

## The Dubai Approach as a New Resolution System for Islamic Finance Dispute Cases

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### Abstract

This paper aims to clarify the new dispute resolution system for Islamic finance by examining its relationship with the conventional dispute resolution systems. Islamic finance has been developing rapidly and has expanded its presence in the Gulf region, especially in the United Arab Emirates (UAE). At the same time, special regulations and legislations were established in order to maintain the stability of this market. There have been discussions around how Islamic financial cases being handled under the conventional legal system might induce the invasion of the Islamic legal jurisprudence as Islamic finance is based on Islamic law, Shari'a. During the latest financial crisis, there were some Islamic financial cases in Dubai. In those circumstances, a unique dispute resolution system was established that was neither the regular courts nor the Alternative Dispute Resolution (ADR) system. Therefore, this paper will describe the general characteristics of this new dispute resolution system, which we call the 'Dubai Approach.'

### 1. Introduction

Islamic finance expanded rapidly, with an annual growth rate of around 20% by the end of the 2000s. Islamic finance has become a leading actor at each domestic market in most of the GCC countries; Bahrain, Kuwait, Qatar, Saudi Arabia and United Arab Emirates (UAE).<sup>1)</sup> However, these domestic financial markets are formed according to conventional financial practices.<sup>2)</sup> Therefore, this causes conflicts with the principles of Islamic finance. The most obvious difference between conventional finance and Islamic finance is that Islamic finance prohibits the charging of interest in order to be consistent with the teaching of Islam.

Previously, much of the debate around Islamic finance revolved around the question of how financial schemes would be designed to avoid *harām* elements. Therefore, the issue of how Islamic

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1) Oman had just started Islamic finance since 2012.

2) 'Conventional finance' in this article means the general mode of finance used before Islamic finance emerged and which is now the most common way finance operates in the world. Usually, this term is used to differentiate between conventional finance and Islamic finance.

financial product should be consistent with the Islamic law was associated with financial structures and other economic elements. However, after the world financial crisis of 2009, another debate over compliance to the Islamic law for Islamic finance had started. UK courts issued a ruling on a case that had involved Islamic finance, which brought international attention to the issue of how to deal with Islamic financial cases in a non-Islamic legal system. The UK is not an Islamic country, but even other Islamic countries, including the GCC countries, adopted Western legal systems after they became independent. Therefore, when Islamic finance questions were brought to ordinary courts or alternative sites of dispute resolution, there was the fear that these ordinary courts would infringe on Shari'a jurisdiction. This issue had started to be addressed by local Islamic banks in the UAE by the end of the first decade of the 2000s. In order to reveal the issue, this article has chosen the UAE as a case study.

In the UAE, Islamic financial institutions are all under the jurisdiction of the central bank, except those related to Islamic law jurisdictions, according to the 1985 Union law No. 6.<sup>3)</sup> This law regulates the establishment and operation of Islamic financial institutions. However, this law does not address how the Islamic finance organizations will apply Shari'a law, where the cases will be brought, and how Islamic law will be followed when the parties have selected an ordinary dispute resolution system. As the central bank regulates Islamic financial institutions, if the conflict is related to the banking system, the central bank will decide the case; for an insurance company, the case will be decided by the Ministry of Economy and Commerce [Feulner and Khan 1986: 316]. However, most cases in the UAE were being brought to the ordinary courts or alternative dispute resolution systems such as arbitration or reconciliation were being used.

On the other hand, Shari'a board members at the local Islamic banks considered this situation a potential risk because it ignored Islamic law by dealing with cases through conventional legal systems.<sup>4)</sup> This situation had been caused by inconsistencies in the legal jurisdictions for Islamic financial institutions. That is to say, federal law secured Islamic law jurisdiction for Islamic financial institutions from their establishment to their operation, but when it came to disputes, the conventional legal system had jurisdiction. This situation contravenes Islamic law for cases involving

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3) 'Islamic financial institutions' here refers to all financial institutions that mention that the organization or company will be established according to Islamic law. Such institutions include Islamic banks, Islamic insurance (*takāful*) companies, and Islamic investment companies.

4) According to an interview with a Shari'a scholar from an Islamic bank in the UAE, the 1985 Union law had guaranteed Islamic financial institutions would be under Islamic legal jurisdiction; therefore, if a dispute among institutions was brought to the conventional court, this would contradict Islamic law. Another legal supervisor of an Islamic bank had also mentioned that if an Islamic financial case is brought to the court as a conventional financial case, it would be controversial under Islamic law.

Islamic financial institutions that are brought to ordinary courts and ordinary arbitration institutions.

In 2006, a movement began in Dubai to establish an arbitration institution to address cases that had Islamic law as their governing law. If there was no clear legal framework for Islamic financial cases, these cases were generally brought to ordinary courts. Against this background, a new dispute resolution system for Islamic finance cases was established in 2009. This movement is a clear example of the push for establishing a dispute resolution system that applies Islamic law. However, the full scope and significance of this new system is not yet known.

In order to fully consider these facts, this paper will first examine the background of the expansion of the issue for the consistency of Islamic law for Islamic finance as it related to courts. Second, this paper will study how Islamic financial dispute cases are dealt with in Dubai, and reveal a new kind of system for Islamic finance dispute resolution. This paper will also introduce Dubai's new dispute resolution system for Islamic finance cases as well as details of the three dispute resolution systems structuring this new approach.

## **2. Expansion of the Islamic Financial Market**

In order to illustrate the entire legal framework for Islamic finance in the UAE, the first section of this chapter will discuss why conventional legal systems could not be applied to the Islamic financial legal system. This paper will then consider the primary institutional factors that distinguish the legal framework for Islamic finance from that of conventional finance. This portion of the chapter will also look at the legal system for the special financial zone in Dubai.

The second section of this chapter will survey the domestic Islamic financial market in the UAE and show the scale of operations.

### ***2.1 Regulatory Oversight System for Islamic Finance***

This section will look through the UAE legal system to see how Islamic law is applied on Islamic financial products. The UAE legislation for Islamic banks is Federal Law No. 6, from 1985, 'Regarding Islamic Banks, Financial Institutions and Investment Companies (Qānūn Ittiḥādī Raqm 6 li-Sana 1985 fi-Sh'an al-Maṣārīf wa al-Mu'assasāt al-Mālīya wa al-Sharikāt al-Istithmārīya al-Islāmya).' This legislation separated the legal system of Islamic financial institutions and conventional legal systems. Therefore, the UAE's legal system for Islamic finance has been categorized as a dual legal system, similar to the Malaysian legal system [Wilson 2012: 107-111].

The UAE was under British protection during the nineteenth century and it modernized their legal system within this context. The civil codes in the UAE and other Gulf countries represent a

blend of Egyptian civil law and Western civil law.<sup>5)</sup> Egyptian civil law, in turn, was modelled on the French civil code. Therefore, most of the civil law in the region has been modernized based on civil codes, except for Muslim family law and, to some extent, property law [Amin 1985; Ballantyne 1986; Brown 1997]. Muslim family law and other branches of Islamic law are addressed in the Shari'a courts, which are separate from the Western law courts.

Generally, commercial laws in the Gulf countries are based on Western law, as some of the contracts were formed by law firms dealing with common law [Al Tamimi 2003; Mallat 2000]. However, it is difficult to deal Islamic finance products under conventional legal framework. This is because the majority of Islamic bankers and jurists consider Islamic finance should be consistent with Islamic law [Nyazee 1998; Kuran 2005; Usmani 2008; Foster 2010a, 2010b]. As Coulson mentions, the Islamic law concept of 'ariya and the common law concept of a loan were combined as legal requisites in UAE courts [Coulson 1964: 1-3]; that implies Islamic law is one component of the UAE legal framework.

However, when it comes to court cases and legal changes after 1985, the UAE legal system contained laws that are not Shari'a compliant. One conspicuous example is the issue of interest, which is prohibited by Islamic law. According to article 714 of Union law No. 5 of 1985, banking interest is prohibited. This Union law is known as the Civil Transaction Law. However, 1987's Union law No. 1 states that the prohibition of interest was to be limited only to civil law, and commercial issues would be dealt with under the 1985 Union law No. 5 until commercial law was established [Ghanem 1991; Hosni 1992: 163].<sup>6)</sup> According to 1987's Union laws No. 3 and 4, commercial transactions which deal with interest were excluded from the application of this law and interest less than 9% was permissible [Al-Suwaidi 1993: 294]. However, Federal law No. 11 from 1992 made charging interest in commercial transactions permissible. It has been said that this modification was viewed as necessary, and was referred to by *daruriyat* as being passed 'for the economic stability and the needs of the people' [Hasan 2010: 91-92]. As an exception, Federal law No. 11 from 1992 will not be retroactive to cases whose legal basis is the Union law from 1970; therefore, the Abu Dhabi Supreme Court has made contracts that charge interest ineffective [Tamimi 2000]. Though interest is generally legitimate, a 1997 judicial precedent declared interest on debt as a duty, and interest is therefore legitimate [Price and Al Tamimi 1998: 53-55]. Therefore, banking interest is legal for commercial

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5) In this paper the 'Gulf countries' for the scope of this study includes six countries—Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the UAE.

6) The 1987 Union law No. 1 was established in order to broaden the legal jurisdiction of the 1985 Union law No. 5 and 1984 Union law No. 8, which are corporate laws. It was intended to legalize various companies that were not categorized as companies under the previous legislations.

transactions [Hasan 2010: 91].

Therefore, in some aspects, it is difficult to say that the UAE law took Islamic law into proper consideration. In addition, most of the law firms supposedly came from common law backgrounds, and this resulted in a situation where English law was frequently applied when forming contracts in the UAE [Al Tamimi 2003: 5]. As a result, from the perspective of precedent and legal reform, theoretically, it would be difficult to deal with cases related to Islamic finance under a legal system which legitimates interest. Therefore, it is necessary to separate the legal system for Islamic finance from the conventional legal systems. Although the legal framework of Islamic finance in the UAE is separated from the conventional framework in terms of its establishment and operation, is not separated in terms of dispute cases [Kawamura 2012].

The Dubai International Financial Centre (DIFC), a special financial centre, is distinct from the domestic market. DIFC is a special financial zone established under Dubai Law No. 8 in 2004. All financial institutions are regulated under the Dubai Financial Service Authority (DFSA) according to Dubai law No. 9 of 2004. The DIFC judicial system is also separate from the domestic system; the 2004 DIFC Law No. 12 decreed that DIFC establish its own court that is independent from the domestic courts of Dubai. In addition, the 2004 DIFC Law No. 13 regulates Islamic finance in the DIFC. Islamic financial institutions are under the regulation of the DFSA, according to DIFC Law No. 13 from 2004. The DIFC Islamic Finance Advisory Council was established in December 2005 to promote and develop Islamic finance [DIFC 2009]. Operating guidelines for Islamic financial institutions are provided in the DFSA Rulebook. More detailed instructions are found in the DFSA Islamic Finance Tailored Handbook, which shows how Islamic financial institutions should follow DIFC legislation [Wilson 2012: 137]. This handbook is divided into five fields: Islamic banks, Islamic investment projects (excluding funding), Islamic insurance, mediators of Islamic insurance, and Islamic funding.<sup>7)</sup> These guidelines are different for Islamic finance and conventional finance. Thus, legal infrastructure for Islamic finance was constructed in the UAE and at DIFC.

## ***2.2 Islamic Financial Market in the UAE***

Islamic financial assets in the Middle East and North Africa (MENA) region account for 44.36% of the world's total Islamic financial assets, and 34.35% of the world's total assets are found in the Gulf countries of UAE, Oman, Qatar, Kuwait, Saudi Arabia, and Bahrain [The Banker 2011: 3]. Standard & Poor's predicted that the Islamic financial market would expand at an annual rate of 20% from 2011 to 2015, and by 2015, the total assets of Islamic finance will reach two trillion

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<sup>7)</sup> According to the DFSA Rulebook Collective Investment Rules 3.1.2 (VER 15/07-12), Islamic funds will 'conduct, or 'hold out' the entire operations 'as being conducted, in accordance with Shari'a.'

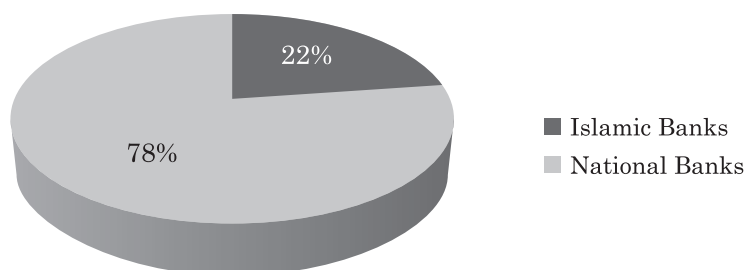


Fig. 1. Asset Ratios for the Commercial Banks and Islamic Banks

Sources: Annual report published from the Emirates Banks Association [EBA 2012a, 2012b].

Table 1. Islamic Banks Established in the UAE

Bank	Year of Establishment
Dubai Islamic Bank	1975
Abu Dhabi Islamic Bank	1997
Sharjah Islamic Bank	2002 <sup>1)</sup>
Emirates Islamic Bank	2004
Noor Islamic Bank	2007
Al Hilal Bank	2007
Ajman Bank	2008

Sources: [EBA 2012b; Kawamura 2012]

<sup>1)</sup> Sharjah Islamic Bank is a successor from the ‘National Bank of Sharjah,’ which had been established in 1975 as a conventional bank. However, it had converted to an Islamic bank in 2002.

dollars [Staff Report 2012; John 2012].

The UAE has become a significant financial centre and the Islamic financial market has a large presence there. According to a report from the General Council for Islamic Banks and Financial Institutions (CIBAFI), the UAE was less affected than Kuwait and Bahrain were by the 2008 financial crisis, and had actually increased the size of its assets by 2009 [CIBAFI 2010: 3].

According to the Emirates Banks Association, Islamic finance controlled 22% of the domestic market in 2011.<sup>8)</sup> Most of the Islamic banks in the UAE had been established during the late 2000s, as the second chart indicates. Therefore, it could be said that its market presence has expanded rapidly although the Islamic financial industry is still new.

8) The statistics given by Emirates Banks Association include assets from the Dubai Bank, which had been merged into the Emirates Bank in 2011. Although Dubai Bank had been merged, the brand name of Dubai Bank remains.

### 3. Civil Dispute Resolution System in the UAE

Legal jurisdiction in Dubai can be divided into three levels: (1) the federal legal system, which has Abu Dhabi at its centre; (2) Dubai's domestic legal system; and (3) DIFC jurisdiction. Therefore, this chapter will examine the categories related to these three jurisdictions. The first section provides an overview of the federal jurisdiction. The second section focuses on Dubai's court system and the Alternative Dispute Resolution (ADR) system to determine what laws are applicable.

#### 3.1 *The Federal Court System and Dubai Court System*

The federal court system has jurisdiction over all seven emirates in the UAE when there is a conflict between the emirates, or among five of the seven emirates (Abu Dhabi, Ajman, Fujaira, Sharjah, and Umm Al-Quwain). The federal court is located in the Abu Dhabi Judicial Department.

The federal court is a three-trial system, consisting of

- Courts of First Instance
- Courts of Appeals
- Supreme Court or Courts of Cassation

Dubai and Ras Al-Khaimah have a court system that is independent from the federal court. The federal court has jurisdiction over Dubai and Ras Al-Khaimah only when a case involves more than two of the emirates or is related to the constitution.

Dubai and Ras Al-Khaimah are the only emirates that have their own court systems that are separate from the federal court. The trial system for Ras Al-Khaimah consists of a first instance court and an appeals court. However, the Dubai court is a three-trial system, consisting of:

- The Dubai First Instance Court
- The Dubai Appeals Court
- The Dubai Court of Cassation

The Dubai court was established under the Dubai decree No. 3 of 1992; the Ras Al-Khaimah court was established according to the Ras Al-Khaimah decree in 1971 [Al Tamimi 2003: 10]. The difference between the Dubai court and the Abu Dhabi Judicial Department is that the Dubai government is distinct from the court. Until the 1992 decree was established, the Dubai court could only handle cases which the Dubai government had allowed it to review. Most of the cases before 1992 were resolved by the Sharī'a court [Afridi & Angell Legal Consultants 1992].<sup>9)</sup>

The Dubai court can issue rulings on cases from Dubai or those that are related to Dubai

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9) Sharī'a court is an independent court system, which applies Islamic law to cases related to Muslims. Sharī'a court deals issues related to the Muslim civil matters and minor criminal cases.

residents. As a result, banks that were established in Dubai, like the Dubai Islamic Bank and Emirates Islamic Bank, were under Dubai court jurisdiction. In addition, the DIFC court jurisdiction could also apply to those who are under the jurisdiction of the Dubai court but prefer to apply common law. On October 31, 2011, a new law amended Article 5 of the 2004 Dubai Decree No. 12. This amendment made DIFC jurisdiction applicable to the Dubai jurisdiction if the contested article in the contract mentioned the DIFC court [DIFCC 2011]. The DIFC court applies common law that was developed in the UK and has been applied to various international transactions. This allows Dubai to have dual jurisdiction—UAE national law and common law.

All cases are brought first to the Dubai First Instance Court. If the dispute is not resolved at this level, the case is brought to the Dubai Appeals Court. If the decision rendered in the case is further appealed, the case is brought to the Court of Cassation, which will assess whether the ruling handed down by the previous court is lawful according to the Constitution. All judges need to be qualified to hear domestic law cases in the UAE and Dubai, but they must also be qualified to hear Islamic law cases.<sup>10)</sup>

### **3.2 *The Dubai Court and Alternative Dispute Resolution***

This section shows how Islamic financial institutions are dealing with conflicts or disputes and in what institutions deals such cases that could not be solved by its own. Most of the disputes or conflicts that occur in the Islamic financial industry are brought to the Shari'a advisory board in each institution before the cases are addressed in court.<sup>11)</sup>

The ADR system for Islamic finance is in the process of being developed. The International Islamic Centre for Reconciliation and Arbitration (IICRA) is a special institution designed for resolving Islamic finance disputes. IICRA located in Dubai was established by the Islamic Development Bank (IDB) in 2005, and commenced work in 2006. When conflicts occur in business, both sides prefer not to make the case public, resulting in arbitration being the most commonly chosen system. IICRA is a special arbitration institution established to deal with Islamic financial cases not only in Dubai but also internationally.

The objective of IICRA is to 'organize settlement of financial and commercial disputes that may arise between financial and commercial institutions or between them and others either through

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10) All judges need to speak Arabic; also, the official court language is exclusively Arabic. In addition, Islamic law is primarily in Arabic, so the judges are automatically required to have knowledge of both the UAE law and Islamic law.

11) This is according to a 2010 interview with a Shari'a scholar who is a member of a Shari'a board in one of the Islamic banks at Dubai. He said that when there are issues related to Islamic banks, the Shari'a board members will deal with the case and issue a *fatwā* or become an arbitrator for the case.



reconciliation or arbitration.’ Reconciliation and arbitration are selected when both parties have agreed to pass a case on to a third party. The procedure of reconciliation is carried out by having both parties and a reconciliatory agent solve the issue. Under arbitration, the third party chosen from the arbitration institution will decide the case. The third party is not from the court but will be selected by the criteria established in the arbitration institutions. If the client selects arbitration, the IICRA will select an arbitrator for the party. There are three standards for selecting an arbitrator: (1) technical knowledge; (2) legal background; and (3) Sharī’a knowledge. The arbitrator will decide how the conflict should be solved and both parties will need to comply with the decision. The IICRA has already handled some cases related to Islamic finance. In addition, the domestic arbitration system in the UAE is different from that of the DIFC. The DIFC has its own ADR system which is different from the system of Dubai as it applies the international model for arbitration known as UNCITRAL.<sup>12)</sup>

However, ADR is at a disadvantage when dealing with disputes cases. One reason is that the contract would need to include a settlement of dispute clause—to choose arbitration or another dispute resolution system. In order to solve dispute cases by ADR, it is necessary to have both parties to agree on using it. Therefore, it will be difficult to bring the case to ADR if nothing is mentioned in the settlement of dispute in the contract.

Another disadvantage that the ADR faces is that it can’t force decisions totally onto the parties involved. After a decision is made by the ADR, usually a new contract is formed. This contract would be a voluntary one, agreed on by both parties. Therefore, when either party has to force the other to follow the contract, the case would be automatically transferred to the courts.

Regarding the court, Islamic financial cases are reviewed in Dubai courts and there are some

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12) The UAE arbitration system had not yet adopted the United Nations Commission on International Trade Law (UNCITRAL), the model law for arbitration, but DIFC has adopted the UNCITRAL faster than the domestic legal system in the UAE [Luttrell 2009]. The UNCITRAL model law is an international model law for arbitration which has been adopted globally. The federal government formed a draft for the UAE arbitration law in February 2012. The UAE has been applying Article 203 of the 1992 federal law No. 11 to Article 218 as the legal framework for arbitration in the UAE [Al Tamimi 2009: 485]. This legal framework was known to be influenced by Egyptian law but it has not caused much conflict with the UNCITRAL; however, there were issues when it came to applying foreign arbitration decisions. The UNCITRAL model law has guidelines for applying foreign arbitration decisions.

The DIFC arbitration law is Dubai law No. 8 from 2004, which is based on the UNCITRAL model law. After the UAE became a member of the New York Convention in 2006, the application of this UNCITRAL was enforced in the UAE. If the contract has a conflict clause that mentions that the conflict will be brought to the DIFC, some cases that are originally under the Dubai jurisdiction could be brought to the DIFC court or other DIFC arbitration institutions and common law could be chosen as the governing law. This epoch-making structure, that removes the partition between the special financial zone and the domestic jurisdiction, is making the best use of DIFC’s legal advantage by applying the common law.

cases that have already been addressed by the First Instance Court, Appeals Court, and the Supreme Court in 2003 and 2007. Both cases featured the *murābaḥa* commodity and had been brought to the First Instance court in 2003 and 2007, but were given the final sentence in 2005 and 2009. According to the author's interviews with judges of the Dubai court, most Islamic finance dispute cases apply the UAE law; this is because the governing law as not many issues related to Islamic law are dealt with in the court. According to the statement from the judges, it could be said that one of the party is Islamic banks but the issues of law is not much related to Islamic law. This implies that Dubai court has not much experience to apply Islamic law for Islamic finance cases.

This chapter has shown that if a conflict occurs it is possible to choose either the court or the ADR system in the UAE. However, both ADR and the courts face difficulties dealing with Islamic financial dispute cases. For ADR, when the case is related to Islamic finance, it is difficult to select a conflict resolution system that deals with Islamic law, unless the IICRA is mentioned as the resolution in the contract. Further, the court is disadvantaged when it has to deal with business cases as the process takes time and is open to the public.

However, when the Dubai shock happened in 2009, the court was unable to deal with the defaults in a manner that the usual cases had been dealt with before the Dubai shock. Therefore, a new dispute resolution system, which will be mentioned in the next chapter, was established.

#### **4. Challenging the Conventional Dispute Resolution System: Case Studies**

As mentioned in the previous chapter, there were limitations to dealing with Islamic financial dispute cases in the conventional courts and the ADR system, which have little legal framework for Islamic finance dispute resolution. However, in late 2009, Dubai faced an unprecedented financial crisis known as the 'Dubai Shock.' According to [Nakano 2010], this financial crisis was a result of two elements: the real estate bubble caused by economic development, and the short-term investments from foreign countries that brought in foreign currency. The Dubai Shock had a great impact on Dubai's economy as the companies affected were mostly owned by Dubai government and these companies had almost defaulted several times, which had had the capacity to affect the domestic economy of the UAE.

This garnered a great deal of attention from the Islamic financial industry as several Islamic financial products were involved in this incident. The negotiations between the Dubai government and Abu Dhabi for dealing with this incident stabilized the financial situation faster at the macro level in late 2010. The financial crisis resolved mostly because of the financial assistance of the Abu Dhabi government and the central bank of the UAE. Although the Dubai shock had been overcome,

it is not known that disputes related to Islamic finance had been solved by the procedures, which would be mentioned below.

This chapter will introduce a new dispute resolution system that had helped resolved Islamic financial cases of the Dubai shock. This new dispute resolution system was established in 2009 by way of a special judicial committee. This new system is an innovative one specially designed for Islamic finance and overcoming the limitations of the courts and the ADR system. As a result, this chapter will confirm the efficacy of this new dispute resolution system by using a case study to get a fuller picture of this system.

#### *4.1 Dispute Resolution System for Dishonoured Checks for Real Estate*

This chapter will first consider the special judicial committee (Lajina Qaḍā'īya Khāṣ) based on Dubai Decree No. 56 of 2009, 'Forming a Special Committee for Cheques Related to Real Estate Transactions.' This decree is specialized to form a special judicial committee to deal with disputes related to bounced cheques issued for real estate transactions [Dispute Resolution Practice 2009].

Article 1 of the 2009 Dubai Decree No. 56 prescribes that the committee formed comprise three judges. The Chairman for the Committee should be a Dubai Court of Appeals judge. The other two judges should be from the Dubai Court of First Instance and the Dubai Land Department, respectively [Hākīm Dubayy 2009a].

Article 3 of the 2009 Dubai Decree No. 56 gives the Special Judicial Committee exclusive authority over all cases that are the target for this decree. Further, all the rights mentioned in the 2006 Dubai Decree No. 7 related to land registration will be the domain of this special judicial committee [Dispute Resolution Practice 2009]. Article 6 of Dubai Decree No. 56 of 2009 says that decisions made by the special judicial committee will never be brought before any Dubai court. These articles show the ultimate authority of the Special Judicial Committee.

Article 7 of the 2009 Dubai Decree No. 56 mentions that the Special Judicial Committee will apply laws in the following order of importance:

1. Laws and ordinances applicable in Dubai
2. Islamic Law
3. Custom
4. Equity and fairness [Hākīm Dubayy 2009a]

The laws and ordinances mentioned here include the federal laws of the UAE and the codified decrees of Dubai. As it has a broader framework, another new decree was established right after this decree; this law included 'Nakheel Sukuk.' This Dubai Decree No. 56 from 2009 serves as an ad-hoc framework in anticipation of dealing with cases related to the Dubai shock.

#### 4.2 *Dispute Resolution System for Nakheel*

Nakheel was a subsidiary of Dubai World, which is entirely owned by the Dubai government and has been dealing in the Islamic financial product called *ṣukūk*. Dubai World was established according to the 2006 Dubai Decree No. 3, and became a national enterprise. In November 2009, Dubai World fell into debt and started business revitalization. They were able to pay off their debts after Abu Dhabi advanced 10 billion dollars to them [Anwar 2009]. Dubai World's default came to be known as the Dubai Shock, and Nakheel Sukuk became one of the first *ṣukūk* default cases in Dubai. There were also some allegations that Nakheel Sukuk had legal issues that had caused the problems [Salah 2010].<sup>13)</sup>

After these issues surfaced in 2009, the ruler of Dubai pushed for the establishment of Dubai Decree No. 57 to create a Special Judicial Committee (Special Tribunal).<sup>14)</sup> This special tribunal had been designed to revitalize Dubai World [Lord 2010]. As Dubai World had been established in the DIFC, the special tribunal had been placed under DIFC jurisdiction. This special tribunal was similar to the one established by the previous Dubai Decree, No. 56, in 2009.

Article 2 of the 2009 Dubai Decree No. 57 prescribes that the chairman of the tribunal be a judge from the DIFC court. The judge could also add other specialists to the Special Tribunal through a declaration from the ruler of Dubai [Rāshid 2009]. Additionally, all the judges specialized in common law. Therefore, this tribunal was able to apply common law, which is a characteristic of the DIFC. In order to decide cases related to the *ṣukūk*, the special tribunal had the option of including an Islamic law or finance specialist.

Article 3 of the 2009 Dubai Decree No. 57 specifies that cases which fall under this special tribunal are not to be heard in the Dubai courts, but rather by the Special Judicial Committee in a single trial session. This was also mentioned in the previous decree; this special tribunal was fully authorized to deal with such cases.

Article 4 of the 2009 Dubai Decree No. 57 declares that the special tribunal will apply the following laws and regulations:

1. DIFC Law No. 3 from 2009 Concerning the Law of Insolvency

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13) The legal issues of Nakheel Sukuk have been pointed out by [Salah 2010]; they include the fact that the scheme of the *ṣukūk*, protection of the investors, and the law of obligation had not worked properly in the UAE legal system, which led it to almost cause default.

14) The English translation by the DIFC mentioned the call for a 'special tribunal,' while in the Arabic text it is written as 'Lajīna Qaḍā'īya Khaṣ,' which means Special Judicial Committee. However, as this special judicial committee was formed in the DIFC court, this book will call the institution—established under the 2009 Dubai decree No. 57—a 'special tribunal.'

2. The Regulations Issued by the Board of Directors of the Dubai International Financial Center Authority (DIFCA) Concerning DIFC Insolvency Regulation
3. DIFC Law No. 10 from 2004 Concerning the Court of DIFC
4. Legislation in force in the Emirate
5. Commercial customs
6. Principles of justice and rules of righteousness and equity [Rāshid 2009]

As mentioned in the article, it is clear that the law applied to the special tribunal was common law.

Article 5, Section 4, of the 2009 Dubai Decree No. 56 declares that the decisions made by the special judicial committee will be final and the cases cannot be brought to any other court or dispute resolution institution. The special judicial committee has the independent authority to deal with the cases that are the target of this decree.

Articles 6 through 10 of the 2009 Dubai Decree No. 56 address the categories of the special judicial committee's authority [Rāshid 2009].

The process of deciding who has the authority to resolve the Dubai World cases in DIFC had been prescribed in 'Practice Direction No. 1 of 2010' in January 2010 [DIFC 2010]. According to the DIFC weekly report, Dubai World had published an extra \$6 million of *shukuk* after 85% of the stockholders had allowed it in order to revitalize the project [DIFC 2011]. The 2011 Decree No. 326 was issued by the Dubai government's legal affairs department in order to separate Nakheel and its subsidiaries' cases and send them to the Real Estate court instead of the DIFC. The Nakheel cases were transferred to a domestic jurisdiction which would not directly use common law.

#### ***4.3 Dispute Resolution System for Amlak and Tamweel***

This section examines the cases in which the Amlak Public Joint Stock Company (PJSC) and the Tamweel PJSC were related parties. These cases were addressed by the special judicial committee (Lajina Qaḍā'iya Khāṣ) according to the 2009 Dubai Decree No. 61. This decree had been formed in order to protect the investors of Amlak PJSC and Tamweel PJSC [Walid 2009]. Before going into detail about the special judicial committee, this section will first describe how the conflict occurred.

The article on this case indicates there were not only judges but also an Islamic finance accounting expert involved in the session. According to the Islamic finance accounting expert, the claimant received AED 11,879,204.80 from the first *murābaha* contract; the claimant also later received AED 3,290,774. After the accounting expert had submitted the report, the claimant insisted that the *murābaha* contract was not Shari'a compliant 'because it did not specifically identify the goods which were the subject of the *murābaha* contract' [Abdallah and Baroudi 2011].

Both these financial institutions had been negotiating to reconstruct their management since 2008. Amlak PJSC is one of the largest real estate companies in the Middle East which also deals in Islamic financial products. However, it faced financial difficulties that led to a loss of 188 million dollars in June 2009. Tamweel PJSC is also a real estate company located in Dubai, and has been listed on the Dubai Financial Market since 2006. Its stock price had been falling ever since it was first listed. Dubai Decree No. 61 was published on December 27, 2009 in relation to this. This decree has been the legal basis for dealing with all conflicts related to these two financial companies, including the Islamic financial cases.

Article 1 of the 2009 Dubai Decree No. 61 prescribed three judges from the Dubai court to be the judges on the Special Judicial Committee [Hākīm Dubayy 2009b]. This decree also specified that cases which fall under the aforementioned decrees were not to be heard in the Dubai courts but rather by the special judicial committee in a single trial session. Therefore, no case could be brought to the general courts after being heard by the special judicial committee. Article 1 of Decree No. 61 assigned the three judges to be members of the special judicial committee. All the judges were from the Dubai courts. Article 2 of this same decree mentions that any conflict that is related to Amlak PJSC or Tamweel PJSC will be brought to the special judicial committee and will not be dealt with in other courts or dispute resolution systems. The range of applications for the special judicial committee to resolve cases related to these companies was categorized into two levels—the targeted companies and their subsidiaries. The special judicial committee considers and adjudicates any request or claim submitted against Amlak PJSC and Tamweel PJSC and any of their subsidiaries, ‘including liquidation and dissolving requests’ as well as ‘(a)ny person linked to the settlement of the financial position of any of these two companies, including their respective Chairman, Board Members, and all employees and workers’ [Hākīm Dubayy 2009b; Helwick 2010].

Article 3 of the 2009 Dubai Decree No. 61 states that the Dubai court of First Instance, the Dubai Appeals Court, and the Dubai Supreme Court cannot hear or adjudicate the cases that are under the jurisdiction of this special judicial committee. Likewise, Article 5 of this decree also states that the decision and adjudication by the special judicial committee will be final and cannot be overruled. Therefore, any cases that are heard under the second article of this decree will be brought only to this special judicial committee and will be addressed only once. This means that the cases brought to the special judicial committee will not be brought to the ordinary courts. From this analysis, we can see that the special judicial committee is independent of the ordinary courts.

Article 4 of this decree mandates that the decision of the special judicial committee will be made behind closed doors and the resolution will be voted on [Hākīm Dubayy 2009b]. As the special

judicial committee deals with cases behind closed doors, it will be difficult to know the details of the cases. However, there are two ways to see how this special judicial committee resolves cases in its entirety. One is from the reports of law firms in Dubai. A report from Al Tamimi & Company revealed details of one case that had been dealt with by this special judicial committee [Abdallah and Baroudi 2011].

The special judicial committee dismissed the claimant's issues and pointed out 'three essential characteristics' of *murābaḥa*:

1. The *murābaḥa* contract 'must relate to an essential product or service indispensable to the consumers who cannot obtain the essential product or service except by the supply of that product or service' [Abdallah and Baroudi 2011].
2. While one of the parties retains a monopoly on the product or service, the other party might have some limitations.
3. The consumers have no choice but to accept the deal which the supplier has offered.

Therefore, the special judicial committee concluded that purchasing the shares was neither essential nor indispensable to the claimant and the defendant had no obligation to fulfil their contract [Abdallah and Baroudi 2011]. The special judicial committee also rejected the claimant's claim that the *murābaḥa* contract was not Shari'a compliant, for the following reason:

(A)n Islamic Bank, which concludes a *murābaḥa* contract with a party, is permitted to charge a percentage on the increase in the price (i.e. the increase in the original price of the merchandise specified in the *murābaḥa*) as compensation for the damages the Bank incurs due to a default in payment...in accordance with the Islamic principle of no harm and no reciprocated harm, 'la Darar wa la Darar' and this would not be considered as Usury (*ribā*) or Tawaruq (cash procurement) [Abdallah and Baroudi 2011].<sup>15)</sup>

The second source for understanding how the special judicial committee resolves cases is interviews with the Chairman of the special judicial committee.<sup>16)</sup> Most of the cases take about two to five months before a decision is rendered, as it takes some time to translate materials in other languages into Arabic. However, the time taken by the special judicial committee to render a decision is quite less as compared the general court system, as a usual court generally takes more than half a year.

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15) Revised by the author from 'rebaa' to 'riba.'

16) The interview with the Chairman of the special judicial committee was conducted during field research in Dubai from 18 June 2011 through 5 July 2011.

In his interview, he also mentioned the number of cases on which a judgment was passed before 2012. In an interview conducted in 2010 by *Emirates247.com*, he said that the special judicial committee had resolved 25 cases before October 2009, and around 52 cases were decided against mortgage lenders who were investors and buyers of Tamweel PJSC and Amlak PJSC [Sadafy 2010]. After the 2011 Dubai Decree No. 27 had been issued, all cases related to Tamweel PJSC had been transferred to the Dubai Court of First Instance. Therefore, the special judicial committee has been only dealing with cases related to the Amlak PJSC and its subsidiaries since September 2011 [Tamweel 2011]. Since the special judicial committee has been dealing only with Amlak PJSC and its subsidiaries, 150 cases have been brought to the special judicial committee and 20% of the cases were 'amicably solved' by both parties [Sadafy 2012a]. In addition, according to an article published on 31 October 2012, by *Emirates247.com*, the Judge from the special judicial committee said that there were eight extra cases that were pending judgment by the special judicial committee, and three of these had been brought to the special judicial committee after August 2012 [Sadafy 2012b].

Article 6 of the 2009 Dubai Decree No. 61 addressed the order of priority for the governing authorities:

1. Applicable laws in Dubai
2. Islamic law
3. Custom
4. Equity [Häkim Dubayy 2009b]

Therefore, national law is the most important governing law for the special judicial committee. According to the Chairman of this special judicial committee, most of the cases are tried under domestic law, and if no provision is applicable, then Islamic law becomes the governing law.

After the Tamweel PJSC cases had been transported to the Dubai court, Tamweel PJSC was targeted to become a Dubai Islamic Bank subsidiary. Tamweel PJSC was taken over by the Dubai Islamic Bank in January 2013 [Al-Sayegh 2013]. Amlak PJSC had been 45% owned by Emaar Property, which is one of the largest real estate companies in the industry. In March 2012, the UAE government announced they would trim the debt for Amlak and its subsidiaries [Fattah 2012].

### **5. New Dispute Resolution System: The 'Dubai Approach'**

After the global financial crisis, legal liquidation of banks and companies was intensively discussed. Voluntary liquidation had been discussed for a decade in order to protect investors and banks that were financially involved in situations where companies were in a critical situation.

In the 1970s, the Bank of England developed a unique voluntary liquidation system called the



‘London Approach’; the new resolution system originates from this. Therefore, before going into details about the nature of the new resolution system, this chapter will first see how financial dispute resolution systems have been developed internationally. We will then analyse the characteristics of the new dispute resolution system.

### 5.1 *‘London Approach’ as Business Revitalization*

As economic activities have become transnational, there is a need for companies to deal with financial issues, bankruptcy proceedings, and business revitalization. These issues require a special framework for resolution. A representative example is the ‘London Approach.’ The Bank of England had formed special proceedings for such issues by dealing with the disposal of bad loans informally; this is known as the ‘London Approach’ [Paulus 2002]. The ‘London Approach’ was the resolution for UK companies inside and outside the country that needed to deal with loan workouts and corporate revitalization during the 1970s.

The ‘London Approach’ was designed ‘to maximize value for creditors’ and ‘avoid the unnecessary collapse of potentially viable businesses as a result of disagreements between creditors’ [Bank of England 1994].

The ‘London Approach’ took place ‘out-of-court’ in order to facilitate negotiations between the creditor, debtor, and other stakeholders and secure a voluntary workout for restructuring debt or revitalizing the company. This approach became the model for other international loan workouts done ‘out-of-court’ such as the International Association of Restructuring Insolvency and Bankruptcy Professionals (INSOL). For example, when the Asian Currency Crisis occurred, the ‘London Approach’ was used as a framework for dealing with non-performing loans in Indonesia, Korea, Malaysia, and Thailand. In addition, as there was a change in the ratios for the approval needed to revitalize a company, a new framework was developed, the ‘Istanbul Approach,’ which was applied for working out debt in Argentina [Laryea 2010: 16-17; Leroy 2011]. The ‘London Approach’ did not utilise the court but instead tried to find a solution by creating a space for both parties to negotiate in. When companies were facing bankruptcy or revitalization, if the stockholders had decided to bring the case to court, the case would have been decided according to the Civil Rehabilitation Law and Corporate Rehabilitation Law. A company’s management could be rearranged, or the entire company would be placed under a trustee’s discretion, if the cases were brought to court.

In the sense that the ‘London Approach’ looked for an amicable settlement, it was similar to today’s ADR systems. It did not use the courts and had its own guidelines for dealing with cases.

Another characteristic of the ‘London Approach’ was that it was not a statute with a large number of rules. The ‘London Approach’ was a more flexible framework than laws or courts that allow

the bank and the stakeholders to settle their differences through compromise. The Bank of England was the mediator and judged the case by applying common sense or other regulations informally [Smith 1996: 233].

### 5.2 Frontier Dispute Resolution System: The ‘Dubai Approach’

This section will examine the special judicial committee as a unique type of legal liquidation instrument. First, this section will identify the characteristics of each type of special judicial committee. Second, this section will explain the concept of the new resolution system, by comparing with legal liquidation system.

Three case studies are offered in the fourth chapter as examples of the new dispute resolution system. As seen in Table 2, three decrees have similar functions for dealing with Islamic finance cases. The committee is formed by two to three judges from the courts and has extra members who are specialists in other fields. In the 2009 Dubai Decree No. 61, an Islamic Accountant was assigned to deal with cases related to Islamic finance.

In addition, as Table 2 shows, the decrees have prohibited the bringing of the case to the general

Table 2. Features of the Case Studies of the Fourth Chapter

	Dubai Decree No. 56 of 2009	Dubai Decree No. 57 of 2009	Dubai Decree No. 61 of 2009
Members of the community	Two judges from the Dubai court and one Representative of the Dubai Land Department	DIFC Judges and a maximum of two specialists	Three judges from the Dubai court
Prohibition	Prohibits challenging cases in other dispute resolution systems		
Governing Law	(1) Legislation in force in the Emirate (2) Islamic Shari’a principles (3) Customs and practices (4) Equity and rule of Justice	(1) DIFC Law No. 3 of 2009 (2) Regulations issued by the Board of Directors (3) DIFC Law No. 10 of 2004 (4) Legislation in force in the Emirate (5) Commercial customs (6) Principles of Justice, and rules of righteousness and equity	(1) Legislation in force in the Emirate (2) Islamic Shari’a principles (3) Customs and practices (4) Equity and rule of Justice
Language	Arabic	English	Arabic
Special Report	Representative of Dubai Land Department is added in the Committee	Nakheel cases had been removed from the jurisdiction of the DIFC into the Dubai real estate office	Islamic accountant had been added to the Committee

Sources: [Hakim Dubayy 2009a, 2009b; Ruler of Dubai 2009]

courts; the decision of the special judicial committee is final. Therefore, a special judicial committee is able to resolve cases rapidly. The authority of the special judicial committee is guaranteed by the prohibition of the bringing of cases to ordinary courts when the case qualifies to be heard by the special judicial committee.

When the special judicial committee system and the ‘London Approach’ are compared, some similarities in dealing with financial difficulties and company revitalization arise. The similarities are listed in Table 3 below. However, the new resolution system involves bringing cases to court and deciding if the cases are applicable to be tried under the special judicial committee’s jurisdiction. Although the procedure is not detailed in the decree, the new resolution is a legal liquidation system. On the other hand, voluntary liquidation will not bring cases to the court. In this sense, the new resolution is a legal liquidation system and the ‘London Approach’ was voluntary liquidation. Voluntary liquidation and legal liquidation are the two approaches to insolvency proceedings. Voluntary liquidation occurs when the debtor and creditor negotiate to revitalize the company or to rearrange the project, and the procedure takes place outside of the court system. Legal liquidation takes place under the court’s jurisdiction and is based on the rehabilitation laws. Although the new resolution system can be categorized as a legal liquidation system, since the court resolves the cases, it also shares elements with voluntary liquidation as the special judicial committee is derived from the court system. However, it is difficult to categorize the new resolution system as either legal or voluntary liquidation, since it features elements of both. Therefore, the new resolution system can be categorized as a hybrid of legal liquidation and voluntary liquidation.

The characteristics of the new resolution will be much clearer when they are compared with the characteristics of the general court system and the ‘London Approach,’ as Table 4 shows. Therefore, this paper will call this new resolution system ‘Dubai Approach.’

Cases from the ‘Dubai Approach’ are first brought to the Dubai court and if the court decides that the case fulfils the necessary conditions of the decrees, the case is brought to the special judicial committee. The procedure for coming to a decision starts with the court, but moves out from under the court’s jurisdiction moving forward. Therefore, the ‘Dubai Approach’ has a different procedure

**Table 3. Similarities and Differences between the London Approach and Dubai Approach**

	Similarities	Differences
Dubai Approach	<ul style="list-style-type: none"> <li>• Closed doors</li> <li>• Flexible enough to apply various type of legislations and regulations</li> </ul>	<ul style="list-style-type: none"> <li>• Brought to court</li> <li>• Judges will mediate the cases</li> <li>• Legal Liquidation ↔ Voluntary Liquidation</li> </ul>

Source: Author’s Own

**Table 4. Characteristics of the Three Dispute Resolution Systems for Financial Issues**

	General Court	Dubai Approach	London Approach
Jurisdiction	Court	Court (Special Judicial Committee)	Out of court
Procedure	Open (According to the Procedure Law)	Closed	Closed
Speed	More than 1 year	2–5 months	n/a
Judges	One to three judges from the Dubai court or DIFC court	Three Judges from the Dubai Court plus one Islamic Accountant	Bank of England
Trials	3	1	1

Source: Author's Own

than that followed by the courts and out-of-court systems.

The procedure for the ‘Dubai Approach’ takes place behind closed doors while the court is required to open its cases to the public. As the ‘London Approach’ was also carried out behind closed doors, the two approaches share this aspect. Cases under the ‘Dubai Approach’ move much faster than cases under the court system as on average, a case takes two to five months to be resolved. General court cases take more than a year, as the courts have a three-trial system. The judges and mediators involved in the three-trial dispute resolution systems are scattered, but the ‘Dubai Approach’ seems to tend to utilize the general court as the members of the special judicial committee are selected from the general court.

The number of trials is an obvious difference between the courts and the other two approaches, as illustrated by the chart above.

As the ‘Dubai Approach’ deals with insolvency and other financial issues related to specific financial institutions, it has features similar to the ‘London Approach.’ However, the procedure for the ‘Dubai Approach’ is similar to legal liquidation, and not so much to voluntary liquidation; this characteristic is unique to the ‘Dubai Approach.’ As a result, the ‘Dubai Approach’ is a new type of dispute resolution system that deals with Islamic finance cases and is similar to the general courts.

## 6. Conclusion

This paper has examined a new trend in dealing with Islamic finance dispute cases in Dubai. Islamic finance developed fairly quickly by expanding its market and at the same time, improving regulations and legislations for the industry. As the market expanded, there were more conflicts in the Islamic financial industry. Some of the conflicts occurred in the domestic market and provoked international tension. The most representative example of the effect that the financial crisis had on the Islamic

financial industry took place in Dubai in 2009.

The conventional court systems and ADR systems faced difficulties resolving disputed cases related to Islamic finance since there was no regulatory framework for Islamic finance in Dubai or in the UAE. However, defaults were occurring after the global financial crisis, and there was a need for finding a rapid solution.

In order to study how Dubai processed financial disputes, including Islamic finance cases, the fourth chapter focused on three decrees that aimed to deal with financial cases, including Islamic finance products. These three decrees prescribed the formation of special judicial committees that would process specific cases, as per the guidelines of the decrees. The decrees also guaranteed the special judicial committee independent authority, and the decisions of this committee would be final and binding. As was explained in the fifth chapter, this special judicial committee can be categorized as a new type of dispute resolution system—the ‘Dubai Approach.’

As the Islamic financial industry is expanding globally and becoming effective on a macroeconomic level, the ‘Dubai Approach’ can be seen as a prototype for dealing with Islamic finance cases, especially where the legal system is not entirely consistent with the teaching of Islam and has little experience in resolving Islamic finance dispute cases. Therefore, the ‘Dubai Approach’ can become the benchmark for Islamic finance dispute resolution, not only in the UAE but also in other countries that urgently require dispute resolution systems.

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