

## **Proposal for the Dubai World Islamic Finance Arbitration Tribunal (DWIFAC) and Jurisprudence Office (DWIFACJO) as the Dispute Resolution Mechanism and Center for the Islamic Finance Industry**

**Camille Paldi<sup>1</sup>**

### **Abstract**

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The proposal for the Dubai World Islamic Finance Arbitration Center (DWIFAC) and Jurisprudence Office (DWIFACJO) entails a complete system of unique dispute resolution tailored specifically for the Islamic finance industry modeled on the built-in contractual dispute mechanism found in the FIDIC contract, which is widely used in the international construction industry. This system encourages completion of contract and preserves the relationships of the parties. Only in the event that this built-in mechanism fails can the parties send the dispute to the Dubai World Islamic Finance Arbitration Center, which will be staffed with arbitrators and Islamic finance and Shariah experts who may apply commercial business practice as well as Shariāh to the arbitration process. DWIFAC will have a working relationship with all of the other dispute resolution bodies in Dubai and the UAE. The Center will host a centralized Shariāh Board for the UAE and DIFC as well issue an Islamic Banking law for the UAE and DIFC, which can be replicated by countries all over the world to facilitate Islamic finance transactions in their states.

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### **Introduction**

As the Islamic finance industry is growing annually at a rate of 10% to 15% per year, it is imperative that a unique, independent legal framework is established in order to effectively adjudicate Islamic finance disputes. Currently, Islamic finance disputes are being adjudicated in inadequate civil and common law courts and arbitration centers where the contracts in dispute are being transformed from Islamic to conventional transactions.

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<sup>1</sup> CEO of the Franco-American Alliance for Islamic Finance.

The aim of this paper is to explore the role of the Dubai World Islamic Finance Arbitration Center (“DWIFAC”) and its’ jurisprudence office (DWIFACJO) as the dispute resolution center of the Islamic finance industry, fitting in with the recent 2013 Sheikh Mohammad ‘Dubai as the Capital of the Islamic Economy’ initiative.

Islamic finance contracts should include an additional standardized dispute resolution contract issued by Dubai World Islamic Finance Arbitration Center Jurisprudence Office (‘DWIFACJO’) with a built-in dispute resolution procedure similar to the International Federation of Consulting Engineers (‘FIDIC’) designating the Dubai World Islamic Finance Arbitration Center (‘DWIFAC’) as the arbitration center. If the contractual dispute resolution procedure is exhausted, then the dispute may be referred to DWIFAC, which may utilize the Model Islamic Banking Law created by DWIFACJO as the substantive law of the arbitration, the procedural law of the seat of the arbitration, and the DWIFAC arbitration rules, which includes *Shari’ah* and *lex mercatoria*.

The arbitration center may be staffed with the world’s top *Shari’ah* scholars and Islamic finance lawyers, judges, and experts who can provide input about the *Shari’ah* aspects of the dispute through the use of an Islamic form of *ex aequo et bono*, which allows disputes to be settled using commercial practice rather than purely legal devices.

### **DWIFAC and DWIFACJO**

DWIFAC along with the DWIFAC Jurisprudence Office shall be the central command station for Islamic finance dispute resolution in the UAE, GCC, and the world, providing a standardized contract with built- in dispute resolution, a uniform Islamic banking law, an arbitration center, and a centralized *Shari’ah* authority in the form of the Supreme *Shari’ah* Council.

It is clear that state courts in common and civil law jurisdictions are inadequate to adjudicate Islamic finance disputes due to the lack of recognition of *Shari’ah* law, lack of independent *Shari’ah* advisory committees, and/or the inability of court staff to apply effectively Islamic finance and *Shari’ah* concepts in dispute resolution.

In addition, the currently existing arbitration centers are insufficient to handle Islamic finance matters due to lack of properly trained staff, inadequate procedure and rules, misapplication and non-application of *Shari'ah* and preference for national law, legal uncertainty, and lack of popularity as a mode of dispute resolution. DWIFAC may offer the Islamic finance industry a globally recognized arbitration center complete with the DWIFAC jurisprudence office, which may issue a uniform Islamic banking law and a standardized DWIFAC dispute resolution contract, creating harmony, legal certainty, and investor confidence in and across the Islamic finance industry. The DWIFAC standardized dispute resolution contract contains a built-in dispute resolution mechanism, facilitating early dispute settlement and completion of contracts. This contract may be attached to all Islamic finance contracts industry-wide, making DWIFAC the central dispute resolution authority for the industry.

### **DWIFACJO Uniform Banking Law**

As it stands now, the UAE does not have an Islamic Banking law, however, it has a law allowing Islamic Banks to exist, *UAE Federal Law No. 6 of 1985 Regarding Islamic Banks, Financial Institutions, and Investment Companies*.

There had previously been a proposed law for governing Islamic banks in 1985, but it had not been backed up by a decree and therefore, that is why the law is not in existence now. However, *Federal Law No. 6 of 1985* was promulgated to legalize Islamic banking in the UAE. Article 5 provides that a Supreme *Shari'ah* Council should be established and approved through a cabinet decision, but it never materialized. The Supreme *Shari'ah* Council would oversee Islamic banks, financial institutions, and investment companies and its opinion would be binding. However, Article 6 was implemented, which requires that each Islamic firm establish its own *Shari'ah* Supervisory Authority ('SSA') consisting of three members, to be approved by the *Shari'ah* Supervisory Council (ISRA 2013:656) and inserted into the articles of association (ISRA 2013: 656). The SSA is obligated to apply *Shari'ah* to the company operations and contracts (Thani, Abdullah, Hasan 2004: 256).

DWIFACJO may take the opportunity to formulate and issue a Uniform Islamic Banking Law based upon the draft of the *UAE 1985 Islamic Banking Law, UAE Federal Law No. 6 of 1985 Regarding Islamic Banks, Financial Institutions and Investment Companies*, the *Law Regulating Islamic Financial Business DIFC Law No. 13 of 2004*, and *AAOIFI standards*. The new law may then be utilized as the substantive law in DWIFAC arbitrations and submitted to the UAE government for approval and gazetting as this law would be necessary for the UAE in order to fulfil its mandate of becoming the capital of the Islamic economy. In addition, DWIFAC may establish a central *Shari'ah* Supervisory Authority or Supreme *Shari'ah* Council for the UAE, which may be utilized by all existing UAE dispute resolution bodies, including the Central Bank of the UAE, the Dubai Courts, and the DIFC/DFSA, which lacks such a board. The Supreme *Shari'ah* Council may fulfil its original purpose of approving the *Shari'ah* boards of all Islamic financial institutions in the UAE, including in the DIFC.

### **The DWIFAC Standardized Dispute Resolution Contract**

I propose that DWIFACJO issue a standardized dispute resolution contract, which may be attached to the main contract. The DWIFACJO standardized dispute resolution contract may contain a similar built-in dispute resolution mechanism as the FIDIC contract containing three stages including (1) the Dispute Resolution Board ('DAB'), (2) amicable settlement, and (3) final referral to DWIFAC arbitration.

Within thirty days of the occurrence of the subject-matter of a dispute, any party to the contract may submit a claim to the DAB, addressed to the chairman of the DAB and with a copy to all parties of the contract. However, if any of the parties to the contract considers that there are circumstances, which justify the late submission, she may submit the details to the DAB for a ruling. If the DAB considers that it, in all the circumstances, is fair and reasonable that the late submission be accepted, the DAB shall have the authority to override the relevant thirty day limit and if it so decides, it shall advise both the parties accordingly.

The DAB shall have sixty days to issue a binding ruling, which must be implemented immediately. If either party is not satisfied with the DAB ruling, either party can give notice of dissatisfaction to the other before the thirty days after the day on which she received the decision on or before the thirty days after the day on which the said period of sixty days expired.

If there is no dissatisfaction within thirty days after the day on which she received the decision, the DAB's decision shall become final and binding upon both parties. The DAB's decision may then only be overturned by settlement or arbitration.

The DAB shall consist of three people who must be suitably qualified in law, Islamic finance, and *Shari'ah*. Each party shall nominate one member for the approval of the other party. The parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman. However, if a list of potential members is included in the contract, the members shall be selected from those on the list, other than anyone who is unable or unwilling to accept appointment to the DAB.

The agreement between the parties and either a sole member (adjudicator) or each of the three members shall incorporate by reference the General Conditions as written by DWIFACJO, with such amendments as agreed between them. The composition of the DAB shall be by nomination and then joint-selection. DAB members are to be remunerated jointly by the parties with each paying half of any fees. DAB members may only be replaced by mutual agreement. The appointment of any member may be terminated by mutual agreement of both parties, but not by any party acting alone. Unless otherwise agreed by both parties, the appointment of the DAB shall expire when the discharge of the matter shall have become effective. Where the parties fail or are otherwise unable to agree upon the appointment, nomination or replacement of any member of the DAB, then the appointing official so named in the contract shall make the appointment.

DWIFAC may establish an Ambassadors List similar to the FIDIC President's List, from which arbitrators and DAB members may be selected, if not specified in the contract. Persons who have successfully completed a DWIFAC Adjudication Assessment Workshop and International Arbitrator's Islamic Finance Contracts Course and applied for entry to the DWIFAC Ambassadors List of Approved Dispute Adjudicators are entered on the List for five years. Successful attendees at an Adjudication Assessment Workshop are required to be fluent in English and to be thoroughly familiar with Islamic finance, law, and *Shari'ah*.

There may be situations where a party fails to comply with a DAB decision. In such cases, the other party may refer the failure to DWIFAC arbitration. Where notice of dissatisfaction has been given, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fiftieth day after the day on which notice of dissatisfaction was given. The attempt to obtain an amicable settlement during this prescribed period of fifty days is a condition precedent to a referral to arbitration. There is no given timeframe to refer a dispute to arbitration, however, it should be without undue delay. Once the arbitration procedure has been initiated, the arbitration shall commence according to the DWIFAC arbitration rules.

The arbitrator(s) shall have full power to open up, review, and revise any decision of the DAB relevant to the dispute. Neither party shall be limited, in the proceedings before the arbitrator(s), to the evidence or arguments previously put before the DAB to obtain its decision nor to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration. Arbitration may be commenced prior to or after completion of the contract. The obligations of the Parties and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the contract.

The arbitration shall be conducted in the English language and any arbitral decision shall be final and binding. All of the DWIFAC decisions (see Appendix B) are to be published in English, French, and Arabic and the arbitration itself to be conducted in English. In the event of a conflict of laws, the *Shari'ah* shall prevail. A valid arbitration decision should lead to a verdict that conforms to the rules of the *Shari'ah* (AAOIFI 2004:559). The *Shari'ah* and legal basis of the arbitration decision shall be mentioned in the decision (AAOIFI 2004:559).

In the context of DWIFAC, the Center may make arrangements with the Dubai and DIFC courts for enforceability of DWIFAC arbitration awards. However, parties to the dispute must realize that the arbitration award issued by DWIFAC may be overturned or enforced in other jurisdictions (*International Bechtel Co. Ltd. v. Department of Civil Aviation of the Government of Dubai* 300 F. Supp. 2d 112 (DDC. 2004)) or challenged in UAE courts based on Article 216 of the *Civil Procedure Law*. *Shari'ah* Supreme Council decisions shall act as a source of precedent and shall be binding, thus providing legal certainty to Islamic finance dispute adjudication. The *Shari'ah* Supreme Council established by DWIFAC shall act as the highest *Shari'ah* authority for DWIFAC arbitration, the UAE, and the DIFC.

## DWIFAC Relationships Courts and Tribunals

A special component of the DWIFAC dispute resolution mechanism is the special relationship between DWIFAC, the Central Bank of the UAE, the Dubai Courts, the DIFC, DIFC-LCIA, and DIAC. The Central Bank of the UAE ('CBUAE') was formed in 1980 and is primarily responsible for overseeing banks in the UAE, except in the DIFC, where the regulatory authority is the Dubai Financial Services Authority or ('DFSA'). The DFSA is a *Shari'ah* Systems Regulator, requiring that any Islamic firm must have a *Shari'ah* Supervisory Board ('SSB'). The DFSA is unfortunately not itself a *Shari'ah* regulator and has not constituted its' own *Shari'ah* Board to oversee the regimes in Islamic firms (DFSA: 2010). Under the *Shari'ah* Systems Regulator requirements, the firm must have systems and controls to implement the SSB's rulings and must conduct annual *Shari'ah* reviews and audits and produce disclosures based on AAOIFI standards (DFSA: 2010). In general, most of the disclosures recommended by the IFSB are already mandated in the DFSA rules (DFSA: 2011) and the DFSA currently requires the use of AAOIFI standards for Islamic financial business (DFSA: 2011). In addition, the DFSA utilizes the IFSB standards in determining its capital adequacy regulations and there are also special rules for Islamic funds and for *Sukuk*(DFSA: 2010).

The DIFC has been actively promoting Islamic finance with the *Law Regulating Islamic Financial Business DIFC Law No. 13 of 2004*, the establishment of the Islamic Finance Advisory Council in 2005, the presence of the Islamic International Rating Agency ('IIRA') from 2006, and an MOU between the DFSA and the Securities Commission of Malaysia facilitating cross-border flows of Islamic Finance between the DIFC and Malaysia in 2006.

There appears to be a substantial amount of Islamic finance business being conducted in the DIFC, under the regulation of the DFSA, however, the DIFC lacks an adequate Islamic finance dispute resolution mechanism and centralized *Shari'ah* authority.

DWIFAC, which shall be funded by Sheikh Mohammed bin Rashid Al Maktoum (Arabic محمد بن راشد آل مكتوم), may act as the independent central dispute resolution authority and *Shari'ah* regulator connecting all of the adjudication apparatus's of Dubai, the UAE, and the DIFC into one consolidated framework for the adjudication of Islamic finance disputes with a centralized *Shari'ah* authority in the form of the *Shari'ah* Supreme Council. The decisions of the *Shari'ah* Supreme Council shall be binding and available to the public for review, thereby giving certainty to legal decisions and promoting confidence amongst investors. The DIFC, Dubai Courts, Central Bank of the UAE, and the IICRCA may refer arbitration to DWIFAC and/or utilize the DWIFAC Ambassador's List and facilities. In addition, DWIFAC may utilize the expert determination, mediation, and other services of the Dubai and DIFC Courts and the arbitrators of the IICRCA, DIFC-LCIA, DIAC, and the Central Bank of the UAE governance unit. DWIFAC awards may be enforceable in the Dubai and DIFC Courts through a special protocol.

## Conclusion

The DWIFAC arbitration center along with the DWIFAC jurisprudence office provides the best solution of the dispute resolution conundrum of the Islamic finance industry, providing a globally recognized center for dispute resolution located in one of the world's major financial centers, which adjudicates disputes using arbitration incorporating *lexmercatoria* and *Shari'ah*, the DWIFACJO uniform banking law, the DWIFAC arbitration rules, and the procedural law of Dubai as well as uses highly qualified *Shari'ah* and Islamic finance/law arbitrators. DWIFAC may also organize and utilize the existing dispute resolution framework in Dubai, the DIFC, and the UAE, consolidating the centers into one hierarchical system, which includes the *Shari'ah* Supreme Council for the efficient adjudication and regulation of Islamic finance disputes.

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يشكر الخالق لم يشكر المخلوق لم من

He who will not thank creatures (human beings) will not thank Allah (SWT).



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## Abbreviations

AAOIFI	Accounting and Auditing Organization for Islamic Financial Institutions
ADCCAC	Abu Dhabi Commercial Conciliation and Arbitration Center
BAFIA	<i>Banking and Financial Institutions Act 1989</i> (Malaysia)
BBA	<i>Bai Bithamin Ajil</i>
BCDR-AAA	The Islamic Financial Mediation and Arbitration Center
BDB	Blom Development Bank
BNM	Bank Negara Malaysia
CBUAE	Central Bank of the United Arab Emirates
CBM Act 2009	<i>Central Bank of Malaysia Act 2009</i>
CRCICA	Cairo Regional Center for International Commercial Arbitration
DAB	Dispute Adjudication Board
DFSA	Dubai Financial Services Authority
DIAC	Dubai International Arbitration Center
DIFC	Dubai International Financial Center
DIFC-LCIA	Dubai International Financial Center- London Court of International Arbitration
DWIFAC	Dubai World Islamic Finance Arbitration Center
DWIFACJO	Dubai World Islamic Finance Arbitration Center Jurisprudence Office
FIDIC	International Federation of Consulting Engineers
IDB	Islamic Development Bank
IFSB	International Financial Services Board
IICRCA	Islamic Center for Reconciliation and Arbitration
IIRA	Islamic International Ratings Agency
IMAC	International Islamic Mediation and Arbitration Center
ISRA	International <i>Shari'ah</i> Research Academy
KLRC	Kuala Lumpur Regional Center for Arbitration
KLSE	Kuala Lumpur Stock Exchange
LOFSA	Labuan Offshore Financial Services Authority
PSA	Property Sale Agreement
QICCA	Qatar International Center for Commercial Arbitration
QFC	Qatar Financial Center
RCICAL	Regional Center for International Commercial Arbitration
SAC	<i>Shari'ah</i> Advisory Council
SIAC	Singapore International Arbitration Center
SSA	<i>Shari'ah</i> Supervisory Authority
SSB	<i>Shari'ah</i> Supervisory Board
TID	Investment Dar
TRAC	Tehran Regional Arbitration Center
UAE	United Arab Emirates