EXPERT CONSULTATION "TOWARDS THE PROMULGATION OF A MORE COMPREHENSIVE ISLAMIC BUSINESS AND BANKING LAWS IN MALAYSIA"
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DISPUTE RESOLUTION FOR ISLAMIC BUSINESS AND FINANCE CASES: THE WAY FORWARD
by
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Judges usually speak in the past tense. They decide on facts that had happened months or years earlier, applying law that may have been in existence for decades or centuries. (Of course, in doing so they interpret and, to a limited extent, develop it.) So, they may not be the best persons to talk about the future. However the future depends on the past and the present. In that sense, they may be useful to tell of the present so that the future may be chartered.

That is what I am going to do: talk of the present. Then, I shall take a look at the future, in particular, regarding the problems that may arise and the way to solve them, so that if and when the problems arise, we are prepared.

Islamic business and Islamic finance

What is "Islamic finance" in this country is quite easy to identify. To identify "Islamic business" is more difficult.

If by "Islamic business" we mean contractual transactions carried out in accordance with Islamic law, the applicable law being Islamic law, then, if we exclude Islamic banking and takaful from it, there may be none. Contracts are governed by the Contracts Act 1950, the Sale of Goods Act 1957 and so on. In such cases, it is those Acts and the common law that apply. And, of course, the forum is the civil court.

But, I think I must repeat what I had said earlier. **First**, please do not make the common mistake of drawing a dividing line between what is normally called "civil law" and "Islamic law': that everything that is called "Islamic law" is 100% God-made law and there are no non-prophet human opinions in it.

Secondly, please do not think that what is called "civil law" is 100% different from what is called "Islamic law". Those who have studied the two would have found similarities in a great majority of the principles of the two laws. Quite often, it is only the dressing that distinguishes the two, not the substance. At times, in practice, the difference between a so-called "Islamic transaction" and a "conventional transaction" is just the use of a different form!

Coming now to "**Islamic finance"**. This covers mainly Islamic banking an capital market matters such as bond issues. Of course, takaful must be added to it.

When we talk about **cases**, meaning cases filed in court arising from Islamic finance transactions, if we exclude cases arising from Islamic banking and takaful transactions, there is hardly any. (Of course I do not mention inheritance, waqf and apostasy because I do not think they can be considered as a "business").

So, the net result is that, when we talk about "Islamic finance cases" we are actually talking about cases arising from Islamic banking transactions. Of course it would not be right if we do not include cases arising from takaful insurance policies.

Are there cases arising from Islamic banking in the civil courts? The answer is: "Yes". A study done shows that as at 31.12.2001 there were 6,074 cases filed in the subordinate courts (Magistrate Courts and Sessions Courts) with a total value of RM148,804,607.73 and 2,567 cases filed in the High Courts with a total value of RM673,572,555.33.

What type of cases are these? Most of them are applications for order for sale under the National land Code, suits for recovery of money which in conventional a banking transaction is called "loan" but in Islamic banking is called the "purchase price" or "sale price" depending on from whose angle you are looking, the "vendor" (lender) or the "purchaser" (borrower). The others are civil claims for the same and for removal of caveats.

In all these cases, there are **no** issues of Islamic law involved. That is because contracts documents are drafted by advocates and solicitors, trained in civil law, in accordance with the requirements of civil law, using civil law precedents plus and minus a few clauses to make them "Islamic". Charges are governed by the provisions of the National Land Code. The remedies are provided by the National Land Code. The procedure is provided by the Rules of the High Court 1980. If companies are involved, the relevant law is the Companies' Act 1965.The pleadings are drafted and the trials or hearings are conducted by advocates and solicitors of the civil courts.

You will be surprised if I were to tell you, and I do so now, that so far there has **not** a been a single occasion when the court has to decide a point of Islamic law in such cases. Perhaps, I should mention a few reported cases arising from Islamic banking. In **Tinta Press Sd. Bhd. v. Bank Islam Malaysia** (1987) 2 M.L.J. 192 (Supreme Court) the issue was whether the High Court was right in issuing a mandatory injunction, a common law remedy. **Bank Islam Malaysia Berhad v.Adnan bin Omar** (1994) 3 C.L.J. 735 (High Court) was an application for an order for sale under the National Land Code. The issue taken was that the provisions of Order 83 rule 3(3) and rule 3(7) of the Rules of the High Court 1980 were not complied. In **Dato' Nik Mahmud bin Daud v. Bank Islam Malaysia Berhad** (1996) 4 M.L.J. 295 (High Court) the order prayed for was that the charge and the sale and purchase agreements were void on the ground that they

contravened the provisions of Kelantan Malay Reserve Enactment 1930. It should be noted that in that case, at first, another ground was raised i.e. the Bank Islam was prohibited from taking a charge in a transaction based on 'riba' and therefore, the charge was ultra vires the Articles of Association of the bank. That would have raised an "Islamic law" issue. But, fortunately for the Judge that argument was abandoned! The latest case, of course, is the judgment of the Court of Appeal in **Bank Kerjasama Rakyat Malaysia Berhad v. Emcee Corporation Sdn. Bhd.** (Court of Appeal, Appeal No. N-02-421-1999), delivered on 29.1.03. There again it was an application for an order for sale under the National Land Code arising from a transaction under the Al-Bai Bithaman Ajil. The issue was whether there was a "cause to the contrary" as provided by section 256 of the National Land Code. This is what I said, delivering the judgment of the Court:

> "As was mentioned at the beginning of this judgment the facility is an Islamic banking facility. But that does not mean that the law applicable in this application is different from the law that is applicable if the facility were given under conventional banking. The charge is a charge under the National Land Code. The remedy available and sought is a remedy provided by the National Land Code. The procedure is provided by the Rules of the High Court 1980. The court adjudicating it is the High Court. So, it is the same law that is applicable, the same order that would be made, if made, and the same principles that will be applied in deciding the application."

I do **not** say that we are right even though we believe we are. But, I **do** say that, as at today, that is the law. As Tun Suffian once said, " If I make a mistake, it becomes law."

So we see that in none of the reported cases so far the civil court had to decide on shari'a issues, although it came very close to it in one.

Is that strange? To me, the answer is: "No". This is because, in addition to what I have said earlier, what is now called "Islamic banking transaction" or "product" is not something created and developed by the traditional Islamic scholars of past centuries. It is not even created and developed by present day "ulamas"(Muslim scholars). They are created and developed by conventional economists, bankers, accountants and lawyers who either themselves know Islamic law or in consultation with the Islamic scholars, only to get an opinion whether a particular transaction or product is contrary to Islamic law.

Secondly, as has been pointed out, the law applicable is civil law. Until today we do not have Islamic Contracts Act, Islamic Sale of Goods Act, Islamic Land Code, Islamic Companies Act and so on, even though, I am convinced that, based on the experience so far, if and when they are made, they are not going to

be very different from what we now have, except for the name and a few provisions. So, if we look at the substance, our existing so-called civil law, is actually at least 80-90 percent Islamic already. Unfortunately, in this country, in matters of religion, form seems to be more important than substance!

Thirdly, all these Acts of Parliament are Federal Laws and are within the jurisdiction of the civil courts to administer.

Should the jurisdiction over Islamic banking cases be transferred to the Shari'a Courts?

At times, we do hear such a suggestion. At the risk of being accused of being biased (since I come from the civil court), with respect, such suggestion is made on the wrong assumption that since the cases are Islamic banking cases, the issues to be determined by the courts are Islamic law issues.

In my view, there should **not** be a transfer of jurisdiction from the civil courts to the shari'a courts in such matters. My reasons are:

First, it would be unconstitutional as the subject falls under the Federal List.

Secondly, as we have seen, of the cases that have arisen so far, not a single case involves the determination of question of Islamic law. On the other hand, they involve issues of land law, company law and others regarding which the shari'a courts have no jurisdiction and the shari'a court judges are not trained in and are not familiar with. The shari'a court judges do not even have precedents to fall back on.

Thirdly, the cases do not only involve Muslims and the shari'a courts do not have jurisdiction over non-Muslims. Neither can non-Muslim lawyers appear in the shari'a courts.

Fourthly, the shari'a courts are state courts, independent of each other and with their own appellate courts. Whereas, the civil courts have only one Court of Appeal and one Federal Court, there are 14 Shari'a Courts of Appeals in the country. Imagine the confusion in the law when the Shari'a Courts of Appeals give contradictory judgments. This is further compounded by the view that the doctrine of stare decisis (binding precedents) do not apply in the shari'a courts as no such principles are to be found in the shari'a, which view, with respect, to me, is not a well-reasoned opinion. Even in making laws we will have the problem of inconsistencies as between states. Even in matters of family law we already have such problems.

Fifthly, with respect, I doubt whether the shari'a courts, as they are now, are capable of handling all those cases. In some states the Shari'a Courts of Appeal have not sat for a number of years, just to give one illustration.

Sixthly, the remedies available in the shari'a courts are very limited. Remedies such as injunction, specific performance and, declaration, for example, are not available.

Seventhly, the problem of enforcement. Winding-up and bankruptcy proceedings, to give only two examples, are not available in the shari'a courts. Reciprocal enforcement of judgments in foreign countries is not available. Even inter-state enforcement is full of problems.

Determination of Islamic law issues arising from civil courts

It is better to be prepared in case the necessity arises. I shall now discuss some forum where such issues may be determined.

A. Civil courts.

While I **do** say that, as it is now, the civil courts clearly have an advantage over the shari'a courts, that civil court judges are in a better position to understand banking transactions, I do **not** say that the civil courts are equipped to decide Islamic law issues arising from Islamic banking. That is because the civil court judges are not trained in Islamic law and not in a position to ascertain the law.

B. Civil courts assisted by Islamic law advisers

Under this arrangement, a civil court is assisted by an Islamic scholar well versed in Islamic banking who I shall call "Islamic law adviser". The civil court judge decides the facts, poses the Islamic law issue to the Islamic law adviser for his ruling, the ruling is binding on the judge, the judge applies the ruling and decides the case. That looks workable. Even now we have "assessors" in land acquisition cases. One plus point in such an arrangement is that it is the same courts in which those issues arise that determine the issues and decide the cases, while the advantages that the civil courts have over the shari'a courts are preserved.

C. Shari'a courts

All the weaknesses of the shari'a courts mentioned earlier are also relevant here. In addition, with respect, I doubt whether, generally speaking, the judges of the shari'a courts are well versed in Islamic baking. True that they know Arabic. But to know a language does not mean that a person will know every subject written in that language. Bearing in mind that Islamic banking is a modern creation using conventional precedents, I believe there is more literature on it in English than in Arabic. True that they are trained in the shari'ah, but how many of them are trained in Islamic banking as is practised today? And, as this is a new subject, there are no precedents for them to go by. The difficulty is not to find the relevant

Hadiths or authorities, if any, on a subject but to understand the nature of the transactions or products, before applying the law.

D. Fatwa Committees of the Religious Councils in the States.

I do not think that they are the proper forums. My reasons are:

First, the multiplicity of such committees, one in each state, will give rise to conflicting rulings on similar issues.

Secondly, the committees are committees of the Religious Councils of the respective states. The Religious Council itself may be a party to a proceeding from which the issue arises. There may be a conflict of interest or that the transparency of the committee may be questionable.

Thirdly, with respect, it is doubtful whether the members of the committees have sufficient knowledge of conventional and modern Islamic banking and finance.

E.National Fatwa Committee.

As far as I know this is an ad hoc committee to which the Rulers Conference refers questions of Islamic law for its determination. Its members consist of all the muftis of all the states in the country. Even though the committee appears impressive in terms of the number of top Islamic scholars sitting in it, I do not think it is the best choice. My reasons are:

First, with respect, even though the muftis are well versed in Islamic law, they may not necessarily be familiar with modern Islamic banking and conventional banking, the knowledge of the latter is necessary to understand the former.

Knowing the law alone is **no** guarantee that a correct decision will be arrived at. Understanding the facts is equally important. Applying the correct law on wrongly perceived facts will give a wrong conclusion. I always give the Ruling of the Shari'a Committee of the Religious Council of the State of Penang as an example. That can be seen in the case of **G. Rethinasamy v. Majlis Ugama Islam Negeri Pulau Pinang** (1993) 2 M.L.J. 166. In that case the Shari'a Committee ruled that part of the mosque and burial ground occupying on the land claimed by G. Rethinasamy to be his should be demolished and removed as it was occupying G. Rethinasamy's land without his consent. The Shari'a Committee did not consider whether the land occupied by part of the mosque and the burial ground was waqf land. Of course, I refused to follow the fatwa as I found clear evidence that that part of the land was waqf land. That is an example where correct law was applied to a wrongly perceived fact leading to a wrong ruling. Of course, the problem may be overcome by inviting experts in conventional banking, civil law and others to advise the committee as and when required.

Secondly, the committee itself is too big and cumbersome. It would not be ideal and indeed costly for it to sit regularly and make expeditious decisions. Bear in mind that the cases are postponed pending the ruling of the issues by the committee.

F. National Shari'a Advisory Council (NSAC)

This committee at Bank Negara was formed in 1996. Its members consist of Islamic scholars, lawyers, bankers, academicians and Shari'a Judge. The original intention of forming this committee was to provide advice on Islamic law to conventional banks that operate Islamic banking business. All directions issued by Bank Negara in consultation with the council are binding on the banks. In fact, I am told that Bank Negara is currently in the process of enhancing the committee into a legally recognized authority regarding Islamic finance, Islamic banking and takaful. This includes reference by courts or arbitrators on Islamic law issues relating to such businesses for rulings by the committee. Bank Negara may even establish a secretariat through which such references may be made.

As I see it, there are several advantages to refer such issues to this committee. **First,** the members are specialists in their respective fields relevant for the decisions to be made. If necessary, the membership may be enlarged.

Secondly, it is a "national" committee. So, the ruling on similar facts will be consistent**.**

Thirdly, since the introduction of Islamic banking in this country the committee has been advising Bank Negara on such issues. In other word, it has the experience.

Fourthly, the administrative support system is there, the Bank Negara itself.

What has to be done, perhaps, is to strengthen it by appointing or co-opting as and when necessary, members whose knowledge and experience are relevant to a decision to be made. If, the ruling is going to be made binding on the civil courts, perhaps a civil court judge should also be made a member. He has the practical experience of the nature of the cases before the courts in which those issues arise.

This committee should be the sole authority to decide on such issues. So banks, financial institutions and all other institutions, faced with such issues, should refer the issues to the committee, so that the rulings will be consistent on similar facts. References on questions of Islamic law in all federal laws yet to be made, should also required to be made to this committee.

Procedure for reference

I suggest that the following procedure be adopted. The Judge, at the case management stage, with the assistance of counsel for both parties, formulates the question to be referred for a ruling. The facts should be stated, followed by the issues and the question to be answered. Relevant documents may be enclosed. The committee will deliberate and make its ruling. In the meantime the proceedings in the court is adjourned. Upon receiving the ruling, the court will proceed with the hearing or trial. Applying the ruling on the question to be answered, the court decides the case. The ruling of the committee should be final and not subject to appeal.

Should the ruling be binding on the court?

In my view, the answer is: "**Yes".** This is to ensure consistency and to avoid non-experts overruling such rulings. Otherwise, the whole purpose of referring the issue to the committee is defeated. There will be inconsistencies in the opinions on similar facts even though the doctrine of stare decisis may check such inconsistencies. Besides, it must be remembered that we are dealing with Islamic law, a religious law of the Muslims. It cannot be equated with a finding of negligence or assessment of damages. I do not think that the Muslim ummah can accept a ruling by a committee of experts on Islamic law being overturned by a civil court judge, what more if he is a non-Muslim.

Takaful cases

All that has been said above equally applies to takaful cases.

11.2.03.