DISPUTE IN CROSS-BORDER *WAQF*: MITIGATION, RESOLUTION, AND THE ROLE OF *WAQF* AUTHORITY

Shandy Primandasetio Freddy*
Nor Asiah Mohamad**

**ABSTRACT**

*Waqf*, or Islamic Trust, embodies the concept of *rahatan lil’alamiin*, or compassion for all people and the whole universe. Its benefits run across countries without race or religious limitations. Cross border-*waqf* is a *waqf* transaction with international elements that includes parties from different countries and the movement of *waqf* assets between countries. There are always some legal risks in every cross-border *waqf* activity, and resolving it is more complex due to obstacles such as the differences in law between countries. The Waqf Core Principles (WCP), as one of the latest *waqf* international best practices, also has no regulation about legal risk mitigation, dispute resolution mechanism, and the role of *waqf* authorities in resolving disputes. This paper aims to study commonly practiced dispute resolution methods in international transactions that can support cross-border *waqf* and investigate the role of *waqf* authority in conflict resolution. This paper uses the qualitative research method. Resources are obtained from Indonesia's and Malaysia's laws, international laws and rules, and some research related to *waqf*. This paper examines twelve international organisations, five conventions, and at least six countries, resulting in seven possible ways to resolve conflict in cross-border *waqf*. The data were gathered and interpreted through exploratory and descriptive methods. The finding shows, among others, the importance of contractual clauses on dispute resolution to mitigate legal barriers in resolving cross-border *waqf* legal disputes. Alternative Dispute Resolution (ADR) is the most efficient method to resolve the conflict and maintain the relationship between parties. Lastly, active participation of the *waqf* authority as a conciliatory party in resolving cross-border *waqf* disputes is also crucial. On a practical aspect, this

*PhD Candidate at Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia. Email: shandy.primandasetio@gmail.com*

**Professor, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia. Email: nasiahm@iium.edu.my**
paper’s findings offer dispute resolution options and phases for cross-border waqf.

Keywords: Cross-Border Waqf, Waqf Dispute Resolution, Waqf Core Principles.

PERTIKAIAAN DALAM WAKAF RENTAS-SEMPADAN: MITIGASI, PENYELESAIAN, DAN PERANAN PIHAK BERKUASA WAKAF

ABSTRAK

Wakaf, atau Amanah Islam, merangkumi konsep rahmatan lil’alamin, atau belas kasih kepada semua manusia dan seluruh alam. Faedahnya merentasi negara tanpa batasan bangsa atau agama. Wakaf rentas sempadan ialah transaksi wakaf dengan elemen antarabangsa yang merangkumi pihak dari negara yang berbeza dan pergerakan aset wakaf antara negara. Sentiasa terdapat risiko undang-undang dalam setiap aktiviti wakaf rentas sempadan, dan penyelesaiannya lebih kompleks kerana elemen antarabangsa. Perbezaan undang-undang antara negara sentiasa menjadi halangan utama. Prinsip Utama Wakaf (WCP), sebagai salah satu amalan terbaik antarabangsa wakaf terkini, juga tidak mempunyai peraturan mengenai pengurangan risiko perundangan, mekanisme penyelesaian pertikaian, dan peranan pihak berkuasa wakaf dalam menyelesaikan pertikaian. Kertas kerja ini bertujuan untuk mengkaji kaedah penyelesaian pertikaian yang biasa diamalkan dalam urus niaga antarabangsa yang boleh menyokong wakaf rentas sempadan dan menyiapkan peranan pihak berkuasa wakaf dalam penyelesaian konflik. Kertas kerja ini menggunakan kaedah kajian kualitatif. Sumber diperolehi daripada undang-undang Indonesia dan Malaysia, undang-undang dan peraturan antarabangsa, dan beberapa penyelidikan berkaitan wakaf. Kertas kerja ini mengkaji dua belas organisasi antarabangsa, lima konvensyen, dan sekurang-kurangnya enam negara secara keseluruhan, menghasilkan tujuh cara yang mungkin untuk menyelesaikan konflik dalam wakaf rentas sempadan. Data akan dikumpul dan ditafsir melalui kaedah penerokaan dan deskriptif. Penemuan itu menunjukkan, antara lain, kepentingan klausa kontrak mengenai penyelesaian pertikaian untuk mengurangkan halangan undang-undang dalam menyelesaikan pertikaian undang-undang wakaf rentas sempadan. Penyelesaian Pertikaian Alternatif (ADR) adalah kaedah paling berkesan untuk menyelesaikan konflik dan mengekalkan hubungan antara pihak. Akhir sekali, penglibatan aktif pihak berkuasa wakaf sebagai pihak pendamai dalam menyelesaikan pertikaian wakaf
rentas sempadan juga penting. Dari aspek praktikal, penemuan kertas ini menawarkan pilihan penyelesaian pertikaian dan fasa untuk wakaf rentas sempadan.

**Keywords:** Wakaf Rentas Sempadan, Penyelesaian Pertikaian Wakaf, Prinsip Asas Wakaf.

**INTRODUCTION**

*Waqf*, or Islamic Trust, is not only representing individuals and public relations but it is a legal entity with power, rights, and duties. It is not a mere religious institution but a body providing for the socio-economy of the *ummah*, or people. Its benefits run across countries, and there is no limit to race, religion, or colour. It is the embodiment of the concept *rahmatan lil’alamiin*, or compassion for all people and the whole universe, which caters for the poor, the rich, humankind, and even animals.¹

Cross border-*waqf* is a *waqf* activity with international elements. Based on some references, international elements can be interpreted in several conditions. First, there is a cross-border movement of funds or goods, such as the *mawquf* or the *waqf* assets, and or usufruct.² Second, a party in the *waqf*, either it is the *wakif* or the donor, *nazir* or the trustee, or the *mawquf-alaih* or the beneficiary, must located in a different country.³ By combining these aspects, it can be concluded that a cross-border *waqf* is a *waqf* transaction that includes parties from different countries,⁴ and the movement of *mawquf* or usufruct between countries.⁵

---


Due to the difference in the party's jurisdiction and origin of the mawquf or the waqf assets, and or usufruct, a cross-border waqf activity will deal with different laws and authorities such as the law of the home country, international law, international rules, and the law of the host country. Based on these premises, there is always a legal risk in every cross-border waqf activity. Between 1989 and 2017, there were over twenty waqf legal disputes in Malaysia. Indonesia has a higher figure, with over eighteen thousand waqf legal disputes from 1963 until 2024. The unique characteristics of cross-border waqf, which include international elements and the application of various laws and rules, make the selection of the most effective and efficient conflict resolution urgent. The following figure illustrates these connections.

![Cross-Border Waqf](image)

Figure 1. Cross-Border Waqf and Dispute Resolution

Resolving disputes in cross-border waqf has more complexity as compared to other kinds of waqf due to the international elements. Legal differences and shariah compliance standards between countries have been the major obstacles in every international transaction, including the cross-border waqf. The losses from the disputes may not

---

8Source: Analyzed by the Authors from several journals from IIUM-AIKOL, Oxford, Samyak Sankalpa College Kalyan-India, and Website of Pejabat Mufti Wilayah Persekutuan.
only appear in the form of finance risk but also non-financial risk. The disputes will certainly tarnish the image of the waqf institution. In fact, there is a lack of legal instruments provided for the cross-border waqf. As an effort to create a more prudent global waqf sector, the Central Bank of Indonesia, the Indonesian Waqf Board, and the International Research of Training Institute-Islamic Development Bank (IRTI-IsDB) introduced the Waqf Core Principles in October 2018. The Waqf Core Principles is meant to be a guiding principle for waqf practices, whether for domestic waqf or international, including cross-border waqf. Even so, it has no regulation regarding legal risk mitigation, dispute resolution mechanisms, or the role of waqf authorities in resolving disputes in cross-border waqf.

Considering the above matters, this paper examines the safest and most efficient dispute settlement method that could be used in cross-border waqf. Several elements are examined to reach the paper's purpose, including the formulation of key factors in choosing the best available mechanism based on the present international legal system, and essences from Indonesian and Malaysian regulations and experiences will also enrich the research.

**RISKS IN CROSS-BORDER WAQF TRANSACTION**

The essence of waqf is protecting the perpetuity of the mawquf or waqf assets and the waqif’s or donor’s will. Protecting the waqf becomes much more complicated when the business or waqf activities are beyond national borders. The first barrier is the difference in law, and in the waqf management and developmental stage, the unknown business environment and different cultures may also become a

---


Aside from the above challenges, considering the international movement of the mawquf or waqf assets and usufruct in a cross-border waqf activity, parties must pay close attention to the risks during the transport or transfer process, for example, possible accidents during the shipping process. After the mawquf or waqf assets arrive in the destination country, the next step for nazir is to manage and develop the waqf. There are also several risks during waqf management in the destination country, especially related to local regulations, such as the regulation to hold any cash waqf inside a country. Obviously, those risks will deal with different regulations and conflict resolution systems from the waqif’s jurisdiction, considering the waqif is domiciled in the home country. Thus, knowing and choosing the most efficient method to prevent and resolve them would be crucial.

In anticipating disputes arising from the risks in waqf activities, the Waqf Core Principles, one of the main references in the research about cross-border waqf, also have several principles related to waqf risks. As mentioned earlier, the Waqf Core Principles, also known as “Core Principles for Effective Waqf Operation and Supervision”, were created in 2018 by the Indonesian Central Bank, the Indonesian Waqf Board, and the Islamic Development Bank (IsDB) by forming a group of international experts, waqf practitioners, scholars, and government officials known as “The International Working Group on Waqf Core Principles”. Its purpose is to support the development of the waqf sector in Indonesia. The Waqf Core Principles provide guidance and main principles in cash waqf management and its supervisory function. The two main components of the Waqf Core Principles are the supervision

15Bank Indonesia, Badan Wakaf Indonesia, and Islamic Development Bank, Core Principles for Effective Waqf Operation and Supervision.
of *waqf* and good governance of *waqf*. As an international best practice, the Waqf Core Principles is expected to function as a guideline in creating policy and regulation in Indonesia and other jurisdictions. Another consideration is the lengthy process and rigid prerequisite of ratification that includes international approval and legal or political domestic procedure. Using the Waqf Core Principles as a guideline for the current time is more favourable because it is more efficient than ratifying an international law about *waqf* to be implemented worldwide.

The Waqf Core Principles classify risks into two groups: risks related to *waqf* management and risks related to shariah compliance. One of the management risks is the country and transfer risks, which are regulated in Waqf Core Principles No.20. It obliges the *waqf* authority to determine that *waqf* institutions have adequate policies and processes to control country risk in cross-border *waqf* activities. The control policy includes a comprehensive view of the country, transfer risk exposure, and potential conflict, which is crucial in a cross-border *waqf* activity. The *waqf* institutions must have the ability to identify, measure, evaluate, monitor, report, control, and mitigate country risk, so it is important to have a proper *waqf* management system that can capture all information and data about each *waqf* activities to be used in the risk analysis process to formulate mitigation to minimize potential risks, such as legal and administrative risks. Despite the complex provisions in the Waqf Core Principles No.20, still it does not state the details of dispute

---

19 Bank Indonesia, Badan Wakaf Indonesia, and Islamic Development Bank, Core Principles for Effective Waqf Operation and Supervision.
20 Bank Indonesia, Badan Wakaf Indonesia, and Islamic Development Bank.
settlement and the role of *waqf* authorities in conflict resolution.\textsuperscript{22}

The shariah compliance risk is regulated in the Waqf Core Principles No.25 about operational and shariah compliance-related risks. It obliges the *waqf* authority to determine that *waqf* institutions have proper operational and shariah compliance risk management processes to minimise potential fraudulent practices, anticipate system breakdown, and any other potential disturbance.\textsuperscript{23} In implementing these provisions, the *waqf* institutions or *nazir* or the trustee, must have a dedicated unit to take care of operational risk and shariah compliance risk.\textsuperscript{24} In a cross-border *waqf* activity, there is a possibility of different regulations, operational standards, and shariah compliance requirements between countries, which are affected by the difference in Islamic schools of thought or *mazhab*.

\textbf{Figure 2. Waqf Risks in the Waqf Core Principles}\textsuperscript{25}

\textsuperscript{22}Bank Indonesia, Badan Wakaf Indonesia, and Islamic Development Bank, Core Principles for Effective Waqf Operation and Supervision.
\textsuperscript{23}Bank Indonesia, Badan Wakaf Indonesia, and Islamic Development Bank.
\textsuperscript{24}Bank Indonesia, Badan Wakaf Indonesia, and Islamic Development Bank.
\textsuperscript{25}Source: Analyzed by the Authors from The Waqf Core Principles.
The figure above shows the complete coverage of risk factors in the Waqf Core Principles. As mentioned earlier, the Waqf Core Principles classify risks into two groups: management and shariah compliance risks. Due to the closeness to waqf assets and usufruct international movement, two previous paragraphs explained Waqf Core Principles No.20 about country and transfer risks and Waqf Core Principles No.25 about operational risk and shariah compliance. Even so, the Waqf Core Principles have accommodated various types of risks related to waqf activity.

Aside from the risk factors mentioned in the Waqf Core Principles, other issues may trigger a dispute in cross-border waqf transactions. In the modern world, mawquf or waqf assets may be exposed to money laundering and black-market risks, as can be learned from the case of Aksi Cepat Tanggap or the Fast Action Response Foundation in Indonesia, which was accused of conducting money laundering and providing illegal items to support terrorism and to enrich the top management level.26

Another issue comes due to the international nature of cross-border waqf, which requires parties to ascertain halal aspects in almost all phases of cross-border waqf. For example, the transport insurance and packaging process and materials.27 If the mawquf is in the form of goods, international halal packaging is required. The involvement of shariah-compliant financial institutions, such as banks and insurance (takaful), is essential in transferring, storing, and investing the mawquf. Examples can be seen in several aspects: (i) the utilisation of shariah-compliant insurance (takaful) in guaranteeing the overseas shipping of the mawquf, this can be seen in the practice of takaful as


marine insurance in the United Kingdom;\textsuperscript{28} (ii) a shariah-compliant bank in managing the \textit{mawquf}, as practiced by Bank Islam Malaysia Berhad and Bank Muamalat Malaysia Berhad as chosen corporates participating in \textit{waqf} activities;\textsuperscript{29} and (iii) choosing a shariah-compliant investment project in the destination country. A perfect example can be seen from Warees Singapore, which developed the \textit{waqf} with property projects.\textsuperscript{30}

Finally, the usufruct must also be distributed (directly or indirectly) in a shariah-compliant way, the usufruct must benefit the entitled one based on the \textit{waqif}'s or donor's will, which has been determined from the \textit{waqf} creation not to conflict with the shariah.\textsuperscript{31} These matters are subjected to risk mitigation in cross-border \textit{waqf}, as stated in the Waqf Core Principles No.24 about disbursement risk.\textsuperscript{32} It is well understood that failure to mitigate the above issues will trigger \textit{waqf} dispute that may lead to the dispute resolution mechanism.\textsuperscript{33}

Another source states that a transactional risk is considered unavoidable in every cross-border transaction, including cross-border \textit{waqf}.\textsuperscript{34} These risks are about how to transfer funds and goods across countries safely.\textsuperscript{35} Based on the World Trade Organisation

\textsuperscript{32}Bank Indonesia, Badan Wakaf Indonesia, and Islamic Development Bank, Core Principles for Effective Waqf Operation and Supervision.
\textsuperscript{35}Schott.
(WTO) data, by the end of 2022, 615 disputes had been brought since the entry into force of the World Trade Organisation agreements in 1995.\footnote{The World Trade Organization, “The World Trade Organization Annual Report 2023” (2023), https://www.wto.org/english/res_e/booksp_e/anrep_e/ar23_e.pdf.} This data shows that there will always be a chance for a dispute in every cross-border transaction. Therefore, this paper will not elaborate more details about waqf risk, considering its role as the trigger of the dispute. The next thing that will be needed is a way to resolve it, whether through ADR or litigation.

**INTERNATIONAL DISPUTE SETTLEMENT BEST PRACTICES**

Disputes are an inevitable part of international relations as they are part of domestic relations. Whatever the nature of relationships, it unavoidably gives rise to disputes.\footnote{Mohammad Naqib Ishan Jan, *International Dispute Settlement Mechanisms* (IIUM Press, 2011).} When a dispute arises, the most beneficial way to solve it is through peaceful means, as Prophet Muhammad exemplifies (peace be upon him).\footnote{Hanis Wahed, “Sulh: Its Application in Malaysia,” *IOSR Journal of Humanities and Social Science Ver. II* 20, no. 6 (2015): 71–79.} The earliest peaceful dispute settlement in Islam can be seen when the Prophet Muhammad (peace be upon him), the head of the state of Medina, agreed to sign the Hudaibiyah Treaty with the Quraisy of Mecca. The purpose of this treaty was to ease the enmity between the two states. Among the most important proficiency in the treaty is that the People of Medina and Mecca agreed to disarm for ten years. This treaty had at least prevented an armed collision between the two forces for a few years until the Quraisy of Mecca dishonored the treaty.\footnote{Hunud Abia Kadouf and Umar A. Oseni, “The Concept of Pacific Settlement Under International Law: An Overview,” *International Dispute Settlement Mechanisms* 2nd (2012).}

In the current world order, many peaceful settlement methods have been practiced by international authorities, organisations, states, and even parties to international contracts. Generally, there are two
groups of peaceful settlements. First, through diplomatic methods, which cover negotiation, mediation, conciliation, and inquiry, also known as fact-finding. Secondly, is through legal methods, which include arbitration and adjudication.

The United Nations (UN) has also established the cardinal principle of peacefully resolving international disputes. The UN General Assembly Resolution of 1970 obliged all state members to seek early and just international dispute settlement through negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, or other peaceful means.

Based on the data from the Central Bank of Indonesia, until December 2018, Bank Indonesia has been involved in more than 6000 (six thousand) Indonesian Government international contracts. From that number, almost all contracts have negotiation as the first dispute settlement method.

Consultation or Negotiation

Consultation

According to the Cambridge Dictionary, consultation is the process of discussing something with someone to get their advice or opinion. In Islam, consultation or counselling is the very first step in resolving
disputes, it is the simplest conflict resolution, cost-effective, and most appropriate for the long-term trade relations of the parties. The World Trade Organisation has been practising consultation under the Dispute Settlement Understanding (DSU), which applies to disputes between World Trade Organisation members. The Dispute Settlement Understanding has principles of fairness, open dealing, and mutual benefit.

Under the Dispute Settlement Understanding, consultation is the first step in the World Trade Organisation conflict resolution mechanism. On the second level, the World Trade Organisation has a good office method that will urge the disputing parties to negotiate. If the problem still cannot be solved, the process would likely go for conciliation and mediation to assist the parties in settling their disputes. Panel proceedings and arbitration through an adjudication panel and appellate body will be the last resort in resolving disputes between the World Trade Organisation members. Those processes will be conducted under the Dispute Settlement Body's (DSB) supervision.

According to the Dispute Settlement Understanding, every dispute must start with a written request for consultation. A consultation request should be answered within 10 (ten) days, and the consultation must begin within 30 (thirty) days and be completed within 60 (sixty) days. This time limit, which the World Trade Organisation practices, can be a benchmark in formulating international best practices as a technical note of the Waqf Core Principles for cross-border waqf.

---


49Jan, “Settlement of International Trade Disputes.”


52The World Trade Organization.
Negotiation

Negotiation is a dispute settlement method that helps the disputants to directly manage and resolve it by themselves through mutually consented consultations or discussions. It requires mutual goodwill, flexibility, and sensitivity from the disputing parties. The way to negotiate is at the discretion of the disputing parties, but no third party shall engage in the process. The result of the negotiation will be legally binding only if the party wishes. The World Trade Organisation also practices negotiation.53

Negotiation also refers to a discussion to reach a mutually acceptable settlement of some issue between two or more states. Negotiation is the most straightforward mechanism for handling international disputes. It is less formal and flexible compared to legal means.54 It can be applied to all types of disputes and only involves the states or parties to the dispute, which allows them to retain a maximum amount of control over the disputes. Parties are not subject to any obligation they do not desire, and at the same time, they can deal with their disputes as they wish.55

International law does not prescribe details about how a negotiation should be conducted. However, some general principles must be observed by the parties, which are the readiness of the disputing parties to work together in good faith, and the ability of the participant states to compromise.56 Negotiation has been exercised more often than all the other methods and is recognised by the Permanent Court of International Justice.57

Negotiation is the first peaceful international dispute settlement method mentioned in Article 33 of the United Nations Charter.58 Several treaties recognise negotiation as the early step toward the settlement of international disputes, such as the North American Free

53Jan, “Settlement of International Trade Disputes.”
55Kadouf and Oseni.
56Kadouf and Oseni.
57Kadouf and Oseni.
Trade Agreement (NAFTA)\textsuperscript{59} and the Convention on the Law of the Sea (UNCLOS).\textsuperscript{60}

In Malaysia, the Manual on the Administration of Waqf Land published by \textit{Jabatan Wakaf, Zakat dan Haji} (JAWHAR) provides that negotiation is the first step to resolving any dispute.\textsuperscript{61} Indonesian \textit{waqf} laws also regulate that the very first method that should be chosen to resolve \textit{waqf} disputes is through peaceful resolution, such as discussion or negotiation.\textsuperscript{62} If this method cannot resolve the issue, then it can be followed by mediation, arbitration (\textit{hakam}), and litigation.\textsuperscript{63}

**Good Offices**

Good offices are a way to resolve international disputes by involving one or more third parties, whether individual, state, or organisation,\textsuperscript{64} to facilitate a negotiation rather than actively seeking and proposing solutions. Good officers do not participate in the negotiations between the disputants.\textsuperscript{65} The process of good offices will end when the


\textsuperscript{61}Zati Ilham Binti Abdul Manaf, “The Use of ADR in Cases of Illegal Occupation of Waqf Lands,” n.d.

\textsuperscript{62}Article 62 of the Law of the Republic of Indonesia No.41 of 2004 concerning Waqf; Article 3(5) and 3(6) of Government Regulation of the Republic of Indonesia No.10 of 1961 concerning Land Registration.

\textsuperscript{63}Article 62 of the Law of the Republic of Indonesia No.41 of 2004 concerning Waqf; Article 3(5) and 3(6) of Government Regulation of the Republic of Indonesia No.10 of 1961 concerning Land Registration.

\textsuperscript{64}G T Baala and Tamunobelema Victory PhD Jaja, “Good Offices and Mediation as Mechanism for International Dispute Settlement,” \textit{Unpublished LL. B. Thesis, Department of Business Law Faculty of Law, Rivers State University, Port Harcourt}, 2021.

\textsuperscript{65}Jan, “The Diplomatic Means of Settling International Disputes.”
negotiation starts.\textsuperscript{66} The World Trade Organisation is an international organisation that utilises good offices to urge its disputing members to negotiate as stated in the Dispute Settlement Understanding of the World Trade Organisation.\textsuperscript{67} An example of an international organisation’s role as a good officer can be seen in the World Trade Organisation. In this process, the Director-General or the Chairman of the Dispute Settlement Body would offer their good offices to the disputing parties.\textsuperscript{68}

Learning from the good offices practice from the above explanation, it can be suggested that in cross-border \textit{waqf}, a high-rank official from an Islamic international organisation or government from the country of origin of a party may offer their good offices to encourage disputing parties to solve the dispute through negotiation, for example, the Minister of Religion or Head of Islamic Development Bank could offer their good offices to conflicting parties in a cross-border \textit{waqf} dispute.

\textbf{Mediation}

Mediation is a non-binding dispute resolution involving a neutral third party who tries to help the disputing parties to reach a mutually agreeable solution. Meditation is a voluntary process where the party's consent is essential for the success of the process. The mediation process consists of four elements, which are: (i) the presence of the parties; (ii) the willingness of the parties to act in good faith; (iii) an impartial or neutral third-party facilitator; and (iv) an appropriate site and confidentiality.\textsuperscript{69}

Mediation is only effective if the solution is fair and equivalent between the parties. It is also challenging to mediate a case where the dispute has become an issue in the domestic politics of one or both parties.\textsuperscript{70} Cross-border \textit{waqf} is a part of Islamic social finance, which

\textsuperscript{66}Jan.

\textsuperscript{67}The World Trade Organization, World Trade Organization (WTO) Dispute Settlement Understanding (DSU).

\textsuperscript{68}Jan, “Settlement of International Trade Disputes.”

\textsuperscript{69}Kadouf and Oseni, “The Concept of Pacific Settlement Under International Law: An Overview.”

\textsuperscript{70}Kadouf and Oseni.
is urge positive relations between related parties before and after the conflict. Thus, mediation can be an alternative to resolving disputes.

Mediation is the second peaceful international dispute settlement method mentioned in Article 33 of the United Nations Charter, which will be conducted if the conflicts cannot be resolved through negotiation. Parties must consent to conduct mediation as the chosen conflict settlement mechanism. Mediation involves a neutral third party, the mediator, who can be individuals, states, institutions, and organisations acceptable to both parties. The function of a mediator includes facilitating communication between parties, assisting in focusing on the dispute's core issues and generating non-legal options that meet the interests of the disputing parties.

Mediation is also considered a very positive mechanism for resolving disputes while maintaining international relations. It offers a better outcome without necessarily having direct meetings between the disputants. Several treaties that recognise mediation are the World Trade Organisation’s Dispute Settlement Understanding, the Pact of the League of Arab States, and the Charter of the Organisation of African Unity (OAU).

Mediation can be conducted by high-ranked or prominent individuals with sufficient knowledge, expertise, and commitment. One example is the Beagle Channel Dispute, where Chile and Argentina were disputing the ownership of certain islands. High-ranked waqf officials or prominent waqf experts can mediate the

---

73 Alan Redfern, Law and Practice of International Commercial Arbitration (Sweet & Maxwell, 2004).
74 Jan, “The Diplomatic Means of Settling International Disputes.”
75 Jan.
76 The World Trade Organization, World Trade Organization (WTO) Dispute Settlement Understanding (DSU).
79 Jan, “The Diplomatic Means of Settling International Disputes.”
dispute in cross-border waqf.

Mediation can also be conducted by a neutral third state, for example, on the role of the Soviet Union in the conflict of Kashmir between India and Pakistan. International and regional organisations can also act as mediators if they have the necessary resources.

Indonesian waqf laws also regulate that the first method to resolve waqf disputes is peaceful resolution, such as mediation. In Indonesia, judges must instruct parties to conduct mediation on the first day of the trial. If parties agree, they are obliged to attend the mediation, which a certified mediator or judge will lead within thirty days. According to the United Nations, this practice is also known as annexed mediation.

In a case study conducted in East Java Province in Indonesia between 1986 - 2010, mediation facilitated by court-annexed mediation and free-standing mediation is considered effective. Charismatic and social network mediators play a significant role in resolving the dispute. Another proof of the effectiveness of a court-annexed mediation can be seen in the lawsuit between Wakif’s Heirs v. Officials for Waqf Pledge Deeds Maker Officials and Mosque Administrator in Gresik Regency, Indonesia. The lawsuit's basis was the absence of a waqf deed and unlawful ownership of the mawquf land certificate by

---

81Articles 3(3), 6, 13, and 24(2) of Regulation of the Supreme Court of the Republic of Indonesia No.1 of 2016 concerning Mediation Procedures in Courts.
83Moh Mahrus, “Resolusi Sengketa Wakaf Dan Perlindungan Aset (Waqf Dispute Resolution and Asset Protection)” (Walisongo University Indonesia, 2017).
84Mahrus.
the mosque administrator. A judge and a senior religious figure led the mediation. The outcome of the mediation was the waqf will remain, and a new nazir will be appointed. ⁸⁶

Mediation or sulh has been practiced in the Malaysian Shariah Court since the 1970s. Mediation has been implemented successfully in the Shariah Court of Selangor, Federal Territories, Melaka, Terengganu, and Pulau Pinang.⁸⁷ Procedures and principles of sulh in Malaysia could be adopted which include: (i) Parties will present their case according to their turn; (ii) When one party talks, the other should listen; (iii) Parties will talk calmly without raising their voices; (iv) Parties should act in good manner and avoid attacking each other; (v) Parties are not allowed to communicate directly in the absence of the mediator; and (vi) Parties must testify to follow stipulated rules before the Majlis Sulh or Mediation Council starts to ensure the smooth running of the process.⁸⁸

Under the Shariah Judiciary Department of Malaysia (JKSM) Practice Direction No.3/2002, all cases need to be referred to sulh (negotiation, mediation, conciliation, and compromise) before proceeding to the court. In Malaysia, the application of mediation is a purely voluntary process, which can be either court mediation or mediation by a non-judge mediator.⁹⁰ In a mediation that handles general cases in Malaysia, the mediator can either be the head of the village, imam (the leader of the prayer at the mosque), ulama (religious scholars), or qadi (judges in the shariah court).⁹¹

In waqf free-standing mediation, the mediators are the State Islamic Religious Council (SIRC), assisted by waqf managers.⁹¹

---

⁸⁸ Hak, Ahmad, and Oseni, Alternative Dispute Resolution (ADR) in Islam.
⁹¹ Dewi Hendrawati et al., “Religious Practices of Land Endowment: Examining Reform and Dispute Resolution Alternatives of Land Waqf in
However, in Malaysian court-annexed mediation, a judge or judicial officer can act as the neutral third party, known as the mediator. There are two law sources of court-annexed mediation in Malaysia, namely the Practice Direction 2010 and the Rules for Court Assisted Mediation, which serve as the main reference apart from the existing Mediation Act 2012.92

Inquiry

Inquiry is a process of searching for understanding the true facts or fact-finding of a case by asking questions and investigating possible answers.93 Inquiry is provided under the Hague Convention for the Pacific Settlement of International Dispute of 1899, revised in 1907.94 Parties must decide the place and establish a commission of inquiry only to find facts, not resolve the problems. In finding the facts, the commission may hear the party’s contention, examine witnesses and experts, carry out the investigation, and review any relevant documentary evidence.95 The commission must create a report in three months but will not legally bind the parties.

The UN is also practicing inquiry and has been acknowledged by several treaties such as the United Nations Convention on the Law of the Sea, Geneva Conventions,96 and Convention on Non-
Navigational Uses of International Watercourses. Several features of inquiry are establishing a neutral panel, focusing on searching the facts, not the law, and the result is only binding if the parties agree.

The panel of inquirers can comprise several senior government officials or experts with related knowledge that may help to find the facts. Their task is formulating good questions, identifying issues and possible answers, searching out evidence through interviews, evaluating arguments, and arriving at well-reasoned conclusions.

The International Centre for Settlement of Investment Disputes (ICSID), an autonomous international institution, also encourages settling any cross-border investment case through ADR. Dispute settlement methods practiced by the International Centre for Settlement of Investment Disputes include mediation, conciliation, fact-finding, and arbitration. Currently, the International Centre for Settlement of Investment Disputes has 165 member states, but in the dispute resolution process, there is no requirement for either party to be linked to an ICSID convention member state.

---


98 Jan, “The Diplomatic Means of Settling International Disputes.”


Conciliation

Conciliation is a process of settling disputes, including *waqf*, by referring them to a person or a commission of persons known as the conciliator.\(^{103}\) Their task is to establish the facts through inquiries and mediation techniques and make a report containing a proposal for a settlement. The commission consists of five persons appointed by each party, and the remaining three are to be appointed by agreement from amongst the citizens of third states. The commission may also summon and hear witnesses and experts and visit with the parties' concerns. The proceedings are to be held private and concluded within six months.\(^{104}\) The result of conciliation will not be legally binding to the parties, and the parties may accept or reject the proposal.\(^{105}\) If accepted, the commission will draw up an agreement to record the fact of conciliation and set out the settlement terms.\(^{106}\)

Through conciliation, the parties will better understand each other's case by undertaking an objective investigation and evaluating all aspects of the dispute. Furthermore, it creates an opportunity for the parties to make concessions and maintain trust through the involvement of a third party in the negotiation. Above all, the key to creating a successful conciliation is the parties' goodwill and readiness to compromise.\(^{107}\)

Conciliation is also known as an intervention to resolve an international dispute by a body without political authority that has the trust of the parties involved and is responsible for examining all aspects of the dispute and proposing a non-binding solution. The conciliation commission consists of a single to many conciliators who examine facts and make recommendations. Conciliation is more formal and less flexible than mediation. Reports and recommendations resulting from Conciliation are not binding. Conciliation is acknowledged by the UN

---


\(^{105}\) Merrills and De Brabandere, *Merrills’ International Dispute Settlement*.


Charter and many other international forums, such as the 1962 Protocol, which established the Conciliation and Good Offices Commission for the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the International Convention on the Elimination of All Forms of Racial Discrimination, United Nations Convention on the Law of the Sea (UNCLOS), The United Nations Commission on International Trade Law (UNCITRAL) and many more. The International Chamber of Commerce also uses conciliation to resolve economic and financial disputes, and the World Trade Organisation utilises conciliation to resolve disputes between its members.

Another well-known organisation that recognises conciliation as a dispute settlement method is the International Centre for Settlement of Investment Disputes, which is part of the World Bank. As of July 2023, 165 states had ratified the International Centre for Settlement of Investment Disputes.

In Indonesia, conciliation has been practiced in resolving waqf disputes outside the religious court. The legal basis of conciliation practice in Indonesia is the law of the Republic of Indonesia No.30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Conciliation is also one of the main alternative dispute resolutions in Malaysia.

---

108 Jan, “The Diplomatic Means of Settling International Disputes.”
109 Jan, “Settlement of International Trade Disputes.”
113 Anita Binti Hashim, “The Use of Alternative Dispute Resolutions (ADR) In Employment Conflict–Malaysia Case,” n.d.
Arbitration

Arbitration is a dispute resolution method involving one or more neutral parties, known as arbitrators, usually agreed by the disputing parties. An arbitral award is considered binding on the parties in Islamic law, except in cases where the award contains an element of flagrant injustice.

Some sources suggest that arbitration has been used to resolve inter-state disputes since ancient Greece. Modern arbitration began in 1794 with the General Agreement of Friendship, Commerce, and Navigation between the United States and the United Kingdom.

Several conventions, such as the International Centre for Settlement of Investment Disputes and the International Centre for Settlement of Investment Disputes, acknowledge arbitration. The Middle Eastern countries also have the Arab Convention on Commercial Arbitration, which established the Arab Centre for Commercial Arbitration. The arbitral award is binding but not necessarily because if the tribunal does not conduct properly, the award can be interpreted, revised, rectified, appealed, or even nullified.

Arbitration is also recognised as a dispute settlement method in Islamic law. In order to be successful, essential elements of arbitration (tahkim) need to be fulfilled, which are the muhakkimun (disputing parties), the muhakkamun (arbitrators), sighah (the pronouncement of offer and acceptance), mawdu al-tahkim (the subject matter), and hukm (award). The subject matter of the arbitration is limited to private disputes, and the award may be submitted to the judge, who may confirm or annul it.

Arbitration can also mitigate risks that arise from different legal systems, which is the main obstacle in cross-border waqf. The process is less formal and generally cheaper from the litigation. The secrecy

---

114 Hak, Ahmad, and Oseni, *Alternative Dispute Resolution (ADR) in Islam*.
117 Merrills and De Brabandere, *Merrills’ International Dispute Settlement*.
118 Merrills and De Brabandere.
119 Hak, Ahmad, and Oseni, *Alternative Dispute Resolution (ADR) in Islam*.
guarantee of the parties is also another consideration. The process of formulating a decision will be done with the non-precedent principle,\textsuperscript{121} which is important in cross-border \textit{waqf}, considering each case has a different characteristic.

Indonesia has a Shariah Arbitration National Body (\textit{Badan Arbitrase Syariah Nasional}), which handles the \textit{waqf} matters.\textsuperscript{122} In a cross-border \textit{waqf}, it is preferable to choose arbitration in the host country because of the location of the \textit{mawquf}, which is highly influenced by the host country's law. Malaysia has an arbitration law and centre known as the Arbitration (Amendment) Act 2018 and the Asian International Arbitration Centre (AIAC).\textsuperscript{123} Arbitration has been used as an alternative dispute resolution in handling \textit{waqf} disputes in Malaysia.\textsuperscript{124}

\textbf{Litigation}

Litigation is the last and most formal method of settling international disputes peacefully. One of the renowned international institutions is the International Court of Justice (ICJ), which is the principal organ of the United Nations.\textsuperscript{125} Conflicting state members in the International Court of Justice must submit themselves to the court's authority. Such consent may be expressed through a special agreement, clause, or other means.\textsuperscript{126}

\begin{flushright}

122Article 56(2) of Law of the Republic of Indonesia No.7 of 1989 concerning Religious Courts.


\end{flushright}
The International Court of Justice's jurisdiction covers all disputes relating to any aspect of international law, and the parties must be state members. The statement that the International Court of Justice covers all matters might be interpreted to include international waqf disputes. However, the International Court of Justice’s dispute settlement history shows that most cases are related to territorial and sovereignty disputes. The conclusion is that the International Court of Justice still needs a shariah legal expert to handle international waqf disputes. Judicial settlement is also encouraged by the International Tribunal for the Law of the Sea and Dispute Settlement of the United Nations Convention on the Law of the Sea.

In international transactions, it is common for the parties to pair the place of litigation and the choice of law. The absence of an agreed choice of law could trigger a complicated event after a violation happens. The remedy to this situation can be found in Article 42(1) of the International Centre for Settlement of Investment Disputes convention, which states that the law of the host state and international law must be applied in such conditions. The host state is the state where the investment is being conducted, the Waqf Core Principles also choose the law of the host or local country as the priority. This provision can be adopted in cross-border waqf, remembering that the waqf location is on the host or destination country, then choosing the host country's law is preferable.

In Indonesia, the jurisdiction to examine, decide, and resolve waqf matters lies in the Religious Court. Based on Indonesian law,
the court must examine the *waqf* dispute if it cannot be resolved by any alternative dispute resolution method.\(^{133}\) The Indonesian law regulates that only a Muslim with decent Islamic Law knowledge may be a judge of the Religious Court. This provision can be adopted for alternative dispute resolutions, only a third party with good knowledge of Islamic law may assist in resolving the cross-border *waqf* dispute.\(^{134}\)

In Malaysia, based on the basic provisions under the Federal Constitution, State Legislations, and several enactments related to *waqf*,\(^{135}\) only the shariah courts shall have the jurisdiction to adjudicate the matter of *waqf*. The shariah courts here refer to the shariah subordinate court, the shariah high court, and the shariah appeal court for each state.\(^{136}\)

---

133 Article 131 of *Herzien Inlandsch Reglement (Reglemen Indonesia Yang Diperbaharui)*; Article 18(2) of Peraturan Mahkamah Agung Republik Indonesia No.1 Tahun 2016 tentang Prosedur Mediasi di Pengadilan (Supreme Court Regulation of the Republic of Indonesia No. 1 of 2016 concerning Mediation Procedures in Courts).


135 Section 2(1) of Wakaf (State of Selangor) Enactment 2015; Section 2(1) Wakaf (State of Malacca) Enactment 2005; Section 2(1) of Wakaf (Negeri Sembilan) Enactment 2005; Section 2(1) Wakaf (Perak) Enactment 2015; Section 2(1) of Wakaf (Terengganu) Enactment 2016; Section 2(1) Wakaf (State of Sabah) Enactment 2018.

Figure 3 above shows the available dispute resolution methods that have been explained before. There will be two options when a conflict arises: peaceful and unpeaceful resolutions. Unpeaceful conflict resolution will result in violence, which is not preferable in every international activity, including cross-border *waqf*. As a better option, a peaceful dispute resolution method could be done through diplomatic and legal means. Diplomatic methods cover consultation or negotiation, good offices, mediation, inquiry or fact-finding, and conciliation. On the other hand, legal methods cover arbitration and litigation.

---

THE ROLE OF WAQF AUTHORITY IN DISPUTE SETTLEMENT

A *waqf* authority role could affect efficiency, effectiveness, and outcome in the *waqf* dispute resolution process. In Indonesia, the *waqf* authority is known as the *Badan Wakaf Indonesia* or the Indonesian Waqf Board. It is an independent agency\(^{138}\) that regulates and develops the *waqf* sector in Indonesia.\(^{139}\) It has the authority to create guidance for *waqf* asset management and development.\(^{140}\) Aside from its function as the authority, the Indonesian Waqf Board also acts as the grand *nazir*,\(^{141}\) and as the *nazir* but only for cash *waqf*.\(^{142}\)

The Indonesian Waqf Board has ten main tasks based on Indonesian *waqf* laws. The first task is conducting *waqf* management training for *nazir*. The Indonesian Waqf Board has the authority to create guidance for *waqf* asset management and development. They provide advice and considerations to the government in formulating policies in the *waqf* sector, which is also one of its main tasks. The Indonesian Waqf Board can also manage and develop *waqf* assets nationally and internationally, including abandoned *waqf*.\(^{143}\) As the authority, any changes in the purpose, status, and exchange of *waqf* assets must be approved by the Indonesian Waqf Board. They also accept, assess, and issue evidence of *nazir*’s registration and

---

\(^{138}\) Article 47(2) of the Law of the Republic of Indonesia No.41 of 2004 concerning Waqf.

\(^{139}\) Article 1 of Indonesian Waqf Board Regulation No.2 of 2008 concerning Representatives of Indonesian Waqf Boards.

\(^{140}\) Article 8b of Indonesian Waqf Board Regulation No.1 of 2007 concerning the Organization and Working Procedures of the Indonesian Waqf Board.


\(^{142}\) Article 1 of Indonesian Waqf Board Regulation No.1 of 2009 concerning Guidelines for the Management and Development of Movable Waqf Assets in the Form of Money.

\(^{143}\) Articles 8b, 8c, and 8f of Indonesian Waqf Board Regulation No.1 of 2007 concerning the Organization and Working Procedures of the Indonesian Waqf Board.
reappoint nazir, whose license has expired.144 The Indonesian Waqf Board can appoint and dismiss nazir. They also provide suggestions to the Ministry of Religion about financial institutions that can accept cash waqf. Lastly, they register the waqf deed or certificate.145

In running its role, the Indonesian Waqf Board may cooperate with central and provincial or district government, social organisations, experts, international organisations, and other relevant parties.146 The Indonesian Waqf Board may also consult with the Ministry of Religion and the Indonesian Council of Ulama (Majelis Ulama Indonesia).147

Another piece of evidence also shows the Indonesian Waqf Board’s role as a mediator in resolving waqf disputes.148 One example of a waqf dispute in Indonesia is the case of Masjid Tawakkal at Malang City, Indonesia. In this case, the waqif wants to deliver the mawquf to the Muhammadiyah Foundation, but the current nazir protested and directed the mawquf to the Nahdatul Ulama Foundation. This Nahdatul Ulama is the biggest Islamic organisation in Indonesia, while Muhammadiyah is the second. The problem got even more complicated because the waqif never created any waqf deed for Masjid Tawakkal, underlining the importance of creating written documents in waqf transactions to accommodate all details, including the dispute resolution method. In resolving the dispute, the Indonesian

144Article 49(1) The Law of the Republic of Indonesia No.41 of 2004 concerning Waqf; Articles 8d, 8e, and 8g of Indonesian Waqf Board Regulation No.1 of 2007 concerning the Organization and Working Procedures of the Indonesian Waqf Board.

145Articles 8h, 8i, and 8j of Indonesian Waqf Board Regulation No.1 of 2007 concerning the Organization and Working Procedures of the Indonesian Waqf Board.

146Article 49(2) The Law of the Republic of Indonesia No.41 of 2004 concerning Waqf; Article 9 of Indonesian Waqf Board Regulation No.1 of 2007 concerning the Organization and Working Procedures of the Indonesian Waqf Board; Article 2(2) of Indonesian Waqf Board Regulation No.4 of 2010 concerning Guidelines for the Management and Development of Waqf Assets.

147Article 50 The Law of the Republic of Indonesia No.41 of 2004 concerning Waqf.

Waqf Board acted as the mediator outside the court and later recommended the dispute be mediated in the religious court. Another example is the dispute between Yayasan Pendidikan Al-Kindi (Al-Kindi Education Foundation) dan Yayasan Pendidikan 2 Mei (2nd May Education Foundation) in Jambi City, Indonesia. In this case, the Indonesian Waqf Board also acted as the mediator.

![Figure 4. The Indonesian Waqf Board Main Tasks](image)

Based on Figure 4 above and elaboration, we can classify two groups of waqf authority’s roles in waqf dispute: prevention and conflict resolution assistance. Conflict prevention roles include management training for nazhir, creating guidelines for prudent waqf management, registration and reappointing nazhir, and

---


150 Alsa Meisya Arwani, “Pelaksanaan Mediasi Dalam Penyelesaian Sengketa Wakaf Di Badan Wakaf Indonesia Perwakilan Kota Jambi (Implementation of Mediation in Settlement of Waqf Disputes at the Indonesian Waqf Agency Jambi City Representative)” (Universitas Jambi, 2023).

151 Source: Analyzed by the Authors from the Indonesian Waqf Board Regulations, Jakarta Religious Court, and a journal published by Jambi University.
providing suggestions about financial institutions that can support waqf. Lastly, but most important, is registering the waqf deed.

Several vital roles of waqf authority can assist in resolving cross-border waqf disputes, including setting the standard or regulation to prioritise and facilitate alternative dispute resolution over litigation. The waqf authority can approve any changes in the purpose, status, and exchange of waqf assets during the dispute settlement process. They also can appoint and dismiss nazir if deemed necessary based on the information provided in the dispute settlement process.

In Malaysia, waqf assets or properties are assigned under the guardianship of the State Islamic Religious Council (SIRC) or the Majlis as the sole trustee (mutawalli/nazir) in each state\(^\text{152}\) in Malaysia.\(^\text{153}\) The State Islamic Religious Council also acts as the sole registered owner of the waqf,\(^\text{154}\) and has a role in maximising the benefit of waqf land according to the intention of the wakif or waqf creator.\(^\text{155}\)

Considering the State Islamic Religious Council functions as the sole trustee of the waqf, which places the burden on the State Islamic Religious Council to be wholly responsible for the administration and

\(^{152}\)Section 4(1) of Wakaf (State of Selangor) Enactment 2015; Section 32 of Wakaf (State of Malacca) Enactment 2005; Section 5(1)(a) of Wakaf (Negeri Sembilan) Enactment 2005; Section 4(1) of Wakaf (Terengganu) Enactment 2016; Section 3(1) of Wakaf (State of Sabah) Enactment 2018; Section 52 of Administration of Islamic Law (Kedah Darul Aman) Enactment 2008; Section 89 of Administration of the Religion of Islam (Perlis) Enactment 2006; Section 89 of Administration of the Religion of Islam (State of Penang) Enactment 2004; Section 70 of Administration of Islamic Law (Pahang) Enactment 1991; Section 61 of Council of the Religion of Islam and Malay Custom, Kelantan Enactment 1994; Section 61 of Administration of Islamic Law (Federal Territories) Act 1993.


management of the waqf, it is common to find that the State Islamic Religious Council is the disputing party in waqf disputes, either as the plaintiff or defendant. This can be witnessed in several legal disputes, as mentioned in Table 1 below.


<table>
<thead>
<tr>
<th>No</th>
<th>Waqf Legal Disputes</th>
<th>SIRC Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td><em>Kamarolzaman Bin Hajar v. Majlis Agama Islam Selangor</em> [2016] 4 SHLR 44</td>
<td>Defendant</td>
</tr>
<tr>
<td>4</td>
<td><em>Ajar Bt Taib &amp; Ors v. Majlis Agama Islam dan Adat Istiadat Melayu Perlis</em> [2014] 3 SHLR 40</td>
<td>Defendant</td>
</tr>
<tr>
<td>8</td>
<td><em>Tengku Zainal Akmal bin Tengku Mahmud &amp; Anor v. Majlis Agama Islam dan Adat Melayu Terengganu &amp; Anor</em> [2012] 3 SHLR 39</td>
<td>Defendant</td>
</tr>
<tr>
<td>9</td>
<td><em>Majlis Agama Islam dan Adat Melayu Terengganu v. Tis ‘Ata’ Ashar Sdn Bhd</em> [2010] 2 SHLR 181</td>
<td>Plaintiff</td>
</tr>
</tbody>
</table>

Table 1. SIRC Position in Selected *Waqf* Legal Disputes

---

158Source: Analyzed by the Authors from Nor Asiah Mohamad “Risk Management in Waqf Administration in Malaysia”.

---
Another issue is the conflict of jurisdiction between the civil and shariah courts in handling the waqf disputes, especially land waqf. The lack of resources of the State Islamic Religious Council remains an institutional weakness, and the lengthy court and trial procedures are also a consideration. For these reasons, alternative dispute resolution remains a recommendable mechanism for waqf conflict resolution in Malaysia.\textsuperscript{159}

Even though the State Islamic Religious Council generally becomes a disputing party in a waqf dispute in Malaysia, it does not mean the Malaysian legal system has abandoned the alternative dispute resolution. The urge to use the alternative dispute resolution method, such as sulh, comes from the Department of Wakaf, Zakat and Hajj (JAWHAR).\textsuperscript{160} With a good intention and proactive role of SIRC as a disputing party to seek an amicable resolution, alternative dispute resolution can be implemented to resolve a waqf dispute as can be seen in the case of Majlis Agama Islam dan Adat Melayu Terengganu v. Tis ‘Ata’ Ashar Sdn Bhd [2010] 2 SHLR 181, and case of Tengku Zainal Akmal bin Tengku Mahmud & Anor v. Majlis Agama Islam dan Adat Melayu Terengganu & Anor [2012] 3 SHLR 39.

In Singapore, the Majlis Ugama Islam Singapura (MUIS) established a Wakaf Dispute Resolution Committee in August 2016.\textsuperscript{161} Its primary function is to encourage and facilitate the use of alternative dispute resolution in resolving waqf disputes that will prevent the nazir from spending unnecessary legal fees. The practiced method of alternative dispute resolution in Singapore includes counselling, mediation, and inquiry conducted by the Committee.\textsuperscript{162}

Based on the waqf dispute resolution practices in Indonesia, Malaysia, and Singapore, all waqf sectors in these countries use alternative dispute resolution as the first step in solving waqf disputes. The role of the nazir or a different specialised body in the waqf sector

\textsuperscript{159}Mohamad, “Risk Management in Waqf Administration in Malaysia.”
\textsuperscript{160}Mohamad.
\textsuperscript{161}Mohamad.
in the countries can be witnessed through their active and supportive role in prioritising alternative dispute resolution.

DETERMINANTS IN CHOOSING THE MOST EFFICIENT DISPUTE SETTLEMENT MECHANISM IN THE CROSS-BORDER WAQF

Maintaining a conducive relationship between parties in cross-border *waqf* is crucial. Thus, peaceful dispute settlement is essential in resolving cross-border *waqf* disputes. As stated in several international laws, rules, and laws in Indonesia and Malaysia, ADR has been the main priority in resolving *waqf* disputes.

Even though settling disputes using ADR has been proven effective and efficient, considering a more complex environment in cross-border *waqf*, it is vital to set the key factors before determining the best mechanism to resolve disputes. Those key factors will decide the best conflict resolution method for cross-border *waqf* activities.

Based on previous elaborations provided in this paper, this paper has listed several possible key factors as determinants in choosing the most efficient and effective dispute settlement mechanism in cross-border *waqf*: The key factors include: (i) Guarantee the perpetuity of the *waqf*; (ii) Maintain good relationships between parties; (iii) Win-win solution; (iv) Neutralise different legal systems’ risks; (v) Less cost; (vi) Less time; (vii) More reachable; (viii) More Control;\(^{163}\) (ix) Shariah compliance; and (x) Secrecy.

The perpetuity of the *waqf* alongside good relationships between parties and control of the party to reach a win-win solution are vital because *waqf* is eternal.\(^{164}\) In other words, all related parties in the *waqf* must manage and maintain the *mawquf*s or the *waqf* assets’ perpetuity


in a conducive environment. The international legal barrier is also one of the major obstacles in international transactions.\textsuperscript{165} Due to that matter, the chosen method must be able to overcome it.

Efficiency is important, which is described in key factors related to cost, time, and accessibility. The dispute must be resolved in a timely and costly manner. Shariah compliance is a must, considering all methods that will be chosen must not fail the shariah. Lastly, the secrecy of the \textit{waqf} dispute should be protected, because every negative information in the \textit{waqf} sector could affect the \textit{waqf} sector worldwide.

In determining the best dispute settlement method for cross-border \textit{waqf}, we have paired all of the key factors to all available possible dispute settlement methods examined in this paper. The results are shown in Table 2 below:

<table>
<thead>
<tr>
<th>No</th>
<th>Settlement Method</th>
<th>Guarantee waqf’s perpetuity</th>
<th>Maintain good relationship</th>
<th>Win-win solution</th>
<th>Neutralize different legal systems’ risks</th>
<th>Less cost</th>
<th>Less time</th>
<th>More reachable</th>
<th>More Control</th>
<th>Shariah compliance</th>
<th>Secrecy</th>
<th>Total Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Consultation / Negotiation</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>10</td>
</tr>
<tr>
<td>2</td>
<td>Good Offices</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>10</td>
</tr>
<tr>
<td>3</td>
<td>Mediation</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>9</td>
</tr>
<tr>
<td>4</td>
<td>Inquiry</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>9</td>
</tr>
<tr>
<td>5</td>
<td>Conciliation</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>9</td>
</tr>
<tr>
<td>6</td>
<td>Arbitration</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>6</td>
</tr>
<tr>
<td>7</td>
<td>Litigation</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>✓</td>
<td>1</td>
</tr>
</tbody>
</table>

Table 2. Key Factors and Determining Dispute Settlement for Cross-Border \textit{Waqf}\textsuperscript{166}

Based on the above table, consultation, negotiation, and good offices reach the perfect score out of seven possible settlement methods. This means that these methods act as the top tier for cross-border \textit{waqf} dispute resolution. On the second tier, in case the top-tier methods cannot resolve the dispute, we must move to mediation.


\textsuperscript{166}Source: Created by the Author.
inquiry, and conciliation. Arbitration or litigation will be left as the last possible choice.

CONCLUSION AND RECOMMENDATION

Based on laws, rules, regulations, and sources that have been examined in this study, several conclusions regarding handling cross-border *waqf* disputes and the role of *waqf* authority are as follows:

1. Alternative dispute resolutions remain the most efficient and effective method in handling international disputes, including cross-border *waqf*.

2. Negotiation and good offices are the best methods for resolving cross-border *waqf* disputes. The second layer includes mediation, inquiry, and conciliation, though conciliation is rarely practiced. Arbitration is on the third layer, which gives binding results but less win-win solutions and control to both parties. Lastly, litigation, as the most formal method, is the last resort in resolving cross-border *waqf* conflict.

3. The *waqf* authority holds many important roles in conflict prevention and resolution through an active role in setting the *waqf* regulation and facilitating the dispute resolution process, for example, as the mediator.
Based on the above conclusions, this research suggests several recommendations as follows:

1. Negotiation should be the top priority in resolving cross-border \textit{waqf} disputes. The flow of cross-border \textit{waqf} dispute resolution is suggested in Figure 5 below:

![Figure 5 Cross-Border Waqf Dispute Settlement Flowchart](image)

2. The \textit{waqf} authorities in every country should maximise their active role in preventing and resolving \textit{waqf} disputes, including cross-border \textit{waqf}.

3. To refine the Waqf Core Principle with technical notes on cross-border \textit{waqf} dispute resolution by utilising this research and other relevant sources.

\hspace{1cm}^{167}$Source: Created by the Author.$
REFERENCES


Baala, G T, and Tamunobelema Victory PhD Jaja. “Good Offices and Mediation as Mechanism for International Dispute
Dispute in Cross-Border Waqf Settlement.” 

Unpublished LL. B. Thesis, Department of Business Law Faculty of Law, Rivers State University, Port Harcourt, 2021.


Hashim, Anita Binti. “The Use of Alternative Dispute Resolutions (ADR) In Employment Conflict–Malaysia Case,” n.d.


“The Diplomatic Means of Settling International Disputes.” 


https://putusan3.mahkamahagung.go.id/search.html?q=%22wakaf%22.


United Nations General Assembly Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of
https://www.refworld.org/docid/3dda1f104.html.


https://dictionary.cambridge.org/.


