

Innovative Process to Resolve Takaful Disputes in Malaysia

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Abstract: Strengthening redress mechanisms for consumers are one of the main focuses of Bank Negara Malaysia. Effective and fair handling of disputes faced by consumers are important to ensure the stability of market conduct as well as the consumer empowerment. Related to this, disputes resolution mechanisms are one of the key points in safeguarding and protecting the consumers of Islamic banking and takaful industry. According to Financial Mediation Bureau Annual Report of 2015, the number of cases related to takaful matters registered are increased compared to number of cases registered in 2014. Thus, the percentage of cases being resolved through mediation by the Financial Mediation Bureau is also increased. For the purpose of research, this study propose to determine that mediation is being the most effective process in resolving takaful disputes at present time. This is because it allows innovativeness in three main aspects, i.e., through its existing legal framework, its process as well as people involved in it.

Key words: Islamic finance industry, takaful, dispute resolution, Malaysia, mechanisms, safeguarding

INTRODUCTION

Takaful industry is recognized as one of the key components in Islamic financial system at present (EY, 2014). According to Malaysia International Islamic Financial Centre (MIFC), our country dominates the takaful market within the ASEAN region, contributing to 71% of the takaful market share in 2014. This is due to the progressive and impactful regulatory initiatives taken in order to ensure efficiency, healthy and sustainability of takaful business operations as well as to protect the interest of participants (MIFC, 2015).

Legal and regulatory framework is inter-related with one of the most importance parts in consumer protection level, i.e., disputes resolution mechanisms. The interest of discussions in disputes resolution mechanisms just flourished recently. There was almost none efforts to venture into the aspect of dispute resolution of Islamic finance industry as stakeholders and policy makers were focusing on the products development for over 40 years back (Oseni and Ahmad, 2015). Applications and interpretations of the Shariah principles particularly in dispute resolution of Islamic finance industry have proven to be inadequate. This is because, disputes over Islamic finance industry were adjudicated in civil courts as it is the existing legal structure and resolving dispute method at the beginning of Islamic finance

implementation. However, as time passes by the were tremendous developments in disputes resolutions mechanisms involving Islamic finance matters with the establishment of Muamalat Court in the High Court of Kuala Lumpur with main consideration in Islamic Banking and Finance cases, the existence of Financial Mediation Bureau and the coming into force of Financial Ombudsman Scheme recently.

Problem statement: With the coming into force of Financial Ombudsman Scheme (FOS) recently and the appointment of Financial Mediation Bureau or now known as Ombudsman for Financial Services as the operator of the scheme (BNM, 2016a, b), mediation has been highlighted to be the main option in resolving islamic banking and takaful disputes. By focusing on the trends of the enquiries and complaints reported to the Financial Mediation Bureau in previous years until 2015, it can be understood that most of the takaful matters would preferably went for mediation mechanism. This is supported with the increased number of takaful cases registered and resolved by the Financial Mediation Bureau. Mediation had been known as the most flexible mechanism in resolving disputes as compared to court adjudication and arbitration. This flexibility allows the element of innovativeness to take place in order to enhance the effectiveness of the mediation process.

Literature review: This study consists of relevant articles on the topic by giving the general perspectives of the disputes resolution mechanism particularly for Islamic banking and takaful industry in Malaysia. It is divided to few sub-sections specifically on the overview of disputes resolution methods for takaful in Malaysia with regards to the court and litigation system in Malaysia, the arbitration and mediation. Disputes resolution patterns in Islamic finance vis-a-vis takaful are also included and accompanied with takaful disputes or cases being registered and resolved by Financial Mediation Bureau with relevant data taken from the annual report of the body.

MATERIALS AND METHODS

This study use qualitative research by analyzing the Financial Mediation Bureau Report in previous and recent years which is relevant to see the trends of takaful cases resolved through mediation. The main references of this study are the relevant articles on mediation and disputes resolution mechanisms. It is to be noted that, the literatures on this topic are limited as most of the literatures are highlighting more on disputes pertaining to Islamic banking products. Therefore, this study may significantly facilitate to fill in the gap.

Dispute resolution mechanisms for takaful in Malaysia:

There were three mechanisms available to resolve takaful disputes in Malaysia. Court adjudication or litigation, arbitration and mediation were given as the options for one in order to decide a takaful case or dispute. Arbitration and mediation are also known as the alternative disputes resolution mechanisms. As far as the court adjudication or litigation system is concerned, English judicial hierarchy is the basis for Malaysia court system with the highest court being the Federal Court. We have two classifications of courts, i.e., the subordinate court and the superior court. Subordinate court is consist of Magistrate Court and Session Court while Superior court is consist of the Court of Appeal and the Federal Court. Statutes have clearly defined the jurisdiction of each courts (Ahmad and George, 2002). Historically, litigation is treated as rare among the Malaysian society particularly in the early years after independence gained from the Britain. However, more cases were brought to the court jurisdiction due to economic expansion, education awareness, commercial and trading activities increment which resulted to the increased of the contractual liabilities and responsibilities.

Similarly, the litigation of Islamic banking and finance including takaful disputes in Malaysia started back in

1985. Litigation is a process by which an entity sues or makes a claim concerning a dispute or disagreement. It is recorded that, High courts began to hear Islamic banking and finance cases with the Islamic Banking Act, 1983 coming into force as well as the introduction of few Islamic finance products into the market. Malaysian courts approach onto the Islamic banking and finance cases can be divided to three main phases (Hasan and Asutay, 2011). The first phase is within the year of 1979-2002 duration of time. Rather than focusing on issues beneath the Shariah principles, the courts during this phase, emphasis more on the application of common law to civil and technical aspects. In fact, during this phase, it is established that the court of law that resolve disputes pertaining to Islamic banking and finance matter is the civil court and not the Syariah court. This is because, Syariah court can only decide the cases that fall under the state list of federal constitutions that excludes any cases relating to commercial laws such as Islamic banking and takaful matters (BIM, 1994). For a case to be heard before the Syariah court, all parties involved must be a Muslim. However, Islamic institutions are corporate institutions created by statute and do not have a religion.

In the second phase (2003-2007), there were some indications made by the courts as to their intention to examine the underlying principles and financing facility offered by the Islamic institutions in Malaysia critically. The third phase which is between the years of 2008 until the years 2010, represent the legal reality for the Islamic finance institutions. This phase also shows the positive approach by the courts in examining Islamic banking practices as well as issues involved.

Alternative Disputes Resolution (ADR) mechanisms are other options available besides litigation. It has been practiced widely by different generations, since many years ago as disputes are unavoidable in human relationships. Whenever disputes were brought before the attention of the formal court system, the parties tend to be farther to each other. This is because litigation leads to a win-lose situation where the winning party rejoices it's winning while the other party wallow in anguish. In order to avoid this, effective disputes resolutions came into the picture to satisfy the real needs of the litigants. Unlike litigation, ADR assists the administration of justice system and safeguard speedy justice without compromising the partie's rights and obligations. In a way, ADR offer a win-win situation and settlement where the parties resolve dispute amicably and secure the ongoing relationship (Oseni and Ahmad, 2015).

As far as ADR in Malaysia is concerned, it has been practiced few years back as similar to the old culture

founded among the people in this country. Historically, elements of disputes resolution were existed within the predominant tribes of Malaysia, i.e., in the Malays (Muhammad, 2008), Chinese and Hindus (Lahoti, 1999). Amicable settlements of disputes were provided in the accustomed values of the three major races in Malaysia.

Arbitration, being one of the options available in the ADR in Malaysia is also recognized as a useful mechanism to resolve disputes in financial transactions. As the nature of Islamic finance transactions are generally part of the international commercial transactions, the UNCITRAL Model Law on International Commercial Arbitration of 2006 and the UNCITRAL Arbitration Rules 2010 form the basis of the substantive and procedural matters involving international arbitration including arbitration of Islamic finance disputes. As such, the legal framework for arbitration in Malaysia when dealing with Islamic finance issues in Malaysia are the UNCITRAL Model Law which is reflected in the Arbitration Act 2005 as well as the KLRCA i-Arbitration Rules 2013 and KLRCA UNCITRAL Arbitration Rules (as revised in 2010). This is also includes the AAOIFI Shariah Standard No. 32 on Arbitration. Kuala Lumpur Regional Centre for Arbitration (KLRCA) is the main relevant body established to supervise and manage the arbitration process in Malaysia.

As regard to mediation, it is known as a flexible process conducted by a neutral person who is actively assist the parties in working towards a negotiated agreement in confidential. Mediation in Malaysia, particularly in Islamic banking and takaful matters is under the purview of Ombudsman for Financial Services (OFS) formerly known as Financial Mediation Bureau (FMB). FMB is a combination of Banking Mediation Bureau and Insurance Mediation Bureau. The two bodies were merged in January 2005 and FMB was established (Segara, 2009). The two bodies were earlier under a close supervision of Bank Negara Malaysia. Banking Mediation Bureau had the responsibility to deal with Islamic banking issues while Insurance Mediation Bureau was in respond with insurance disputes by offering simple resolution process. FMB was incorporated on 30th August 2004 and come into force officially on 20th January 2005 which after the merger between the two bodies took place. FMB provides a fast, efficient and free mechanism for the financial providers who are the members of the bureau. There are hundred members of FMB as for now which comprise of commercial banks, Islamic banks, investment banks, development financial institutions, payment system operators and payment instrument issuers, life insurance companies, general insurance

companies, composite insurance companies and takaful operators. Ten out of hundred members of FMB are the takaful operators while 16 of the total members are the Islamic banks.

Dispute resolution patterns in Islamic finance vis-a-vis takaful in Malaysia: The dispute resolution framework particularly for Islamic finance matters has undergone different phases, since the enactment of the first legislation of Islamic Banking Act (IBA) 1983 (Lee and Oseni, 2015). These different phases are also significant with takaful cases and disputes development in Malaysia. There were five major stages of phases which are the adaptation stage, formative stage, capacity-building stage and consolidation stage.

Adaptation stage (1983-1993) is also known as teething period for the entire Islamic finance industry itself (Lee and Oseni, 2015). In this stage, the process to resolve Islamic finance disputes is only limited to litigation as the industry need to deal with the existing legal framework at that point of time. The issues raised were particularly on the nature of banker customer relationship. It is understood that this is a learning period for the court as they need to face with matters involving Shariah issues for the first time. We may refer to the case of Bank Islam Malaysia Bhd v Adnan bin Omar, whereby in this case the court had established the fact that civil court has the jurisdiction to hear Islamic banking and takaful matter due to the powers conferred in List 1 of the Federal Constitution. We may also refer to the case of Dato Haji Nik Mahmud bin Daud v Bank Islam Malaysia Bhd where in this case the court of appeal upheld the application of the bank pertaining to Order for Sale over a Malay Reserved Land with regards to the Bai' Bithamin Ajil (BBA) financing facility granted to the appellant. Both cases showed that, the courts as well as the judges at this stage were more in favour of the Islamic banks. Yet, the main issue remain untouched at this stage as regard to the court's ability to decide on Islamic banking and takaful matters according to Shariah principles.

The year of 1994 until 2003 marked the formative stage. At this stage, the industry began to think for better solution for the untouched issue faced by the civil courts. Expertise also began to propose new ideas for effective dispute resolution to suit the industry needs. At this point of time, the Islamic Banking and Takaful Department of Bank Negara Malaysia had prepared a draft proposal paper on "Arbitration Framework for Islamic Banking and Takaful Business". Subsequently, the proposal was approved by the Assistant Governor of the Bank Negara with regard to utilize KLRCA (formerly known as Regional Centre for Arbitration Kuala Lumpur) in administering

arbitrations arising from Islamic banking and takaful transactions. It was agreeable on 8th October 2003 that, Regional Centre for Arbitration Kuala Lumpur is a viable outfit for dispute resolution in Islamic banking transactions and takaful business (AALCO, 2004).

During the capacity-building stage (2004-2010), Financial Mediation Bureau is established to address disputes between the financial service providers and its participants. This integrated dispute resolution agency has been benchmarked against best practices worldwide, notably in countries such as the United Kingdom, Canada and Australia (Aziz, 2005). It is also stated that, the jurisdiction of Financial Mediation Bureau has been expanded during this stage by also includes matters or disputes relating to Islamic banks, takaful operators and development financial institutions. With the creation of Financial Mediation Bureau, Bank Negara Malaysia believed that it represents an important milestone in the enhancement of the consumer protection infrastructure as well as an available avenue for the consumers to seek resolutions of the issues faced by them.

The period of 2011-2020 marked the consolidation stage whereby Bank Negara Malaysia introduced the two 10-year of Masterplans in order to promote monetary and financial stability favorable to the sustainable growth of the Malaysian economy and Islamic finance sector particularly. The two 10-year master plan are The Financial Sector Masterplan (FMSP) which was for the period between the years of 2001 until the year of 2010. The masterplan provided basis for the organized development of the financial sector. To create an efficient, progressive and comprehensive Islamic financial system that contributes significantly to the effectiveness and efficiency of the Malaysian financial sector while meeting the economic needs of the nation, Bank Negara Malaysia has set up few recommendations. Recommendation 5.10 had proposed to establish an effective legal structure by forming a committee to set up a Shariah commercial court to deal with legal matters in Islamic banking and takaful.

At present, the dispute resolution range of Islamic banking and takaful has reached an introduction of benchmarking stage (Lee and Oseni, 2015). The Financial Sector Blueprint 2011-2020 which is a strategic plan that charts the future direction of Malaysia financial system was released in 2011 (BNM, 2016a, b) Besides having mentioned on the important role of the industry to meet the financial needs of emerging Asia, The Blueprint also laid down recommendation pertaining to dispute resolution in the Islamic banking and takaful industry. Financial Ombudsman Services (FOS) Scheme with the expanded controls to encourage the effective and fair

management of disputes with financial service providers is included under the Recommendation 5.2.4. Successes were also recorded in mediating Islamic banking and takaful disputes under the purview of Financial Mediation Bureau (Lee and Oseni, 2015). Significantly, the Financial Ombudsman Services (FOS) Scheme has come to force recently and effective on 1st October 2016 with Ombudsman for Financial Services (formerly known as Financial Mediation Bureau) being responsible with its operational system. It is believed that, the introduction of Financial Ombudsman Scheme further strengthens financial consumer protection framework (BNM, 2016a, b).

The introduction of Islamic Financial Services Act (IFSA) in June 2013 provides an appropriate framework particularly on consumer protection which is also closely related to dispute settlement in Islamic banking and takaful industry. It comes with a special provision on Financial Ombudsman Scheme. By virtue of Section 138 and Section 271 of the Act, takaful operators in Malaysia shall be the members of Ombudsman for Financial Services. Special regulations on Financial Ombudsman Scheme particularly for Islamic banking and takaful matters Islamic are subsequently enacted and came into operation on 14th September 2015 (OFS, 2016). These regulations are basically to cover the functions and duties of the financial ombudsman as well as the terms of a financial ombudsman scheme including types of disputes that may be referred, eligible complainants, its operations procedure, etc. Section 138(5) of IFSA 2013 also laid down a clear prohibition on making a dispute reference to Tribunal for Consumer Claims after which such dispute had been lodged to Ombudsman for Financial Services (OFS). This is specifically meant to prevent “forum shopping” and to secure the position of the OFS and its awards.

Takaful disputes/cases in Malaysia: As the new legislation, IFSA 2013 had mentioned that takaful business shall be divided into two classes, i.e., family takaful and general takaful most of the disputes raised in takaful were based on these classifications. According to the Act, family takaful business is defined as any business which related to the administration, management and operation of a takaful arrangement specifically under the family takaful certificate. On the other hand, any other business not related to family takaful business or arrangement is deemed to be general takaful business. The classifications construed by the Act are wide in nature. Occasionally, various takaful products were designed, developed and transacted under both classes. Consequently, few disputes were reported. For the

Table 1: Comparison of Takaful claims handled in FMB between 2014 and 2015

Categories	Cases Handled in 2014			Cases Handled in 2015			
	B/f	Registered	Resolved	B/f	Registered	Resolved	Pending
Conventional							
General insurance (motor)	207	407	445	169	368	415	122
Life insurance	104	264	319	49	262	255	56
General insurance (medical)	19	70	81	8	65	61	12
General insurance (non-motor)	155	107	184	78	109	160	27
Third party property damage	28	70	76	22	67	71	18
Total conventional	513	918	1,105	326	871	962	235
Takaful							
Family	58	103	135	26	114	111	29
General	16	17	25	8	14	17	5
Motor	18	93	87	24	94	100	18
Third party property damage	5	6	10	1	11	11	1
Total takaful	97	219	257	59	233	239	53
Total conventional/takaful	610	1,137	1,362	385	1,104	1,201	288

Financial mediation Bureau annual report 2015

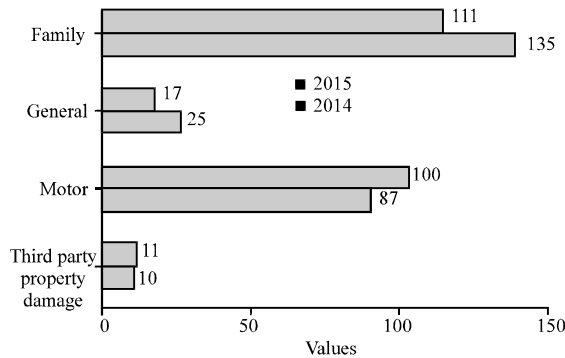


Fig. 1: Comparison of Takaful Cases Resolved in 2014 and 2015 Financial Mediation Bureau Annual report 2015

purpose of this sub-section an analysis of the takaful disputes and cases will be explained with a close reference made to the Annual Report of Ombudsman for Financial Services (formerly known as FMB) in previous and recent years.

Takaful cases in Table 1, represent 21.1% of the total number of insurance and takaful cases registered in 2015, i.e., 1,104 cases. There was a rise in takaful cases registered to FMB, i.e., 233 cases compared to only 219 cases in 2014. Number of cases registered on takaful family cases, takaful motor cases and takaful third-party property damage cases are expanding from the year of 2014-2015 except the takaful general cases.

Figure 1 shows the number of takaful cases resolved by the FMB in comparison between the year of 2014 and 2015. The number of cases resolved are increasing, thus the percentage are also rise up from 81.1% in 2014-81.8% in 2015. The disputes registered and resolved by FMB are mainly based on the types of the takaful products offered by the takaful operators.

Table 2 shows the trend of cases resolved by Financial Mediation Bureau from the year of 2012 until the recent years, 2015.

Table 2: Takaful cases resolved by Financial Mediation Bureau

Years	Brought forward	Cases registered	Cases Handled	Cases resolved (%)
2012	173	166	339	186 (54.8)
2013	153	217	370	273 (73.7)
2014	97	219	316	257 (81.3)
2015	59	233	292	239 (81.8)

Extract of Financial Mediation Bureau Annual Report 2012-2015

RESULTS AND DISCUSSION

Analysis and findings: Number of takaful cases resolved by Financial Mediation Bureau shows a steady trend of increment each year from only 54.8% in 2012-81.8% in 2015. This is due to the proactive approach taken by FMB to meet and engage with the takaful operators on a regular basis which consequently had expedited the settlement of claims (FOS, 2015). Majority of cases brought forward or registered in the FMB were resolved by way of mediation as chosen by the parties to disputes during the case management with the takaful operators. In other words, the mediator of FMB upheld the takaful operator's decision in facilitating the parties to resolve disputes. Thus, this trend shows that mediation continues to be the preferred channel to resolve compelement and disputes in takaful without compromising on the relationship between parties.

Recommendations on innovative ways to resolve takaful disputes: Innovative ways can be interpreted as the facilitative methods in resolving disputes pertaining to takaful matters. Facilitative methods should consist of comprehensive legal framework which includes guidelines and standards, effective process of handling and resolving disputes as well as progressive involvement of responsible people throughout the mediation process.

Comprehensive legal framework: Islamic Financial Services Act 2013 has specified special provisions which authorized regulations to be made in connection with

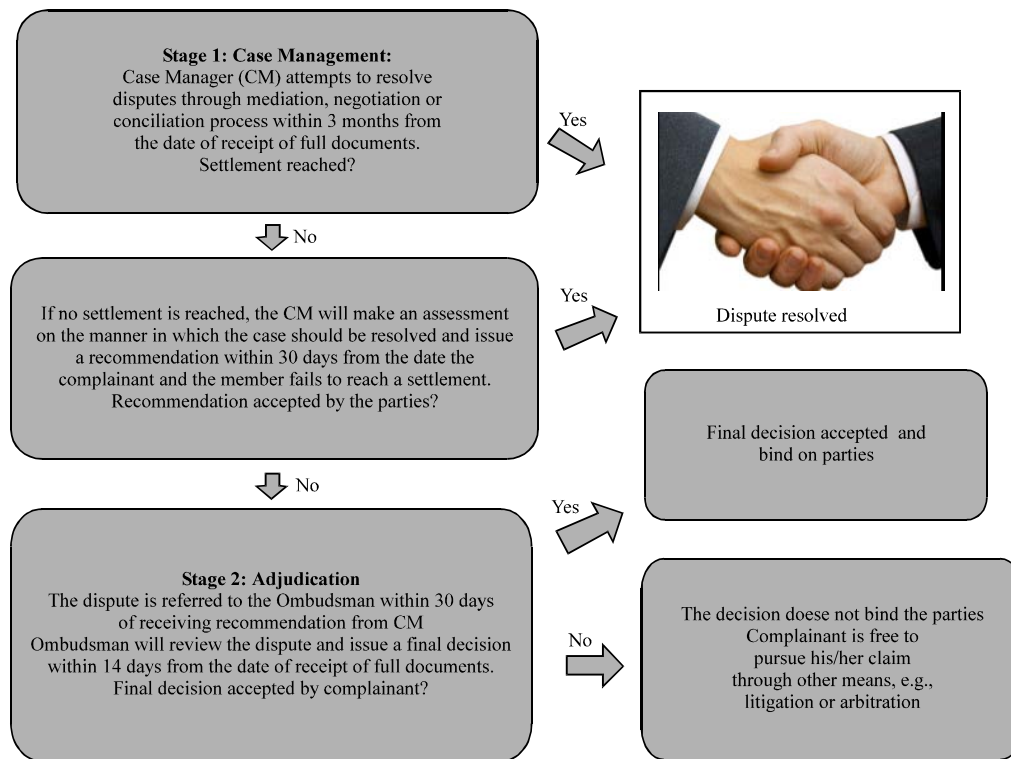


Fig. 2: Effective process of case management and adjudication

Financial Ombudsman Scheme. By virtue of these special provisions, Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015 is enacted and came into operation on 14 September 2015. This special Regulations basically work as a parent legal framework for Financial Ombudsman Scheme (FOS) whereby it provides for the approval, oversight and obligation of the FOS in Malaysia (FOS, 2016). This special Regulations also listed down the approved takaful operators to be among the members of the Ombudsman for Financial Services (OFS) as mentioned in the first Schedule of the Regulations. Besides, Terms Of Reference (TOR) was also passed consistent with this Regulations which set out the scope of the Financial Ombudsman Scheme which include the terms of membership, types of disputes, the Award that may be granted by an Ombudsman, procedures and functions for a dispute to be referred to the FOS. In order to ensure the comprehensiveness of the current legal framework for Financial Ombudsman Scheme (FOS), the element of innovativeness need to be inserted for example the current law must incorporate the flexibility of Ombudsman for Financial Services (OFS) on resolving the takaful disputes. In addition to this, Bank Negara Malaysia may issue certain specific guidelines whenever necessary for example guidelines on disputes resolution

for case manager. This is because, case manager and Ombudsman are two different individuals involved in the dispute resolution process under the OFS (Fig. 2).

Effective process: As we can see from the chart above, the dispute resolution process under the purview of OFS is further enhanced with a two-tier approach. It is to be noted that, before the dispute or complaint can be filed with the OFS such dispute need to be referred to the respective member of the OFS at the first place. In the event that, the complainant is dissatisfied with the decision made by the respective member or no response on the specific complaints is received from the member after 60 days from the date the complaint is referred, the complainant is now eligible to bring the matter to the OFS (FOS, 2016) through its first touchpoint, i.e., Case Management Unit (CMU) (OFS, 2016). CMU will then determine whether the registered matter is under or outside the jurisdiction of OFS. If such matter or dispute fall under the jurisdiction of the OFS, the first stage, i.e., case management will come into the picture.

The first stage of the dispute resolution process is involving the duty of the case manager. An officer of the OFS will be appointed as a case manager to resolve dispute registered through three possible means which

are negotiation, mediation or conciliation. The case manager's roles are to encourage and facilitate dialogue, provide guidance, assist the parties to the dispute in clarifying their interests and in understanding differences and to work towards a mutually acceptable settlement (OFS., 2015). Dispute between the complainant and the respective member is considered resolved if a settlement is achieved between the two. However, if there is no agreement on the resolution made, again the case manager will reassess or reexamine the dispute and issue a recommendation within 30 days from the date both of the complainant and member failed to reach for a settlement. The same method is applied if such recommendation made by the case manager is not accepted by the complainant. The dispute will be brought to the next stage, i.e., adjudication.

At adjudication stage, case manager will no longer has his hand on the matter. It is now under the jurisdiction of the Ombudsman. As far as the Ombudsman of the OFS, there are two Ombudsmen at present appointed by the body particularly for conventional banking and insurance matters as well as for Islamic banking and takaful. Ombudsman will review the dispute and issue a final decision. It is always on the complainant whether to accept or reject such decision made by the Ombudsman. If such decision is accepted by the complainant it considered as binding on both parties and if the complainant decided to reject the decision, he is free to initiate a legal redress or arbitration on that particular dispute.

Utilization of technology can be one of the innovative elements to be introduced in the takaful dispute resolution process. For instance, online dispute resolution might be considered to be one of the options for the parties to settle their dispute through mediation as offered by the OFS. The parties may opt to engage with video conference method to save time, energy and costs particularly in adjudication stage as matters referred to the Ombudsman are made in writing. It can create more understanding between the parties as both of them are able to react and discuss in harmony with the assistance of the Ombudsman to mediate the matter. Besides, active engagement and involvement of the takaful operator throughout the process until the dispute resolved. This is one of the recommendations to enhance the innovativeness of the dispute resolution process as it is only the case manager or the Ombudsman involved in resolving the dispute. Therefore, with the active participation of the takaful operator, it will increase the confidence of the complainant on the takaful operator as well as on the mediation process set up by the OFS.

Progressive people: Takaful operators, Ombudsman and complainants possess important roles in ensuring progressive and innovative takaful disputes resolution. Knowledge enhancement with consolidated efforts by the stakeholders, i.e., regulator and industry will definitely safeguard the progressiveness of the people involved in resolving takaful disputes through mediation. Sufficient trainings and knowledge empowerment on dispute resolution to takaful operators or members of the OFS are essential. Financial literacy and financial education awareness among the public vis-a-vis complainants need to be improved so that they understand their rights and own fair financial decisions. This may include an ample exposures on mechanisms and respective bodies available in resolving disputes as well as the right steps to be taken when having a dispute with takaful operators or other financial service providers.

CONCLUSION

Issues concerning to the best mechanism for dispute resolution in Islamic banking and takaful has caused some discussions among the expertise. Majority of cases on Islamic banking and takaful were adjudicated by the civil courts few years back and caused confusions. This scenario has attracted the expertise to come out with comprehensive solutions to solve the problem. A perfect and effective dispute resolution body for takaful matters will surely boost the Islamic finance industry in Malaysia to a better position and being the benchmark or model for other countries. Mediation is the best option to resolve takaful disputes because it allows innovations and Ombudsman for Financial Services as the operator for Financial Ombudsman Scheme is the most effective avenue. This is because mediation itself is designated to enable innovations particularly in the context of its dispute resolution process. However, to have the most impactful framework, some elements of innovations need to be added as per recommendations mentioned before with a close supervision by the regulator and cooperation from the takaful industry.

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