa eu/

In 2004 a code of conduct for mediation was developed by a group of stockholders with the assistance of European Commission [46] It sets out a number of principles to which individual mediators can voluntarily decide to commit It is intended to be applicable to mediation in civil and commercial matters. Organizations providing mediation services can also make such a commitment, by asking mediators acting under the auspices of their organization to respect this code Adherence to the court is without prejudice to national legislation or rules regulating individual professions.

Directive on Certain Aspects of Mediation in Civil and Commercial Matters 2008

In 2008 a European Directive on Certain Aspects of mediation in Civil and Commercial Matters was agreed The purpose of the Directive is to facilitate access to dispute resolution and to promote amicable settlement of disputes by encouraging the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings The Directive must be implemented by 2011 [47]

The Directive applies to processes where two or more parties to a cross-border dispute of a civil or commercial nature attempt by themselves, on a voluntary basis, to reach an amicable settlement to their dispute with the assistance of a mediator. The Directive only applies to cross-border disputes, although it does not prevent member states from applying the provisions of the Directive to Internal mediation process Given the broad definition to the "cross-border disputes", the Directive's provisions on confidentiality and limitation and prescription periods also apply in situations which are purely internal at the time of mediation but became international at the judicial proceedings stage, for example if one party moves abroad after mediation failed

[46] Available at htpp //ec europa eu/civiljustice/adr/adr_ec_code_coduct_en pdf (Last visited 10 July, 2012)
[47] The Directive is available in the Official Journal of European Union L 136/3 (May 2008)

Organization for Economic Co-operation and Development (OECD)

The Organization for Economic Co-operation and Development (OECD) recommendations on Consumer Dispute Resolution and Redress which was adopted by the OECD Council in July 2007, sets out principles for an effective and comprehensive dispute resolution and redress system that would be applicable to domestic and cross-border disputes [48] Member countries are required to review their existing dispute resolution redress frameworks to ensure that they provide with access to fair, easy to use, timely and effective dispute resolution and redress without unnecessary cost or burden In doing so the recommendation states that Member Countries should that their domestic frameworks provide for a combination of different mechanisms for dispute resolution and redress in order to respond to the varying nature and characteristics of consumer complaints.

1-3 Classification of ADR

Dispute settlement processes can be arranged along a spectrum which correlates with increasing third party involvement, decreasing control of the parties over the process and outcome, and , usually, increasing likelihood of having the relationship between the disputants deteriorate during and after settlement of dispute [49] This spectrum can be grouped into five categories

Preventive ADR	Facilitative ADR	Advisory ADR	Determinative ADR	Collective ADR	Court-Based ADR

[48] OECD Recommendation on Consumer Dispute Resolution and Redress This Recommendation was developed by OECD Committee on Consumer Policy (CCP) Works on its principles was initiated late in 2005 The Recommendation was adopted by OECD Council on 12 July 2007 It is available at http //www oecd org/dataoecd/43/50/38960101 pdf (last accessed 19 March, 2013)

[49] Fiadjoe Alternative Dispute Resolution A Developing World Perspective (Cavendish 2004) at 21

Negotiation	Mediation	Conciliation	Arbitration	Ombudsman Schemes	Early Neutral Evaluation
ADR Clauses		Collaborative Lawyering	Adjudication		Court Settlement Masters
Parnering			Expert Determination		Court Referred ADR
					Small claims

The Explanation of above mentioned categories is following

1.3.1 Preventive ADR Processes

Preventive ADR can be described as conflict avoidance process which provide for efficient and systematic management of disputes. It is evident that preventing unnecessary disputes can result in huge monetary savings for individuals, avoid relationship break-downs and enhance trust and confidence between individuals

Preventive ADR is a device which is commonly used in the construction and employment sector In employment & consumer sectors, it is compulsory that organizations must put in place internal structured dispute resolution procedures to deal with complaints and grievances

There is a variety of internal dispute resolution processes aimed at resolving grievances fairly, constantly and in a timely manner These can range in a very formal arbitration procedure to the informal "open door" policy In general, when a grievance occurs, employees or consumers must first exhaust these internal measures if no resolution can be reached, the parties may then proceed to use external mechanisms. These internal dispute resolution procedures resolve an overwhelming percentage of grievances and prevent the escalation of the grievance into a complete dispute. Preventive ADR processes include negotiation, ADR clauses, partnering, joint problem solving and systems design

(a) Negotiation

Negotiation is any type of voluntary communication between two or more people for the purpose of arriving at a mutually acceptable agreement Negotiation is something which occurs in daily life, without most of us really being aware that we are engaging in a process [50] For example, it might consist of a simple and informal conversation between a parent and a child regarding an increase in pocket money In fact, majority of disputes, justiciable and non-justiciable are settled by this process and negotiation is at a core of all ADR processes.

Ury and Fisher note that Negotiation is a basic mean of getting what you want from others It is back and forth communication designed to reach an agreement when you and other side have some interest that are shared and other that are opposed [51]

Principled negotiation refers to the interest-based approach to negotiation [52] The core of the approach is that parties focus on solving the problem by finding a mutually-beneficial

[50] Barrent A HISTORY of Alternative Dispute Resolution (Jossey-Bass San Francisco 2004) at 205
[51] Fisher & Ury Getting to Yes Negotiating Agreement Without Giving in (2nd ed Penguin Books 1991) at xvii

solution rather than on defeating the other side. The four basic principles of principled negotiation are:

I Separating the people from the problem,

II Focusing on interest, not positions,

III. Inventing options for mutual gain, and

IV Insisting on objective criteria.[53]

(b) Partnering

Partnering is co-operative arrangement between two or more parties It is based on the promotion and recognition of mutual goals and it requires all parties to agree on how they will make decisions, including making strategies for resolving disputes during the lifetime of any project. When a partnering is successful, it can develop communication and trust in business relationships such as in the context of a building or public infrastructure project In such sense, it addresses concerns of other stakeholders, such as community groups, private developers, governmental organizations and regulatory authorities etc, since they can be invited to participate in the partnering process. This can help build extensive support for a project.[54]

Partnering is used widely in the construction industry It was first used by the US Army Corps of Engineers in the late 1980s and was first applied in the UK in the North Sea oil and gas industries in the early 1990s [55] Successive UK construction industry review reports emphasized

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[52] Ibid

[53] See Fisher & Ury Getting to Yes Negotiating Agreement Without Giving in (2nd ed Penguin Books 1991) at xvii

[54] Clay et al "Creating Long-Term Success Through Expanded Partnering" (Feb-Apr 2004) 59 Dispute Resolution Journal 42 at 47

[55] Skaggs "Project Partnering in the International Construction Industry" (2003) 20 International Construction Law Review 456 Available at WWW1 fidic org (Last visited 25, June, 2013)

the importance of partnering arrangements in order to facilitate and enhance team work across contractual boundaries [56]

Consensus building, joint problem solving and system design are concepts similar to partnering. They involve determining, in advance, what process will be used for handling conflicts which arise within an organization or between organizations and individuals

In other words, partnering is a preventative process which is used to avoid disputes before they occur through building a strong relationship between the parties The main target is to avoid a major dispute or alternatively, minimize disruptive impact, by focusing on the development of a cooperative working relationship rather than an adversarial one Partnering is a comparatively a new hybrid form of dispute resolution

(c) ADR Clauses

An ADR clause is a contractual clause requiring the parties to attempt to resolve any dispute arising out of the contract using and ADR process or processes The International Centre for Dispute Resolution offers the following short form model standard clause for international commercial contracts

> Any controversy or claim arising out of or relating to this contract, the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.[57]

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[56] See Latham Constructing the team The Latham report Final report of the government/industry review of procurement and contractual arrangements in the UK construction industry (Department of the Environment July 1994) For an example of an International Partnering success see Carlisle "MTRC – Tseung Kwan O Extension Case Study" available at WWW johncarlislesea com (Last accessed 22, Nov, 2013)

[57] Guide to Drafting International Dispute Resolution Clauses International Centre for Dispute Resolution Available at WWW adr org (Last visited 17, Nov, 2013)

ADR clauses can be multi-tiered or stepped which means that the parties are willing to move along the ADR spectrum and they are required to engage in distinct and escalating stages of dispute settlement often ending in final and binding resolution by arbitration or litigation In other words, if one process fails, another dispute settlement process is attempted in order to resolve the dispute.

1.3.2 Facilitative ADR Processes

Facilitative ADR processes involve a neutral, independent and unbiased third party providing help in the management of the process of dispute settlement The neutral and independent third party has no consultative or determinative role in the resolution of the dispute or in the outcome of its resolution but assists the parties in reaching a commonly acceptable agreement by encouraging parties to define the issues with the aim of finding common ground between the parties. This type of ADR includes the process of mediation.

(a) Mediation

The mediation process consists of the neutral and independent third party meeting with the parties who have the necessary authority to resolve the dispute The mediator begins the process by explaining the process to the parties, assessing the suitability of mediation to the situation and ensuring that the parties are willing and able to participate This is known as joint session

The neutral and independent third party then meets with each party in private to discuss their respective positions and their own principal needs and interests These private meetings are known as causes Information which is provided by the parties to the third party

during causes is strictly confidential, unless a party expressly gives his consent to the third party informing the other party of such information.

Once all parties have expressed their views and interests to the mediator in private, the mediator will try to establish areas of common ground and provide the parties with the opportunity of exploring proposals for a mutually acceptable resolution When an agreement is reached between the parties, the mediator will draft the terms and conditions of agreement, ensuring that all parties are satisfied with the agreement, and have all parties sign the agreement [58] This final session is known as the closing joint session

The parties are not bound by any position taken during mediation until a final agreement is reached and signed, at which point it becomes an enforceable contract Mediation aims to achieve a win-win result for the parties to a dispute Some of the proclaimed advantages of mediation include privacy, speed, cost, flexibility, informality, party-control and preservation of relationships

Numerous varieties of mediation have been developed. Firstly, Shuttle mediation is a form of mediation where the mediator goes between the parties and assists them in reaching an agreement without meeting "face to face "[59] Secondly, Transformative mediation does not seek the resolution of the immediate problem, but rather seeks the empowerment and mutual recognition of the parties involved [60] Thirdly, Therapeutic mediation is an assessment and treatment approach that assists families in dealing with touching issues in high conflict

[58] See Stitt Mediation A Practical Guide (Cavendish, 20040, and Boull Mediation principles, process, practice (Butterworths, 2001)

[59] See Liebmann Community and Neighborhood Mediation (Covendish Publishing Ltd 1998) at 59

[60] See Bush & Folger The Promise of Mediation Responding to Conflict Through Empowerment and Recognition (Jossy-Bass 1994)

separation and divorce The focus is on the parties themselves as contrasting to the dispute.[61] Fourthly, In evaluative mediation the third party plays a more advisory role in assisting in the resolution of the disputes The mediator allows to the parties to present their factual and legal arguments

After evaluating both sides, he or she may then offer his or her own assessment of the dispute or put forward views about the merits of the case or particular issues between parties This form of mediation mirrors conciliation [62] Fifthly, Community mediation is mediation of a community issue [63] Sixthly, Peer mediation is a process whereby young people, trained in the principles and skills of mediation, help disputants of their own age group to find solutions to a variety of disputes and is often promoted in school settings for resolving disputes between peers.

Facilitation and fact-finding are similar concepts to mediation and involve a neutral and independent third party assisting the parties in identifying the problems and positions but they do not impose or recommend any solutions to the parties

1.3.3 Advisory ADR Processes

Advisory ADR processes include conciliation and collaborative lawyering They are also called evaluative processes, because they have an involvement of a neutral and independent third party, actively assisting the parties in reaching a mutually acceptable agreement The third party may evaluate the position of the parties, give advice to the parties as to the facts of the

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[61] See Irving and Bejamin Therapeutic Family Mediation Helping Families Resolve Coflict (Sage Publications, 2002)

[62] See Alfini "Evaluative versus Facilitative Mediation A Discussion" (1996) 24 Fla St U L Rev 919, Levin "Propriety of Evaluative Mediation Concerns about the Nature and Quality of an Evaluative opinion" (2000) 16 Ohio St J Disp Resol 267

[63] See the Northside Community Law Centre website for more information on their community mediation service at www nclc ie

dispute recommend the options for resolution of the dispute. The advisory ADR processes include:

(a) Conciliation

Conciliation is a process similar to mediation but the neutral third party takes a more dominant role in bringing the two parties together. If the parties are unable to reach a mutually acceptable resolution, the conciliator issues a recommendation which is binding on the parties except it is rejected by one of them While the conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, it is not a determinative role. A conciliator does not have the power to impose a settlement The interpretation of conciliation mirrors the model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law Article 6 (4) of the Model law states that.

> The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute [64]

(b) Collaborative Lawyering

Collaborative lawyering is a problem-solving method of dispute settlement, used mostly for the resolution of family disputes, where the parties and their lawyers agree, through a contractual commitment, to settle the issues without litigation Typically, each spouse retains a solicitor to help them to negotiate an outcome that they consider, following independent advice, to be fair and acceptable [65] Lawyers represent the parties for settlement purposes only and both

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[64] UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002) Available at WWW uncitral org (Last visited 19, Dec, 2013)

[65] Horgan "Let's Work Together" (June 2005) Law Society Gazette at 24

solicitors are not allowed to have any further involvement in the case The aim is to find a fair and impartial agreement for the couple The successiveness and effectiveness of this process depends on the honesty, cooperation and integrity of the participants [66]

If a client desires to proceed through the collaborative law process, both side must sign a legally binding agreement to disclose all documents and information that relates to the issues. Negotiation sessions take place during four-way meetings, with solicitors and clients all meeting together Both the clients and solicitors must agree to work together honestly and in good faith, within the collaborative law process.[67]

1.3.4 Determinative ADR Processes

Determinative ADR processes involve a neutral and independent third party hearing both parties and making a determination, which is potentially enforceable, for its resolution This kind of ADR includes the processes of arbitration, adjudication, and expert determination

(a) Arbitration

Arbitration is long-established procedure in which a dispute is submitted, by agreement of parties, to one or more unbiased and independent arbitrators who make a binding and enforceable decision on the dispute The Arbitrator is generally selected from a penal of available arbitrators or may have already been agreed upon in the arbitration clause Once the matter has been submitted to the arbitrator, the arbitrator will contact all the parties A timetable will be set, which includes when all documents must be exchanged, submitted, when and where the hearing will be conducted A preliminary meeting will be held at arbitrator's

[66] Walls "Collaborative law a new and better way" Sunday Business Post 25 March
[67] Horgan "Let's Work Together" (June 2005) Law Society Gazette at 24

request. This may be a joint session with all parties present or may be conducted by telephone Conference At the arbitration hearing, each of the respective parties is allowed to present evidence After review of the evidence, the arbitrator will make an arbitrator's award After the arbitrator's award has been issued, the prevailing party often has the ability to have it issued as an enforceable court order.

There are many variants of arbitration developing in different jurisdictions These include

- Baseball Arbitration: In this arbitral process, each party submits a proposed monetary award to the arbitrator At the conclusion of the hearing, the arbitrator is required to select one of the proposed awards, without modification This approach sometimes called "Last Offer Arbitration", severely limits the arbitrator's discretion [68]

- Bounded Arbitration: in this process the parties agree in private without informing the arbitrator that the arbitrator's final award will be adjusted to a bounded range

- Incentive Arbitration. In this form of arbitration, the parties agree to a penalty if one of them rejects the arbitrator's decision, resorts to litigation, or fails to improve his position by some specified percentage Penalties may include payment of attorneys' fee incurred in the litigation [69]

- High-low Arbitration This is an arbitration in which the parties agree in advance to the parameters within which the arbitrator may render his or her award.[70]

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[68] See The International Institute for Conflict Prevention and Resolution "ADR Glossary" 2005 at WWW cpradr org (Last visited 10, Dec, 2013)

[69] See The International Institute for Conflict Prevention and Resolution "ADR Glossary" 2005 at WWW cpradr org (Last visited 10, Dec, 2013)

[70] See Arbitration Defined 2003 JAMS, available at WWW jamsadr com (Last visited 12, Oct, 2013)

(b) Hybrid Models including combinations of mediation and Arbitration: Med-Arab and Arb-Med

There have also been various Hybrid models developed, which involve a combination of mediation and arbitration. These hybrid processes are known as med-arb and arb-med Both models allow the parties to select a single third party to serve as both mediator and arbitrator

Med-arb is a process in which the parties first attempt to resolve the dispute through mediation. If mediation does not yield a settlement, the mediator switches the roles from mediator to arbitrator, and imposing a binding decision on the disputing parties Med-arb is commonly used in labor disputes in the United States and is considered suitable for patent dispute also [71]

Arb-med is a process where the parties first present the case to arbitrator At the end of the hearings at this stage, the arbitrator writes up a decision and seals it without disclosing its contents to the parties Then, for a fixed period of time the parties mediate the dispute If the parties reach agreement before the deadline for the end of the mediation, the parties never learn about the contents of the decision of arbitrator If they do not reach agreement by the specified deadline, the arbitrator decision becomes final and binding on the parties.[72]

These hybrid models have been met with some criticism. It has been suggested that the parties are likely to be inhibited in their discussions with the mediator if they know that the

[71] See IDA v University of Southampton (2006) EWCA Civ 145 Elliot "Med/Arb Fraught with Danger or Ripe with Opportunity" (1996) 34 Alta L Rev 163, and Landry "Med/Arb Mediation with a Bite and an Effective ADR Model" (1996) 63 Def Council J 263

[72] Zack "Quest for Finally in Airline Dispute A Case for Arb-Med" (Jan 2004) 58 The Dispute Resolution Journal, at 34-38

mediator might be called upon to act as mediator in the same dispute;[73] and a third party who mediates and then assumes the role of arbitrator may be biased by what has been conveyed to him or her informally and confidentially in the mediation process [74]

(c) Adjudication

Adjudication is a process similar to expert determination and involves a neutral and independent third party, an adjudicator, who uses his or her own knowledge and investigations, while also weighing the evidence presented by the parties, in order to reach a legally binding decision The adjudicator will decide how the dispute is to be settled The hearing is confidential An adjudication decision that is not appealed against will become a binding determination order The process is most commonly associated with the settlement of disputes in the building and construction industry in the UK

(d) Expert Determination

Expert determination is an ADR process in which the parties to a dispute appoint a neutral and independent third party to make a final and binding determination on a dispute which relates to that expert's particular area of specialization The parties, therefore, agree in advance to be bound by the decision of the expert determination

Expert determination can be mainly useful in disputes involving technical issues Expert determinations are often conducted solely on written submissions It has been suggested that this makes the process short and cost effective as compared to litigation It can also be used in conjunction with other dispute resolution process such as mediation, where a technical issue

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[73] Limbury "Med-Arb, Arb-Med, Neg-Arb and ODR" A paper presented to the New South Wales Chapter of The Institute of Arbitration and Mediation Australia (Sydney, August 3rd 2005)
[74] Ibid

needs to be resolved quickly and with the current expertise Common examples of expert determination include the use of a surveyor in a rent review, or an accountant to provide a valuation under a share purchase agreement [75]

Whilst the expert determination process can resemble arbitration there are several remarkable differences between the two processes [76] In terms of enforcement, an expert's determination will not be enforceable without separate court order. Consequently, whilst expert determination may resolve the dispute in a quickly manner, enforcing the determination may necessitate arbitration or litigation or any event 77

1.3.5 Collective ADR

Collective ADR may be used successfully as a method of dealing with multi-party scenarios without approaching to litigation An example of collective ADR was the Alder Hay mediation case Similarly, "test cases" such as those used in the Social Welfare Equality Claims of the 1980s can be used as a means of assisting the administrative resolution of similarly situated parties Collective ADR processes include:

(a) Ombudsman Schemes

Ombudsman is a governmentally designated person who confidentially receives, investigates and facilitates the resolution of complaints The ombudsman may interview the parties, review the files and make recommendations to the disputants but normally not empowered to impose

[75] Carey "Expert determination –Some Practical Issues" (2004) 2 Journal of Civil Practice and Procedure 1 at 9

[76] For a Summary on the differences between arbitration and expert determination see Dowing-Hussey "The Irish Law of Arbitration An Overview part11" (2007) 25 ILT 137

[77] In O'Mahony v Patrick Connor Builders Ltd [2005] IEHC 248 Clarke J held that where parties agreed to be bound by the report of an expert, such report could not be challenged on the ground that mistakes had been made in its preparation, unless it could be shown that the expert had departed from the instructions given to him in a material respect or had acted in bad faith

solutions. Ombudsmen often work as management advisors to identify the solutions for systematic problems and in addition to their focus on disputes from individual sides

Many services have an ombudsman scheme that the customer may use For example, the services provided by insurance companies, banks and building societies all are covered by Financial Ombudsman Service (FOS). The complainant will only be able to refer the matter to the ombudsman after fulfilling the procedural requirements. The complainant has to submit written detail of his complaint, together with the copies of any of his evidence. The ombudsman makes a recommendation or ruling which is usually accepted by the supplier, but is not legally binding Hence the complainant still can approach the court if he is not satisfied by the recommendation of ombudsman. However, the Court will take the ombudsman's ruling into account when deciding the claim

1.3.6 Judicial ADR Processes

Judicial ADR processes are dispute resolution processes which often occur after litigation has been initiated and during the lead up to the commencement of a trial and are aimed at reaching a settlement on some or all issues These processes can involve the assistance of a judge of the court or a court official in supervising the process A judicial ADR process is well developed in Canada and United States and includes early neutral evaluation, mini-trial, court settlement conferences and small claims procedure

(a) Early neutral evaluation

Early neutral evaluation is a non-binding ADR process in which parties to a dispute appoint a neutral and independent third person, usually a judge or somebody legally qualified, who provides an unbiased and impartial evaluation of the facts, evidence or legal merits of a dispute

and provides guidance as to the likely outcome should the case be heard in the Court The goal of early neutral evaluation is to reduce the cost of litigation by facilitating communications between the parties while at the same time providing them, early in the process with a rational analysis of their case [78] It is often described as a mean of providing the parties with a reality-check of the strengths and weak points of their case Early neutral evaluation often occurs early in the litigation process, traditionally in the pre-trial period prior to the commencement of discovery (the exchange of detailed documents between the parties)

The evaluator holds and informal meeting of clients and their legal representatives where each party presents the evidence and arguments supporting its case The evaluator identifies areas of agreement and clarifies and focuses on the issues The evaluator generally writes an evaluation in private that may include an estimation of the relative strengths and weaknesses of each party's case and the reasoning that supports this assessment. This evaluation is provided to the parties either privately or jointly

Early neutral evaluation is often suitable when the dispute involves technical or factual issues that lend themselves to expert evaluation. It is also used when the parties disagree significantly about the value of their cases In Australia early neutral evaluation is increasingly used in family law disputes where a husband and wife are in conflict over issues arising out of their martial collapse. The evaluator, who is often a family law specialist, will provide to both parties an early neutral evaluation of the probable result if the matter was to be litigated in the family court This process is also used in certain US state courts, and is offered by the English Commercial Court judges and the Technology and Construction Court

[78] Conner "Primer for Participants in Early Neutral Evaluation" (1990) 70 Oklahoma Bar Journal

Case appraisal is a similar process to early neutral evaluation in which a impartial and independent third party investigates the dispute and provides advice on possible outcomes for the resolution of disputes.[79]

(b) Mini Trial

This is a non-binding and voluntary ADR process which is typically used by private entities, companies and governmental agencies involved composed disputes that involving significant amounts The mini-trial has some formal aspects of beginning parts of a trial or arbitration, in addition to the characteristics of mediation In mini-trial, each party appoints a member to a three member penal. The party's member should be someone at a high level in the organization or governmental agency who has had little involvement in the dispute and who is not closely familiar with the dispute's factual understandings The parties select a neutral third party member who chairs the process, guides the parties through the process and serves as a mediator if needed.

Each party makes an unofficial presentation of witness and evidence Each party engages in some, limited questioning of the other's party witness and presents arguments to the penal After both parties complete their presentations, the parties engage each other in negotiations Each party's penal member participates in the negotiations. The third-party neutral serves as mediator if the parties consider it necessary to facilitate a resolution or to resolve impasses as they may arise An agreement reached by the parties generally binding and enforceable

(c) Court Settlement Process

[79] Ibid

Court settlement process is a process similar to the judicial mini-trial and was introduced in England and Wales Technology and Construction Court in 2006 as a pilot scheme It is a confidential, voluntary and non-binding dispute settlement process in which a settlement judge (who is a judge of the Technology and Construction Court) assists the parties in reaching an amicable settlement at a court settlement Conference.[80]

Save as the parties otherwise agree, during the court settlement conference the settlement judge may communicate with the parties together or with any party alone, including private meetings at which the settlement judge may express views on the disputes. Each party must assist the settlement judge A party may request a private meeting with the settlement judge at any time during the court settlement conference The parties shall give full support to enable the court settlement conference to proceed and be concluded within the time predetermined by the settlement judge If an agreement is reached it becomes binding on the parties once they sign the agreement

If no settlement is reached, the case continues, but with a different judge The settlement judge cannot be called as a witness in any future proceedings associated with the claim. After the process, the parties have the choice of asking the settlement judge for an assessment giving his views on the dispute, including forecast of success and expected outcome This will be exclusively confidential and the parties will not be able to use or refer to it in any successive proceedings

Judicial settlement Conferences are either allowed or required by statute in many US courts as a procedural step before trial Federal judges are clearly authorized under Rule 16 of the Federal Rules of Civil Procedure 2007 to use settlement procedure to resolve the case or

[80] See Alberta Law reform Institute Research Paper on Dispute Resolution A Directory of Methods, Projects and Resources' No 19 July 1990 at 26

controversy before the court Local court rules often provide for mandatory settlement conferences during the pre trial proceedings The judge handling the case may carry out informal settlement discussions with the parties, but, in recent years, a practice has developed of assigning a judge or magistrate to conduct the settlement conference. This judge will not be the judge to try the case if settlement is unsuccessful This separates the roles of adjudicator and mediator Once again, the settlement judge has no power to impose settlement and does not attempt to pressurize a party to accept any proposed terms The parties may agree to a binding settlement If no settlement is reached the case remains on the litigation track [81]

1.4 Salient Features of ADR

ADR gives parties in dispute the chance to work through disputed issues, generally with the help of a neutral third party. It is generally faster, efficient and less expensive than litigation

The salient features of ADR include

- Save a lot of time by avoiding/resolving conflicts/disputes within weeks or months, compared to litigation, which can take years
- Save a lot of money, including fees for lawyers and experts, and other expenditures occurred during the proceedings of courts
- Put the parties in control (instead of their lawyers or the court) by giving them an opportunity to tell their side of the story and have a say in the final decision
- Focus on the issues that are important to the people in dispute instead of just their legal rights and obligations involving the case

[81] Ibid

- Assist the people involved come up with flexible and creative options by exploring what each of them wants to achieve and why
- Safeguard and preserve relationships by helping people co-operate instead of creating one winner and one loser
- Produce excellent results, for example settlement rates of the cases is up to 85 per cent
- Reduce pressure from court appearances, time and cost
- Keep private disputes private, only people who are invited can attend an ADR session, unlike the courts, where the proceedings are usually publically and in an open session conducted, even the media can attend the proceedings
- Lead to more flexible remedies than court, for example by making agreements that a court could not enforce or order (for example a change in the policy or practice of a business)
- Be satisfying to the participants, who often report a high degree of satisfaction with ADR processes
- Give more people access to justice, because people who cannot afford court or legal fees can still access a dispute resolution mechanism

These are some important distinctive features of ADR which may be sufficient to prove the efficiency and importance of these processes as compare to court litigation

Conclusion

ADR facilitate the early settlement of disputes. Early settlement can be both emotionally and financially beneficial to the disputants It may also repair and maintain an important relationship, something that may be at risk in adversarial litigation While it is also true that lawyers always engage in negotiation and settlement, sometime on the steps of the court, a successful negotiation often depends on the strength of the legal rights-based arguments, which can only be developed following expensive and time consuming processes such as discovery. This legalistic approach often overlooks other avenues of settlement opportunity, which may better address a client underlying interests and needs

Alternative Dispute Resolution processes must be seen as an integral part of any modern civil justice system It must become such a well established part of it that when considering the proper management of litigation it forms as essential and as instinctive part of our lexicon and of our thought process, as standard consideration like what, if any, expert evidence is required

Chapter II

Concept of ADR in Islamic Law with reference to Islamic Finance

Introduction

Amicable Dispute Resolution in Islamic Law is as old as Islam itself when one critically considers the Islamic Legal history particularly in relation to Commercial transactions as well as political fields ADR Processes are these in Islamic Law i e Sulh, Tahkim, Muhtasib and fatwa of mufti etc it is therefore necessary to explain and highlight the basis of ADR in Islamic law and its kinds in Islamic legal history This chapter is divided into four sections. Section I analyses the basis of ADR in Islamic law. Section II analyses different forms of ADR in Islamic legal history Section III discusses the relevance of ADR in Islamic Finance Disputes Section IV will conduct a brief Comparison between ADR and ordinary litigation Finally a brief conclusion will be drawn

1.1 The Basis of ADR in Islamic Law

It is a popular belief that ADR has emerged and originated in the west during past few decades. But contrary to this belief such ADR processes like Arbitration, Mediation, Negotiation, Expert Determination (fatwa of Muftiees) and ombudsman etc are as old as Islamic itself, that is, 1400 years old All of these are not only mentioned in prime and primary Islamic sources such as Quran and Hadith but have been in practice since the times of Prophet, (P B U H) who was a great supporter of the amicable resolution of disputes Many remarkable evidences are available in the support of this statement A look at ADR as a whole in Islamic law and also at various ADR processes independently brings out certain distinctive features which grant uniqueness to it in Islamic legal system

Let these features be stated here before their explanation which will be given later [82] These include.

1. A religious holiness attaches with the ADR processes in Islamic law because of their origin being in Quran and the prophetic approval given to these processes. The sense of submission which the Quran and Sunnah (sayings, doings and tacit approvals of the prophet) construct in Muslims, make observance to ADR a divine obligation, elevating ADR to the higher pedestal of spirituality that demands submission
2 The support given to the idea of amicable settlement in Islamic law is so convincing that it is allowed in every situation except where it make a thing haram as halal and halal as haram, that is to say, to make a prohibited as permitted and vice versa This idea covers judicial proceedings too, requiring the qadis to go on striving for settlement during the entire course of judicial proceedings
3 Amicable settlement of a dispute which is already put to arbitration has been made a moral duty of the parties as well as the arbitrator
4 Amicable composition is freely allowed, empowering an arbitrator to use his sense of fair play, equity, justice and good conscience in making the award
5 Parties to an arbitration agreement are allowed to revoke it at any time before award is given.
6 Futures disputes are not permitted to be covered by an arbitration agreement in Islamic law, which maintains a "wait and see" attitude, that is, since a dispute may or may not arise, so what is the urgency, once it arises, the parties may agree to settle it by arbitration

[82] Syed Khalid Rashid Peculiarities & Religious Understanding of ADR in Islamic Law, p 2

7. Expert determination comes in the form of fatwa of muftis. As fatwa is non-binding verdict of a jurist consult of great religious standing in the society, on a disputed point carries the stamp of wisdom and religious piousness, which compels a more ready submission than the verdict of a mere expert
8. Ombudsman in Islamic law is known as Muhtasib, whose office is mentioned in the Holy Quran and the first two ombudsmen that of Makkah and Madina, were appointed by the prophet himself Muhtasib serves towards dispute avoidance and dispute resolution [83]

Whatever has been stated above is sufficient to serve as the bases of the claim regarding the novelty, posterity and religiosity of ADR processes in Islamic law Now let us give a brief explanation of each of above mentioned points

1. Religious sacredness Attaching with the ADR processes in Islamic law

Shariah or Islamic law is not only law but a complete code of life for the Muslims surrounding their entire life from cradle to the grave. The provisions of this law are either revealed (Quran) or based on the prophet's Sunnah, (sayings, doings or his implied approvals), or legal opinions and findings of Muslim jurists. The first of these two, that is, those which are based on the Quran or Sunnah are considered as most sacred and therefore, most compliance worthy As the ADR processes in Islamic law are based on Quran and Sunnah, so a religious sanctity and holiness demanding unquestionable obedience comes to be attached with it, conferring on it a status which is unique and incomparable among the legal systems of the world Once a Muslim

[83] Ibid

is told about the real origin of a particular ADR process, he needs not to be convinced any further of its practical worldly usefulness, he will comply, considering as religious demand [84]

It is expressly stated in the Quran "this is a Book which (Allah) has revealed as a blessing; so follow it and be righteous, that ye may receive mercy".[85]

Quran says

وَهَٰذَا كِتَابٌ أَنزَلْنَاهُ مُبَارَكٌ فَاتَّبِعُوهُ وَاتَّقُوا لَعَلَّكُمْ تُرْحَمُونَ

A Muslim again comes across in the Quran such verses which tell him about the benefits of the divine revelations For example, Quran says

إِنَّ فِي هَٰذَا لَبَلَاغًا لِّقَوْمٍ عَابِدِينَ

"Verily in this (Quran) is a message for people who would (truly) worship Allah".[86]

And describing the objectives of the shariah, Quran says

يَا أَيُّهَا النَّاسُ قَدْ جَاءَتْكُم مَّوْعِظَةٌ مِّن رَّبِّكُمْ وَشِفَاءٌ لِّمَا فِي الصُّدُورِ وَهُدًى وَرَحْمَةٌ لِّلْمُؤْمِنِينَ

"O mankind, a direction has come to you from your lord, it is a healing for the ailments .. And guidance".[87]

About the sanctity and holiness of the prophetic statements, we have a declaration from Allah himself in the holy Quran Allah (S.W T) says

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[84] *Ibid p 3*
[85] Quran, Surah Al An'am (6), ayat 155 [Abdullah Yousuf Ali's translation]
[86] Quran, Surah Al Anbya (21), ayat 106
[87] Quran, Surah Yunus(10), ayat 57

إِنْ هُوَ إِلَّا وَحْيٌ يُوحَىٰ وَمَا يَنطِقُ عَنِ الْهَوَىٰ

Nor does he (i e., the prophet) say of his own desire It is no less than the inspiration sent down to him [88]

Sunnah of the prophet (P B.U H) has become a source of inspiration for every Muslim and a considered second pillar on which rests faith and life of a Muslim No doubt, a Muslim always turns to the Quran and Sunnah for answers to his every problem The path laid down in the Quran is to be followed by a Muslim, as commanded by Allah in the Quran

وَأَنَّ هَٰذَا صِرَاطِي مُسْتَقِيمًا فَاتَّبِعُوهُ وَلَا تَتَّبِعُوا السُّبُلَ فَتَفَرَّقَ بِكُمْ عَن سَبِيلِهِ ذَٰلِكُمْ وَصَّاكُم بِهِ لَعَلَّكُمْ تَتَّقُونَ

Verily, this is my way leading straight follow it, follow not (the other) paths they will scatter you about from His (great) path Thus doth He command you, that ye may be righteous [89]

The Islamic law is full of such provisions which explain to Muslims the importance of the submission to the Quran and Sunnah It is therefore proper to say that to adopt and practice ADR processes is like a religious or sacred obligation for a Muslim once he becomes aware that these are based on the Quran and Sunnah Today, unfortunately, a majority of Muslims are unaware of this fact

2- The all pervasive support that ADR finds in Islamic law

A famous letter that the second caliph of Islam – Umar bin Al-Khattab (R A) – wrote to Abu Musa Al-Ash'ri after appointing him as Qadi (judge) contained certain rules to guide him in

[88] Quran, Surah Al Najam, ayat 3-4
[89] Quran, Surah Al Amin, ayat 153

deciding cases One of these rules spelled out the wide extent of coverage of amiable settlement of disputes The exact words of Umar (R A) are·

> All types of compromise and conciliation among Muslims are permissible except those which make haram (unlawful) anything which is halal (lawful) and a halal as haram [90]

This above mentioned principle is directly based on the saying of the prophet that "if somebody innovates something which is not in harmony with the principles of our religion, that thing is rejected" [91]

In fact the support that the Quran gives to the peaceful resolution of disputes forms the basis of the widest support that the idea finds among the Muslims For example, the Quran says·

إِنَّمَا الْمُؤْمِنُونَ إِخْوَةٌ فَأَصْلِحُوا بَيْنَ أَخَوَيْكُمْ وَاتَّقُوا اللَّهَ لَعَلَّكُمْ تُرْحَمُونَ

> The believers are but a single brotherhood, so make peace and reconciliation (sulh) between two (contending) brothers, and fear Allah, that ye may receive mercy.[92]

The holy Quran was here repeating the same thing it already declared in another ayah of the same sorah, which is in the following words

وَإِن طَائِفَتَانِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأَصْلِحُوا بَيْنَهُمَا ۖ فَإِن بَغَتْ إِحْدَاهُمَا عَلَى الْأُخْرَىٰ فَقَاتِلُوا الَّتِي تَبْغِي حَتَّىٰ تَفِيءَ إِلَىٰ أَمْرِ اللَّهِ ۚ فَإِن فَاءَتْ فَأَصْلِحُوا بَيْنَهُمَا بِالْعَدْلِ وَأَقْسِطُوا ۖ إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ

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[90] The letter is still preserved For its authenticity, which is established with carbon dating process, see, D D Magnolith, "Omar's Instructions to the Qadi", Journal of Royal Asiatic Society, (1910), p 307 at 311-312, Asif A A Fyzee, A Modern Approach to Islam, (Lahore, 1978 ed Of the original Indian Edition), pp 41-46, Mahmood A Ghazi, Adab al Qadi, (Urdu) 2nd ed (Islamabad, Islamic Research Institute, 1993), p 164

[91] Sahih Al-Bukhari,Vol 3, p 535, Eng Tr By Muhsin Khan (Dar Al Arabia, Beirut, n d)

[92] Quran, Surah Al-Hujarat, ayat 10

> If two parties among the believers fall into a quarrel, make ye peace between them . With justice, and be fair for Allah loves those who are fair (and justice) [93]

The Prophet was so supportive of the amiable resolution of disputes that he is repeated to have expressed his willingness to overlook the use of an exaggeration or miss-statement if it is for the sake of sulh (peaceful settlement). The hadith is as follows

> Narrated Um Kulthum bint Uqba that she heard Allah's Apostle (P B U H) saying 'He who makes peace (sulh) between the people by inventing good information or saying goods, is not a liar 94

This support is unique in the sense that it is not seen in any other legal system, except to some extent in the present Chinese constitution and the teachings of Confucius

3- Settlement is embedded in Arbitration

One of the discussions among early Islamic jurists was concerning the meaning to be given to arbitration Should it be regarded as an attempt at 'Conciliation' or something similar to 'judicial proceedings' where award is binding as a judgment? The Hanafis and Shafis favored first view, while the Malikis and Hanbalis favored the later view [95] During the course of centuries, a amalgamation of the two views evolved the law and it stands somewhere in the middle. That is, it is a duty of the parties and arbitrator to struggle for the settlement during

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[93] Quran, Surah Al-Hujarat, ayat 9

[94] Abdul Hamid El-Ahdab, Arbitration With the Arab Countries, (Kluwer Law & Taxation Publisher

[95] , Deventer/Boston, 1990), pp 15, 20-22, and Abdul Hamid El-Ahdab, "General Introduction on Arbitration in Arab Countries", International Handbook On Commercial Arbitration, Supplement 27 (December 1998), citing Fatwa Al- Hindiyyah, vol 3 at 468, and Ibn Qudama, Al Mughni, vol , 9, 3rd (Cairo, 1367 H) Ibn Abidin, Radd Al Mukhtar, p 483

the entire course of arbitral proceedings, if no settlement comes through, then the award given by the arbitrator will be binding, but only if ratified by a court of law

This is very healthy approach, because the purpose of arbitration is to resolve a dispute and not to fight a legal battle. A settlement is always preferable over and imposed award

4- Amicable composition comes within the inherent powers of an Arbitrator

Amiable composition is a principle which allows the arbitrator to take consideration his own sense of fair play, justice and equity in making the award Islamic law of arbitration allows it, so also the civil law, but common law rejects the concept and compels the arbitrator to follow the law strictly, even if it results into inequity and unfairness [96] The principle in Islamic law is based on a Quranic verse which says:

إِنَّ اللَّـهَ يَأْمُرُكُمْ أَن تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُم بَيْنَ النَّاسِ أَن تَحْكُمُوا بِالْعَدْلِ

نَّ اللَّـهَ نِعِمَّا يَعِظُكُم بِهِ إِنَّ اللَّـهَ كَانَ سَمِيعًا بَصِيرًا[97]

Allah doth command you, to render back your Trusts to those who, they are due,And when ye judgeBetween man and man, that ye judge with justice.

According to Abdul Hamid El-Ahdab, a leading Arab authority on arbitration in Islamic law,

The prevailing opinion in Muslim law derived from the (above) text is that arbitration must settle the disputes according to the rules of fairness and with respect to the public order Their position is rather close to that of 'amicable compositieur' in, say, French law, who has to settle the dispute in an analogous sprit to that which the parties would have had, had they been able to agree on a compromise However, judging fairly does

[96] Syed Khalid Rashid Peculiarities & Religious Understanding of ADR in Islamic Law, p 5
[97] Quran, Surah Al Nisa, ayah 58

not mean that the arbitrator does not have to apply the rules of Muslim law when the legal principle underlying the dispute is covered by these rules Should no such rules exist, fairness guides the arbitrator in looking for the solution the arbitrator must also take into account those principles in commercial matters, which Al Ghazali in his Ihya Ulum al-Din has derived from the Quran and Sunnah[98] under the heading of 'good conduct of commercial matters' These principles help the judge or the arbitrator when a (strict0 direct implementation of the contractual provisions would seem unfair (due to change in economic circumstances and personal situation of each party), rendering the performance of contractual obligations unduly burdensome.[99]

The recognition of the principle of amiable composition in the Islamic law of arbitration nearly a thousand years ago, well before its adoption by the French law, or its recent adoption in the UNCITRAL Model Law, due to its human nature and logical justification, is a unique feature of the Islamic law of arbitration The arbitrator under Islamic law does not need an express written authorization from both the parties to use amiable composition, as required in the UNCITRAL Model Law [100]

5- Revocability of the Arbitration Agreement

Islamic jurists have not laid down any general theory of contract Instead, they studied individual contracts, like that of sale, lease and mortgage, etc Any contract which relates not to a specific contract was not given much consideration These were left to be dealt with by the parties as they wish, including revocation As arbitration agreements do not fall within the

[98] Al Ghazali , Ihya Ulum al-Din, vol 2, p 79ff

[99] Al Ehdab, Arbitration with the Arab Countries, (Kluwer Law Taxation Publisher, 1990), pp 50-51, citing Omar El Kadi, L'Arbitrage International enter le Droit Musulman et le Droit Positif Francais et Egyptien, These de Doctoral, Paris XI, pp 190-191

[100] Syed Khalid Rashid Peculiarities & Religious Understanding of ADR in Islamic Law, p 6

scope of a specific contract, hence these are considered revocable, even unilaterally by a party [101]

Due to the inbuilt revocability of arbitration agreement, any of the parties may take the dispute to the Court for adjudication, instead of referring it to arbitration, and without any fear of stay of proceedings Because if the other party objects to judicial determination and insists on arbitration, the party may revoke the arbitration agreement, making stay of action meaningless Even though the modern Arab world's arbitration laws do not allow revocation of the agreement without valid cause, yet it has to be admitted that the irrevocability of the agreement is only a mixed blessing. In many cases where a party is compelled to submit to arbitration against its free choice, ends up creating every possible hurdle in the way of smooth conduct of arbitral proceedings and ultimately in the enforcement of the award [102]

6- Lot of problems are Avoided by not allowing "future" Disputes to be arbitrated

According to Article 1847-1850 of the Majallah Al Ahkam Al Adliyyah (Ottoman Civil Code), which is based on Islamic law, one of the basic conditions of a valid arbitration agreement is that the dispute to be arbitrated must have already arisen Future disputes cannot be arbitrated Because of the uncertainty arising out of the contingency that a dispute may or may not arise gives rise to the gharar, a principle of Islamic law which strikes down any provision which is subject to an uncertainty. This is why in Islamic law, an arbitrator must be appointed by name The attitude of Islamic law is wait and see Let the dispute arise

[101] Ibd
[102] Syed Khalid Rashid Peculiarities & Religious Understanding of ADR in Islamic Law, p 7

If parties at that given time are mutually agreeable to refer the dispute to arbitration, they may enter into an agreement, name the arbitrator and start the proceedings In case of future disputes, however, there may take place a very long gap between the time of entering into the agreement and the arising of the dispute Meanwhile, either party may lose his zeal for arbitration, yet he is legally 'forced' into it with counterproductive consequences This way, the prohibition imposed on the arbitration of futures disputes appears to be prudent Sacrificing a little convenience may open up the possibility of big gains [103]

7- A very special kind of "Expert Determination" is provided in the form of Fatwa of Mufti

Expert determination is one of the ADR processes in which the parties in a dispute seek the expertise of an expert for making a neutral evaluation of matter in dispute and pronounce an assessment of the relative merit of the cases of both the parties This assessment is not binding but advisory in nature However, keeping in view the knowledge of the expert and his impartiality parties tend to accept the assessment as binding and settle their dispute accordingly Fatwa given by the Muftis very much resembles with expert determination. Fatwa in Islamic law is non-binding evaluative opinion given by a Mufti about a specific issue affecting the whole society (e g transplantation of human organs, birth control, cloning, etc) or a specific individual problem affecting only two parties (e g A matrimonial problem, business dispute, testamentary disposition, etc) not everyone can act as a Mufti, except those who have the same qualification as a Qadi

Islamic legal history is full of cases in which thousands of problematic issues and disputes were referred to Muftis and the answers given by them constituted a collection of

[103] Ibid

fatwas In fact, fatwa has become an integral part of Islamic legal history, both in past and at present. The earliest collection of fatwa is known as Kitab Al Nawazil was compiled by Abu Layth al Sumarqandi, who died in 983 AD And the latest collection is Fatawa of Abu Zahra published from Beirut in 1998. In many countries like Malaysia, there are government constituted Fatwa Committees to give verdicts on matter of general interest for every Muslim In still other countries like Pakistan and India, there are Dar ul Iftas constituted by the different religious sects to give fatwa on voluntary basis. These have helped in resolving thousands of disputes among Muslims.

8- Muhtasib or Ombudsman Is As Old as Islam itself is

The institution of ombudsman (Muhtasib) has now become an integral part of the administration of civil justice in many countries in the world Ombudsman helps to take into cognizance such public complaints against the government bureaucracy which are generally regarded outside the jurisdiction of the courts This institution emerged in Sweden in 1809 and in England in 1967 through the parliamentary commissioner Act It is now considered as an important and integral part of ADR.

In Islamic law, however, the institution of ombudsman in the form of Muhtasib mentioned in the Quran and hence is more than 1400 years old. In this regard Quran states

وَلْتَكُن مِّنكُمْ أُمَّةٌ يَدْعُونَ إِلَى الْخَيْرِ وَيَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنكَرِ ۚ وَأُولَٰئِكَ هُمُ الْمُفْلِحُونَ [104]

Let there arise out of you A band of people enjoining what is right and forbidding what is wrong and believing in Allah

[104] Quran, Surah Aal e Imran, ayah 104

The Quranic obligation of "forbidden what is wrong" did not remain a theoretical idea The prophet himself appointed two prominent persons as Muhtasibs, Umar bin Khatab for Madina and Sa'ad ibn Al A'as Umayyah for Makkah According to the renowned jurist ibn Tamiyyah, the jurisdiction of the Muhtasib covers areas that are generally considered to be outside the scope of law courts [105] His duty is to keep an eye on public morals, to eradicate fraudulent practices of the traders and generally to ensure the goal health of the civil society

> A separate department of Hisba Account taking, with full time Muhtasib, assisted by qualified staff (known as 'Arifs and Amins) was introduced by Abbasid Caliph Abu Ja'afar al Mansur in 157 AH (733 AD) The institution of Hisba moved along with Muslims in the Western provinces of Spain and North Africa Similarly the office of Muhtasib was an important department during the rule of Fatamids, Ayyubids and Ottomans
>
> The institution of hisba remained in vogue during the entire Muslim period of History, though it has been termed in a different way in various regions For example, in the Eastern provinces of Baghdad caliphate the officer in-charge was muhtasib, in North Africa he was sahib al-suq, in Turkey, Muhtasib aghasi and in Pakistan and India, Kotwal [106]

According to Mawardi, there are three types of complaints which a muhtasib may entertain;

a) Complaints regarding weights and measures,

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[105] Ibn Taimiyyah, Al-Hisab fi al-Islam wa Wazifat al Hukkam al-Islamiyyah (Hisbah in Islam and Duties of Islamic Officals), (Madinah University, n d) p 10

[106] Muhammad Akram Khan, "Al-Hisba and the Islamic Law" in Ibn Taimiyyah, Public Duties in Islam, Eng tr by Mukhtar Holland (Islamic Foundation, Leichester, 1986, 1986

b) Complaints against adulteration of various kinds and undue hike in prices of items sold,

c) Complaints against non-payment of debt even while possessing the ability to repay it [107]

He has authorized the Muhtasib to take assistance of the police in discharging his duties His jurisdiction includes keeping an eye on the working of various professionals like doctors, teachers, goldsmiths, etc, in the way they conducted their business or profession He also covered religious activities and community affairs, like keeping the roads and streets clean and lit at night In Pakistan there is a sophisticated network of Muhtasibs in all the four provinces of the country and a chief Muhtasib for the whole country There is a feeling among the common people of Pakistan that in view of the usefulness of this institution, its jurisdiction should be enlarged [108]

2.2 Forms of ADR in Islamic legal history

Amicable dispute settlement in Islamic law is as old as Islam itself when one critically considers the Islamic legal history particularly with regard to commercial transactions as well as political disputes The Islamic corpus juris is replete with lagal texts prescribing ADR processes such as sulh, tahkim, muhtasib, and hybrid processes for the resolution of disputes in an amicable manner. These ADR processes are considered as "Basic Tenets" of civil justice in Islamic law [109] This extra-legal resolution of disputes has strong support in the two prime sources of Islamic law the Quran and Sunnah, to encourage people to always bury the hatchet as much as possible From the view point of Islamic law, the following represent the recognized processes of dispute resolution·

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[108] Information given by Justice • Khalil ur Rahman, retired judge of the Supreme Court of Pakistan who also worked as the Chief Muhtasib of Pakistan See, also M S Naz, Islami Riyasat Mei Muhtasib ka Kirdar, (Urdu) (Idara Tahqiqat-e-Islami, International Islamic University, Islamabad), pp 351-377

[109] Syed Khalid Rshid "Alternative Dispute Resolution in the context of Islamic Law" n 17 at p 96

I Sulh (good faith negotiation, mediation/conciliation, compromise of action),

II Tahkim (Arbitration),

III Med-Arb (A combination of sulh and tahkim),

IV. Muhtasib (Ombudsman),

V Wali al- Mazalim (Informal Justice or Chancellor),

VI Fatwa of Muftis (Expert Determination or non-binding evaluative assessment) [110]

Though most of the aforesaid processes may directly or indirectly apply to Islamic banking and finance disputes, it is convenient for us to focus on the relevant processes for the sake of evaluative assessment A brief appraisal of some relevant ADR processes recognized in Islamic law is as follows.

2.2.1 Sulh (Conciliation)

2.2.1.1 Literal Meaning

Solh is an Arabic word which means "peace" as opposed to war It is derived from the same root as Arabic word musalaha meaning reconciliation In Islamic Law it means an "amicable settlement [111]

2.2.1.2 Technical Meaning:

An agreement by which a dispute or conflict between two or more parties is resolved [112]

In Majallah Al-Ahkam Al-Adliyyah Sulh is defined as

[110] Ibid
[111] Al-Mufradat fi Ghareeb Al-Quran by Imam Al-Raghib Al- Asfahani p 420
[112] Al-Bahr Al-Raiq by Ibn Nujaim 7/255, Kashaf Al-Qina by Bohoti 3/278

It is an agreement made with the consent of both the parties to resolve the dispute after its occurrence [113] It means that according to Hanafies the agreement of Sulh can only be made after the occurrence of a conflict Future disputes cannot be arbitrated

However, according to Malikies the existence of the dispute is not necessary for validity of the agreement of Sulh.[114] Expected future disputes can also be arbitrated.

2.2.1.3 Legitimacy of Sulh:

The primary sources of the Shariah strongly promote amicable settlement in all situations based on equitable, fair and just manner with the ultimate end of justice through a win-win result.[115]

Quran:

The basic of sulh may be found in following two verses of Quran:

وَإِنِ امْرَأَةٌ خَافَتْ مِن بَعْلِهَا نُشُوزًا أَوْ إِعْرَاضًا فَلَا جُنَاحَ عَلَيْهِمَا أَن يُصْلِحَا بَيْنَهُمَا صُلْحًا وَالصُّلْحُ خَيْرٌ

And if a woman fears from her husband contempt or evasion, there is no sin upon them if they make terms of settlement between them - and settlement is best. [116]

وَإِن طَائِفَتَانِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأَصْلِحُوا بَيْنَهُمَا فَإِن بَغَتْ إِحْدَاهُمَا عَلَى الْأُخْرَىٰ فَقَاتِلُوا الَّتِي تَبْغِي حَتَّىٰ تَفِيءَ إِلَىٰ أَمْرِ اللَّهِ فَإِن فَاءَتْ فَأَصْلِحُوا بَيْنَهُمَا بِالْعَدْلِ وَأَقْسِطُوا إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ

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[113] Majallah Al-Ahkam Al-Adaliyah (The Ottoman Courts Manual) section 1026

[114] Rauzah Al-Talibeen by Allamah Al-Nawawi 4/194

[115] Quran 49 9-10 provides And if two parties or groups among the believers fall into a quarrel, then make peace (sulh) between them [ ] with justice, for Allah loves those who are fair (and just) * The believers are but single brotherhood, so make (peace and) reconciliation (sulh) between two (contending) brothers, and fear Allah, that you may receive mercy Also see, Quran 4 114. See generally, F Ali, "Conflict –Its psychological causes, Effect and Resolution Through the Quran" , paper presented at the Conference on Conflict Resolution in the Arab World, Cyprus, August 1993.

[116] Quran, Surah Al-Nisa (4) ayat 128

"The believers are but a single brotherhood, so make peace and reconciliation (sulh) between two (contending) brothers, and fear Allah, that ye may receive mercy"[117]

The above mentioned two verses and other relevant legal texts of the Quran strongly advocate the amicable settlement of disputes on equitable and fair manners and promise divine mercy to those who do it.

Sunnah:

The Holy prophet (PBUH) says

All types of compromise and conciliation (sulh) among Muslims are permissible, except those that make what is lawful prohibited or makes what is prohibited lawful [118]

Apart from the support given by Quranic verses, the Sunnah is also replete with practical approaches towards the proper establishment of the institution of Sulh [119] For instance, sahl bin sa' ad narrated that there was an intra-tribe dispute amongst the tribes of Amr bin Auf, and the prophet immediately set out for the sole purpose of making Sulh among them [120]

Ijma (Consensus)

Sulh is also recognized by Ijma (Consensus) of Ummah [121]

2.2.1.4 Elements of Sulh:

[117] Quran, Surah Al Hujurat (3) ayat 9

[118] Sunan-e- Abi Dawood by Abi Dawood 2/612, Hadith 3596

[119] Muhammad Abu-Nimer, "Conflict Resolution in an Islamic Context –Some Conceptual Questions", Peace & Charge, January 1996, p 35

[120] The full text is given in Sahih al-Bukhari See Muhammad Muhsin Khan, trans The Translation of the meaning of the Meaning of Sahih al- Bukhari, (Beirut Dar al-Arabia, n d), p 531

[121] Al- Sunan Al-Kubra by Al-Baihaqi 5/311, Alfiqh Al-Islami Wa Adillahtoho by Wahbah Al-Zuhaili 5/294

According to Hanafies offer and acceptance is the only element of Sulh [122]But according to the majority of the jurists Sulh has three elements

1. Offer and Acceptance,
2. The Parties,
3. The dispute to be settled [123]

2.2.1.5 Conditions of a valid Sulh

1 Offer and acceptance should be with the consent of the parties For an example one party says. I want to make a settlement with you in this case and other says' I accepted your offer or I am agree, this is a valid Sulh [124]

2 The parties should be eligible for making Sulh That is to say they should be adult and mature, sound and they should have the right over the subject matter of Sulh

3 The subject matter of Sulh should be a Haq Al-Abd. it cannot be executed over the Haq Allah Thus there is no Sulh in Hudood Penalties, like Hadd Al-Zina etc.[125]

4 The subject matter of Sulh should be an existing recognized right of the party making settlement [126] No party can make a settlement over the right which they cannot claim at the time of settlement

5 The subject matter of Sulh should be of a nature that can be compensated. A right without having proper compensation cannot be settled upon For an example It is not permissible for anyone to make Sulh with a woman against a monetary consideration to

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[122] Al-Badaye Al-Sanaye by Kasani 5/40
[123] Al-Mughni by Ibn Qudamah Al-Hanbali 4/532, Kashaf Al-Qina by Buhoti 3/578
[124] Al-Badaye Al-Sanaye by Kasani 5/40
[125] Al-Badaye Al-Sanaye by Kasani 6/48, Kashaf Al- Qina by Buhoti 3/388
[126] Ibid 6/49, Tuhfah Al- Ulama by Samarqandi 3/427

enjoy a sexual intercourse, because it leads to make a Haram (prohibited) Halal (permissible)[127]

6 The subject matter of Sulh should be known and well defined to the parties, because Sulh is in fact a kind of Bai (sale agreement) and it is necessary for a valid sale agreement that the subject matter should be known and specified.[128]

In most cases, Sulh takes the nature of a binding contract on the parties involved, as it is generally described as an agreement between two or more parties to end a dispute by addressing its causes with a view to ending it finally.

Though, the Sulh is usually conducted in an informal manner, the law allows institutionalized sulh to facilitate the process of settlement of disputes and ensure the enforceability of any agreement reached between the disputing parties Even within the institutionalized framework there is always unencumbered emphasis on informalism in the procedural rules. In relation to Islamic banking and finance disputes, Sulh is a real gold mine that should be explored as a first step towards the settlement of disputes This will be very relevant in bank and customer relationship disputes In addition, disputes between the financial institutions can be easily resolved through well-coordinated good faith negotiation

2.2.2 Tahkim (Arbitration)

2.2.2.1 Literal Meaning:

The word Tahkim is derived from يحكم حكم which means to authorize someone to decide the matter in dispute Allah (S W.T) said

وَآتَيْنَاهُ الْحُكْمَ صَبِيًّا[129]

[127] Al-Mughni by Ibn Qudam 4/550
[128] Kitab Al-Um by Imam Shafi 3/221

And we gave him judgment [while yet] a boy

Tahkim literally means to authorize someone to make a decision

One of its meanings is to settle a dispute between two parties.[130]

2.2.2.2 Technical Meaning:

Tahkim means to appoint a hakam/arbitrator by the parties with their consent in order to settle their dispute [131]

International Fiqh Academy defined Tahkim/Arbitration as agreement among the disputants upon appointing an arbitrator to give a binding award in matter in dispute in the light of the injunctions of Islam [132]

In other words Tahkim means To authorize someone by the disputants or the court as the case may be, to resolve the dispute between them.[133]

2.2.2.3 The legitimacy of Tahkim

Tahkim is recognized by Quran, Sunnah and Ijma (Consensus)

Quran:

There are three basic texts in the Quran that give approval for tahkim Quran says·

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِنْ أَهْلِهِ وَحَكَمًا مِنْ أَهْلِهَا إِن يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا

إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا[134]

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[129] Quran, Surah Maryam, Ayah 12
[130] Qamoos Al-Muheet by Fairoz Abadi 3/210
[131] Majallah al Ahkam al Adaliyyah,(Ottoman Civil Code), section 1790
[132] Resolution of International Fiqh Academy 95/8/د 90
[133] Rad-ul- Muhtar by Ibn –e- Abideen 5/428

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]

وَمَن قَتَلَهُ مِنكُم مُّتَعَمِّدًا فَجَزَاءٌ مِّثْلُ مَا قَتَلَ مِنَ النَّعَمِ يَحْكُمُ بِهِ ذَوَا عَدْلٍ مِّنكُمْ[135]

And whoever of you kills it intentionally - the penalty is an equivalent from sacrificial animals to what he killed, as judged by two just men

From the first legal text, one may assume that the arbitration is limited to the family disputes This idea is not correct, as application of arbitration extends to commercial, financial and civil disputes [136]

Sunnah:

The holy prophet (PBUH) appointed Sa'ad bin Ma'az as Hakam (Arbitrator) in the case of Bani Quraizah upon their demand [137]

Ijma (Consensus):

There is consensus of Ummah upon legitimacy of Takim [138]

The decisions of Companions of Holy Prophet (P B U H) have proved that they have decided matters through arbitration For example

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[134] Quran, Surah Al-Nisa, ayah 35
[135] Quran, Surah Al-Maidah, ayah 95
[136] On the scope of tahkim in Islamic jurisprudence, see Umar A Oseni, n 31 at p p 77 – 79
[137] Fath al Bari by Ibn Hajar 6/165
[138] Al Mabsoot by Sarakhsi 21/62, Mughni Al Muhtaj by Khatib Al Sharbini 4/378

There was dispute between Hazrat Umar (R A) and Hazrat ubai bin Ka'ab (R A) Both have appointed hazrat Zaid Bin Thabit (R A) to resolve their dispute [139]

Hazrat Umar Farooq (R A) had a dispute with one person Qadi Shoraih has resolved their dispute.[140]

Similarly Hazrat Usman (R A) and Hazrat Talha (R A) have appointed Hazrat Jubairr bin Mutim (R A) as an arbitrator to resolve dispute It is important to mention here that above-mentioned arbitrators were not working as a judge at that time.

Similarly, the other examples are

Ehl-e-shoorah has appointed Hazrat Umar (R A) as an arbitrator [141]

Hazrat Ali (R A) has appointed Abu Musa Ashari as an arbitrator

Hazrat Muawiyah has appointed Hazrat Umar Bin ala'as (R A) as an arbitrator [142]

The practices of Companions showed that they have decided matters by way of arbitration and no one has objected it Therefore, it is evidence from Ijma Further, all Muslim Jurists also accepted Tahkim as valid way for settlement of disputes [143]

2.2.2.4 Elements of Tahkim.

Bothe Conventional Law and Shariah (Islami Law) are agreed that the Tahkim (Arbitration) is solely based upon the consent of the parties, but the law differs in the sense that the contract of tahkim must be in written form due to its importance,[144] while in Islamic law it is not the condition of the validity of Tahkim, thus it can be executed orally. However, if it is in written

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[139] Sunan Dar ul Qutni 4/242, Al-Baihaqi 10/144
[140] Akhbar ul Qudat by Wakee 2/189
[141] Al-Bukhari with Fath ul Bari 7/61-62
[142] Tarikh ul Tabari 5/67
[143] Al-Sarakhsi, Al-Mabsoot 21/62
[144] Most of the legal systems of the world made it necessary in relevant provisions i e section 1005 of French Law, section 501 of Egyption Law and section 252 of Iraqian Law etc

form then it is appreciated according to shariah because shariah has stressed upon writing of contracts at that time when the trend of writing was very rare

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنتُم بِدَيْنٍ إِلَىٰ أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ[145]

O you who have believed, when you contract a debt for a specified term, write it down

Tahkim is contract like other contracts In this regard, tahkim has same elements as in other contracts For example parties to dispute, subject matter, oral or written form of contract and existence of dispute etc

The following are the elements of Tahkim

1 Disputants They could be two or more than two [146]

2. The Hakam to whom the dispute is referred [147]

3 Offer and acceptance [148]

2.2.2.4(1) Conditions of Tahkim:

There are certain conditions for tahkim

1 The dispute should exist[149] it means that there should be a claim of right from each of the disputants against other.

2 Each of the disputants should agree upon the decision and award of the Hakam (Arbitrator), if he is not appointed by the Qadi, but if he is appointed by the Qadi then there is no need of agreement of the parties upon the decision [150]

[145] Quran, Surah Al-Baqarah, Ayah 282
[146] Aqd Al-Tahkeem by Al-Duwari P 76
[147] Qanoon Al- Tahkeem Al- Ordani , Section 14
[148] Aqd Al-Tahkeem by Al-Duwari P 130
[149] Majallah Al-Ahkam Al-Adaliyah (The Ottoman Courts Manual) section 1876
[150] Al- Bahr Al-Raiq by ibn –e- Nujaim Al Hanafi 7/25

3 There should be an offer from the disputants to appoint a third party as a Hakam and acceptance by the Hakam [151]

4 The Hakam should be eligible for Tahkim

5 The Hakam should be known and nominated [152]

2.2.2.5 Similar Terms:

Qada, Sulh, Ifta and Taofeeq

These all terminologies are closely linked with arbitration wherein matters are settled or decided in the light of injunctions of Islam while they are different from some aspects Qada is similar to Arbitration from following aspects

1 In both (Qada & Tahkim) the common thing is to find out the Hukm Shari about the matter in dispute

2 Both (Qada & Tahkim) settle disputes

3 In the both the decision is binding

4. Both the Qadi and Hakam (Arbitrator) do not interfere in the disputes of people until and unless the matter brought to them [153]

(a) Tahkim and Qada

Though there are similarities between Qada and Tahkim as mentioned above but there are following differences as well

1 In Qada the the mandate of Qadi is derived from legtimate authority while the Hakam (Arbitrator) derives his mandate from the parties, and in some cases from the Qadi. Further, Arbitrator works within the limits prescribed by the parties while the

[151] Rad-ul- Muhtar by Ibn ~e- Abideen 5/428
[152] Ibid
[153] Daghi, Professor Dr Ali Muhyiddin al-Qurah Boohoos fi Fiqh al Bunok al Islamiyyah, p 476

jurisdiction of the Qadi is decided by the Court. Similarly in Tahkim (Arbitration) the parties can terminate the Arbitrator whereas disputant have no authority to terminate the Qadi [154]

2 Qadi has jurisdiction to exercise his powers over all the individuals, likewise he can also decide all kind of cases i e civil, criminal and family etc whereas the jurisdiction of an Hakam (Arbitrator) is limited to the parties [155]

3. Tahkim (Arbitration) is based on the consent of the parties while the decision of the Court not necessarily given according to the will of parties The authority of the Qadi is not subject to the consent of any individual

4 In Tahkim (Arbitration) if the parties cannot execute the award they can refer to the ordinary Court. However, the decision of the Court is effectively implemented by the executive

5 Qadi may set aside the decision of Arbitrator because of mistake of law if the decision is challenged in the Court whereas the decision of Court is different In court of law, one judge cannot abrogate the decision of the other judge because one ijtihad cannot abrogate another

6. Arbitrator cannot decide matter against the guardian of a minor when it may harm the minor because arbitration is like Sulh and no compromise can be made against a minor On other hand, Qadi can give a decision against the guardian of a minor though that harms the interest of the minor

7 If testimony of any person is not competent to an arbitrator then in such testimony can be acceptable to other arbitrator, however in case of Court if one witness is proved as incompetent, he cannot give testimony in another court [156]

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[154] Ibid

[155] See Mausoah Fiqhiyyah al-Kuwaitiyyah 10/234

(b) Tahkim and Sulh

Sulh is also similar to Thakim (arbitration) in a sense that the purpose of both processes is to resolve disputes but there is difference as well in both processes i-e in Sulh there is a consideration among parties and third person is not allowed to interfere They decide their matters by compromising in their rights The role of third person is just to make efforts for their compromise His decision is not binding on parties. On the other hand, arbitration is different In arbitration, the sole authority rests with arbitrator The decision of the arbitrator is binding on parties

(c) Tahkim and Ifta

Regarding Ifta, the similarity is to find out Islamic (shariah) solution of the disputes and the consent of the parties is necessary The difference is that the verdict of mufti is not binding but the decision of arbitrator is binding. Ifta is related to the Ibadaat, tenets of faith ets and its scope is wider, however arbitrators resolve specific issues [157]

Ibn Farhoon provided the difference that the work of Mufti is to inform about the hukm-e-Shari, however the decision of judge and arbitrator is binding on parties [158]

(d) Tahkim and Taufeeq

Taufeeq /Conciliation also attempts to make conciliation between the parties but it is not binding as arbitration

2.2.2.6 Scope of Tahkim

As per Quran, Sunnah and practices of companions it is proved that the scope of Tahkim is high and more wider, therefore in financial, economic, collective and individual matters, parties

[156] Ibn e Nujaim, Al-Bahr al-Raiq 7/4-27, Al- Fatawa al-Hindiyyah 3/400
[157] Al-Qarrafi, Al-Forooq 4/52, Ibn Farhoon, Tabsirat al Hukkam 1/65
[158] Ibid /65

may refer to Arbitrator In this context, Islamic law is closely explaining the new concept of arbitration [159]

2.2.2.7 Nature of Arbitration

Sometimes the provision of arbitration is inserted in the contract from the beginning i-e in case of existence of dispute, parties shall refer the case to arbitration Sometimes it may be done after the existence of dispute In this case, parties gave their consent i-e they will decide matter by way of arbitration In both above-mentioned cases, the important is the consent of parties This is the general rule, but according to law, as an exception to this general rule there happens a special kind of Arbitration in some socialist societies where the parties are bound to resolve their dispute by arbitration and hence have no option to approach the court This is an exception to the general rule and the general rule is that the parties are not bound to refer their matter to arbitrators.[160]

If we look into the fiqh literature, we find that this kind of arbitration is not an exception; however it is a basic kind of arbitration For example, if there is dispute between husband and wife, parties must refer matter to arbitrator It is the opinion of Hazrat Ali, ibn Abbas, Hazrat Muawiyah, Shabi and one group of Muslim Jurists ALLAH said

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِن يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا[161]

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)

[159] Buhoos fi Fiqh al Bunook al Islamiyyah 482,
[160] See Taha Abulkhair حرية الدفاع, p 318
[161] Quran, Surah Al-Nisa, Ayah 35

Qadı ıbn Arabı ınterprets thıs verse as ıf the ruler or the person actıng on behalf of hım has knowledge of the fact that there ıs dıspute between husband and wıfe, ıt ıs obligatory on ruler to appoınt two arbıtrators to resolve the dıspute [162]

Thıs verse clearly states that ın thıs matter the decısıon should be gıven by two arbıtrators Here we know that ıt ıs not an exceptıonal case to compel the partıes to resolve theır dıspute by way of arbıtratıon rather ıt ıs a prımary way of settlıng the dıspute ın thıs vary case

2.2.2.8 The role of Court after the award of Arbitrator

The decısıon of arbıtrator ıs bındıng on the partıes It may only be cancelled ıf ıt clearly expresses ınjustıce accordıng to the majorıty of Muslım Jurısts.[163] Hanafı jurısts hold that ıf the decısıon ıs agaınst the decısıon of qadı then qadı may cancel ıt Allama Kasanı saıd that ıf the decısıon of arbıtrator ıs agaınst the decısıon and opınıon of the Qadı, he may cancel the decısıon of arbıtrator ın any dıspute [164]

2.2.2.9 Is contract of Takim a Binding contract or valid/legal contract?

In thıs case there ıs dıfference of opınıon among Muslım Jurısts and four opınıons are there

1 Accordıng to ıbn Majıshoon (Malıkı), when contract of arbıtratıon ıs completed wıth condıtıons then ıt ıs bındıng. In thıs context, one party cannot cancel ıt wıthout the consent of the other party because ıt ıs general rule of contract that ıf the elements and condıtıons are completed then ıt ıs bındıng except those contracts whıch are expressly

[162] Ibn e Arabı Ahkam ul Quran 1/427
[163] Zaılel Tabyeen ul Haqaıq 4/194, Al-Nawawı Rauzat ul Talıbeen 11/123
[164] Al-Kasanı Badaıe al-Sanaıe 9/4081

recognized by Shariah as non-binding contracts i.e agency contract etc Shariha has stressed upon the fulfillment of contracts [165] ALLAH said

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ[166]

O you who have believed, fulfill [all] contracts

2. Anyone of the arbitrators can withdraw before giving award, even when it is given it must be with the consent of both the arbitrators. In this sense their findings are like a fatwa of Mufti. This opinion is of Shafi, immami and zaidi schools of thought [167]
3. Parties may revoke authorities of arbitrators before the pronouncement of award Award once given is binding Parties are bound to accept it This is the opinion of Maliki and Hanbali schools of thought [168]
4 When decision will be given, it becomes binding. This opinion is attributed to Hanafies and some Shafies and Malikies They hold that parties may cancel the authority of arbitrator before the decision is given [169]

All Muslim Jurists are agreed upon the binding nature of the arbitration irrespective of such minor differences. After award is given, neither party is allowed to cancel it Its foundation is on consent of parties so it will be binding on parties only, not on others

Though the concept of Tahkim as an alternative dispute resolution mechanism has been extensively practiced in the pre-Islamic Arabia When Islam came it recognized Tahkim and further modernized the procedure to ensure fair dealing and justice The primary sources of Islamic Law directly recognize the use of Tahkim as an alternative dispute settlement process

[165] Al-Dosoqi Hashiat al Dosoqi 3/348
[166] Quran, Surah Al-Maidah, Ayah 1
[167] Al-Raudah 11/122, Miftah al Karamah 10/3, Al-Bahr al-Zakhar 6/114
[168] Al-Qarafi Al-Zakhirah 8/50, Al-Insaf 11/199
[169] Ibn Aabideen Radd ul Muhtar 5/429, Rauzah ul Talibeen 11/122, Al-Muntaqa 5/227

along side the al- qada (Judiciary) Tahkim, in its simplest form, means arbitration It has been described as "the spontaneous, and more or less improvised, move by two or more parties in dispute to submit their case to a third party called hakam or muhakkam (arbitrator)."[170] Such a reference of a dispute to a neutral third party for settlement based on the provisions of Islamic law occupies an important position in dispute settlement within the context of Islamic law [171]

2.2.3 Med-Arb

As the name implies, Med-Arb is an acronym of two previously discussed processes of dispute settlement, i e Mediation and Arbitration Within the context of Islamic law, Med-Arb is the hybrid of both the sulh and tahkim processes in order to arrive at an amicable settlement of the dispute This hybrid process is famous within the conventional practice of ADR Yet, the Med-Arb process has been recognized and prescribed by the Quran and it has been in practice throughout the Islamic legal history The practice has been one of the main dispute settlement techniques in Islamic law since over 1,400 years ago [172] The basis of Med-Arb is given in the following legal text as contained in the Quran

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِن يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا[173]

> If you fear a breach between them twain (the man and his wife, appoint (two) arbitrators, one from his family and other from her, if they wish for peace, Allah will cause their reconciliation

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[170] Samir Salih, Commercial Arbitration in the Arab Middle East, (London Graham & Trotman Limited, 1984) p 20
[171] Umar A Oseni, " A Comparative Legal Analysis of the rule of Arbitration in Maritime Dispute Resolution", (MCL Dissertation, International Islamic University Malaysia, 2009), p 74
[172] Umar A Oseni, n 31 at p 99
[173] Quran, Surah al-Nisa, ayah 35

The latter part of the ayah gives an indication to the effect that if during the proceedings any of the parties or both wish for reconciliation rather than an arbitral award through a compromise, then Allah will guide them to such reconciliation Therefore, it is always emphasized that the arbitrator must begin with suggestions of possible moves towards reconciliation before starting the arbitral proceedings[174] The mechanism of the Med-Arb process within the context of Islamic law has been explained in a outstanding research work done by Mr Umar A Oseni, thus he says

The Med-Arb process is a mechanism for dispute resolution enmeshed within the general framework of Sulh (amiable settlement) in Islamic jurisprudence Sulh is a broad term which literally means amiable settlement Its juristic meaning is all-embracing as it includes good faith negotiation, mediation/conciliation and compromise of action [175] In most cases during the tahkim proceedings, both sulh and tahkim are combined to facilitate the process of dispute resolution This is encouraged in most cases because employing the Med-Arb process is considered an obligation for the arbitration in Islamic jurisprudence [176]

This hybrid process is now being recognized as a universal principle in dispute resolution across the world [177] Most arbitration laws of countries across the world have some elements of Med-Arb process This is based on the fact that many countries have now patterned their Arbitration laws after the UNCITRAL Model Law on International Commercial Arbitration It is

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[174] Syed Khalid Rashid, n 17 at p 110
[175] Ibid, at pp 96 – 97
[176] Umar A Oseni, n 31 at p 99
[177] See James T Peter, "Med-Arab in International Arbitration", The American Review of International Arbitration, [Vol 8, 1997] 83, P G Iim, "The Growth and Use of Mediation Throughout the World Recent Developments in Mediation/conciliation Among Common Law and Non-Common Law Jurisdictions in Asia", [1998] 4 MLJ, cv-cvxii, Jeffery C Y Li, "Comment Strategic Negotiation in the Greater Chinese Economic Area A New American Perspective", (1996) 59 Alb L Rev 1035, 1044, Haig Oghigian, "Discussion on Arbitrators Acting as Mediators", (2001) 67 Arbitration 221, Brette L Steel, "Enforcing International Commercial Mediation Agreements as Arbitral Awards under the New York Convention", 54 UCLA L Rev 1385 -1412, and David C Elliott, "Med/Arb Fraught with danger or Ripe with Opportunity?" (1996) 62 Arbitration, 716

hoped that the Islamic banking and finance industry will utilize and maximize the good qualities of the Med-Arb process for a quick and cost-effective dispute resolution mechanism

2.2.4 Muhtasib

2.2.4.1 Literal Meaning:

Muhtasib is originated from word Hisbah Hisbah literally means to anticipate Allah's reward, to denounce other personal wrongful behavior

And the word Ihtisab means to demand a reward and to get it It also means to examine something The word Muhtasib means who demands a reward So the Muhtasib is one who examines and inspect [178]

2.2.4.2 Technical meaning

Hisbah is defined as enjoining good when it is neglected and forbidding evil when it is prevalent in society [179] Hisbah is the duty of promoting what is good and preventing what is evil It is a collective duty or obligation of the Muslim community Hence, a considerable number of individuals should assume this responsibility, take an affirmative stand toward it, and put it into practice whenever there is a need for it

Muhtasib is one who performs the duty of promoting what is good and preventing what is evil.[180] According to Imam Ghazali Hisbah is a comprehensive expression for the duty of enjoining the good and forbidding evil [181]

2.2.4.3 Legtimacy of Hisbah

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[178] Lisan Al-Arab by Ibn Manzoor 1/314 Al-Qamoos Al-Muheet by Fairoz Abadi, Maddah (حسب)
[179] Ahkam Al-Sultaniah by Mawardi P 240
[180] Ibid
[181] Ihya Al- Uloom by Imam Ghazali 2/392

Hisbah is a defined way of guidance towards what is good and what is wrong Allah the almighty loves those people who perform this duty It is recognized by the Holy Quran and Sunnah.

Quran:

There are several verses in the Holy Quran recognize Hisbah Some of those are as follows.

وَلْتَكُن مِّنكُمْ أُمَّةٌ يَدْعُونَ إِلَى الْخَيْرِ وَيَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنكَرِ ۚ

وَأُولَٰئِكَ هُمُ الْمُفْلِحُونَ[182]

Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong They are the ones to attain felicity

كُنتُمْ خَيْرَ أُمَّةٍ أُخْرِجَتْ لِلنَّاسِ تَأْمُرُونَ بِالْمَعْرُوفِ وَتَنْهَوْنَ عَنِ الْمُنكَرِ وَتُؤْمِنُونَ بِاللَّهِ[183]

You are the best nation produced [as an example] for mankind You enjoin what is right and forbid what is wrong and believe in Allah

These verses demand that there should be a sufficient number of people who direct the general public towards good and prevent them from evil, to perform the most important religious and social duty

Sunnah:

[182] Quran, Surah Aal e Imran, ayah 104
[183] Quran, Surah Aal e Imran, Ayah 110

The Sunnah of the Messenger of Allah (peace and blessings of Allah be upon him) is reflected in a saying of the Messenger of Allah (peace and blessings of Allah be upon him) in the following words

> Whoso among you sees an evil in any person he must stop it by force and if He is not having such force by his lips and if still he is unable to do so to Consider (and feel) such evil as bad in his heart but this will be the weakest degree of faith [184]

2.2.4.4 Elements of Hisbah

According to Imam Ghazali there are four major elements of Hisbah [185]

1- Al-Muhtasib,

Muhtasib is one who takes decision on the spot, in any place at any time as long as he protects the interest of the public His responsibilities are almost open-ended in order to implement the foregoing principle commanding the good and forbidding the evil of wrongdoing

2- Al-Muhtasab Feeh

Al-Muhtasabfeeh (subject-matter of Hisbah) is good when it is neglected and evil when it is prevalent in society

3- Al-Muhtasab Alihe

Muhtasab Alihe is one who is subjected and accountable to a Muhtasib If the Muhtasab Alihe stays away from Maroof (good) or involved in a Munkar (evil) he will be subjected to Muhtasib.

4- Degrees of Al-Muhtasib

[184] Sahee Muslim by Imam Muslim, 1/69
[185] Ihya Al- Uloom by Imam Ghazali 2/398

Imam Ghazali had outlined following degrees These should be applied gradually with great care and consideration.

- To inform the violator of the forbidden lest he/she is then ignorant about the wrongdoing The right to know is imperative before applying any punishment
- To forbid verbally, advising not to do
- To obstruct the forbidden through preaching advise and fearing the punishment of Allah
- To chide or to scold with strong wording, after Muhtasib being a kind and discreet reminder
- To affect change manually, like forcing a man not to wear silly clothing or breaking a jar of wine, or pulling the aggressor out of house which is not his etc the purpose here is to get red of forbidden physically.
- Threatening with things may become worse in the near future, if the aggressor is not reprimanded
- Applying physical punishment without using any weapon, so as to avoid any damage or any bleeding
- To use suitable weapons indicating that serious action might take place.
- To enforce regulations by restoring to a cadre of police This stage has two conditions

(a) To affect change manually only when it is necessary

(b) To affect change manually according to what is needed.

2.2.4.5 Conditions of a Muhtasib[186]

- He should be mature, pious, sane, free, just and learned scholar (faqih)
- He should have the ability to ascertain right from wrong

[186] Ihya Al- Uloom by Imam Ghazali 2/398 and behind, Adab Al-Qazi by Mawardi 1/275, Al-Forooq by Al-Qarrafi 4/55, Al-Ahkam Al-Sultaniyyah by Mawardi P 41

- Should have the capability to distinguish the permissible (halal) from the non-permissible (haram).
- He is entrusted to secure the common welfare and to eliminate injuries to society as whole
- He should be appointed by the state.

Mohtasib is one of the alternative dispute resolution processes The institution of ombudsman (Muhtasib) has become a real tool for both the private and public sector to resolve disputes amicably, thus it ensure the administrative justice and to preserve ongoing business relationships. Within the context of Islamic law, the institution of ombudsman is known as Muhtasib with certain variations of the duties of the later compared to the former Though, the institution of ombudsman emerged in its present form in Sweden as established in 1809,[187] it had been in practice of Muslims with wider jurisdiction in the Islamic legal and political history in form of muhtasib One of the main functions of a muhtasib is to regulate commercial activity within the state by protecting the interest of the consumers and the entrepreneurs equally, and safeguard public interest with much emphasis on administrative justice.

Specific duties of a muhtasib include taking account (hisbah) of issues regarding rate and measures, quality of commodities on sale in markets, honesty in trade and commerce, observance of modesty in public places, and such other things both temporal and spiritual [188] The distinctive nature of the functions of a muhtasib can be observed in its two important elements of dispute avoidance and dispute resolution [189] The basis of muhtasib is found in the

[187] The popular legal historical background for the institution of ombudsman has its source in the justitieombudsman created in Sweden in 1809 He was given the important task of prosecuting culpable administrators and judges Etymologically, "Ombudsman" is a Swedish word which means a representative or agent of the people or group of people The modern Swedish ombudsman ensures the public office holders respect the law and properly fulfill their entrusted obligations

[188] Syed Khalid Rashid, n 17 at p 111

[189] Ibid

prime sources of the Islamic law There are numerous legal texts of the Quran which provide for institution of muhtasib. Its suffices to cite this.

> Let there arise out of you a group of people inviting to all that is good (Islam) and, enjoining what is right and forbidding what is wrong. And it is they who are the successful 190

The above mentioned legal text from the Quran lays down the general law regulating the establishment of the institution of muhtasib in a state The prophet Muhammad practically carried out these divine legislations by appointing 'Umar bin al-Khattab as the muhtasib of Madinah, while Sa'ad bin Ummayyah as a muhtasib of Makkah [191] The whole institution of muhtasib is to carry out the sacred duty of commanding good and forbidding evil for the general benefit of all [192] This is however carried out through the process of dispute avoidance and dispute resolution in line with the shariah From the foregoing, it is clear that the general powers vested in the office of a muhtasib are vider in scope than the modern ombudsman because the former's powers cover both temporal and spiritual affairs [193] A muhtasib has an enormous role to play in Islamic banking and finance disputes because of the informal nature of dispute avoidance and resolution and the friendly procedure adopted in the process

2 2.5 Fatawa of Muftis

2.2.5.1 Literal Meaning:

The word fatwa, also futya, whose plural is fatawa, means response to a question of any

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[190] Quran, Surah, al-imran 104 Also see Quran 4 110, 114, Quran 9 71

[91] Ibn Taimiyyah, Al- Hisbah fi al-Islam wa wazifat al-hukkam al-Islamiyyah, (Madinah Madinah University, n d), p 10, cited in Syed Khalid Rashid , n 9 at p 112

[192] Abdul- Wahab Khallaf, Al-siyasa al- shar'iyyah aw nizam al daulah al- islamiyyah fi al-shu'un al- dusturiyyah wa al-kharigiyyah wa al-maliyyah, (Beirut Al- Risalah Foundation, 1984), p 17

[193] Syed Khalid Rashid, n 17 at p 113

kind [194]

2.2.5.2 Technical Meaning:

In the technical sense, it means responding to a question about a hukm shari [195] It has been used in the Quran in the general as well as technical sense For example, the technical meaning is to be found in the verses

> They ask instructions concerning the women, say Allah instructs you about them [196]

> And they ask for a legal decision Say Allah directs about those who leave no descendants or ascendants as heirs [197]

Accordingly, fatwa may be defined as follows

> It is an authoritative statement about a Hukm Shari, in response to a question, when the ruling has been derived from the acknowledgement sources of school and is in conformity with the usul, Qawad and precedents adopted by the school

2.2.5.3 Who is Mufti

According to Ibn Abideen, the view of the usulees has come to established that the Mufti is one who is Mujtahid As for as the non-mujtahid, from among those who memorize the views of the mujtahid, he is not a mufti For this (latter) jurist, it is obligatory that when he is asked a question that (in his response) he mentions the view of a mujtahid, like Imam Abu Hanifa, by way of narration Thus, it becomes known that what is termed Fatwa of the existing jurists in

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[194] Lisan Al-Arab by Ibn –e- Manzoor 15/145
[195] Sharh Al-Muntaha by Buhoti 33/456
[196] Quran, Surah Al-Nisa (4) ayat 127
[197] Quran, Surah Al-Nisa (4) ayat 127

our times is not a fatwa, rather it is the transmission of the view of the mufti (mujtahid) so that a questioner may adopt it [198]

2.2.5.4 Legitimacy of Fatwa

Fatwa is farz Al-Kifaya Muslims are in a strong need of the qualified person who guides them towards hukm shari in their daily life Quran says

وَإِذْ أَخَذَ اللَّـهُ مِيثَاقَ الَّذِينَ أُوتُوا الْكِتَابَ لَتُبَيِّنُنَّهُ لِلنَّاسِ وَلَا تَكْتُمُونَهُ فَنَبَذُوهُ وَرَاءَ ظُهُورِهِمْ وَاشْتَرَوْا بِهِ ثَمَنًا فَبِئْسَ مَا يَشْتَرُونَ قَلِيلًا

> And [mention, O Muhammad], when Allah took a covenant from those who were given the Scripture, [saying], "You must make it clear to the people and not conceal it But they threw it away behind their backs and exchanged it for a small price And wretched is that which they purchased [199]

> The above mentioned ayah demands from the experts of Shariah to make things clear regarding hukm shari It means fatwa is only the responsibility of Mufti (mujtahid) and it is not a general obligation

2.2.5.5 Essential Characteristics of a Mufti:

No man should appoint himself to issue verdicts (fatwa) until and unless he fulfills five characteristics [200]

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[198] Rad Al-Muhtar by Ibn Abideen 4/302

[199] Quran, Surah Aal e Imran (3) ayat 187

[200] Rad Al-Muhtar by Ibn Abideen 4/310, Al-Majmo by Nawawi 1/75, Sharh Al-Muntaha by Boholi 3/457, Ielam Al-Muqieen by Ibn Qayyim Al-Juziyyah 1/46, Aadab Al-Mufti Wa Al-Mustafti by Al-Nawawi P 19

1 He should pocesses the ability of practicing ijtihad A mere transmission of the views of mujtahideen is not a fatwa, rather it is a transmission of fatwa

2 He should have sufficient knowledge of legal study of Quran (Ayaat Al-Ahkam)

3 He should have sufficient knowledge of legal study of Sunnah (Ahadith Al-Ahkam).

4 Strong knowledge of Arabic Language as it is the only medium of understanding the primary sources of fatwa

5 Strong knowledge of Islamic jurisprudence (Usul Al-Fiqh)

6 Having the knowledge of places of Ijma (Consensus) Otherwise he may go against the consensus

Fatwa of Muftis in one of the alternative dispute resolution processed recognized in Islamic law and has been in practice since the beginning of Islamic legal history The need for expert determination of disputes through a process of evaluation of matter in dispute cannot be overemphasized in the modern mechanisms of dispute resolution Fatwa of Muslim jurists represents three evaluative assessment of a dispute which may involve evaluative mediation, mini-trial or expert determination Hence, fatwa can be described as "the issuance of non-binding advisory opinions (fatwa, or fatwas) to an individual questioner (mustafti), whether in connection with litigation or not" [201] The non-binding advisory opinion may even be sought by two opposing parties or a group of people who have certain differing opinions on an issue This

[201] Muhammad Khalid Masud, Brinkley Messick, and David S Powers, "Muftis, Fatwas and Islamic legal Interpretation", in Muhammad Khalid Masud, et al (eds), Islamic Legal Interpretation Muftis and Their Fatwas,(p 3), (Massachusetts Harvard University Press, 1996)

process of dispute resolution is similar to Expert Determination used in the conventional practice of ADR

Expert Determination is a process "where parties to a dispute entrust it to some expert for evaluation in view of the technical nature of the dispute "[202] This form of consensual ADR allows a third party neutral jointly appointed by the disputing parties to make an evaluative assessment of the rights and duties of the latter based on the basis of objective criteria There is a difference between Expert Appraisal and Expert Determination on the basis of the binding nature of the evaluation Generally, Expert Appraisal is not considered binding and is only of persuasive value, while Expert Determination is usually binding on the parties when it is considered as a contract.[203]

Within the context of Islamic law, the expert determination of a jurist is useful in two instances, i e Dispute Avoidance and Dispute Resolution In circumstances where a preemptive fatwa or non-binding evaluation is taken from an expert and accepted by the parties based on their religious conviction, such evaluation is useful in dispute avoidance Though, such a fatwa is not binding on the parties like a judgment of a qadi (judge), morality demands that since the parties appointed the expert, they should invariably accept his verdict

Against the above background, though the verdict or the evaluation given by an expert is of convincing nature and not considered binding, the significance of it is mostly felt in the area of dispute avoidance This is an indispensable aspect of the phenomenon of dispute

The future of ADR in the modern world is a paradigm shift towards the dispute avoidance processes and not just mere emphasis on dispute resolution Hence, a fatwa of an

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[202] Syed Khalid Rashid, n 17 at p 115 Also see generally, H J Brown and A L Marriott, ADR Principles and Practice, 2nd Ed (London Sweet and Maxwell, 1999), pp 352-376

[203] Sir Laurence Street, "Binding and Non-binding Expert Appraisal", Australian Dispute Resolution Journal, (1990), pp 133-135

expert (Mufti) in form of non-binding evaluative opinion can be utilized to serve the golden purpose of dispute avoidance This will be very useful within the Islamic banking and finance services where avenues may be provided for preemptory legal opinions on certain financial dealings that would have bred unwarranted disputes However, the beauty of some of these processes of dispute resolution and avoidance can be better appreciated when practically used in a hybrid process

2.3 Relevance of ADR in Islamic finance disputes

The frequent instances of Islamic finance litigation in the Civil Courts call for the need to have an Islamic legal framework for the settlement of Islamic finance disputes This is, no doubt, the fact that Islamic finance disputes can be best resolved through Islamic processes of dispute resolution and not otherwise Islamic finance disputes require speedy and efficient processes owing to the nature of business disputes and the need to secure ongoing business relationship and avoid unnecessary public attention, which may affect the credibility of this industry We must decide which way to follow whether to adopt the conventional ADR processes or look inwards to evolve relevant processes for Islamic finance disputes

The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI),[204] has issued the standard on arbitration This is yet to be fully utilised by the Islamic banks and financial institutions The AAOIFI standard on Arbitration is a welcome development, which mirrors the unique features of Islamic arbitration Unfortunately, the Islamic banks and financial institutions only adopt other standards, which they feel affect their daily business transactions while neglecting aspect of arbitration In cases of default, it is common for Islamic banks to approach the Courts rather than giving effect to the AAOIFI standard on arbitration It is

[204] a body that issues global standards on different aspects of Islamic finance

shocking to observe that many Islamic finance practitioners have continued to neglect dispute resolution in Islamic finance in their policies and practices Rather, their complete focus is on other areas that directly affect the profit and risk involved in financial dealings It must be mentioned here that if care is not taken, the courts will ultimately restructure all Islamic finance transactions in line with their limited understanding of the dynamics of most transactions

Therefore, there is an instant need to establish a strong legal frame work which guarantees the shariah compliance in the legal side of the industry. Alternative dispute resolution processes having a long practice in Islamic legal history, is the best solution for the problems facing Islamic banking and finance industry as a whole in litigating their disputes in conventional Courts

2.4 ADR vs. Ordinary litigation

A brief Comparison

Alternative Dispute Resolution mechanism and contemporary court litigation may be well compared in light of two cases decided on two different forums The following is the outcome for two contracts concerning Islamic financial transactions, similar governing law clauses, but differing forums

The first provided for dispute settlement by arbitration, while the second selected the English Courts Juxtaposing the outcomes of the settlement of these two disputes highlights the flexibility of arbitration in addressing disputes arising under Islamic finance agreements and the limitations and problems in the ability of the English courts to apply Islamic law

Case 1 Dispute arising from an Istisna financing arrangement between Sanghi Polyesters Ltd (India) v The International Investor KCSC (Kuwait) [2001] C L C [205]

Arbitration was the dispute resolution process of choice, and the terms of reference of the arbitration confirmed the place of arbitration as London. and the pplicable substantive law as "This dispute shall be governed by the Laws of England except to the extent it may conflict with Islamic Shariah, which shall prevail".

The decision of the arbitrator, an expert in Islamic law, as expressed in an ICC Arbitration Award obtained in London, gave effect to the parties' will to be governed by English law except where this would conflict with the Shariah, by awarding principal and the profit claims, but disallowing additional damages claims because, although compliant with English law, these would conflict with Islamic Shariah.

Case 2 Dispute arising from a Murabahah financing agreement between Shamil Bank of Bahrain v Beximco Pharmaceuticals Limited and Ors206 [2004] 2 Lloyd's Rep 1

The governing law clause stated "Subject to the principles of Glorious Shariah this agreement shall be governed by and construed in accordance with the laws of England " The English court found the proviso "Subject to the principles of the Glorious Shariah" to be inadequate to fulfil the purpose of incorporating the principles of Shariah into the parties' agreements, that the governing law of the contract was simply English law and held accordingly

[205] Sanghi Polyesters Ltd India v The International Investor KCSC (Kuwait) 2001 CLC at 748

[206] Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd and Others (known as the Beximco Case), heard by the London Court of Appeal in 2004, is still considered to be a landmark judgment in the field of Islamic finance litigation EWCA Civ 19, [2004] 4 All ER 1072

There are limitations on the Court to consider Shariah principles which was the apparent intention of the parties.The English courts are well established forums of choice in international financial transactions for legal certainty and speed, but their limitations lead to the trading off of "certainty of Shariah compliance" for "financial commercial certainty" The inbuilt features of arbitration may provide for more flexibility in terms of rendering decisions that are in line with the expectations, intentions and will of the parties than do national courts when it comes to the application of Islamic law as an applicable law of contract

Note also that if parties have agreed on terms that are questionable under Islamic law but allowed under local law, the local legal system will almost certainly enforce it, enabling parties to evade Islamic law. For example, Islamic law does not allow recovery of lost profits, seeing such claims as both speculative and unearned. But a national law may award such damages, even against a losing party's protest that the contract is 'Islamic'

Conclusion

The religious undertones of ADR and certain of its characteristics have made it distinctive among the other legal systems of the world Its immense coverage is difficult to be matched by any other legal system, so also the willingness of persons professing Islam to submit themselves to the idea of amicable resolution of disputes It is appropriate time that the true nature of ADR shall be explained to and popularized among Muslims The culture of litigation imposed on Muslim societies during the colonial days must be replaced by the Islamic ways of amiable resolution of disputes

Chapter III

Current situation, practices and settlement of Islamic finance disputes in Pakistan

Introduction

Pakistan is the only country in the world which came into existence in 1947, on the basis of Islam and declared as Islamic Republic under Article 1 of the Constitution of Pakistan, 1956 In the Constitution of 1962 country was declared as republic only but made again Islamic Republic under Article 1 of the Constitution of Pakistan, 1973 Under Article 2 of the Constitution, 1973 Islam was declared as a state religion Right after from independence of the State various important steps including but not limited to Objective Resolution, were taken to form the State financial system on Islamic basis Islamic banking and finance as a major constituent of this system emerged due to economic, religious and Constitutional needs of Pakistan Islamic financial system is a Riba (Interest) free system Current as well as all previous constitutions of Pakistan incorporated provision of elimination of Riba (interest) as an important objective of state policy

This chapter is divided into five sections Section I argues about Islamization of financial system in Pakistan Section II analyses legal and regulatory issues facing Islamic finance industry in Pakistan Section III describes current practices of litigating Islamic finance disputes in Civil Courts and issues therein Section IV analyses in detail the land mark English case titled. Beximco Pharmaticals Ltd & Ors Vs Shamil Bank of Bahrain EC At the end of the chapter a brief conclusion will be drawn

3.1 Islamization of Financial System in Pakistan

The major steps towards the islamization of the financial system as a Whole are as follows:

Steps for Islamization of banking and financial system of Pakistan were started in 1977-78 Pakistan was among the three countries in the world that had been trying to implement interest free banking at national level But as it was a mammoth task, the switchover plan was implemented in phases. Elimination of interest from the operations of specialized financial institutions including HBFC, ICP and NIT in July 1979 and that of the commercial banks during January 1981 to June 1985. The legal framework of Pakistan's financial and corporate system was amended on June 26, 1980 to permit issuance of a new interest free instrument of corporate financing, which is named Participation Term Certificate (PTC) [207]

Separate Interest-free counters started operating in all the nationalized Commercial banks, and one foreign bank (Bank of Oman) on January 1, 1981 to mobilize deposits on profit and loss sharing basis. Regarding investment of these funds, bankers were instructed to provide financial accommodation for Government commodity operations on the basis of sale on deferred payment with a mark-up on purchase price Export bills were to be accommodated on exchange rate differential basis

In March, 1981 financing of import and inland bills was introduced. Rice Export Corporation of Pakistan, Cotton Export Corporation and the Trading Corporation of Pakistan were shifted to mark-up basis Simultaneously, necessary amendments were made in the related laws permitting the State Bank to provide finance against PTC It also extends advances against promissory notes supported by PTCs and Mudaraba Certificates

From July 1, 1982 banks were allowed to provide finance for meeting the working capital needs of trade and industry on a selective basis under the technique of Musharaka. As

[207] Muhammad Akram Khan, An Introduction to Islamic Economics (Islamabad The international Institute of Islamic Thoughts and institute for Policy studies, 1954), 83

from April 1, 1985 all finances to all entities including individuals began to be made in one of the specified interest-free modes From July 1, 1985, all commercial banking in Pak Rupees was made interest-free. From that date, no bank in Pakistan was allowed to accept any interest-bearing deposits and all existing deposits in a bank were treated to be on the basis of profit and loss sharing. Deposits in current accounts continued to be accepted but no interest or share in profit or loss was allowed to these accounts However, foreign currency deposits in Pakistan and on-lending of foreign loans continued as before.

The State Bank of Pakistan had specified 12 modes of non-interest financing classified in three broad categories However, in any particular case, the mode of financing to be adopted was left to the mutual option of the banks and their clients.The procedure adopted by banks in Pakistan since July 1, 1985 was, however, declared un-Islamic by the Federal Shariat Court (FSC) in November 1991 [208] The system was based largely on 'Mark-up' technique with or without 'Buy-Back arrangement' The FSC declared that various provisions of the laws held repugnant to the injunctions of Islam in its Judgment dated November 14, 1991 would cease to have effect as from July 1, 1992 [209]

However, the Government and some banks/DFIs preferred appeals to the Shariat Appellate Bench (SAB) of the Supreme Court of Pakistan The SAB delivered its judgment on December 23, 1999[210] rejecting the appeals and directing that laws involving interest would cease to have effect finally by June 30, 2001 In the judgment, the Court directed the government to bring radical changes in legal framework to bring it into conformity with the Shariah It also directed the Government to set up, within specified time frame, a Commission

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[208] Dr Mahmood-ur- Rahman Faisal vs Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government of Pakistan, Islamabad etc , PLD 1992 FSL 1

[209] Ibid

[210] Dr M Aslam Khaki and Others vs. Syed Muhammad Hashim and Others, PLD 2000 SC 225

for Transformation of the financial system and two Task Forces to plan and implement the process of the transformation The Court indicated some measures, which needed to be taken, and the infrastructure and legal framework to be provided in order to have an economy conforming to the injunctions of Islam. Later this decision was set aside regarding transformation of whole system in review petition in SCP and remanded back to FSC in the case United Bank Ltd etc vs Messers Farooq Brothers (2002) Nevertheless Government and SBP advanced to encourage this sector in parallel with Conventional banking

3.1.1 Post Judgment Measures

The Commission for Transformation of Financial System (CTFS) was constituted in January 2000 in the State Bank of Pakistan under the Chairmanship of Mr I A Hanfi, a former Governor State Bank of Pakistan A Task Force was set up in the Ministry of Finance to suggest the ways to eliminate interest from Government financial transactions Another Task Force was set up in the Ministry of Law to suggest amendments in legal framework to implement the Court's Judgment The CTFS constituted a Committee for Development of Financial Instruments and Standardized Documents in the State Bank to prepare model agreements and financial instruments for new system

The first Interim Report of the CTFS submitted in October 2000 identified a number of prior actions, which were needed to be taken to prepare the ground for transformation of the financial system The second Interim Report was submitted in May, 2001, it identified major Shariah compliant modes of financing, their essentials, draft seminal law captioned 'Islamization of Financial Transactions Ordinance, 2001', model agreements for major modes of

financing and guidelines for conversion of products and services of banks and financial institutions [211]

The Commission submitted its final report, by joining together the above two reports, to the Government in August 2001 The Commission also dealt with major products of banks and financial institutions, both for assets and liabilities side, like letters of credit or guarantee, bills of exchange, term finance certificates (TFCs), State Bank's Refinance Schemes, Credit Cards, Interbank transactions, underwriting, foreign currency forward cover and various kinds of bank accounts.

The Commission observed that all deposits, except current accounts, would be accepted on Mudaraba principle Current accounts would not carry any return and the banks would be at liberty to levy service charge as fee for their handling The Commission also approved the concept of Daily Product and Weightage System for distribution of profit among various kinds of liabilities/deposits.

The CTFS suggested that its recommendations concerning the modes of financing, their essentials and guidelines for conversion of banks' services and products be circulated among banks, financial institutions, trade bodies, etc in order to help them prepare for the adoption of the new system when the proposed law is promulgated. The Report also contained recommendation for forestalling willful default and safeguarding interest of the banks, depositors and the clients

According to the Commission, prior the preparatory works for introduction of Shariah compliant financial system briefly included creating legal infrastructure conducive for working of Islamic financial system, launching a massive education and training program for bankers and

[211] Muhammad Akram Khan, An Introduction to Islamic Economics (Islamabad The International Institute of Islamic Thoughts and Institute for Policy studies, 1954), 83

their clients and an effective campaign through media for the general public to create awareness about the Islamic financial system [212]

The Report of the Task Force of the Ministry of Law comprises the Case History of the movement for eliminating Riba from the economy It proposed ordinances and drafted amendments in various laws or provisions of laws and the record of discussions held during meetings of the Task Force. While the CTFS had proposed one comprehensive seminal law namely, 'Islamization of Financial Transactions Ordinance' the Task Force proposed two separate draft ordinances namely 'Prohibition of Riba Ordinance' and the 'Financial Transactions Ordinance' However, it corresponds to the proposal by the CTFS that in case of two separate laws, the same may be promulgated simultaneously to avoid any gap or dislocation

3.1.2 Follow up Measures

The Finance Minister in his budget speech for the FY02 declared the following

Government is committed to eliminate Riba and promote Islamic banking in the country For this purpose a number of steps are under way, which is

1 A legal framework is designed to encourage practice of Islamic banking by banks and financial institutions as subsidiary operations of their main operations,

2 Consultations and exchanges are undertaken with brother Islamic countries and renowned institutions of Islamic learning such as Middle Eastern countries and Al-Azhar University of Egypt, to learn more about their experiences and practices,

[212] Ibid

3 Amendments in HBFC Act are being made in line with the directive of the Supreme Court With these changes, HBFC would be fully Shariah compliant institution, which will play an effective role both in promotion of Islamic financing method but also in the development of the important housing sector,[213]

4 Sharia compliant modes of financing like Musharaka and Mudaraba will be encouraged so that familiarity and use of such products is enhanced and their adoption at a wider scale made possible

5 The transformation commission established in the State Bank of Pakistan will continue to function and its recommendations whenever finalized will be considered by the government for appropriate action

6 It is government's intention to promote Islamic banking in the country while keeping in view its linkages with the global economy and existing commitments to local and foreign investors"

The House Building Finance Corporation had shifted its rent sharing operations to interest based system in 1989 The Task Force of the M/O Law proposed amendments in the HBFC Act to make it Shariah Compliant. Having vetted by the CTFS, the amended law has been promulgated by the Government Accordingly, the HBFC has launched "Ghar Aasan Scheme" in the light of amended Ordinance based on the Diminishing Musharakah concept

A Committee has been constituted in the Institute of Chartered Accountants, Pakistan (ICAP), wherein the SBP is also represented, for development of accounting and auditing standards for Islamic modes of financing The Committee is reviewing the standards prepared

[213] Mahmood Islamisation of Economy in Pakistan Past, Present And Future, p 25

by the Bahrain based Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) with a view to adapt them to our circumstances and if considered necessary, to propose new accounting standards The State Bank has also reviewed its forms of financial statements for banks in the light of AAOIFI standards A new Islamic Banking Division has been established in Banking Policy Department of SBP for regulation and promotion of Islamic banking Existing Prudential Regulations for banks have been reviewed by SBP for their application on Islamic banks [214]

3.1.3 Policy Decision

It was decided that the shift to interest free economy would be made in a gradual and phased manner and without causing any disruptions [215] It was also agreed that State Bank of Pakistan would consider

- Setting up subsidiaries by the commercial banks for the purpose of conducting Shariah compliant transactions,
- Specifying branches by the commercial banks exclusively dealing in Islamic products, and
- Setting up a new full-fledged commercial bank to carry out exclusively banking business based on proposed Islamic products

Accordingly, the State Bank issued detailed criteria in December 2001 for establishment of full-fledged Islamic commercial banks in the private sector Al Meezan Investment Bank received the first Islamic commercial banking license from SBP in January 2002 and the Meezan

[214] Ibid

[215] The decision was made in a meeting held on September 4, 2001under the Chairmanship of the President, attended by officials of the Ministries of Finance and Law, Governor State Bank of Pakistan, Chairman and some members of the Council of Islamic Ideology and the chairmen of the CTFS and the two Task Forces

Meezan Bank Limited (MBL) commenced full-fledged commercial banking operation from March 20, 2002 Further, all formalities relating to the acquisition of Societe Generale, Pakistan by the MBL were completed, and by June, 2002 it had a network of 5 branches all over the country, three in Karachi, one in Islamabad and one in Lahore The MBL maintains a long term rating of AA and short term rating of A1+, assessed by JCR VIS Credit Rating Co Ltd, signifying a consistent satisfactory performance

The SBP is itself committed to promoting Islamic banking in Pakistan on a parallel basis The SBP strategy provides for three institutional options·

- An independent and dedicated Islamic bank,
- an Islamic banking subsidiary of a conventional bank,
- Or a dedicated Islamic banking branch of a conventional bank with all safeguards to ensure integrity and purity of Islamic banking operations In this respect, SBP has taken a number of initiatives since the judgment
- A detailed set of criteria for establishment of Islamic commercial banks in the private sector was issued in December 2001
- A new fully dedicated Islamic bank, Meezan Bank Limited, has been issued a license and the bank has started its business
- In order to allow existing banks to set up subsidiaries for Islamic banking, draft amendments in Section 23 of Banking Companies Ordinance, 1962 have been submitted to Government for approval

- A new Islamic Banking Division has been established in the Banking Policy Department for regulation and promotion of Islamic banking [216]

- Existing Prudential Regulations have been reviewed by SBP for their application on Islamic banks, and revised regulations are being prepared.

- Courses on Islamic economics, banking and finance have been included in the curricula of the Institute of Bankers in Pakistan

- International Islamic University, Islamabad, has conducted a training course for trainers on Islamic Financial System in April 2002 SBP staff along with staff of other banks attended the course

- SBP has reviewed its Forms of Financial Statements for banks in the light of newly developed accounting standards "

If we look at the industry progress reports issued by SBP, we can say that this sector has made remarkable achievements in overall banking industry of Pakistan Share of this sector in total assets of overall banking industry has increased from 0 5% in 2003 to 6 7% in 2010 Deposits share in industry has jumped from 0 4% in 2003 to 7.2% in 2010 with 6 2 banking industrial share in 2010 as compared to 0 5% in 2003. Currently, there are 479 of five full fledge Islamic banks in Pakistan namely Meezan Bank Ltd, Al Barka Bank (Pakistan) Ltd, Bank Islamic (Pakistan) Ltd Burj Bank Ltd and Dubai Islamic Bank (Pakistan) Ltd are providing Islamic banking services to their customers (State bank of Pakistan, 2010) In addition 223 Islamic banking branches of twelve (12) Conventional banks are also working in this sector (State Bank of Pakistan, 2010) SBP has planned to double these figures in next few years in order to increase share of IBIs in overall banking sector

[216] Ibid

3.2 An Overlook on legal and regulatory issues facing Islamic Finance industry in Pakistan

A strong and viable legal and regulatory framework is one of the basic requirements for the progress and development of any industry Islamic financial institutions in Pakistan emerged without clear legal and regulatory framework Due to interest-free character It has attracted society at large to use services of this sector Islamic banking re-launching in Pakistan brought new realistic approach and discarded regulatory approach This new approach affected legal and regulatory developments at larger extent Currently Islamic banking sector is showing notable figures with unique features as compared to Conventional banks but in future problems are clearly evident in regularity and legal matters Therefore, it is time to rethink beyond the simple extension of existing legislation and regulation applying to conventional banking institutions [217]

Absence of appropriate statutory laws is creating serious concerns and adding enforcement costs of financial transactions in Islamic finance industry in Pakistan Currently, there is no statutory law in the country which deals with the establishment and workings of Islamic banking institutions A full fledge sector is working under few guidelines, directives and circulars issued by central bank of the country Laws dealing with the conventional banking sector have been extended to this newly formed sector On the other hand Banking Companies Ordinance 1962 as a formal law deals with the operation of conventional banks only. It is also considered as outdated law which only dictates banking sector to make banking business according to Islamic principles but does not mention the mechanism for this sake. Legal developments relating to Modaraba business have only been made in the shape of Modaraba

[217] Wafik Grais and Pellegrini, "Coporate Governance and Sharih Compliance in Institutions Offering Islamic Financial Services"World Bank policy research working paper 4054, November 2006, p 2.

Companies and Modaraba (Floatation and Control) Ordinance 1980 but statutory laws relating to other banking products are absent [218]

Moreover, nowadays there is no statutory law in the country which deals with appointment, remuneration, removal and operations of SSB which is a major distinctive feature of Islamic banking institutions SBP has granted these powers to board of directors in its Shariah compliance guideline (State Bank of Pakistan, 2008b) Such discretionary nature and absence of formal law gives freedom to Board of Directors to work according to their will Therefore they have involvement in the matters relating to conflict of interest, wrong disclosers and insider dealings in these institutions [219]

In Pakistan, various corporate, commercial and banking laws have also been narrowly defined and only cover conventional business For example, various provision in Companies Ordinance 1984, states the rights, duties and liabilities of directors in a corporate entity but do not discuss the aspects of Sharia board members who also act as directors in parallel board with ordinary operational board

Increasing banker-customer disputes and Non-performing loans in the environment of continuous expansion in Islamic banking sector also putting question mark on current judicial arrangements in this field In 2001 separate banking courts having special nature were established in Pakistan under Financial Institution (Recovery of Finances) Ordinance, 2001 Sole objective of this Ordinance was to provide a speedy summary procedure for the recovery of

[218] Muhammad Naveed Chohan, "Corporate Governance in the Islamic Banking Institutions of Pakistan Waking Legal and Regulatory Challenges", Member of Center of Excellence for research Lahore Chapter (CERLC), Faculty Member at Department of Management Sciences COMSATS Institute of Information Technology (CIIT), Lahore, Pakistan, P 6

[219] Ibid

loans, advances, credits and finances extended by the financial institutions operating in Pakistan to their borrowers and customers [220]

But unfortunately these courts have failed to meet the needs due to narrow scope, burden of work, procedural impediments and low level of performance In addition problem of inexperienced and unqualified judges in the matters of Islamic banking also create backlog of pending matters in these Courts Currently there are only 29 banking courts in Pakistan working for overall banking sector of Pakistan Non-Performing Loans (NPLs) are continuously increasing and showing a figure of Rs 594 billion of overall Pakistani banking sector including over Rs 13 billon in Islamic Banking. It is not possible for these limited courts to resolve matters present at such extent. Disputes related to Islamic banking are presented before the same court and judge as the conventional one while the nature of the legal system of Islam is totally different

SBP as a regulator of Pakistani Islamic banking sector has played a pivotal role SBP has issued time to time various guidelines and regulations for this sector through specially formed Islamic Banking Department (IBD) SBP has recently done a significant work which will expected to be more helpful in resolving regulatory and corporate governance issues involving in the industry A "Shariah Governance Framework for Islamic Banking institutions" was formulated by SBP in April 2014 The importance and the scope of the above mentioned work is as under

In 2002, SBP issued detailed instructions and guidelines for Shariah Compliance vide IBD circular No 2 of 2008 However, keeping in view the developments take place in Islamic banking industry over the recent years some of the instructions and directions were revisited and a comprehensive Shariah Governance Framework (the framework) was developed The framework shall be applicable to all IBIs i e full-fledged Islamic banks, Islamic banking

[220] Ibd, p 7

subsidiaries and Islamic banking divisions of Conventional banks The primary objective of the framework is to strengthen shariah compliance environment in IBIs and explicitly define the role of various organs of the IBIs, including Board of Directors(BOD), Executive Management(EM), Shariah Boards(SB) and internal and external auditors towards Shariah Compliance [221]

But there are still many regulatory issues which are calling for special focus These can be resolved by keeping in view market situation, international guidelines and Islamic norms SBP has formed a central Sharia Board to standardize Sharia interpretations, monitoring of Sharia compliance and to settle Sharia disputes Main motive behind this board is to achieve humanization and convergence in Sharia rulings But problems like less powers and conflicting interests prohibiting it to work efficiently. Currently Sharia advisors are allowed to work in the central Sharia board in SBP which is against the provision of conflict of interest When at the same time advisor will work in both boards then matters will not remain confidential To make sure independence well rewarded and independent Sharia advisor are required at central board

In addition Islamic banks have tendency to use bench mark of conventional banks which led to confusion and uncertainty in the minds of the perspective customers about Islamic banking Tight regulation is required from central bank to address this issue and in order to differentiate products of both sectors.[222]

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[221] Islamic Banking Deparment State Bank of Pakistan, "Shariah Governance Framework for Islamic Banking Institutions", April, 2014

[222] Muhammad Naveed Chohan, "Corporate Governance in the Islamic Banking Institutions of Pakistan Waking Legal and Regulatory Challenges", Member of Center of Excellence for research Lahore Chapter (CERLC), Faculty Member at Department of Management Sciences COMSATS Institute of Information Technology (CIIT), Lahore, Pakistan, p 7

3 3 Current practices of litigating Islamic finance disputes and issues therein

The current legal framework for the resolution of disputes emanating from the Islamic banking and finance industry across the world cannot effectively serve the purpose for which the financial institutions were set up The current trend of litigating Islamic banking and finance disputes does not augur well with the prospects of Islamization of the industry Unfortunately, there are legal firms in the Muslim world that specialize in this area of legal practice We make bold to observe that the idea of subjecting Islamic banking and finance disputes to court litigation, where many of those presiding do not have the requisite knowledge, is antithetical to Islamic law regulating dispute resolution

More often than not, the cases are usually between two Islamic financial institutions owned by Muslim majority shareholders In this case, the simple rule of dispute resolution is to employ the legal processes sanctioned by the law rather than embracing the conventional litigious practice While examining the constraints faced by the Islamic financial services in relation to dispute resolution, Engku Rabiah Adawiah observed thus

> In the case of disputes arising between an Islamic financial institution and its clients, they will have to refer the matter to the civil or common law courts that have jurisdiction to hear the litigation This may result in decisions that may not comply with the Shariah rules. This problem is further exacerbated by the non-existence of any substantive law on Islamic financial services and banking practices in such countries In short, although the transactions entered by the parties may be Shariah compliant in the first place, but upon enforcement of the

contracts, the court may make orders and decisions that may sideline the Islamic legal principles [223]

This clog in the wheel of dispute resolution in Islamic banking and finance has cast some doubts in the full implementation of Sharī'ah-compliant products After the enactment of the Islamic Banking Act 1983, and the consequent establishment of full-fledged Islamic Banks and Islamic windows in Malaysia, cases started emanating from the industry All the cases were heard and decided by the civil courts based on their outlandish rules that are strange to Islamic banking and financial transactions Engku Rabiah Adawiah did a very good critique on a number of decided cases where she unraveled the inherent defects in the Court decisions which is as a result of lack of expertise in the dynamics involved in the Islamic banking and financial services [224] We do not intend to repeat the critique but it is important to emphasize that a separate legal framework is essential for the proper Islamization of the banking and finance industry, or else, we shall continue to grope in the darkness of conventional rules while only succeeding in christening the financial services as "Islamic" [225]

In the first case on Islamic banking and finance ever heard and determined by the English court, Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems NV & Ors[226] , a case of murabahah contract, the parties have agreed on the choice of law and jurisdiction as being the English law After examining the nature and terms of the contract and

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[223] Engko Rabiah Adawiah bt Engku Ali, "Constraints and Opportunities in Harmonization of Civil Law and Shariah in the Islamic Financial Services Industry", [2008] 4 MLJ i at p iii

[224] See generally, Engku Rabiah Adawish bt Engku Ali, n 8 at pp v-xxvi Example of cases heard and decided by civil courts in Malaysia include Tinta Press v Bank Islam Malaysia Bhd [1986] 1 MLJ 474, Bank Islam Malaysia Bhd v Adnan bin Umar [9194] 3 CLJ 735, and Dato Hj Nik Mahmud bin Daud v Bank Islam Malaysia Bhd [1996] 4 MLJ 295 (High Court), [1998] 3 MLJ 396 (Supreme Court)

[225] The Islamic Banking and financial services cases that have been heard and determined by the civil courts in Malaysia include Bank Islam Malaysia Bhd v Adnan bin Omar [1994] 3 AMR 44, Dato' Hj Nik Mahmud bin Daud v Bank Islam Malaysia Bhd [1996] 4 MLJ 295 (High Court), and [1998] 3 MLJ 393 (Appellate Court), and Affin Bank Bhd v Zulkifli bin Abdullah [2006] 3 MLJ 67

[226] (2002) WL 346969 (QB Comm Ct 13 February 2002)

listening to expert opinion, the court held that the English law principles of contract must apply to the purported murabahah contract despite the fact that the expert opinion revealed that the agreement in issue did not have the essential characteristics of a murabahah contract

This is premised on clause 25 of the agreement which provides that "this Agreement and each Purchase Agreement shall be governed by, and shall be construed in accordance with, English law . ."[227] With this clause, the parties have agreed that the transaction as well as any purchase agreement made pursuant thereto shall be governed and construed in accordance with the English law In addition, clause 26 of the underlying agreement provides for an irrevocable submission to the jurisdiction of the English court It is important to observe that in fairness to the English judges, party autonomy is of paramount importance in the choice of law and jurisdiction Therefore, the court construed the agreement as an English law contract which validated the seemingly invalid murabahah contract

The above mentioned illustration gives an insight into the problems faced in the proper implementation of Islamic banking and financial services in situations where parties subject themselves to the jurisdiction of courts that have little or no knowledge about Islamic law This has been the trend in Islamic banking and finance cases before the English courts as further complicated in Beximco Pharmaceuticals Ltd & Ors v Shamil Bank of Bahrain EC[228] where the English courts decided not to be concerned with or be bound by the principles of the Shari'ah in deciding the respective cases This unfortunate situation is further highlighted thus

This anomaly is further exacerbated by the choice of the parties to be adjudicated by a non-Islamic court in a non-Islamic jurisdiction, who may not give due recognition and enforcement to the Islamic legal principles in arriving at the judgment As a result, a transaction

[227] Ibid
[228] [2004] EWCA Civ 19 (Court of Appeal, Civil Division), [2004] All ER (D) 280 (Jan)

that is non-compliant with the Shariah may still be validated and enforced by the court of law. This will translate into the bank being able to recover the amount claimed, ie, its selling price inclusive of profits, despite the transaction being non-compliant with the Shariah If this is the result of the judgment order, the noble aim of having Islamic banking and financial services that comply with the Shariah will be defeated [229]

It is hoped that this incongruity in the implementation of Islamic financial services will be corrected and properly streamlined to reflect the best practices in the industry by adopting a legal framework for dispute resolution based on Islamic law

3.4 ANALYSIS OF LAND MARK CASE·

Beximco Phormaticals Ltd & Ors Vs Shamil Bonk of Bahrain EC

3.4.1 Factual Background of the Dispute:

The Bank was established under the laws of Bahrain, a country that encourages Islamic Banking practices as national policy and the Bank holds itself out as applying Islamic Banking principles and uses Shariah-compliant financial products The Bank extended finances to the Contractor on the basis of Murabahah mode of financing, and the documents executed contained a governing law clause as follows

> Subject to the principles of glorious Shariah, the agreements should be governed and construed in accordance with English Law

3.4.2 Murabahah - Mode of Financing:

[229] Engku Rabiah Adawiah bt Engku Ali, n 8 at p xxix

The term "Murabahah" is used for a sale transaction wherein the commodity is sold for a deferred price which includes an agreed profit added to the cost It is not a loan given on interest The Bank provides funds for purchase of goods, machinery, and equipment etc, on the basis of Murabahah If the funds are required for other purposes e g paying price of goods already purchased, electricity, salaries of the staff or cash for payment for other utilities & services, Murabahah cannot be effected

There has to be real sale of some commodities and not merely advancing a loan The financier must own the commodity before he sells to his client. The Bank purchases the commodity itself or through an Agent and takes possession of the commodity physically or constructively and thereafter sells it to the client While settling the commodity on credit, the Financier takes into account the period in which the price is to be paid by the client and increases the price accordingly The longer the period of maturity, the higher the price. The price in Murabahah transaction as practiced by Islamic Banks is always higher than the market price. If a seller increases the price because he allows credit, it is not prohibited by Shariah if there is no cheating, there is no unconscionable gain and the purchaser accepts the price quoted with open eyes

3.4.4 Case Summary

Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd and Others (known as the Beximco Case), heard by the London Court of Appeal in 2004, is still considered to be a landmark judgment in the field of Islamic finance litigation The underlying facts can be summarized as follows. An Islamic bank based in Bahrain had entered into a murabahah financing agreement with a South Asian borrower The borrower did not repay the loan as scheduled Negotiations over restructuring the debt all remained without success

The bank finally called in the loan and brought a claim in the English courts, which the loan agreement determined as venue The defendant argued, inter alia, that the transaction was altogether void, alleging that it was only dressed up as an Islamic murabahah agreement, but was in fact an interest-bearing loan Thus, it violated the Islamic prohibition of riba (usury) The lack of shariah compliance, the borrower argued, made the agreement altogether unenforceable, and freed the borrower from his obligation to repay

Assuming that the allegation was correct, and that the particular agreement in fact was contrary to Islamic law (which, however, is difficult to determine on the basis of the facts as reported in the case), this raises the question of whether a State Court will enforce the shariah promise given by an Islamic bank, pursuant to which a particular transaction is compliant with Islamic principles In addition, if a state court should get involved with shariah issues, who then will determine the content of the shariah rules? This is a difficult issue that touches fundamental questions, such as the competence of state courts to opine on religious matters and the protection of parties to contractual promises to the extent that such promises are of a nonpecuniary nature

In the Beximco Case the agreement provided that "Subject to the Principles of the Glorious Shariah, this Agreement shall be governed by and construed in accordance with the law of England " This clause ("Subject to") can well be read to imply that shariah rules are meant to override principles of English law, at least to the extent that the latter are not mandatory Such an approach may be consistent with the intentions of the parties to enter into an Islamic transaction that is distinct from a conventional one

The Court of Appeal nevertheless declined to validate the shariah rules referred to in the agreement a choice of law, the Court held, is only valid if it refers to the law of a particular

state, or at least a body of black letter rules that are incorporated in the agreement The "Principles of the Glorious Shariah," however, were too vague to be applied by a state court The parties will not have intended to entrust a state court with the interpretation of religious principles, the Court continued In view of this, the Court ruled on the basis of the provisions of the agreement and did not hear the shariah arguments put forth by the defendant—altogether a pragmatic approach, one can say, upholding the validity of the agreement for the benefit of the lending bank

Conclusion

After the detailed analysis of Beximco Case we can conclude that among the other legal and regulatory issues facing Islamic finance industry the most critical and serious issue, which affects the efficiency of Islamic finance industry as whole and imposes the question on the shariah compliance of the industry, is the lack of proper forum and legal mechanism for the settlement of Islamic finance disputes Dispute emanating from this industry are heard in the conventional courts where, in the most of the cases, particularly where shariah expert determination is required, the judges do not have sufficient knowledge and requisite expertise about the principles and modes of Islamic finance

On the other hand there is a general tendency toward ADR thus certain specialized dispute resolution bodies have been developed at different jurisdictions, for matters such as construction, shipping, commodity transactions, sports, intellectual property, takeover rules, and trade finance Therefore a proper legal framework and specialized dispute resolution bodies for Islamic finance disputes should be developed for the resolution of Islamic finance disputes in the country like Pakistan where Islamic finance industry is playing a vital role in national financial system

Thesis Conclusion

The purpose of this study is to analyze the concept of ADR with particular reference to Islamic finance Analytical and descriptive method is followed in order to ascertain the loopholes in the existing legal framework particularly, in Pakistan

This study has established that ADR is the more speedy and efficacious way in administration of justice Chapter I has established that ADR facilitate the early settlement of disputes Early settlement can be both emotionally and financially beneficial to the disputants. It may also repair and maintain an important relationship, something that may be at risk in adversarial litigation While it is also true that lawyers always engage in negotiation and settlement, sometime on the steps of the court, a successful negotiation often depends on the strength of the legal rights-based arguments, which can only be developed following expensive and time consuming processes such as discovery. This legalistic approach often overlooks other avenues of settlement opportunity, which may better address a client underlying interests and needs

Chapter II has established that the religious undertones of ADR and certain of its characteristics have made it distinctive among the other legal systems of the world Its immense coverage is difficult to be matched by any other legal system, so also the willingness of persons professing Islam to submit themselves to the idea of amicable resolution of disputes It is appropriate time that the true nature of ADR shall be explained to and popularized among Muslims The culture of litigation imposed on Muslim societies during the colonial days must be replaced by the Islamic ways of amiable resolution of disputes

Final chapter has revealed that among the other legal and regulatory issues facing Islamic finance industry the most critical and serious issue, which affects the efficiency of Islamic finance industry as whole and imposes the question on the shariah compliance of the industry,

is the lack of proper forum and legal mechanism for the settlement of Islamic finance disputes. Dispute emanating from this industry are heard in the conventional courts where, in the most of the cases, particularly where shariah expert determination is required, the judges do not have sufficient knowledge and requisite expertise about the principles and modes of Islamic finance On the other hand there is a general tendency toward ADR thus certain specialized dispute resolution bodies have been developed at different jurisdictions, for matters such as construction, shipping, commodity transactions, sports, intellectual property, takeover rules, and trade finance. Therefore a proper legal framework and specialized dispute resolution bodies for Islamic finance disputes should be developed for the resolution of Islamic finance disputes in the country like Pakistan where Islamic finance industry is playing a vital role in national financial system

Recommendations

1. Since there is lack of a proper legal framework for Islamic financial institutions, therefore certain steps may be taken to establish a strong legal and regulatory framework for Islamic finance industry
2 As the current practices of litigating Islamic finance in traditional courts is inadequate ADR is the proper forum for the settlement of the disputes arises in Islamic financial institutions
3 For this purpose, a number of recognized sulh (mediation/conciliation) may be established on regional basis in the countries where Islamic finance is being in practice
4. A clause should be included in all Islamic finance agreements that whenever any dispute would arise in future it should be settled through ADR Processes
5 ADR Centers should be functional and equipped with qualified staff having considerable
6. Islamic commercial law background
7. As ADR is an appropriate mechanism for dispute resolution in general, and particularly for the settlement of disputes arise in Islamic Financial Transactions, it should be taught as a separate subject in Islamic Commercial Law
8 During the research I realized that areas like "legal and regulatory framework for Islamic finance industry" are needed to be addressed separately
9. However, the permanent solution of the issue discussed is the establishment of Islamic financial courts where the disputes may be settled according to glorious principles of Shariah (Islamic Law)

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