THE LEARNING CONFERENCE ISLAMIC BANKING AND FINANCE
19 & 20 February 2014
Keynote Address
ISLAMIC FINANCE: LET US NOT BE "AN UMMAH OF LOST OPPORTUNITY"
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Sheikh Nizam Mohammed Saleh Yaquby, a well-known Shari'ah Scholar and an expert in Islamic finance from Bahrain, at a seminar in Kuala Lumpur a few years ago, made a statement that I have been quoting and now I am using it as the title of my speech. He said, *"We are an ummah of lost opportunity."*

Islamic finance had developed beyond anybody's imagination in the last thirty years. What began out of the desire of pious Muslims to try to avoid committing a sin in their financial transactions had grown into trillion dollar business in six continents covering 75 countries.

Since the beginning and up to now, countries have focused on producing Shariah-compliant products. But, there is one area which no country had done i.e. to produce Shariah-compatible law for the implementation of those products and settlement of disputes arising from them. What parties, even though they are Muslim-owned companies, do is to write in their contracts that the law of choice of the parties is the English or New York law and the court of choice is the court in England or New York. At the same time, they make it a term of the contract that Shari'ah should be applied.

We know that the English law applicable is not completely Shariah-compatible. We know that English lawyers and Judges are not trained in Shari'ah. We know that most of the Judges are, at least, indifferent towards Shari'ah. It is further complicated by the application of the Rome Convention on the Law Applicable to Contractual Obligations of 1980 and Rome I Regulation, European Parliament and Council Regulation No. 593/2008 of June 17, 2008 on the Law Applicable to Contractual Obligations (Rome I). How do you expect such courts to give judgment in accordance with Shariah? In fact, those courts have, in no uncertain terms said, that they would apply English law.

To choose the United States law as the law of choice is no better. *"There is concern by U.S. scholars that a choice of law that necessitates looking into Shariah law will run afoul of the First Amendment prohibition of state endorsement of a particular religion."*[i] Some States have even passed laws prohibiting reference to Shari'ah.

Choosing the English or United States' court for settlement of disputed in Islamic finance cases is comparable to a Muslim who takes the trouble to go and buy *halal* meat, then go to a non-*halal* restaurant and ask the chef to cook it. The chef is an honest man. He says, *"My cooking is not halal. I use wine as an ingredient."* The Muslim replies, *"No problem. I respect your integrity."* That is how smart we are.

In my view, there is a need for Shari'ah-compatible law in the documentation of Islamic finance transactions and, in addition, Shari'ah-friendly courts to settle

disputes arising from those transactions.

This is where, I believe, Malaysia should move in, fast. We have many factors in our favour, compared to other countries. They are:

1. Malaysia, in the eyes of the world, is an Islamic country. Internationally, it is seen as model Islamic country. It is only natural for Malaysia to want to be the hub for Islamic finance.

2. Malaysia is already the leader in Islamic finance.

3. No other Government in this world has done more than the Malaysian Government in developing and for the development of Islamic finance.

4. We already have a pool of Shari'ah scholars who have specialized in Islamic finance. Some of our Shari'ah scholars are sitting in Shari'ah Committees all over the world. We also have people in their thirties (to me, the right age), who are proficient in both Arabic and English who are also trained in law and Shari'ah. They are our potentials.

5. We have the Shari'ah Advisory Council of Bank Negara Malaysia (SAC, BNM) and the Shari'ah Advisory Council of the Securities Commission (SAC, SC) at national level, to make Shari'ah rulings on Islamic finance.

6. We already have the common law and the common law system in place and working comparatively well.

7. Malaysian lawyers and Judges speak English, our laws and judgments of our superior courts are in English.

8. Our courts and arbitrators are efficient, competent and independent. Remember that the cases are pure civil cases based on contract involving companies and individuals. There is no politics in it. Negative perception should not be an issue unless there are Malaysians who go around the world condemning our courts and arbitrators for ulterior motives. In terms of knowledge in Islamic finance, our Judges, Arbitrators and lawyers, taken as a whole, are at par with their counterparts in other countries, if not better.

9. We have the infrastructure. Our court rooms are among the best in the world, our transportation and communication are good, our streets and hotels are free from suicide bombing (so far), our cost of living is comparatively cheap and we have "summer" which is rather mild throughout the year. All these factors are conducive to foreign lawyers coming to do litigation here.

I think we have the right ingredients to take the lead to our advantage while, as Muslims, we are also doing a service to Shari'ah.

As far as harmonising the law is concerned, we had actually started doing it with the establishment of the Law Harmonization Committee of Bank Negara Malaysia of which I am Chairman. So far, we have reviewed 17 laws including the National Land

Code 1965, Contracts Act 1950 and the Rules of Court. Out of that, 7 issues have been identified as requiring legislative amendments to facilitate Islamic financial transactions, 8 issues do not require any change to the law and 4 issues are still under review. The provision regarding penalty for late payment of judgment debt came into force on 1 August 2012. It is the first of its kind in the world and it is working. Similarly, the law requiring the Court and the arbitrator to refer Shari'ah issues to the Shari'ah Advisory Council had been confirmed by the Court of Appeal as constitutional and valid and courts and arbitrators are now referring such issues for determination by the Shari'ah Advisory Council. The idea is to enable Shari'ah issues to be determined by Shari'ah, Islamic finance, legal and other experts jointly avoiding such issues to be determined by non-expert Muslim and non-Muslim Judges and to promote consistency in the rulings. Again, we are the first in the world to do so.

Judges must also educate themselves so that they have adequate knowledge of Islamic finance and Shari'ah to handle or deal with those cases. They should start to read on the subject. Besides, the Judiciary too should conduct courses, at least to selected judges, on the subject. I am happy to note that they have actually started. But, as in other areas of law and knowledge, as far as the Judges are concerns, what they learn on the job makes the difference.

However, as this conference is co-organised by the Current Law Journal and the Bar Council and lawyers, I believe, form a large number of the participants, I would like to focus more on the role of lawyers on this issue.

Lawyers play a very important role in Islamic finance. Indeed their role span over the period from conception to death of an Islamic financial institution as well as every product and every contract.

In this respect, lawyers should not only be thinking of representing defaulting customers in debt collecting suits. They should think of cross-border contracts involving multi-national companies in Islamic finance transactions. They should think big.

In September last year, the Global Financial Centers Index ranked Kuala Lumpur at number 22 in the global ranking in competitiveness of Financial Centres which is above Dubai and Qatar. Who are the top four? They are London, New York, Hong Kong and Singapore. It is to be noted that in 2007, Kuala Lumpur was not even ranked. While we should do more to improve our position, perhaps it is arguable that we should focus more at becoming the hub for Islamic finance, because, as I have mentioned earlier, we have many factors in our favour.

To improve our position, professional services need to be locally available and lawyers must be ready for the challenge. They must have the necessary expertise, capability, experience and network to handle those big clients and big transactions, from negotiation, documentation to litigation, if need be. Even to get the job, in the first place, they will have to gain the confidence of the big customers. They too have to be big, respected and well known.

Sadly, Malaysian lawyers can't even agree to have a single Malaysian Bar. Why?

Short term self-interest and lack of self-confidence. Let me tell you a true story. In 1980's when I was a Senior Federal Counsel at the Department of Inland Revenue, I used to go to Kota Kinabalu High Court for tax cases. Quite often I found a Kuala Lumpur lawyer on the other side with a Sabah lawyer "assisting" him. All that the Sabah lawyer did was to fetch him at the airport, drive him to hotel, take him out for dinner, drive him to court the next morning and sit beside him at the bar table while all the arguments were done by the Kuala Lumpur lawyer. Once, I said to the Sabah lawyer, "There are many big tax cases coming from Sabah. Why don't you specialise and do it yourself?" He replied, "What for? I get more money than him."

With such attitude, how do you expect the standard of the profession to improve? It is a similar attitude that prevail vis-à-vis the liberalisation of the legal profession. There is the fear that the foreign lawyers will get the works because they are better! Instead, they should strive to be better.

I was told by a senior partner of a very big law firm in London, some time ago that one ex-Soviet, Central Asia country decided to open up its legal profession. English firms opened up branches there and employed local lawyers. Now, lawyers from that country are practicing in big law firms in London.

From my discussion with senior partners of big law firms, bankers and others involved in Islamic finance industry, I believe that to be a holistic hub for Islamic finance, Malaysia has to open up its legal profession. The need is seen from two perspectives.

First, from the perspective of facilitating efficient and effective intermediation of cross-border business. International financial centres would enable clients from anywhere in the world to come and raise funds in the centre where global investors are accessible. These are normally transacted in international currencies, normally in US Dollars, Euro, Pound Sterling and recently, in Renminbi and because of its cross-border nature, would be documented under internationally accepted law (i.e. either New York or English law).

At the international centre, there will be banks and financial advisers to do the financial transaction as well as professional advisors like tax advisors, accountants and lawyers to advise on the tax, accounting and legal aspects of the transaction.

So if a client, say, a Japanese intends to raise cross-border USD Sukuk using English laws in Malaysia for distribution to international investors, he would expect tax, accounting and legal professionals to be available in KL to advise him on the tax, legal and accounting implications as a Japanese issuer doing such transactions. This is because if he were to do so in London, Singapore or HK, for example, such professionals would be readily available at the doorstep instead of having to be flown in. Even lawyers proficient in Japanese laws and a variety of other laws which their clients are subject to would be available.

I was told that Malaysia has the full range of professional services except for law firms that can provide advice on cross-border transactions especially non-Malaysian laws, in Malaysia. This puts us at a cost and efficiency disadvantage compared to other international centres.

Secondly, it is seen from the perspective of generating investment and business from abroad as well as growth of the Islamic wealth management industry. High net worth individuals would use their professional advisors, particularly law firms, to act for them in exploring investment and business opportunities. We see this among those in *Gulf Cooperation Council countries* and *Middle East and North African* regions, and now among those in the ASEAN region. They would normally use law firms and private banks experienced in structuring vehicles to hold properties and real estate in the most efficient manner.

For example, a high net worth UAE investor may use a UK law firm to invest in properties in France. If the size of the property investments is big and the same law firm is used to advise that UAE investor, that UK law firm will in all likelihood establish a presence in France, because it would enable them to discharge their role more effectively. I am told that even Malaysian law firms have landed themselves in a similar situation. They have Malaysian clients who have ventured into infrastructure developments in Qatar and Abu Dhabi. Because of that, they now have offices there and are representing their clients in construction arbitration there. You are welcomed to set up your offices there so that you may serve your Malaysian clients better. Why shouldn't we do the same for foreign law firms wanting to serve their foreign clients here in this country?

Having these law firms would generate interest and from there, financing opportunities through Sukuk, Islamic funds and other financial vehicles. This is where the Malaysian legal services can benefit, through collaborations with such foreign law firms to advise on the Malaysian aspects of the property or real estate deals, and to advise on the Sukuk or Islamic funds which will be issued in Malaysia.

Realising its importance, even non-common law countries where English language is not even the language of the law, have taken positive steps to open up their legal profession. Examples are China and Japan.

In Japan, with the introduction of the foreign lawyer law, *Gaikoku Bengoshi ni Yoru Horitsu Jimu no Toriatsukai ni Kansuru Tokubetsu SochiHo 66*, in 1987, there was a slowly evolving process that eventually saw the introduction of a system known as *Gaigokuho-Jinni-Bengoshi* (GJB) in 1994 which allowed foreign law firms and Japanese firms to form joint ventures and share profits. However, this attracted only a handful of foreign law firms due to its systemic restrictive conditions and it was not until 2005 that Japan began to see a significant increase in the presence of foreign lawyers.

In 2005, the Ministry of Justice in Japan allowed registered foreign law firms to enter into full partnerships, instead of joint ventures, with Japanese firms and eased restrictions on partnerships' areas of practice. These partnerships were also permitted to share a unified name. In 2010, further reforms were introduced to allow foreign law firms to incorporate as a Law Corporation in their own right, thereby allowing foreign law firms to operate their own office in Japan.

(Of course, in Japan, one key impetus for the liberalisation in Japan was the shortage of local lawyers which is not the case here.)

China

In China, foreign law firms are not allowed to practise local law, but are licensed to advise in areas of law which facilitate the flow of trade and investments. Domestic firms are permitted to form collaborations and strategic alliances with foreign firms to facilitate knowledge sharing and best practices. This delicate balance has succeeded in attracting leading foreign firms to expand into China and provide services to multinational corporations and major Chinese companies competing globally.

When China liberalised its legal services sector by the end of 2001, 104 foreign law firms had established representative offices in China. This figure has doubled to 208 foreign firms in 2011, which facilitated the US$116 billion foreign direct investments that flowed into China. As a result, Chinese firms are now able to service major Chinese corporations that are expanding abroad, and have opened branch offices in financial centres such as London and New York.

Singapore

In Singapore, one of the key reasons for liberalisation was that more foreign law firms will bring to Singapore a greater volume of offshore work, thus increasing the legal services sector's contribution to the country's GDP. Indeed, this reason does carry weight. Since 2007, the number of foreign lawyers in Singapore has increased by 42%, with 1,200 foreign lawyers working in over 100 foreign law firms, constituting one-fifth of the legal professionals in Singapore. During the same period, the value of Singapore's legal services industry grew by 25% in 4 years from 2008 to 2012, now amounting to more than S$1.9 billion.

Further, it was believed that allowing more foreign law firms to set up in Singapore would facilitate the greater use of Singaporean law in international transactions; thus making Singaporean law "exportable". Again this has proved to be right. From 2008 to 2011, the value of legal services exported from Singapore increased by 51%, from S$363 million in 2008 to S$551 million in 2011. In particular, arbitration activities have grown significantly. The total number of new cases handled by the Singapore International Arbitration Centre (SIAC) has more than doubled from 99 cases in 2008 to 235 cases in 2012. In addition, the total sum of disputes arbitrated in Singapore in 2012 was S$3.61 billion, more than the total sum of disputes in 2010 and 2011 combined, which were S$1.35 billion and S$1.32 billion respectively.

Therefore, the claim that the liberalisation of legal services will strengthen trade and investment flows into the country is not without merit.

Interestingly, local law firms continue to dominate. In all these countries, the largest law firms are local.

What about Malaysia? Sadly, things do not seem to be moving fast enough. Talks had been going on between the Government and the Bar since 2006. But due to objections and disagreements, the proposal stalled until in 2012 when the Legal Profession (Amendment) Act 2012 was passed by Parliament. However, the amendment act is yet to come into force as the rules have not been finalised yet.

On the other hand, Singapore which had quietly done it, had already been reaping the benefits, attracted the big firms, including those which had earlier shown interest to come to Malaysia. With Singapore one hour away by air, would they open another branch in Malaysia? What is left for Malaysia? I am reminded of the term *"cuci mangkuk"* (literally, cleaning the bowl) used by loggers before. Now, there aren't bowls to clean anymore. Let us not be "*an ummah of lost opportunity*"! It is time that everyone wakes up and start thinking big and do it.

Thank you.

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[i] Julio C. Colon, Choice of Law and Islamic Finance, TILJ.