

# Dispute Resolution in Singapore: Challenges and Opportunities for Islamic Finance

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## Abstract

*It has been established that the stronger and more reliable the structure of the dispute settlement mechanisms, the higher it can elevate the market players' trust and confidence in the Islamic finance landscape. These mechanisms are virtually part of the regulatory treatment proliferated to achieve sustainable development of the Islamic finance industry. Dispute resolution mechanisms are strongly available in Singapore as comparable with the nation's resilient position in its legal, financial and economic infrastructure. Furthermore, Singapore has constantly been aspiring to be an international hub for dispute resolutions. This study seeks to review these mechanisms in Singapore and its suitability and prospects for Islamic finance industry. In spite of the Singapore's efficient system, there are shortcomings found to suit the peculiarities of Islamic finance such as absence of a proper framework for Islamic finance and dearth of expertise to deal with Islamic finance disputes.*

**Key Words:** Islamic Finance, Alternative Dispute Resolutions, Arbitration, Mediation, Adjudication

## Introduction

A proper medium to try disputes in Islamic finance is essential and thus under the legal and regulatory framework, a legal recourse should be provided for Islamic finance. This is to ensure the enforceability of Islamic finance contracts and operations. In parallel with the growth of Islamic finance, the adjudication medium must also be available for the parties involved. However, the system should not be merely existing and accessible; rather, there is a need to ensure that it is also reliable. There are two types of dispute settlement mechanisms available in most countries, which are adjudication through

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the court system and settlement mechanisms that take place outside the court system which is famously known as Alternative Dispute Resolutions (ADR). The litigation procedures through the court system are seen as a tedious and cumbersome process, which could also amount to incurring higher expenses. There are also a large number of backlog cases, resulting in delayed judgments.

ADR, on the other hand, is esteemed to be a practical option for vast areas, including Islamic finance disputes. Although some parties still have skeptical perceptions of the strength of ADR, the movement preaching to adopt this type of method is highly encouraging. Singapore aspires to develop an established centre to resolve disputes in parallel with its status as a leading judiciary system in the Asian region. There are many forms of ADR but in the Singapore context and for the purpose of this study, only two prominent means of ADR will be delved into, namely mediation and arbitration. These dispute settlement mechanisms available in Singapore are explored to accommodate Islamic finance practices which could possibly help to develop the Islamic financial industry as a whole in the said nation.

### **Adjudication by the Court System**

The judicial system in Singapore is governed by the main legislations, namely the Supreme Court of Judicature Act (Cap. 322) and the State Courts Act (Cap. 321). The Singapore's court structure is a two-tier type consisting of the subordinate courts (now known as state courts) and the supreme courts. The supreme courts in Singapore consist of higher courts and the Court of Appeal.<sup>3</sup> Similar to the judicial system in other Commonwealth countries, different tiers of courts in Singapore have different capacities or jurisdictions.

Adjudication is commonly referred to as litigation. It is arguably the most referred medium for disputing parties as the method used is well-known amongst the public. Having considered Singapore's position in the judiciary system globally and the Asian region particularly, it is the most respected system. Hence, Singapore is able to attract confidence of disputing parties. The judiciary system in Singapore emphasises quality, adequacy and efficiency. As a whole, this has led to positive implications on the economic and financial stability in Singapore.

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3. Constitution of the Republic of Singapore, Art 94(1) provides "*The Supreme Court shall consist of the Court of Appeal and the High Court with such jurisdiction and powers as are conferred on those Courts by this Constitution or any written law.*"

The Singapore judiciary system is highly effective and impartial in dealing with business or commercial disputes. Financial market players would generally feel secure because of the effective and substantial commercial requirements. Consequently, the contracts are easily enforceable. In summary, the Singapore financial system has benefited greatly from its efficient judiciary and legal system.<sup>4</sup>

Given the merits that the country's judiciary system holds, they are considerably advantageous for disputes relating to Islamic finance and ultimately could ensure the enforceability of Islamic finance transactions. Nevertheless, it is pertinent to identify the exact forum for Islamic finance within the legal infrastructure in Singapore, as well as the arising issues and challenges.

### **The applicability of Islamic Finance in the Singapore Court System**

The State Courts Act and the Supreme Court of Judicature Act do not provide a specific avenue for Islamic finance transactions to be tried. Islamic finance is also not addressed under the Administration of Muslim Law Act (AMLA) (Cap.3), the only statutory legislation governs Muslim matters in Singapore.

It is interesting to note that a unique feature of the Singapore Courts is the existence of the Shariah court. Singapore has proven its strong sense of legal pluralism as the Shariah court is able to co-exist with the civil courts, which underpin the common law system.<sup>5</sup> However, the jurisdiction of the Shariah court is confined to Muslim personal laws only as provided under the AMLA. It should be borne in mind that Singapore does not give any special treatment to the Shariah court. The Shariah court is not fully independent as it falls within the structure of civil or secular courts.<sup>6</sup> This is evidenced by a specific provision under the State Courts Act, which states that the District court has the authority to hear and try any civil proceedings that fall under the AMLA.<sup>7</sup>

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4. Subordinate Courts Singapore, "Singapore Judiciary & Legal System Stays At The Top", Media Release, 25th June 2004, 2

5. Black, Ann, "Lessons From Singapore: An Evaluation Of The Singapore Model Of Legal Pluralism", *Asian Law Institute Working Paper Series No.026*, July 2012, 23

6. Abdul Rahman, Noor Aisha, "Muslim Personal Law within the Singapore Legal System: History, Prospects and Challenges", *Journal of Muslim Minority Affairs*, 29:1, 15 April 2009, pp 109-126.

7. State Courts Act (Cap.321) (Revised 2007), s.19(5) provides that "*A District Court's jurisdiction to hear and try any civil proceeding which comes within the jurisdiction of the Syariah Court constituted under the Administration of Muslim Law Act (Cap. 3) shall be the same as the High Court as if section 17A of*

A concurrent jurisdiction can be found between the Shariah court and the civil courts and thus, an intervention can be made by the civil courts on certain matters. The determination of divorce in accordance to Muslim law falls solely under the Shariah court jurisdiction. However, ancillary matters relating to divorce such as the disposition of matrimonial assets and custody of children can be enforced under the civil courts.<sup>8</sup>

Although the AMLA provides the Shariah court to try Muslim personal laws such as the Islamic law of inheritance and administration of *waqf*, there is still no sole discretion given. With regards to disputes arising from inheritance and *waqf* properties, the civil courts have the jurisdiction to hear and try the matters.<sup>9</sup>

In contemplation of the above, the shortcomings of the Shariah court in Singapore can be greatly felt as its discretionary power is restricted. The Shariah court also has no jurisdiction to hear Islamic finance matters. Therefore, Islamic finance matters fall within the mainstream civil courts jurisdiction.

It can be observed that legislations and regulations pertaining to Islamic finance in Singapore are “couched in secular language” and have marginalised any references to Islamic law. Therefore, Islamic finance matters belong to the secular courts to try.<sup>10</sup> To date, there is no judicial precedent with regards to Islamic finance disputes in Singapore. According to a number of industry players in Singapore, there is yet to have any claim of suits relating to Islamic finance.<sup>11</sup>

The Singapore court system emanates from English common law principles. The rulings made in the English courts thus have persuasive legal effects on the Singapore courts.

Subsequently, the *ratio decidendi* (legal reasoning) from prominent English cases relating to Islamic finance would be likely to be taken into consideration in the Singapore legal system. The first case on Islamic finance tried in the English court was

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*the Supreme Court of Judicature Act (Cap. 322) applies to the District Court with the modification that any reference therein to the High Court shall be read as a reference to a District Court.*”

8. Administration of Muslim Law Act (Cap.3) (Revised 2009), section 35A.
9. Absence of legal provisions is evident in these situations but civil courts are the main medium to try disputes pertaining to Islamic law of inheritance and waqf properties as proven in various legal reported cases such as the case of *Abdul Rahman bin Mohamed Yunoos and Anor v. Majlis Ugama Islam Singapura* [1995] 2 SLR 705.
10. Thomas, Raj Joshua. “Islamic Banking and Finance-Regulatory Regimes in Malaysia and Singapore”, *Singapore Law Review*, 29 Sing.L.Rev., 2011, pp 165-190.
11. Interviews conducted by the authors with few Islamic financial industry players

*Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems NV & Ors*,<sup>12</sup> whereby Islamic law was not the governing law but the interpretation of commercial clauses was subject to English law. Furthermore, a noteworthy principle in this case is that the expert opinions on the Shariah contract, which were sought from the court, are not binding and the judicial power has the discretion to decide based on the facts and circumstances of the case. English law was upheld in accordance to the express terms of the agreement.<sup>13</sup>

The other landmark case reported in the English court was *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd*<sup>14</sup>, whereby the main contention forwarded by the borrower was that the loan agreement lacked Shariah compliance as it involved interest (*riba*) and as such, rendered the contract unenforceable.

The appellate court upheld that it was implausible for the case in the secular legal system to be tried in accordance with religious principles. Interestingly, the clause was intended for business purposes and not to give a legal binding effect.<sup>15</sup> The latter English case also followed the same ruling in the landmark case based on the doctrine of *stare decisis*. This can be seen in the case of *Investment Dar Company KSCC v Blom Development Bank SAL*<sup>16</sup> in which the promise made in the agreement is not enforceable under English common law.

Singapore, being a Commonwealth country and its legal system being very much influenced by English common law, there is a higher inclination for Singapore to adopt the legal principles established in the abovementioned Islamic finance cases tried in the English courts. Accordingly, the Singapore law pertaining to commercial transactions or contracts will prevail in the event there is Islamic finance disputes tried in the Singapore courts.

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12. [WL 36969 Q.B.Com.Ct.Feb 13 2002, unreported].

13. Yaacob, Hakimah, *Alternative Dispute Resolution (ADR): Expanding Options in Local and Cross Border Islamic Finance Cases*, (Kuala Lumpur: ISRA, 2012), p.16.

14. [2004] 1 W.L.R 1784.

15. Thomas, Raj Joshua, p.186

16. (Rev 1) [2009] EWHC 3545 (Ch).

### **Challenges arise in the Singapore Court System for Islamic Finance**

By embracing such legal rulings, similar glitches encountered in the English legal system or common law are likely to be faced in Singapore. Since the civil courts in Singapore have the jurisdiction to try Islamic finance, the rules and procedures applied are essentially derived from the English common law principles. Hence, more often than not the rules invoked are contrary to Islamic law principles. A conflict of two legal systems and principles is foreseeable and unfortunately, the conventional legal system or the law of the land would dominate over the Islamic law rulings.<sup>17</sup>

Apart from that, the dearth of judges' competencies to hear Islamic finance cases may be greatly experienced in Singapore. Judgments given in court cases relating to Islamic finance are often found not in favour of the essence of Islamic finance and subsequently ignore Islamic law. The negative implication of judgments made by incompetent judges in Islamic finance cases is that Islamic finance practices themselves are adversely affected.

In order to overcome the above problem, seeking expert opinions on Shariah rulings would be advisable. However, considering the opinions and constituting them as admissible evidence is another layer. Malaysia has been rigorously supportive of Islamic finance, taking the initiative to make expert opinions on Shariah rulings relating to Islamic finance as legally binding.<sup>18</sup> In comparison, the English court declined to accept Shariah expert opinions even though according to the latter, the agreement in dispute was found to be contradicting the Shariah principle and thus non-Shariah compliant.<sup>19</sup>

In view of the above, as a secular country envisioned in the Constitution of the Republic of Singapore, the approach that would be adopted by the Singapore court is akin to that of the English courts. The Shariah expert opinions are merely persuasive. At this juncture, there is an absence of legal provisions requiring a reference of Shariah expert opinions. These opinions can only be considered within the ambit of witnesses and opinions under the Evidence Act (Cap. 97).<sup>20</sup>

With reference to the expert opinions, it is interesting to highlight that the AMLA provides that the Islamic Religious Council of Singapore is entrusted to advise

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17. Hakimah Yaacob, 21.

18. Central Bank of Malaysia Act 2009, s.56 and s.57.

19. *Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems NV & Ors*, [WL 36969 Q.B.Com.Ct.Feb 13 2002, unreported]

20. Evidence Act (Cap.97) (Revised 1997), s.47-53 explain the Opinions of Third Persons when Relevant.

Singapore on Muslim law.<sup>21</sup> Specifically, the establishment of a body of expertise in Muslim law – referred to as the Fatwa Committee – is embodied under Section 31 of the AMLA. Section 31 explains that the Fatwa Committee has the power to issue fatwa or decrees on Muslim law upon request. The Fatwa Committee also has the right to issue opinions on its own volitions and address issues that are relevant to its necessity to protect public interest.<sup>22</sup>

The Fatwa Committee's decisions on Muslim law can be referred to by both civil courts and the Shariah court in Singapore. In the Shariah court, such opinions can be considered binding but they are not so in the case of the civil courts.<sup>23</sup> There is no legal provision mentioned on the legal binding effect of the rulings made by the Fatwa Committee. However, there are various law reports or cases which infer that the Fatwa Committee's rulings are not obligatory for the civil courts to accept.<sup>24</sup>

The position of the Fatwa Committee and its issuances of rulings from the legal perspective make an important contribution to our understanding of Islamic finance disputes that may be tried in the Singapore court system. This means that the Fatwa Committee may be referred to alongside without undermining the judiciary power as mandated by the law. In other words, the civil courts could refer Islamic law matters to the Fatwa Committee.<sup>25</sup> Moreover, the generality of the wordings from Section 3(2) (b) of the AMLA that MUIS is empowered to administer any matters relating to Muslim religion and Muslims in Singapore, including matters on Haj and halal certification. The term "any matters" invoked that Islamic finance may be included. Hence, it could be suggested that the Singapore court system along with a supportive structure such as the Fatwa Committee is an available medium for Islamic finance disputes.

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21. Administration of Muslim Law Act (Cap.3) (Revised 2009), section.3.

22. Administration of Muslim Law Act (Cap.3) (Revised 2009), section.32 (6) and section 32(7).

23. Abbas, Ahmad Nizam, "The Islamic Legal System in Singapore", *Pacific Rim Law & Policy Journal*, Vol.21 No.1, January 2012, p.170.

24. *SaniahBinte Ali and Others v. Abdullah Bin Ali*, [1990] 1 SLR(R) 555 and *Mohamed Ismail bin Ibrahim and Another v. Mohammad Taha bin Ibrahim*, [2004] 4 SLR(R) 756, cited in Ahmad Nizam Abbas, "The Islamic Legal System in Singapore", p.175.

25. Administration of Muslim Law Act (Cap.13) (Revised 2009), section 32(7) provides that "*If in any court any question of the Muslim law falls for decision, and such court requests the opinion of the Majlis on the question, the question shall be referred to the Legal Committee which shall, for and on behalf and in the name of the Majlis, give its opinion thereon in accordance with the opinion of the majority of its members, and certify such opinion to the requesting court.*"

Be that as it may, the challenges faced in adopting the court system could perpetuate hindrances for Islamic finance to prosper due to a lack of inefficiency in dealing with the intricacies of Islamic finance. The court system has shown to be an inadequate mode of determining Islamic finance disputes exclusively in the interpretation of Shariah and its application.<sup>26</sup> The judges are not suited to adjudicate such an area and might declare the clauses in Islamic finance contracts to be unenforceable and against the public policy because they need to be resolved through the national system.

For the above mentioned reasons, many have proposed by means of the alternative dispute resolution (ADR) to overcome the deficiencies faced in Islamic finance disputes. Reference to either mediation or arbitration would entail the flexibility to make suitable changes to existing laws and procedural rules.<sup>27</sup> In the Singapore perspective, these modes i.e mediation and arbitration are seen as complementary elements to the judicial system as a whole.

### **ADR: Mediation**

Mediation is referred to as negotiation and reconciliation between parties to resolve a situation confidentially by reaching an amicable solution. A third party is appointed as a mediator to facilitate the negotiation, but no authority can be imposed onto the disputing parties and outcome of the negotiation.

The practice of mediation was revived in the 1990s as Singapore noted its potential to form an integral part of its legal system. Various dispute resolution mechanisms have been introduced in government departments and professional bodies. There are three main types of mediation available in Singapore, which are Private commercial mediation, Court-based mediation and Community mediation. The institutionalised mediations that oversee these three categories are the Singapore Mediation Centre (SMC) incorporated under the Singapore Academy Law, Primary Dispute Resolution Centre (PDRC) launched under the Subordinate Courts and Community Mediation Centre (CMC) under the Ministry of Law.<sup>28</sup>

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26. Mohammad Illiyas Seyed Ibrahim, "Dispute Resolution in Islamic Finance: A Need to Complement Litigation with Expert Determination", MIF Monthly June 2008.

27. Suggestion made by the presiding Judge in the case *Affin Bank Bhd v Zulkifli Abdullah*, [2006] 1 CLJ 438, at 447 cited in Hakimah

28. Hwang S.C, Michael et.al, "Alternative Dispute Resolution in East Asia", in *Alternative Dispute Resolution in Business, Practice and Issues Across Countries and Cultures*, edited by Jean Claude Goldsmith, et.al, (New York: Kluwer Law International, 2006), 149-150.

Both SMC and PDRC are tailored to a wide range of cases encompassing civil matters from probate to tort to international commercial transactions. CMC is dedicated to managing family, neighbourhood and relational disputes.<sup>29</sup> To date, there is no enactment specifically governing mediation in Singapore with the exception of community mediation.<sup>30</sup>

Subsequently, common law principles such as the law of contract are referred to govern mediations under the SMC. As such, issues like the enforceability and validity of mediation clauses and damages for breach of such clauses are determined according to the English common law.<sup>31</sup> There are broad services offered by the SMC such as the Commercial Mediation and Small Commercial Mediation Scheme.

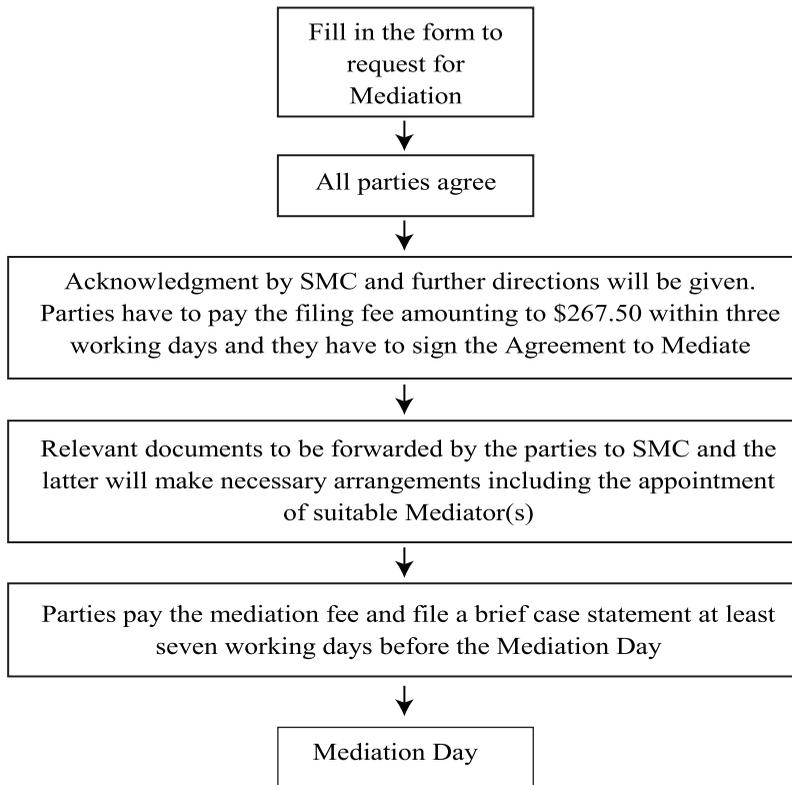
The SMC does not provide a specific list of cases that can be mediated in respect of geographical jurisdiction and quantum of claim. Typically, disputes over commercial matters that have been mediated in the SMC involve banking, construction, employment and any other cases that are commercial in nature. The mediation procedures are illustrated in the figure below:

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29. Goh, Joon Seng, "Mediation in Singapore: The Law and Practice", n.d, 159.

30. The Community Mediation Centres Act (Cap.49A) was introduced in 1998

31. Hwang S.C, Michael, et.al, p.150



**Figure: Mediation Procedure<sup>32</sup>**

Singapore has recently set up the Singapore International Mediation Centre (SIMC).<sup>33</sup> It is designed for international commercial mediation. The recommendation to set up a separate centre for international commercial disputes is in line with Singapore's position as an international financial centre and serves to complement a whole suite of dispute resolution services in Singapore.

Additionally, there is a hybrid form of mediation with arbitration named Med-Arb Service.<sup>34</sup> In this regard, the SIMC collaborates with the Singapore International Arbitration Centre (SIAC) and the hybrid service is available starting with mediation

32. Diagram adapted from the Singapore Mediation Centre Website, <[www.mediation.com.sg](http://www.mediation.com.sg)>.

33. It was officially launched on 5 November 2014 as reported in Today, <http://www.todayonline.com/new-singapore-international-mediation-centre-launched>

34. Singapore Mediation Centre website, <<http://www.mediation.com.sg>>

and if it is terminated due to several reasons, it will proceed to arbitration.<sup>35</sup> The parties involved may incorporate the SIMC-SIAC Med-Arb clause in their agreements. The submission of documents must be made to the SIMC for mediation named the Request for Mediation and the Notice of Arbitration for SIAC. Arbitration only takes place when the dispute is unable to settle during the mediation.

Furthermore, legislations also recognise the inter-related mechanism between mediation and arbitration. For instance, mediation is dealt with in arbitration statutes such as Section 16 of the International Arbitration Act (Cap.143A) (Revised 2002) and Section 62(1) of the Arbitration Act (Cap.10) (Revised 2002) on the appointment of a mediator. It has been pointed out that the unique feature of the Med-Arb mechanism is the option given to the parties involved to record the settlement during the mediation stage in the form of an award for arbitration, which can be enforced.<sup>36</sup>

Apart from the above options, the PDRC provides an alternative dispute resolution mechanism known as the Court Dispute Resolution (CDR) convened under Order 34A of the Rules of Court. CDR can be requested by parties or be referred to during summons for direction hearings or pre-trial conferences for civil claims. The mediation sessions take place in the state courts. They are featured as a vital part of the civil justice case process.<sup>37</sup>

An interesting point to highlight is that the court mediation sessions are conducted by experienced District Judges. Instead of the usual presiding court judge, they are more inclined to act as mediators and are named settlement judges. Even more interesting is the fact that the settlement judge is allowed to seek assistance from a third party who can either be a foreign judge or an expert to conduct the mediation sessions together.<sup>38</sup> This implies pro-active guidance for the parties involved.

Since there is yet to be a specific legislation governing mediation, the mediation practices in Singapore are flexible. Although there are three main institutionalised bodies pertaining to mediation as previously described, there are also many other bodies

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35. Sample of clauses and med-arb services are available at <http://simc.com.sg/model-clauses/the-singapore-arb-med-arb-clause/> and <http://www.siac.org.sg/component/content/category/67-model-clauses>

36. Singapore International Mediation Centre, "Med-Arb Services", <<http://simc.com.sg/our-services/arb-med-arb/>>

37. Hwang S.C, Michael, et.al, p.154

38. State Courts of Singapore Website, "FAQ" <<https://app.subcourts.gov.sg/civil/print.aspx?pageid=54106>>

that partake in establishing forums for mediation. The rules, regulations and standards, including the mediators' appointment, may vary in different organisations.<sup>39</sup>

One such body is the Financial Industry Disputes Resolution Centre Ltd (FIDReC), which was launched under the auspices of the Monetary Authority of Singapore in the year 2005.<sup>40</sup> FIDReC provides an independent and affordable avenue to resolve any disputes arising with financial institutions across different financial sectors comprising the banking, insurance and capital markets industries.<sup>41</sup> Furthermore, it affords a forum on dispute resolution for structured products and has to undergo a specific process. The FIDReC scheme is for customers who want to solve their problems with financial institutions indirectly. Prior to such a scheme, customers are required to contact the financial institutions directly and attempt to reach a mutually agreed settlement. This centre will only handle the matter in the event of a failure in the customers' attempt to settle it amicably.

FIDReC has two-tier processes: the mediation stage and the adjudication stage. The latter is adopted when after the first stage, the case is still unresolved. The panel of adjudicators will decide based on the facts and circumstances of the case. At the first stage, an appointed FIDReC case manager will conduct the case on a free basis. Meanwhile, a management fee of S\$50 is required and a monetary reward is to be decided during the adjudication stage.<sup>42</sup> It should be noted that only claims made by individuals will be entertained and not claims by corporations or proprietorships. FIDReC classifies the specific claims that can be brought as well as other matters that cannot be brought to claim.<sup>43</sup> The jurisdiction of FIDReC is as follows:

- (1) For claims not exceeding S\$100,000 between insured and insurance institutions
- (2) Quantum of amount claimed not exceeding S\$50,000 for disputes between banks and consumers, capital market disputes and all other disputes including third party claims and market claims

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39. Hwang S.C, Michael, et.al, p.150

40. Singapore being an International financial centre, the MAS also is empowered to issue regulations relating to dispute resolution schemes. This is provided under Section 28A of the Monetary Authority of Singapore Act (Cap.184).

41. Financial Industry Disputes Resolution Centre Website, <<http://www.fidrec.com.sg/>>

42. Monetary Authority of Singapore, "Getting it Right: How to Resolve a Problem with Your Financial Institution", part of initiative by MoneySense, a National Financial Education Programme for Singapore, December 2005, 6

43 41 Ibid, 6 -7

### **ADR: Arbitration**

Arbitration is perceived to be more formal than mediation but less tedious than the litigation procedure. Arbitration is “a referral of a dispute to one or more impartial persons for a final and binding determination”.<sup>44</sup> One similarity between arbitration and mediation is the appointment of a third party as the ‘middle person’ to facilitate the case. The only difference is that the decision made is binding upon the parties in dispute.

In tandem with Singapore’s status as a global financial and commercial centre, the utilisation of arbitration is also increasing. This is because Singapore is able to offer an attractive and conducive environment for international commercial arbitration, especially in the Asian region, complemented with a well-respected and highly efficient legal system. The current legislative regime for arbitration proceedings in Singapore is governed by two main statutes, which are the Arbitration Act (Cap. 10) and the International Arbitration Act (Cap. 143A).

These two distinct statutes govern two different areas: domestic and international arbitrations. The Arbitration Act (AA) is applicable to domestic arbitrations. As stated in Section 3, it applies to any arbitration place in Singapore but does not apply under Part II of the International Arbitration Act (IAA). Interestingly, the Singapore courts have a greater degree to intervene in the process of arbitration.<sup>45</sup>

On the other hand, international arbitration is governed by the IAA. The IAA adopts the United Nations Commission on International Trade Law (UNCITRAL) Model, which has the ‘force of law in Singapore’.<sup>46</sup> The UNCITRAL rules are incorporated under the First Schedule. Unlike the AA, the intervention of Singapore courts is strictly limited and the right to appeal on the award is not found under the IAA.

The exclusive trait of arbitration in Singapore is that the parties involved are given the choice to opt for arbitration governed under AA or IAA as long as they have mutually consented on the choice of the operation of law. Thus, it must be ascertained in the arbitration agreement at the first instance the intention to arbitrate within the domestic or international domain.

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44. Yaacob, Hakimah, p. 53

45. Arbitration Act (Cap.10) (Revised 2002), Part III, s.6-8.

46. International Arbitration Act (Cap.143A) (Revised 2002), section 3(1).

Meanwhile, the institutional framework for international arbitration practices in Singapore is mainly led by the Singapore International Arbitration Centre (SIAC). It was established in March 1990 to enhance Singapore's role as a centre for international commercial arbitration.<sup>47</sup> The SIAC provides top arbitral facilities and support services, and is well-placed to facilitate the growing number of international arbitrations in the region.<sup>48</sup>

It should be borne in mind that under the IAA, Section 5(2) has laid down the conditions to qualify what constitutes international arbitration, but considering whether it is international or domestic does not mean whether the arbitration takes place on in Singapore or not. The parties still can opt out of the IAA if they agree, and the UNCITRAL model shall automatically be applied.<sup>49</sup>

No specific claims can be made under arbitration. The parties have almost complete autonomy in deciding what types of dispute may be referred to in arbitration, but the matters are mostly commercial in nature. In the preamble of the Act, however, it is explicitly mentioned for International Commercial arbitration but Section 11(1) of the Act also indicates that it can be “any dispute” and that the most important requirement is that it does not contradict the public policy. It is observed that the concept of disputes in arbitration is closely related to considerations of public interest.<sup>50</sup>

As for the selection of arbitrators, no restrictions are set out under the IAA. As such, any person(s) can be appointed to conduct the arbitration provided they are deemed fit to do so. According to the UNCITRAL model, arbitrators are not restricted to a certain nationality, individual or professional body.<sup>51</sup> Another interesting fact on arbitration in Singapore is that there are also no restrictions on foreign lawyers to represent the parties in any arbitration. The common practice is that parties would appoint lawyers to represent them in proceedings, particularly in international commercial disputes.<sup>52</sup>

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47. Shyng Yang, Lih & Chew, Leslie, “Arbitration in Singapore”, in *International Commercial Arbitration in Asia* (3<sup>rd</sup>ed) edited by Tom Ginsburg & Shahla F. Ali, (USA: Juris Publishing, 2013), p.468.

48. Mayer Brown JSM, “Asia's Arbitration Centres- Hong Kong, China and Singapore”, The MayerBrown Practices, 2011, p.3.

49. International Arbitration Act (Cap.143A) (Revised 2002), section 5(1).

50. Report by the Review of Arbitration Act Committee 2000 cited in the case of *Larsen Oil and Gas Pte Ltd v Petropod Ltd*, [2011] SGCA 21.

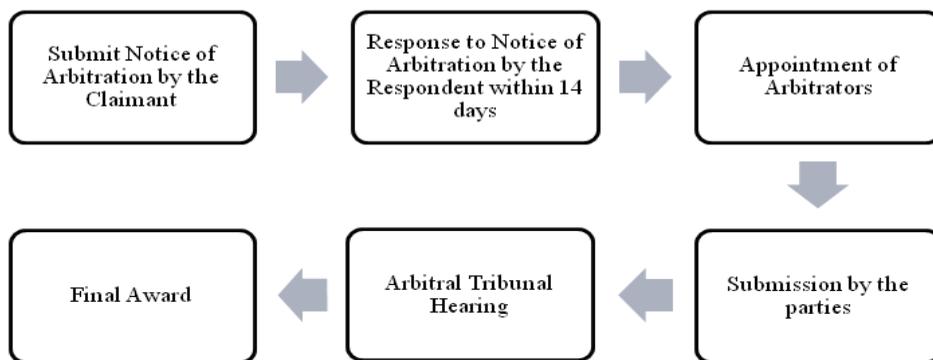
51. United Nations Commission on International Trade Law (UNCITRAL) Model on International Commercial Arbitration, Art.11.

52 50 Lih, Shyng Yang & Chew, Leslie, p.483.

One essential element that needs be taken into account under arbitration is the arbitral choice of law. Arbitration provides autonomy to the parties by giving them freedom to choose the substantive law to be tried and governed in the related disputes based on their mutual agreement. The methods used to resolve the disputes also may not necessarily adhere to stringent standards. In the event that no choice of law is expressed, the arbitral tribunal can exercise its discretion to determine law in accordance to the conflict of laws principles.<sup>53</sup>

The conduct of arbitral proceedings is not specified in the IAA. Indeed, the parties are given the freedom to choose or agree on the procedure to be adopted by the tribunal. It is argued that the conduct of proceedings is detailed clearly and comprehensively under the issuance of rules by the institutionalised arbitration centres compared to the Act.<sup>54</sup> For instance, the SIAC rules provide that the conduct of proceedings must be appropriate and ensure fair, expeditious, economical and final determination of the dispute.<sup>55</sup>

It is submitted that the SIAC rules can facilitate international arbitration. The SIAC issued its rules in 2013 after several enhancements were made to certain rules. The parties that opt for arbitration to be handled by the SIAC must subscribe to their rules and procedures. However, if any of the rules appear to be in conflict with the mandatory applicable law, such provisions shall prevail. The procedures and guidelines regarding arbitration in Singapore are summarised in the figure below:



**Figure: Arbitration Procedure**

53. UNCITRAL Model, Art.28.

54. Shyng Yang, Lih& Chew, Leslie,p.481.

55. Singapore International Arbitration Centre (SIAC) Rules (5<sup>th</sup> edition, 1 April 2013), para 16.1.

Arbitration is viewed as a flexible method for the resolution of disputes because the parties involved have the opportunity to choose the manner by which the potential disputes would be resolved. They are also allowed to appoint arbitrators who are confident and possess experience in the commercial field, thus proving to be capable of resolving complicated disputes.

### **Applicability of Mediation and Arbitration for Islamic Finance**

Forms of settlement which are outside the court system such as mediation and arbitration are not so conservative. Although the procedures and processes may not be as cumbersome or complex as the court system, the mechanisms are still efficient.

There is the possibility of settling domestic disputes regarding Islamic finance by way of mediation. The appropriate forums of mediation in Singapore for Islamic finance disputes may fall under the institutions of SMC and PDRC as CMC only manages family disputes and the relevant services offered by the SMC would be Commercial Mediation and Small Commercial Mediation Scheme. Although to date, there is no record found in SMC dealing with Islamic finance disputes, such disputes are deemed to be within the purview of commercial matters. Thus, the mediation procedures prescribed by the SMC must be adhered to. Other institutionalized mediation forum would be the FIDReC and thus certain requirements as stated earlier must also be fulfilled.

As for international disputes, it is believed that the existence of international mediation centre could be an effective medium for Islamic finance disputes which involved cross-border transactions.<sup>56</sup> In this respect, the combination of mediation and arbitration could be considered as a form of settlement for international disputes.

However, the drawback of this form of settlement in Singapore is the non-availability of a competent mediator who is familiar with Islamic finance matters. Another demerit is the rather substantial link between mediation with the court system, particularly the PDRC which would fall under the same trap of challenges within the court system.

Arbitration, on the other hand, is advocated by most Islamic finance industry players to be the best medium for international disputes. Arbitration is a well-placed to deal

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56. Ang, Cheng Hock, "Ministry of Law Welcomes Recommendations to Develop Singapore into a Centre for International Commercial Mediation", *Allen & Gledhill Legal Bulletin* Vol.25, No.12 December 2013, p.1.

with the unique intricacies of Islamic finance issues because it is a medium that allows the arbitrators to be selected according to their expertise and thus possess the requisite knowledge of Shariah and relevant commercial transactions.<sup>57</sup>

In the Singapore legal environment, domestic arbitration may not be suitable for Islamic finance disputes because there is a high inclination and allowance for the courts to intervene whenever necessary. This is further aggravated by the absence of a concrete legal definition of what Islamic finance is.

In contrast, the international arbitration is more suitable to be applied in Singapore as governed under the International Arbitration Act. In addition, such disputes could subscribe to the procedures provided by the SIAC. The strength of such a mechanism is its efficiency and practice of comprehensive procedures. An arbitrator can also be appointed by the parties. However, only one arbitrator with expertise in Islamic finance is registered under the SIAC.<sup>58</sup> This signifies another shortcoming as it means a lack of qualified arbitrators for Islamic finance disputes is substantially felt.

In line with Singapore's aim to be the leading international arbitration centre and its current position as a global financial centre, the direction Singapore has taken regarding Islamic finance is steered towards catering to international cross-border transactions.

## **Recommendation**

To strengthen the practice of Islamic financial operations, it is recommended to have an appropriate legal recognition to a specific entity as the ultimate authority in ensuring Shariah compliance. The role of the Fatwa Committee is important in overcoming potential challenges in the course of resolving Islamic finance disputes. In this regard, the Malaysian model could be considered as an example whereby references on Shariah matters relating to Islamic finance must be made to the Shariah Advisory Council by the presiding judge or arbitrator.

Mediation in Singapore could be enhanced by providing an all-rounder avenue for Islamic finance disputes. It has been observed that mediation reinforces the legal infrastructure of Islamic finance by providing an effective and credible avenue

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57. Lawrence, Jonathan, et.al., "Dispute Resolution in Islamic Finance", *Global Islamic Finance Report* 2012, April, 3.

58. Professor Andrew White is a Director of International Islamic Law and Financial Centre, Singapore Management University and holds other positions such as arbitrator and adjudicator under FIDReC.

to resolve Islamic finance disputes speedily and with justice.<sup>59</sup> With the newly established Singapore International Mediation Centre, this would attract more Islamic financial investors globally as a reliable mediation forum is accessible. Nevertheless, an explicit acknowledgment that such forum is available for Islamic finance disputes is still required. Eventually, the mediation centre should provide specific mediation procedures to cater Islamic finance disputes alongside with competent mediators who are well-versed in Islamic finance.

Legal recognition should also be made to arbitration, hence, it accounts for a specific provision to acknowledge that Islamic finance disputes could subscribe to a proper procedure provided by the SIAC. Examples can be taken from other arbitration centres that have established clear guidelines for Islamic finance disputes such as the Kuala Lumpur Regional Centre for Arbitration (KLRCA) and the International Islamic Mediation Arbitration Centre (IMAC), another renowned international financial centre in Asia which is based in Hong Kong.

## **Conclusion**

It is believed that dispute resolution mechanisms in Singapore could be a cogent platform to strengthen the growth of Islamic finance in Singapore. This is due to its overall efficient and reliable system. Nevertheless, there is still an absence of clear indications or comprehensive rules and guidelines on these mechanisms to cater to the intricacies of Islamic finance disputes in Singapore. An unequivocal acknowledgment that such a forum is available for Islamic finance disputes and to subscribe for a specific procedure is still required for Islamic finance. By having proper and comprehensive guidelines in dispute settlement mechanisms for Islamic finance disputes, this would have substantiated the Singapore's support for Islamic finance practices in cross border transactions. This also would certainly accelerate the development of Islamic finance and mold the nation as a leading non-Muslim majority jurisdiction and a strong International Financial Centre for the Islamic finance industry.

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59. Mokhtar, Khairil Azmin and Syed Ahmad, Sharifah Nadiyah, "Mediation in Islamic Banking" in Adnan Trakic and Hanifah Haydar Ali Tajuddin, *Islamic Banking and Finance: Principles, Instruments and Operations*, (Kuala Lumpur: CLJ Publication, 2012), p.385

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