

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

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ABSTRACT

Waqf, or Islamic Trust, embodies the concept of *rahmatan lil'alamain*, 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

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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'alam*, atau belas kasihan 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 urusan niaga antarabangsa yang boleh menyokong wakaf rentas sempadan dan menyoiasat 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

¹Hisam Ahyani and Memet Slamet, "Building the Values of Rahmatan Lil'Alamin for Indonesian Economic Development at 4.0 Era from the Perspective of Philosophy and Islamic Economic Law," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 16, no. 1 (2021): 111–36.

²Mazin Abdulhameed Dawood Hassan, "Rights and Duties of the Buyer Under the Sale of Goods in Shariah and International Trade Law: A Comparative Analysis" (Kuala Lumpur: Ahmad Ibrahim Kulliyah of Laws, International Islamic ..., 2018).

³"Pejabat Mufti Wilayah Persekutuan - Irsyad Al-Fatwa Series 274: Waqaf Ahmad Dawjee Dadabhoy," accessed July 21, 2022, muftiwp.gov.my.

⁴Frank Gardner, "The International Economy and the National Interest" (Oxford University Press, 1980).

⁵Frank Gardner, "The International Economy and the National Interest" (Oxford University Press, 1980).

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.⁶ Indonesia has a higher figure, with over eighteen thousand *waqf* legal disputes from 1963 until 2024.⁷ 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.

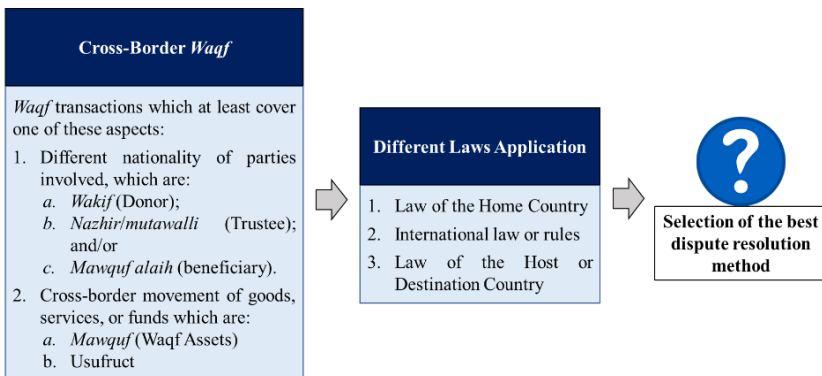


Figure 1. Cross-Border *Waqf* and Dispute Resolution⁸

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

⁶Zati Ilham Abdul Manaf, "Management of Waqf Disputes in Malaysia: Issues and Recommendations," 2020.

⁷Mahkamah Agung Republik Indonesia, "The Supreme Court of the Republic of Indonesia's Data on Waqf Legal Dispute," Court Decision Directory, 2024, <https://putusan3.mahkamahagung.go.id/search.html?q=%22wakaf%22>.

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.⁹ 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*.¹⁰ 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.¹¹ 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

⁹Annelies Van Cauwenberge et al., "International Trade, Foreign Direct Investments, and Firms' Systemic Risk: Evidence from the Netherlands," *Economic Modelling* 81 (2019): 361–86.

¹⁰Bank Indonesia, Badan Wakaf Indonesia, and Islamic Development Bank, "Core Principles for Effective Waqf Operation and Supervision" (2018), <https://www.bi.go.id/en/edukasi/Pages/Prinsip-Prinsip-Pokok-Untuk-Pelaksanaan-Dan-Pengawasan-Wakaf-Yang-Efektif.aspx>.

¹¹Anis Pattanaprichawong, "The Purposes of The Shariah (Maqasid Al-Shariah) and Waqf," in *Proceeding Antasari International Conference*, vol. 2, 2021.

challenge.¹²

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.¹³ 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.¹⁴ 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”.¹⁵ 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

¹²Josef Polák, Michaela Beranová, and Jakub Tabas, “Conception of Risk in the International Trade,” in *INPROFORUM 2011*, 2013.

¹³Ketki Kulkarni et al., “Preventing Shipping Accidents: Past, Present, and Future of Waterway Risk Management with Baltic Sea Focus,” *Safety Science* 129 (2020): 104798.

¹⁴Hamid Rasyid, “Waqf Regulatory Issues Faced by Finterra Technologies Sdn Berhad” (2022).

¹⁵Bank Indonesia, Badan Wakaf Indonesia, and Islamic Development Bank, Core Principles for Effective Waqf Operation and Supervision.

of *waqf* and good governance of *waqf*.¹⁶ 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 approval¹⁷ and legal or political domestic procedure.¹⁸ 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.¹⁹ The *waqf* institutions must have the ability to identify, measure, evaluate, monitor, report, control, and mitigate country risk,²⁰ 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 minimise potential risks, such as legal and administrative risks.²¹ Despite the complex provisions in the Waqf Core Principles No.20, still it does not state the details of dispute

¹⁶Setiawan Budi Utomo, Dian Masyita, and Fitri Hastuti, "Why Cash Waqf Fails to Meet the Expectation: Evidence from Indonesia," *Journal of Islamic Economic Studies*, October, 2020.

¹⁷Hans Blix, "The Requirement of Ratification," *Brit. YB Int'l L.* 30 (1953): 352.

¹⁸Cătălin Daniel Pop, "Treaty Ratification Law – Empirical Study on the Temporal Efficacy of the Parliamentary Procedure," *Studia Universitatis Babeş Bolyai-Iurisprudentia* 68, no. 1 (2023): 13–42.

¹⁹Bank Indonesia, Badan Wakaf Indonesia, and Islamic Development Bank, Core Principles for Effective Waqf Operation and Supervision.

²⁰Bank Indonesia, Badan Wakaf Indonesia, and Islamic Development Bank.

²¹Nor Asiah Mohamad, "Risk Management in Waqf Administration in Malaysia," *Journal of Financial Technologies (Fintech), Inclusion and Sustainability* 1, no. 1 (2022): 1–8.

settlement and the role of *waqf* authorities in conflict resolution.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.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.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*.

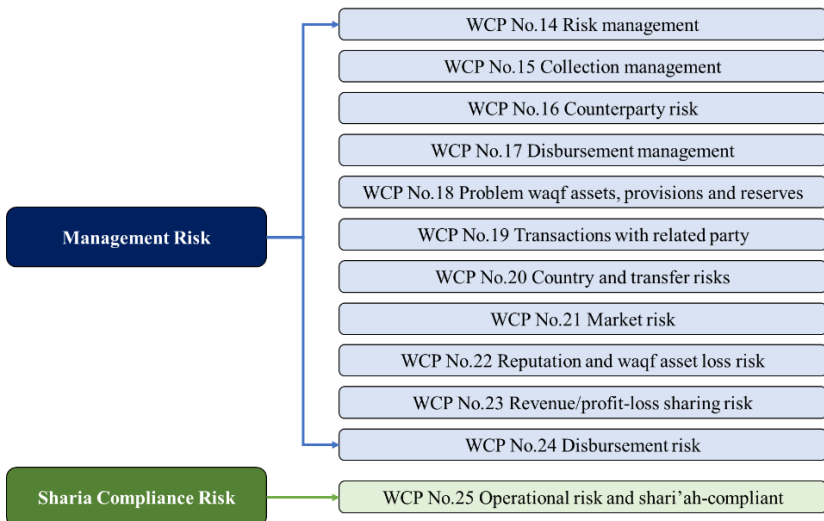


Figure 2. Waqf Risks in the Waqf Core Principles²⁵

²²Bank Indonesia, Badan Wakaf Indonesia, and Islamic Development Bank, Core Principles for Effective Waqf Operation and Supervision.

²³Bank Indonesia, Badan Wakaf Indonesia, and Islamic Development Bank.

²⁴Bank Indonesia, Badan Wakaf Indonesia, and Islamic Development Bank.

²⁵Source: 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

²⁶Tiara Alfarissa et al., “Urgensi Penguatan Pengawasan Eksternal Yayasan Sebagai Bentuk Preventif Atas Penyalahgunaan Dana Yayasan: Studi Kasus Yayasan Aksi Cepat Tanggap (The Urgency of Strengthening External Monitoring as a Preventive of Foundation Funds Misuse: Case Study of Th,” *Madani: Jurnal Ilmiah Multidisiplin* 1, no. 5 (2023).

²⁷Ministry of Religion of the Republic of Indonesia, “Undang-Undang Republik Indonesia Nomor 33 Tahun 2014 Tentang Jaminan Produk Halal (Law of the Republic of Indonesia Number 33 of 2014 Concerning Halal Product Guarantees)” (2014), https://cmsbl.halal.go.id/uploads/2014_UU_Nomor_33_Tahun_2014_Jaminan_Produk_Halal_2209235c2a.pdf.

marine insurance in the United Kingdom;²⁸ (ii) a shariah-compliant bank in managing the *mawquf*, as practiced by Bank Islam Malaysia Berhad and Bank Muamalat Malaysia Berhad as chosen corporates participating in *waqf* activities;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 *waqf* with property projects.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 *waqif*'s or donor's will, which has been determined from the *waqf* creation not to conflict with the shariah.³¹ These matters are subjected to risk mitigation in cross-border *waqf*, as stated in the Waqf Core Principles No.24 about disbursement risk.³² It is well understood that failure to mitigate the above issues will trigger *waqf* dispute that may lead to the dispute resolution mechanism.³³

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

²⁸Mehedi Ibne Rahim, "Takaful Viability with Hindsight of UK Marine Insurance: Paradigm Splitting the Islamic Viewpoints—Will Insurance Really Ever Be Considered Halal?," *Stud* 143 (2008): 144.

²⁹Nor Shahrina Mohd Rafien et al., "The Involvement of Islamic Banking in Waqf Activities," *Journal of Life Science Journal* 11 (2017): 104–10.

³⁰Helza Nova Lita and Zahera Mega Utama, "Legal Aspect for Managing Waqf Assets Through Company Management: Development of Share Waqf," *Hamdard Islamicus* 43, no. Special Issue (2020).

³¹Faizah Darus et al., "Corporate Waqf: A Sustainable Model of Islamic Wealth Creation and Distribution," *International Journal of Economics and Business Research* 22, no. 4 (2021): 357–68.

³²Bank Indonesia, Badan Wakaf Indonesia, and Islamic Development Bank, *Core Principles for Effective Waqf Operation and Supervision*.

³³Moh Mahrus, "Settlement of Waqf Disputes and Its Asset Protection in East Java, Indonesia," 2021.

³⁴Jeffrey J. Schott, "China-US Relations and the Global Economic System," The Peterson Institute for International Economics (PIIE) and the China Finance 40 Forum (CF40), Washington, DC, USA, 2019, <https://www.piie.com/research/piie-charts/united-states-relies-wto-settle-trade-disputes-more-any-other-member>.

³⁵Schott.

(WTO) data, by the end of 2022, 615 disputes had been brought since the entry into force of the World Trade Organisation agreements in 1995.³⁶ 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.³⁷ When a dispute arises, the most beneficial way to solve it is through peaceful means, as Prophet Muhammad exemplifies (peace be upon him).³⁸ 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.³⁹

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

³⁶The 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.

³⁷Mohammad Naqib Ishan Jan, *International Dispute Settlement Mechanisms* (IIUM Press, 2011).

³⁸Hanis Wahed, “Sulh: Its Application in Malaysia,” *IOSR Journal of Humanities and Social Science Ver. II* 20, no. 6 (2015): 71–79.

³⁹Hunud Abia Kadouf and Umar A. Oseni, “The Concept of Pacific Settlement Under International Law: An Overview,” *International Dispute Settlement Mechanisms* 2nd (2012).

groups of peaceful settlements.⁴⁰ First, through diplomatic methods, which cover negotiation, mediation, conciliation, and inquiry, also known as fact-finding.⁴¹ Secondly, is through legal methods, which include arbitration and adjudication.⁴²

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.⁴³

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.⁴⁴ From that number, almost all contracts have negotiation as the first dispute settlement method.⁴⁵

Consultation or Negotiation

Consultation

According to the Cambridge Dictionary, consultation is the process of discussing something with someone to get their advice or opinion.⁴⁶ In Islam, consultation or counselling is the very first step in resolving

⁴⁰Mohammad Naqib Ishan Jan, "The Diplomatic Means of Settling International Disputes," *International Dispute Settlement Mechanisms* 2nd (2012).

⁴¹Kadouf and Oseni, "The Concept of Pacific Settlement Under International Law: An Overview."

⁴²Kadouf and Oseni.

⁴³United Nations, "United Nations General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations" (1970), <https://www.refworld.org/docid/3ddaf104.html>.

⁴⁴Istanto Dwiyo Martoyo, "Letter of Credit in the Central Bank of Indonesia" (Department of Banking Services, Licensing and Treasury Operations, 2018).

⁴⁵Martoyo.

⁴⁶University of Cambridge, "Cambridge Dictionary," 2023, <https://dictionary.cambridge.org/>.

disputes,⁴⁷ 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.⁴⁸

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.⁴⁹ Those processes will be conducted under the Dispute Settlement Body's (DSB) supervision.⁵⁰

According to the Dispute Settlement Understanding, every dispute must start with a written request for consultation.⁵¹ 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.⁵² 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*.

⁴⁷Nora Abdul Hak, Sa'odah Ahmad, and Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, 2nd ed. (Kuala Lumpur, Malaysia: IIUM Press, 2013).

⁴⁸Mohammad Naqib Ishan Jan, "Settlement of International Trade Disputes," *International Dispute Settlement Mechanisms* 2nd (2012).

⁴⁹Jan, "Settlement of International Trade Disputes."

⁵⁰Abdul Haseeb Ansari and Umar A. Oseni, "Referral to Arbitration and Negotiation: Modern Trends in International Dispute Resolution Institutions," *International Dispute Settlement Mechanisms* 2nd (2012).

⁵¹The World Trade Organization, "World Trade Organization (WTO) Dispute Settlement Understanding (DSU)" (1994), https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

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."

⁵⁴Kadouf and Oseni, "The Concept of Pacific Settlement Under International Law: An Overview."

⁵⁵Kadouf and Oseni.

⁵⁶Kadouf and Oseni.

⁵⁷Kadouf and Oseni.

⁵⁸United Nations, "Charter of the United Nations" (1945), <https://www.un.org/en/about-us/un-charter>.

Trade Agreement (NAFTA)⁵⁹ and the Convention on the Law of the Sea (UNCLOS).⁶⁰

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

Good Offices

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

⁵⁹The Government of Canada, The Government of the United Mexican States, and The Government of the United States of America, “The North American Free Trade Agreement (NAFTA)” (1992), <https://www.italaw.com/sites/default/files/laws/italaw6187%2814%29.pdf>.

⁶⁰United Nations, “The Convention on the Law of the Sea (UNCLOS)” (1982), https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

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

⁶²Article 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.

⁶³Article 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.

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

⁶⁵Jan, “The Diplomatic Means of Settling International Disputes.”

negotiation starts.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.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.⁶⁸

Learning from the good offices practice from the above explanation, it can be suggested that in cross-border *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 *waqf* dispute.

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. Mediation 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.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.⁷⁰ Cross-border *waqf* is a part of Islamic social finance, which

⁶⁶Jan.

⁶⁷ The World Trade Organization, World Trade Organization (WTO) Dispute Settlement Understanding (DSU).

⁶⁸Jan, "Settlement of International Trade Disputes."

⁶⁹Kadouf and Oseni, "The Concept of Pacific Settlement Under International Law: An Overview."

⁷⁰Kadouf 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,⁷¹ which will be conducted if the conflicts cannot be resolved through negotiation.⁷² Parties must consent to conduct mediation as the chosen conflict settlement mechanism.⁷³ 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.⁷⁴

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.⁷⁵ Several treaties that recognise mediation are the World Trade Organisation's Dispute Settlement Understanding,⁷⁶ the Pact of the League of Arab States,⁷⁷ and the Charter of the Organisation of African Unity (OAU).⁷⁸

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.⁷⁹ High-ranked *waqf* officials or prominent *waqf* experts can mediate the

⁷¹United Nations, Charter of the United Nations.

⁷²John Merrills and Eric De Brabandere, *Merrills' International Dispute Settlement* (Cambridge university press, 2022).

⁷³Alan Redfern, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 2004).

⁷⁴Jan, "The Diplomatic Means of Settling International Disputes."

⁷⁵Jan.

⁷⁶The World Trade Organization, World Trade Organization (WTO) Dispute Settlement Understanding (DSU).

⁷⁷The League of Arab States, "The Pact of the League of Arab States" (1945), https://avalon.law.yale.edu/20th_century/arableag.asp.

⁷⁸Heads of African States, "The Charter of the Organization of African Unity" (1964), https://au.int/sites/default/files/treaties/7759-file-oau_charter_1963.pdf.

⁷⁹Jan, "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 judge⁸⁰ will lead within thirty days.⁸¹ According to the United Nations, this practice is also known as annexed mediation.⁸²

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.⁸³ Charismatic and social network mediators play a significant role in resolving the dispute.⁸⁴ 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.⁸⁵ The lawsuit's basis was the absence of a *waqf* deed and unlawful ownership of the *mawquf* land certificate by

⁸⁰Fatahillah Abdul Syukur and Dale Margaret Bagshaw, "When Home Is No Longer 'Sweet': Family Violence and Sharia Court-Annexed Mediation in Indonesia," *Conflict Resolution Quarterly* 30, no. 3 (2013): 271–94.

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.

⁸²United Nations Development Programme, "Court-Annexed Mediation and Dialogue," *July Policy Brief*, 2020, <https://www.undp.org/sites/g/files/zskgke326/files/migration/vn/EUJUL-E-Court-Annexed-EN.pdf>.

⁸³Moh Mahrus, "Resolusi Sengketa Wakaf Dan Perlindungan Aset (Waqf Dispute Resolution and Asset Protection)" (Walisongo University Indonesia, 2017).

⁸⁴Mahrus.

⁸⁵Mahkamah Agung Republik Indonesia, *Wakif's Heirs v. Officials for Waqf Pledge Deeds Maker Officials and Mosque Administrator*, Dispute No.474/Pdt.G/2020/PA (2020).

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.⁸⁹ 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).⁹⁰

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

⁸⁶Agus Suprianto, "Analisa Hukum Mediasi Sengketa Wakaf Dalam Putusan Perkara No. 474/Pdt. G/2020/PA. Gs Di Pengadilan Agama Gresik," *JURISY: Jurnal Ilmiah Syariah* 2, no. 2 (2022): 34–57.

⁸⁷Nur Khalidah Dahlan, "Sulh As an Alternative Dispute Resolution Mechanism For Islamic Banking and Financial Disputes in Malaysia," *Malaysian Journal of Consumer and Family Economics* 23, no. S1 (2020): 138.

⁸⁸Hak, Ahmad, and Oseni, *Alternative Dispute Resolution (ADR) in Islam*.

⁸⁹Wahed, "Sulh: Its Application in Malaysia."

⁹⁰James A Wall Jr and Ronda Roberts Callister, "Malaysian Community Mediation," *Journal of Conflict Resolution* 43, no. 3 (1999): 343–65.

⁹¹Dewi 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-

Indonesia and Malaysia," *International Journal of Public Policy and Administration Research* 9, no. 3 (2022): 71–78.

⁹²Muhammad Amrullah Bin Drs Nasrul, Muhamad Helmi Md Said, and Nurin Athirah Binti Mohd Alam Shah, "Court-Annexed Mediation in Malaysia: Prospect and Challenges 1," *Islamic Business and Covid 19 Recovery: Towards Attaining Financial and Social Wellbeing*, n.d., 298.

⁹³Henry Campbell Black, *Black's Law Dictionary* (West Publishing Company St. Paul, Minn., 1910).

⁹⁴"The Hague Convention" (1907), <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907>.

⁹⁵United Nations Codification Division, *Handbook on the Peaceful Settlement of Disputes Between States* (New York: United Nations, 1992), <https://legal.un.org/cod/books/HandbookOnPSD.pdf>.

⁹⁶Geneva Convention, "Additional Protocol I of the Geneva Convention 1949" (1949),

https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf.

Navigational Uses of International Watercourses.⁹⁷ 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.⁹⁸

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,⁹⁹ conciliation,¹⁰⁰ fact-finding,¹⁰¹ and arbitration.¹⁰² 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.

⁹⁷United Nations, “Convention on Non-Navigational Uses of International Watercourses” (1997), https://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf.

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

⁹⁹The International Centre for Settlement of Investment Disputes (ICSID), “ICSID Mediation Rules” (2022), <https://icsid.worldbank.org/procedures/mediation/overview/2022>.

¹⁰⁰The International Centre for Settlement of Investment Disputes (ICSID), “ICSID Conciliation Rules” (2022), <https://icsid.worldbank.org/procedures/conciliation/convention/overview/2022>.

¹⁰¹The International Centre for Settlement of Investment Disputes (ICSID), “ICSID Fact Finding Rules” (2022), <https://icsid.worldbank.org/procedures/fact-finding/overview/2022>.

¹⁰²The International Centre for Settlement of Investment Disputes (ICSID), “ICSID Arbitration Rules” (2022), <https://icsid.worldbank.org/procedures/arbitration/convention/overview/2022>.

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

¹⁰³Faisal Faisal, "Waqf Land Disputes and Alternative Settlements," *Randwick International of Social Science Journal* 2, no. 3 (2021): 259–68.

¹⁰⁴Malcolm N Shaw, *International Law* (Cambridge university press, 2017).

¹⁰⁵Merrills and De Brabandere, *Merrills' International Dispute Settlement*.

¹⁰⁶The Institute of International Law, "Regulations on the Procedure of International Conciliation" (1961), https://www.idi-iiil.org/app/uploads/2017/06/1961_salz_02_en.pdf.

¹⁰⁷Kadouf and Oseni, "The Concept of Pacific Settlement Under International Law: An Overview."

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,¹⁰⁸ and the World Trade Organisation utilises conciliation to resolve disputes between its members.¹⁰⁹

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.¹¹⁰

In Indonesia, conciliation has been practiced in resolving *waqf* disputes outside the religious court.¹¹¹ 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.¹¹² Conciliation is also one of the main alternative dispute resolutions in Malaysia.¹¹³

¹⁰⁸Jan, “The Diplomatic Means of Settling International Disputes.”

¹⁰⁹Jan, “Settlement of International Trade Disputes.”

¹¹⁰World Bank, “ICSID Database of Member States,” 2023, <https://icsid.worldbank.org/about/member-states/database-of-member-states>.

¹¹¹Adi Nur Rohman, “Penyelesaian Sengketa Wakaf Di Pengadilan Agama Jakarta Selatan (Settlement of Waqf Disputes at the South Jakarta Religious Court),” *Ijtihad* 12, no. 1 (2018): 20–43.

¹¹²Government of Indonesia, “Undang-Undang Republik Indonesia No.30 Tahun 1999 Tentang Arbitrase Dan Alternatif Penyelesaian Sengketa (Law of the Republic of Indonesia No.30 of 1999 Concerning Arbitration and Alternative Dispute Resolution)” (1999).

¹¹³Anita 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,¹¹⁴ usually agreed by the disputing parties.¹¹⁵ An arbitral award is considered binding on the parties in Islamic law, except in cases where the award contains an element of flagrant injustice.¹¹⁶

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.¹¹⁷ 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.¹¹⁸

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.¹¹⁹

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.¹²⁰ The secrecy

¹¹⁴Hak, Ahmad, and Oseni, *Alternative Dispute Resolution (ADR) in Islam*.

¹¹⁵Black, *Black's Law Dictionary*.

¹¹⁶Abdul Hamid El Ahdab, *Arbitration with the Arab Countries*, 2nd ed. The Hague: Kluwer Law International, 1999, 19.

¹¹⁷Merrills and De Brabandere, *Merrills' International Dispute Settlement*.

¹¹⁸Merrills and De Brabandere.

¹¹⁹Hak, Ahmad, and Oseni, *Alternative Dispute Resolution (ADR) in Islam*.

¹²⁰Farshad Ghodoosi and Monica M Sharif, "Arbitration Effect," *American Business Law Journal* 60, no. 2 (2023): 235–87.

guarantee of the parties is also another consideration. The process of formulating a decision will be done with the non-precedent principle,¹²¹ which is important in cross-border *waqf*, considering each case has a different characteristic.

Indonesia has a Shariah Arbitration National Body (*Badan Arbitrase Syariah Nasional*), which handles the *waqf* matters.¹²² In a cross-border *waqf*, it is preferable to choose arbitration in the host country because of the location of the *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).¹²³ Arbitration has been used as an alternative dispute resolution in handling *waqf* disputes in Malaysia.¹²⁴

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.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.¹²⁶

¹²¹Ingrid A Müller, "The Role of Precedent in International Arbitration," in *Experientiam et Progressionem in Comparative and International Law. Contributions to the 2nd Conference on Comparative and International Law-June 24, 2022, Bucharest-International Conference* (Societatea de Stiinte Juridice si Administrative, n.d.), 38–46.

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

¹²³Government of Malaysia, "Arbitration Act 2005" (2005).

¹²⁴Zati Ilham Abdul Manaf, Sharifah Zubaidah Syed Abdul Kader, and Nor Asiah Mohamad, "ADR as an Alternative Access to Justice in Resolving Waqf Land Disputes," *CLJ Bulletin-Legal Network Series (LNS), LNS (A) Ii 1* (2018).

¹²⁵Abdul Ghafur Hamid and Khing Maung Sein, "The World Court: A Bulwark of International Justice," *International Dispute Settlement Mechanisms 2nd* (2012).

¹²⁶Kadouf and Oseni, "The Concept of Pacific Settlement Under International Law: An Overview."

The International Court of Justice's jurisdiction covers all disputes relating to any aspect of international law, and the parties must be state members.¹²⁷ 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.¹²⁸ 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.¹²⁹

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,¹³⁰ the *Waqf* Core Principles also choose the law of the host or local country as the priority.¹³¹ 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.¹³² Based on Indonesian law,

¹²⁷United Nations, "Statute of The International Court of Justice" (1945), https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf.

¹²⁸International Court of Justice, "International Court of Justice List of All Cases," 2023, <https://www.icj-cij.org/list-of-all-cases>.

¹²⁹Ansari and Oseni, "Referral to Arbitration and Negotiation: Modern Trends in International Dispute Resolution Institutions."

¹³⁰The International Centre for Settlement of Investment Disputes (ICSID), "ICSID Convention" (1966), https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf.

¹³¹Bank Indonesia, Badan Wakaf Indonesia, and Islamic Development Bank, Core Principles for Effective Waqf Operation and Supervision.

¹³²Article 49(1) of Law of the Republic of Indonesia No.7 of 1989 concerning Religious Courts; Article 49 of Law of the Republic of Indonesia No.3 of 2006 concerning Amendments to Law No.7 of 1989 concerning Religious

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

Courts; Article 226 Article 227 of Instruction of the President of the Republic of Indonesia No.1 of 1991 concerning Compilation of Islamic Law.

¹³³Article 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).

¹³⁴Article 13(1) of Law of the Republic of Indonesia No.7 of 1989 concerning Religious Courts.

¹³⁵Section 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.

¹³⁶Siti Mashitoh Mahamood, "Law of Waqf in Malaysia: Recent Developments," in *Essential Readings in Contemporary Waqf Issues*, ed. Monzer Kahf and Siti Mashitoh Mahamood (Kuala Lumpur, Malaysia: CERT Publications Sdn. Bhd., 2011), 77–106.

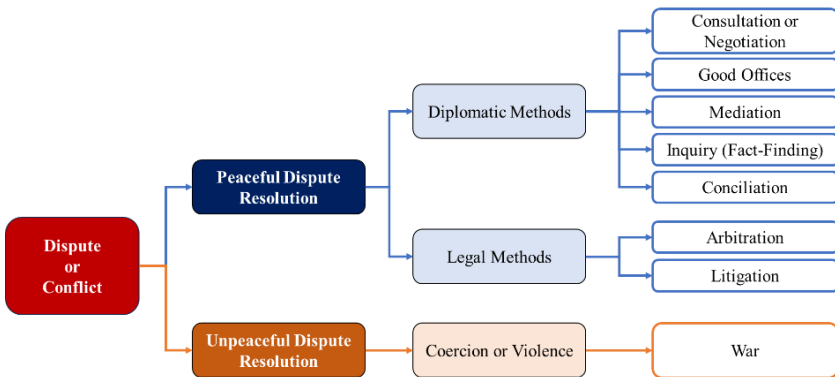


Figure 3. International Dispute Settlement Options¹³⁷

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.

¹³⁷Source: Analyzed by the Authors from: 12 International Organizations (United Nations, International Court of Justice, The World Bank, United Nations Commission on International Trade Law, United Nations Educational, Scientific and Cultural Organization, World Trade Organization, International Centre for Settlement of Investment Dispute, Permanent Court of International Justice, United Nations Development Programme, Charter of the Organization of African Unity, Charter of the Arab League, Arab Union for Commercial Arbitration and Dispute Settlement); 5 Conventions (The Geneva Convention 1949, Convention on Non-Navigational Uses of International Watercourses, North American Free Trade Agreement, United Nations Convention on the Law of the Sea, The Hague Convention for the Pacific Settlement of International Dispute); and 6 Countries (Indonesia, Malaysia, Chile, Argentina, India, Pakistan).

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 agency¹³⁸ 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

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

¹³⁹Article 1 of Indonesian Waqf Board Regulation No.2 of 2008 concerning Representatives of Indonesian Waqf Boards.

¹⁴⁰Article 8b of Indonesian Waqf Board Regulation No.1 of 2007 concerning the Organization and Working Procedures of the Indonesian Waqf Board.

¹⁴¹Zaenuri, "The Ideal Institutional Form of the Indonesian Waqf Board and the Role of the Ministry of Religion in Guiding, Supervising the Nazir and Securing Waqf Assets," Indonesian Waqf Board, accessed May 16, 2023, <https://www.bwi.go.id/wp-content/uploads/2020/09/Dr.-Zaenuri-MH.pdf>.

¹⁴²Article 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.

¹⁴³Articles 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.

¹⁴⁸Jakarta Religious Court, "Keputusan Pengadilan Agama Jakarta (Jakarta Religious Court Decision) No.38/Pdt.G/2007/PTAJK Dated 24 May 2007" (Jakarta, Indonesia, 2007).

Waqf Board acted as the mediator outside the court and later recommended the dispute be mediated in the religious court.¹⁴⁹ 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.¹⁵⁰

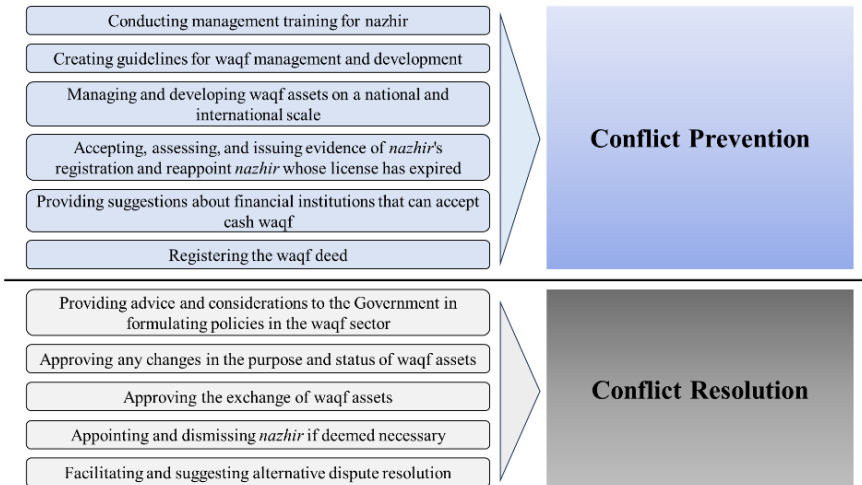


Figure 4. The Indonesian Waqf Board Main Tasks¹⁵¹

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 *nazir*, creating guidelines for prudent *waqf* management, registration and reappointing *nazir*, and

¹⁴⁹Mohammad Syamsul Arifin, “Peranan Badan Wakaf Indonesia Dalam Penyelesaian Sengketa Tanah Wakaf,” *Jurnal Hukum Dan Kenotariatan* 4, no. 1 (2020): 27–40.

¹⁵⁰Alsa 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).

¹⁵¹Source: 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 state¹⁵² in Malaysia.¹⁵³ the State Islamic Religious Council also acts as the sole registered owner of the *waqf*,¹⁵⁴ and has a role in maximising the benefit of *waqf* land according to the intention of the *wakif* or *waqf* creator.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

¹⁵²Section 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.

¹⁵³Nor Asiah Mohamad and Amer Hazim Haron, "Perpetuity of Waqf: Issues and Discussion," in *Global Waqf Conference: Waqf Past, Present and Future*, 2021, 61–75.

¹⁵⁴Hisham Yaacob and Hisham Yaacob, "Waqf History and Legislation in Malaysia: A Contemporary Perspective," *Journal of Islamic and Human Advanced Research* 3, no. 6 (2013): 387–402.

¹⁵⁵Sharifah Zubaidah Syed Abdul Kader and Nor Asiah Mohamed, "The Legal Position of Waqf Lands in Malaysia," in *Waqf Laws and Management*, 2017, 85–110.

management of the *waqf*,¹⁵⁶ it is common to find that the State Islamic Religious Council is the disputing party in *waqf* disputes, either as the plaintiff or defendant.¹⁵⁷ This can be witnessed in several legal disputes, as mentioned in Table 1 below.

¹⁵⁶ Zati Ilham Abdul Manaf, “Resolution of Waqf Land Disputes: The Relevance of a Waqf Tribunal in Malaysia,” in *Kertas Prosiding, International Conference on Dispute Resolution, Modern Trends in Effective Disputes Resolution, Universiti Islam Antarabangsa Malaysia (UIAM) Pada*, 2017, 9–10.

¹⁵⁷ Examples of legal cases: (i) *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2008] 6 MLJ 488; (ii) *G Rethinasamy v Majlis Ugama Islam Pulau Pinang dan Satu yang Lain*. [1993] 2 MLJ 166; (iii) *Kamarolzaman bin Hajar v Majlis Agama Islam Selangor*. [2016] 4 SHLR 44; (iv) *Majlis Agama Islam Selangor v Bong Boon Chuen & 146 Lagi*. [2008] 6 MLJ 488; (v) *Majlis Agama Islam Selangor v Hicom Gamuda Development Sdn Bhd & Anor*. (2011) 1 SHLR 10; (vi) *Kamarolzaman Bin Hajar v Majlis Agama Islam Selangor*. [2016] 1 CLJ 1018; (vii) *Mohd Ridza bin Abdul Latiff (berniaga sebagai Rimbunan Niaga) v Majlis Agama Islam Negeri Johor & Anor*. [2016] MLJU 424, [2016] 4 SHLR 44; (viii) *Majlis Agama Islam Negeri Pulau Pinang v Abdul Latiff Bin Hassan & Anor*. [2015] MLJU 1115; (ix) *Ajar Bt Taib & Ors v Majlis Agama Islam dan Adat Istiadat Melayu Perlis*. [2014] 3 SHLR 40; (x) *Majlis Agama Islam Pulau Pinang v Katijah Yoan & Ors*. [2010] 4 CLJ 592; (xi) *Tengku Zainal Akmal Tengku Besar and Tengku Hidayah Tengku Habib v. Majlis Agama Islam Dan Adat Melayu Terengganu*. Summons No.11200-099-0400-2008; (xii) *Majlis Agama Islam dan Adat Melayu Terengganu lwn Tengku Zainul Akmal bin Tengku Besar Mahmud dan Seorang Lagi*. [2012] LXV (II) JH 191; (xiii) *Tengku Zainal Akmal bin Tengku Mahmud & Anor v Majlis Agama Islam dan Adat Melayu Terengganu & Anor* [2012] 3 SHLR 39; (xiv) *Majlis Agama Islam dan Adat Melayu Terengganu v Tis 'Ata' Ashar Sdn Bhd*. [2010] 2 SHLR 181; (xv) *Majlis Agama Islam Selangor v Hicom Gamuda Development Sdn Bhd dan Seorang Lagi*. [2011] 1 SHLR 10; (xvi) *Ismail Bin Wahab v Majlis Agama Islam Melaka & 3 Ors*. [2008] 25(1) JH 123; (xvii) *Bakhtiar Bin Adnan v Mohd Fawzi bin Nahrawi dan 6 Yang Lain*. [2006] XXI (1) JH 19.

No	Waqf Legal Disputes	SIRC Position
1	<i>Kamarolzaman Bin Hajar v. Majlis Agama Islam Selangor</i> [2016] 4 SHLR 44	Defendant
2	<i>Mohd Ridza bin Abdul Latiff (berniaga sebagai Rimbunan Niaga) v. Majlis Agama Islam Negeri Johor & Anor</i> [2016] MLJU 424	Defendant
3	<i>Majlis Agama Islam Negeri Pulau Pinang v. Abdul Latiff Bin Hassan & Anor</i> [2015] MLJU 1115	Plaintiff
4	<i>Ajar Bt Taib & Ors v. Majlis Agama Islam dan Adat Istiadat Melayu Perlis</i> [2014] 3 SHLR 40	Defendant
5	<i>Majlis Agama Islam Pulau Pinang v. Katijah Yoan & Ors</i> [2010] 4 CLJ 592	Plaintiff
6	<i>Tengku Zainal Akmal Tengku Besar and Tengku Hidayah Tengku Habib v. Majlis Agama Islam Dan Adat Melayu Terengganu</i> [Summons No. 11200-099-0400-2008]	Defendant
7	<i>Majlis Agama Islam dan Adat Melayu Terengganu v. Tengku Zainul Akmal bin Tengku Besar Mahmud dan Seorang Lagi</i> [2012] LXV (II) JH 191	Plaintiff
8	<i>Tengku Zainal Akmal bin Tengku Mahmud & Anor v. Majlis Agama Islam dan Adat Melayu Terengganu & Anor</i> [2012] 3 SHLR 39	Defendant
9	<i>Majlis Agama Islam dan Adat Melayu Terengganu v. Tis 'Ata' Ashar Sdn Bhd</i> [2010] 2 SHLR 181	Plaintiff
10	<i>Majlis Agama Islam Selangor v. Hicom Gamuda Development Sdn Bhd dan Seorang Lagi</i> [2011] 1 SHLR 10	Plaintiff
11	<i>Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors</i> [2009] 6 MLJ 307 (FC) & [2008] 6 MLJ 288 (COA)	Plaintiff

Table 1. SIRC Position in Selected *Waqf* Legal Disputes¹⁵⁸

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.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).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 2016.¹⁶¹ 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.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

¹⁵⁹Mohamad, "Risk Management in Waqf Administration in Malaysia."

¹⁶⁰Mohamad.

¹⁶¹Mohamad.

¹⁶²Ministry of Culture Community and Youth of Singapore (MCCY), "Strengthening the Administration of Muslim Law Act," 2017, <https://www.mccy.gov.sg/about-us/news-and-resources/parliamentary-matters/2017/aug/strengthening-the-aml>.

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

¹⁶³Wesam S Alaloul, Mohammed W Hasaniyah, and Bassam A Tayeh, "A Comprehensive Review of Disputes Prevention and Resolution in Construction Projects," in *MATEC Web of Conferences*, vol. 270 (EDP Sciences, 2019), 5012.

¹⁶⁴Teguh Tresna Puja Asmara and Lastuti Abubakar, "Juridical Study on the Optimization of Cash Waqf Management by Islamic Banking in Indonesia," *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 6, no. 3 (2019): 427–45.

in a conducive environment. The international legal barrier is also one of the major obstacles in international transactions.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 *waqf* dispute should be protected, because every negative information in the *waqf* sector could affect the *waqf* sector worldwide.

In determining the best dispute settlement method for cross-border *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:

No	Settlement Method	Guarantee waqf's perpetuity	Maintain good relationship	Win-win solution	Neutralize different legal systems' risks	Less cost	Less time	More reachable	More Control	Sharia compliance	Secrecy	Total Score
1	Consultation /Negotiation	V	V	V	V	V	V	V	V	V	V	10
2	Good Offices	V	V	V	V	V	V	V	V	V	V	10
3	Mediation	V	V	V	V	V	V	V	X	V	V	9
4	Inquiry	V	V	V	V	V	V	V	X	V	V	9
5	Conciliation	V	V	V	V	V	V	V	X	V	V	9
6	Arbitration	X	X	X	V	V	V	V	X	V	V	6
7	Litigation	X	X	X	X	X	X	X	X	V	X	1

Table 2. Key Factors and Determining Dispute Settlement for Cross-Border *Waqf*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 *waqf* dispute resolution. On the second tier, in case the top-tier methods cannot resolve the dispute, we must move to mediation,

¹⁶⁵Vishal Kashav et al., “Management and Analysis of Barriers in the Maritime Supply Chains (MSCs) of Containerized Freight Under Fuzzy Environment,” *Research in Transportation Business & Management* 43 (2022): 100793.

¹⁶⁶Source: 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 *waqf* disputes. The flow of cross-border *waqf* dispute resolution is suggested in Figure 5 below:

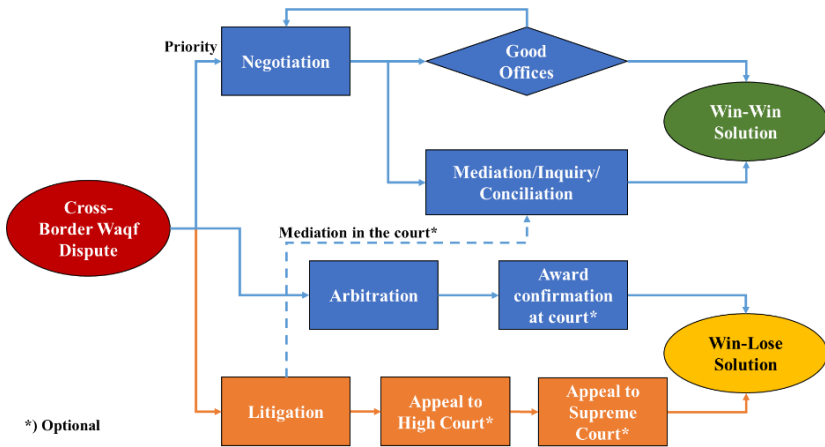


Figure 5 Cross-Border *Waqf* Dispute Settlement Flowchart¹⁶⁷

2. The *waqf* authorities in every country should maximise their active role in preventing and resolving *waqf* disputes, including cross-border *waqf*.
3. To refine the *Waqf* Core Principle with technical notes on cross-border *waqf* dispute resolution by utilising this research and other relevant sources.

¹⁶⁷Source: Created by the Author.

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