

RESEARCH PAPER (No: 47/2012)

# THE SHARĪ'AH ADVISORY COUNCIL'S ROLE IN RESOLVING ISLAMIC BANKING DISPUTES IN MALAYSIA: A MODEL TO FOLLOW?

TUN ABDUL HAMID MOHAMAD  
DR. ADNAN TRAKIC



# THE SHARĪ'AH ADVISORY COUNCIL'S ROLE IN RESOLVING ISLAMIC BANKING DISPUTES IN MALAYSIA: A MODEL TO FOLLOW?

*Tun Abdul Hamid Mohamad\* and Dr. Adnan Trakic\*\**

## ABSTRACT

*This research paper seeks to highlight the importance of the Shariah Advisory Council of the Central Bank of Malaysia (SAC) in the determination of Sharī'ah issues in adjudicating Islamic banking disputes. Effective resolution of Islamic banking disputes requires the adjudication of both civil and Islamic law issues raised by the parties. Civil courts are well equipped only to adjudicate civil law issues whereas they lack competency to determine issues of Sharī'ah compliance or non-compliance. In Malaysia, an attempt has been made to address the problem by the enactment of certain amendments in the Central Bank of Malaysia Act 1958 and subsequently enacting new provisions in the Central Bank of Malaysia Act 2009. The new provision makes it compulsory for the civil courts and arbitrators to refer Sharī'ah issues to the SAC for determination. Even though challenges are being made against the provision, including on constitutional grounds, the provision seems to be working: to date, courts and arbitrators have already referred such issues to the SAC, and answers have been given and acted upon. The article proposes this model as a viable solution that could be adopted by other countries wishing to introduce or develop Islamic finance.*

**Keywords:** *Islamic banking and finance, Islamic banking disputes, Shariah Advisory Council of the Central Bank of Malaysia (SAC), Sharī'ah issues, Central Bank of Malaysia Act 2009, Constitutionality of the SAC.*

---

\* Former Chief Justice of Malaysia, Chairman of Law Harmonization Committee Central Bank Malaysia, Member of Shariah Advisory Council Central Bank of Malaysia and the Securities Commission of Malaysia. He can be contacted at [tunabdulhamid@gmail.com](mailto:tunabdulhamid@gmail.com). See also [www.tunabdulhamid.my](http://www.tunabdulhamid.my).

\*\* LL.B (Hons)(IIUM), MCL (IIUM), PhD (IIUM), Lecturer, Department of Business Law and Taxation, Monash University, Sunway campus. He can be contacted at [trakic.adnan@gmail.com](mailto:trakic.adnan@gmail.com).

## 1. INTRODUCTION

Islamic banking and finance has become an increasingly important component of the international financial system. As of September 2012, there are more than 600 Islamic financial institutions operating in more than 75 countries across the globe. Global Islamic finance assets are estimated to reach USD 1.6 trillion by the end of 2012 and are projected to exceed USD 6.5 trillion in 2020. As of September 2012, there are 12 jurisdictions where Islamic finance has been categorized as having mainstream relevance, mainly due to large Muslim populations and strong government support. Besides them, there are 25 other countries in which Islamic finance has a niche presence. These countries are offering various Islamic finance products and are constantly working to develop them further. Likewise, 18 other countries have been identified that have an interest in developing the Islamic finance industry and are actively engaged with regulators to enable incorporation and governance of Islamic banks in their jurisdictions (GIFF, 2012: 5).

One of the countries most responsible for the unprecedented expansion and popularity of the Islamic finance is Malaysia. Malaysia is the largest Islamic financial hub in the Asia-Pacific region and a role model, in terms of legal and Shari'ah infrastructure, for other countries aspiring to develop their own Islamic finance industry. By the end of 2011, Islamic financial assets in Malaysia stood at USD 272.5 billion (GIFF, 2012: 77). In 2012, Malaysia proudly hosted 21 Islamic banks (including 5 international Islamic banks), 17 *takāful* operators (including 1 international *takāful* operator and 4 *retakāful* operators), and 16 Islamic fund management companies licensed under the Capital Market and Services Act 2007 (Mohamad and Trakic, 2012: 23). In addition, Malaysia is the largest *ṣukūk* market in world with USD 107.0 billion of total *ṣukūk* outstanding or 71.6% of the global total market shares (GIFF 2012, 77).

Malaysia's achievements are indicative of the unprecedented efforts of the Malaysian government, industry players, and the community at large in getting where they are today. Strong and steady growth of the Islamic finance industry presumes the existence of an efficient regulatory environment, well-implemented Shari'ah framework, and strong support from the government. Malaysia has a unique dual financial system, comprised of conventional and Islamic institutions operating harmoniously in parallel with one another.

One of Malaysia's innovations is the creation of the SAC as the highest national authority to approve Sharī'ah products and ascertain the Sharī'ah position on issues arising in proceedings in court and before arbitrators.

## 2. EVOLUTION OF THE SAC

The evolution of the SAC can be divided into three periods:

- (i) The period between 1<sup>st</sup> May, 1997 and 1<sup>st</sup> January, 2004;
- (ii) The period between 1<sup>st</sup> January, 2004 and 24<sup>th</sup> November, 2009;
- (iii) The period after 24<sup>th</sup> November, 2009.

### 2.1 The Period between 1<sup>st</sup> May, 1997 and 1<sup>st</sup> January, 2004

When Islamic banking was first introduced in Malaysia in the 1980s, the focus was to ensure that the product was Sharī'ah compliant. For that purpose, a Sharī'ah Committee was established at Bank Islam Malaysia Berhad, the only Islamic Bank in the country then. It was that committee that approved a product to be marketed.

When more Islamic banks and *takāful* companies were established, it was decided that it would be better to have an SAC at the national level for approving new products in order to ensure uniformity and avoid inconsistency in rulings on the same issue, besides making available the best expertise for the job. For example, it would cause confusion if a Sharī'ah Committee of one company were to say that *bay' bi thaman ājil* (BBA) is Sharī'ah compliant while another says no. Therefore, while every Islamic financial institution (IFI) was required to have its own Sharī'ah Committee, the SAC was established administratively on 1<sup>st</sup> May, 1997 for that purpose. From then onwards, all new Islamic banking and *takāful* products were required to get the approval of the SAC before being introduced to the public.

### 2.2 The Period between 1<sup>st</sup> January, 2004 and 24<sup>th</sup> November, 2009

Bank Negara Malaysia, as usual, was thinking ahead. Bank Negara Malaysia was worried about Sharī'ah issues that might arise in cases before the courts. At first, they thought that perhaps the solution would be to establish a Muamalat Court. In 2002, a

study was made by a Judge of the Court of Appeal. He concluded that that would not solve the problem and proposed that Shari'ah issues arising in the courts be referred to the SAC of Bank Negara Malaysia to ascertain the Shari'ah position (Mohamad).<sup>1</sup> That proposal was accepted. The Central Bank of Malaysia Act 1958 (CBMA 1958) was amended by the Central Bank of Malaysia (Amendment) Act 2003 (CBM(A)A 2003), which came into force on 1<sup>st</sup> January, 2004.

A new section 16B was added to CBMA 1958. Since section 16B was superseded by the provisions in the new Central Bank of Malaysia Act 2009 (CBMA 2009) on 25<sup>th</sup> November, 2009, we shall focus on the new provisions rather than the earlier one. However, it is worth noting that, for the first time, a federal law in Malaysia established the SAC to “be the authority for the ascertainment of Islamic law for the purposes of Islamic banking business, takaful business, Islamic financial business, Islamic development financial business, or any other business which is based on Syariah<sup>2</sup> principles and is supervised and regulated by the Bank” (CBMA, 1958: 16B/1).

Subsections (7), (8) and (9) of the new section 16B provide:

(7) The bank shall consult the Syariah Advisory Council on Syariah matters relating to Islamic banking business, takaful business, Islamic financial business, Islamic development financial business, or any other business which is based on Syariah principles and is supervised and regulated by the bank, and may issue written directives in relation to those businesses in accordance with the advice of the Syariah Advisory Council.

(8) Where in any proceedings relating to Islamic banking business, takaful business, Islamic financial business, Islamic development financial business, or any other business which is based on Syariah principles and is supervised and regulated by the bank before any court or arbitrator any question arises concerning a Syariah matter, the court or the arbitrator, as the case may be, may—

(a) take into consideration any written directives issued by the bank pursuant to subsection (7); or

---

<sup>1</sup> Summary of the finding and the reasons could also be found in “Interlink/interface between common law system and Shari'ah rules and principles and effective dispute resolution mechanism,” (in English), [www.tunabdulhamid.my](http://www.tunabdulhamid.my).

<sup>2</sup> We retain the spelling of “Syariah” for “Shari'ah” as it appears in the passage quoted.

(b) refer such question to the Syariah Advisory Council for its ruling.

(9) Any ruling made by the Syariah Advisory Council pursuant to a reference made under paragraph (8) (b) shall, for the purposes of the proceedings in respect of which the reference was made—

(a) if the reference was made by a court, be taken into consideration by the court in arriving at its decision; and

(b) if the reference was made by an arbitrator, be binding on the arbitrator (CBMA, 1958: 16B/7-9).

One point that should be noted here is that it was not mandatory for the court or the arbitrator to refer a Sharī'ah issue to the SAC. Even if it did, the ruling given by the SAC pursuant to such reference was not binding on the court. However, if the arbitrator chose to refer the issue to the SAC, the ruling of the SAC was binding on the arbitrator. It appears that the discrepancy was due to the fear that making the ruling binding on the court would raise the issue that the SAC had usurped the function of the court in determining the “law”.

It is also interesting to note that the provision of section 16B CBM(A)A 2003 was adopted in the Malaysia Co-Operative Societies Commission Act 2007 in section 26 – “Power to Consult the Syariah Advisory Council”. It means that the role of the SAC was extended by that Act to cover cases falling under it. It also means that the idea of having a SAC at the national level was being accepted.

### **2.3 The Period after 24<sup>th</sup> November, 2009**

The new CBMA 2009 was passed by Parliament and subsequently received the Royal assent on 19<sup>th</sup> August, 2009, and was published in the gazette on 3rd September, 2009. However, it only came into force on 25 November, 2009.

Chapter 1 of Part VII, sections 51 to 58, are devoted entirely to the SAC. Section 51 talks about the establishment of the SAC, which shall be the authority for the ascertainment of Islamic law for the purposes of Islamic financial business and that it may determine its own procedures. Section 52 lays down the functions of the SAC, namely:

(a) to ascertain the Islamic law on any financial matter and issue a ruling upon reference made to it in accordance with this Part;

(b) to advise the Bank on any Shariah issue relating to Islamic financial business, the activities or transactions of the Bank;

(c) to provide advice to any Islamic financial institution or any other person as may be provided under any written law; and

(d) such other functions as may be determined by the Bank” (CBMA, 2009: 52/1).

It can be seen that the functions of the SAC are quite broad and that it really serves as a body that shall give its advice or ruling once reference is made to it in accordance with Part VII as well as giving advice to the Central Bank of Malaysia and other financial institutions or persons as may be provided under any written law. The SAC’s functions are even further expanded in subsection 52(1)(d), which states “such other functions as may be determined by the Bank”.

Nevertheless, all the roles of the SAC could be trimmed down to three main functions: advising the Central Bank of Malaysia; approving Sharī’ah-based products; and determining the ruling for Sharī’ah issues arising from cases in court and before arbitrators relating to Islamic banking, Islamic finance and *takāful*. In this paper, we are more concerned with the last function.

Section 53 empowers the Yang di-Pertuan Agong, who “may, on the advice of the Minister after consultation with the Bank, appoint from amongst persons who are qualified in the Shariah or who have knowledge or experience in the Shariah and in banking, finance, law or such other related disciplines as members of the Shariah Advisory Council” (CBMA, 2009: 53/1). Civil and Sharī’ah Court judges may be appointed as members of the SAC after consultation with the Chief Justice or the relevant Chief Sharī’ah Judge, as the case may be.

Section 54 empowers the Bank to establish a secretariat and other committees and appoint officers and other persons as the Bank considers necessary to assist the SAC in carrying out its functions.

Section 55 makes it compulsory for:

the Bank to consult the SAC on any matter –

(a) relating to Islamic financial business; and

- (b) for the purpose of carrying out its functions or conducting its business or affairs under this Act or any other written law in accordance with the Shari'ah, which requires the ascertainment of Islamic law by the SAC (CBMA, 2009: 55/1).

Furthermore, "Any Islamic financial institution in respect of its Islamic financial business may—

- (a) refer to a ruling; or
- (b) seek the advice,

of the SAC on the operations of its business in order to ascertain that it does not involve any element which is inconsistent with the Shariah" (CBMA, 2009: 55/2).

Section 56(1) provides that "where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, shall—

- (a) take into consideration any published rulings of the SAC; or
- (b) refer such question to the SAC for its ruling" (CBMA, 2009: 56/1).

We believe that the intention is for the court or arbitrator to refer to the published rulings first and, if there are relevant ones, to apply them. Otherwise, the question should be referred to the SAC for its ruling.

Then comes the new and—we may say—controversial provision of section 57: "Any ruling made by the Shariah Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under section 55 and the court or arbitrator making a reference under section 56" (CBMA, 2009: 57).

Finally, section 58 provides that "where the ruling given by a Shariah body or committee constituted in Malaysia by an Islamic financial institution is different from the ruling given by the SAC, the ruling of the SAC shall prevail" (CBMA, 2009: 58).

Pursuant to sections 51 and 56 of the CBMA 2009, on 19<sup>th</sup> June 2012, the SAC issued its Manual Rujukan Mahkamah dan Penimbang Tara Kepada Majlis Penasihat Syariah Bank Negara Malaysia (Manual for Reference by the Court and Arbitrators to the Shariah Advisory Council of Bank Negara Malaysia). To date, it is only available in



Malay. For the purpose of this paper, we are using our own translation. We are sure that this is the first such procedure ever made anywhere in the world. As such it is worthwhile to reproduce parts which we consider to be more important.

Paragraph 1 explains that the Manual is issued as guidance to the courts and the arbitrators when referring Sharī'ah issues regarding Islamic financial business to the SAC.

Paragraph 3 requires the court or the arbitrator to refer to published rulings of the SAC before deciding to make a reference to the SAC, and the court or the arbitrator may contact the Secretariat of the SAC for any clarification on such rulings.

Paragraph 5 states that only questions concerning Sharī'ah matters arising from proceedings in Islamic finance transactions may be referred to the SAC.

Paragraph 6 defines questions concerning Sharī'ah matters as follows:

A Sharī'ah question on a matter relating to Islamic finance involving matters that have not been determined by the SAC. Such questions include, but are not limited to, aspects of the Islamic finance business such the structure of the business, products or services, implementation or operation, terms and conditions or documentation.

Illustration I: A non-Sharī'ah matter

In a court proceeding, a question arises regarding the status of the licensing of an Islamic financial institution in Malaysia. That question does not concern a Sharī'ah matter.

Illustration II: Questions on the structure of the business, products or services

The SAC has decided that the *tawarruq* contract may be used in structuring financing facilities. A customer has challenged the status of the Sharī'ah compliance of a financing product based on *tawarruq* offered by an Islamic financial institution because it uses silver bullion as the underlying asset for the *tawarruq* transaction in that financing.

In this regard, the court may refer to the SAC the issue whether the use of silver as the underlying asset in the *tawarruq* transaction in the said financing is permissible in the Sharī'ah.

Illustration III: Questions relating to implementation and operations

The SAC has decided that the *bay' al-īnah* contract may be used in structuring financial facilities. A customer challenges in court that the structure of the financing product offered by Financial Institution A, which is based on *bay' al-īnah*, is not Sharī'ah compliant because the transaction did not follow the proper transaction sequence in an *īnah* contract.

In this regard, the court may refer to the SAC for a clarification on the meaning of “proper transaction sequence in an *īnah* contract” or similar questions.

However, the actual sequence in that particular case is a question of facts to be decided upon by the court or the arbitrator. Similarly, the question of whether or not the sequence executed in the case is in compliance with the Sharī'ah requirement is a decision that should be made by the court or the arbitrator.

Illustration IV: Question regarding terms, conditions and documentation

The SAC has decided that *ta'wīd* may be used in financing products. A dispute arises in court between a customer and an Islamic financial institution regarding a *ta'wīd* clause in the agreement entered by the two parties. The customer claims that the clause is not Sharī'ah compliant because it involves a prior agreement between the parties on a *ta'wīd* rate.

In this regard, the court may refer to the SAC the question of whether pre-agreement by contracting parties on a particular *ta'wīd* rate is permissible.

Illustration V: The SAC has not issued any ruling

The SAC has decided that *ta'wīd* may be imposed on sale-based financing. A dispute arises as to whether *ta'wīd* may be imposed on financing based on *qard*. Since there is no specific ruling on it, the court may refer such question to the SAC.

Paragraph 7: In answering questions forwarded by the court or arbitrator, the SAC takes into consideration that the function of the SAC is only to ascertain Sharī'ah rulings regarding the issues forwarded. SAC has no jurisdiction to make findings on facts or to apply a particular ruling on the facts of the case and make a decision, whether on a particular issue or on the whole case, because such powers are within the jurisdiction of the court and the arbitrator.

Illustration VI:

The court has referred a question as to whether a particular certificate validly represents a unit in a particular building used as an asset transacted in a *murābahah* transaction.

In answering this question, the following needs to be done:

- I. To examine the certificate and make a finding of facts on it (based on evidence, witnesses, etc.);
- II. To ascertain the Sharī'ah ruling regarding *murābahah* and the validity of a particular asset in a *murābahah* transaction;
- III. To apply the Sharī'ah ruling to the facts; and
- IV. To make a decision on the question, which may decide the whole case.

Only item II lies within the jurisdiction of the SAC. Items I, III and IV are within the jurisdiction of the court or arbitrator.

Paragraph 8: After receiving the questions from the court or the arbitrator, the SAC will identify and analyse the Sharī'ah issues contained in them and ascertain the Sharī'ah rulings on them. The court or the arbitrator will make the decision by applying the Sharī'ah principles as ascertained by the SAC to the facts of the case.

Paragraph 9: Barring unforeseeable circumstances, the SAC shall issue its rulings not later than 90 days from the date the reference in complete form is received by the Secretariat.

Paragraph 12: Parties to a dispute may forward opinions or arguments of their respective Sharī'ah experts on the issue in writing together with the submission of the reference by the court or the arbitrator. If the SAC deems it necessary, the Sharī'ah experts of both parties may be invited to present their Sharī'ah opinions or arguments on the matter referred.

We would like to stress two points here. First, the Manual goes to great lengths to make it clear that only Sharī'ah issues may be referred to the SAC. It even tries to define what a Sharī'ah issue is, giving lucid examples by way of illustrations, pointing out what is within the jurisdiction of the SAC to rule and what is within the jurisdiction of the Court or the arbitrator. In short, the SAC will only state the Sharī'ah ruling. It is then up to the court to make a finding of the facts of the case, apply the Sharī'ah ruling and arrive at a decision. This is clearly to avoid the SAC being accused of usurping the function of the court.

The other point is the provision of the right to be heard, which could be in writing and/or orally. However, this is confined to Sharī'ah experts only, not lawyers. That is understandable as the issue to be determined is only the Sharī'ah ruling on a matter. It is not a trial. It does not involve finding of facts and deciding the issue or the case on the facts.

### 3. CIVIL COURT AND SHARĪ'AH ISSUES

#### 3.1 Whether Sharī'ah Issues Arose, and How They Were Decided by the Civil Courts

Before going any further, we should clarify about the Muamalat Division of the High Court. It is not a separate court system established to hear Islamic banking and *takāful* cases. It is purely an administrative arrangement in Kuala Lumpur alone. Prior to the introduction of Islamic banking, the High Courts in Kuala Lumpur were divided into a number of divisions, namely Criminal; Family and Property; Commercial; and Appellate and Special Powers. That was done for administrative purpose only. All it means is that cases of a similar type are registered in the same "division". Later the Commercial Division was broken into Commercial and Muamalat. This arrangement is only made in Kuala Lumpur. At other places, especially where there is only one Judge, all types of cases are registered in the same court and heard by the same Judge. Do not

think, then, that the “Muamalat Court” is more than a name given to a “division”. That was why Dato’ Abdul Hamid Mohamad (as he then was) observed, in his study on the proposal to establish the Muamalat Division of the High Court in 2002, that naming a court a Muamalat court would not solve the problem regarding the determination of Shari’ah issues and suggested that the issues be referred to the SAC (Mohamad).

Based on a study made by the International Shari’ah Research Academy for Islamic Finance (ISRA), most of the cases brought before the Muamalat Division of the High Court are in relation to *bay’ bi thaman ājil*, widely known as BBA facility. In fact, 90% of the total number of cases brought before the court is comprised of BBA cases (Yaakob, 2011: 11). The remaining 10% of cases involve all the other contracts, such as *ijārah*, AITAB, *qard*, *īnah*, etc. (Yaakob, 2011: 11). The contentious issues in relation to BBA facility are often raised by customers when there is a default in payment. Most of the time, the main issue is the quantum of claim. The banks strictly interpret the BBA agreements. Thus, in case of customer default, the bank will still claim full settlement price despite the fact that the customer would not be utilizing the full tenure of the contract. The customer, on the other hand, would argue that the bank should not be entitled to unearned profit and that *ibrā’* (rebate) should be given to the customer.<sup>3</sup> The BBA facility has been the subject of many scholarly discussions in the past few years.<sup>4</sup> There are instances where different courts have decided differently on the same Islamic banking matters. The asymmetric approaches by the Malaysian judges deciding Islamic banking and finance issues have widened the uncertainty, and that could adversely affect the future development of the Islamic banking and finance industry.

---

<sup>3</sup> For further discussion see *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 1 CLJ 438, *Malayan Banking Bhd v Ya’kup bin Oje & Anor* [2007] 5 CLJ 311, *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 CLJ 22, *Bank Islam Malaysia Berhad v Azhar Bin Osman* [2010] MLJU 358, Dalam Mahkamah Rayuan Malaysia Rayuan Sivil No: W-02-609-2010.

<sup>4</sup> See, for instance, Norhashimah Mohd. Yasin, “Islamic Banking: Case Commentaries Involving Al-Bai Bithaman Ajil”, *Malayan Law Journal*, Volume 3, (1997), xcii. See also Ashgar Ali Ali Mohamed, “Al-Bai Bithaman Ajil – Its Consistency with Religion of Islam: With the Special reference to Arab-Malaysia Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors and Other Cases”, *Malayan Law Journal*, Volume 6, (2008), xiv. See also Nuarrual Hilal Md Dahlan and Sharifah Zubaidah Syed Abdul Kader Aljunid, “Shariah and Legal Issues in the Bay’ Bithaman- Al-Ajil (BBA): A Viewpoint”, *Malayan Law Journal*, Volume 6, (2010), lxxv.

### 3.2 Cases Decided by the Courts during the Three Periods

#### 3.2.1 *The Period prior to 1<sup>st</sup> January, 2004*

Perhaps the first Islamic banking case to have reached the then Supreme Court was *Tinta Press Sdn. Bhd. V. Bank Islam Malaysia Bhd* (High Court, 1986: 1 MLJ 25) (High Court, 1987: 2 MLJ 192). It arose from a leasing agreement. Had it not been for a line in the head note, “Facility granted on Islamic banking business, which included profit margin”, no one would have realised that it was a case arising from an Islamic banking transaction. The only issues were whether the High Court was right to grant a mandatory injunction and whether the transaction was a loan or a lease transaction. The Supreme Court held that the learned Judge had rightly concluded from the documents and the affidavit evidence that the agreement in this case was a lease agreement and not a loan agreement, if we may add, from the civil law perspective. It is to be noted that the word “Sharī’ah” was not even mentioned throughout the judgment of either the High Court or the Supreme Court.

In *Bank Islam Malaysia Bhd v Adnan bin Omar* (Ranita Hussain JC: 1994: 3 AMR 2291), the plaintiff bank had granted to the defendant a facility under the concept of BBA. The defendant defaulted. The plaintiff filed this originating summons under Order 83 of the Rules of the High Court 1980 (RHC) seeking an order for sale of the charged land. All the challenges were on the ground of non-compliance with the provision of Order 83 rule 83(3) of the Rules of the High Court 1980, not for non-compliance with Sharī’ah. For example, the defence mounted, based on *ibrā’* (rebate), which was referred to as *muqāṣṣah*, was phrased as follows: “Whether Order 83 r 3(3) (d) had been complied with as the amount stated by the plaintiff as unpaid under the charge was subject to rebate (*muqassah*) in the event of early recovery.”

The court replied as follows: “The defendant does not have a right to the rebate as the rebate or *muqassah* **is practised by the plaintiff** on a discretionary basis.”

The next case is that of *Dato’ Hj Nik Mahmud bin Daud v Bank Islam Malaysia Bhd* (Idris Yusoff J, 1996: 4 MLJ 295). Again, no Sharī’ah issue was raised. Challenge was mounted for contravention of land law, particularly the Kelantan Malay Reservations Enactment 1930 and the National Land Code 1965.

Even as late as January 2003, in *Bank Kerjasama Rakyat Malaysia Berhad v Emcee Corporation Sdn Bhd* (2003: 2 AMR 177), a case involving a BBA transaction, the only issue in question was the validity of the charge. There was no Shari'ah issue. Abdul Hamid Mohamad JCA (as he then was), delivering the judgment of the Court of Appeal, made the following observation:

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 Code and 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, if made, and the same principles that should be applied in deciding the application.

As will be seen later, judges are very fond of quoting this passage but, unfortunately, often out of context. The point to remember is that, in that case, there was no Shari'ah issue at all. It was an ordinary application of an order for sale in which only the civil law—e.g., National Land Code, the Rules of the High Court 1980—apply.

We could not find any case decided prior to 1<sup>st</sup> January, 2004 (the date that CBMA(A) 2003 came into force) in which a Shari'ah issue was raised that required a decision by the civil court.<sup>5</sup> The provision for the court and the arbitrators to refer Shari'ah issues was made in anticipation of such issues arising. It was thinking ahead.

### ***3.2.2 The Period from 1<sup>st</sup> January, 2004 to 25<sup>th</sup> November, 2009***

We will now look at the period from 1<sup>st</sup> January, 2004 to 25<sup>th</sup> November, 2009, the latter being the date that CBMA 2009 came into force. During this period the law provided that the court and the arbitrators could (without it being mandatory) refer Shari'ah issues arising in any proceeding before the court or the arbitrators to the SAC.

---

<sup>5</sup> That was the finding of Tun Abdul Hamid Mohamad when he made the study in 2003 – See Dato' Abdul Hamid bin Haji Mohamad, *op.cit.*

Perhaps the first reported judgment delivered during this period was the case of *Tahan Steel Corporation Sdn. Bhd. v Bank Islam Malaysia Berhad (no. 1)* (2004: 3 AMR 43).<sup>6</sup> It was an application for an “interim injunction to restrain the defendant from dealing in security documents executed in connection with an Islamic banking facility...granted to the plaintiff”. Out of the five issues, none was a Sharī'ah issue. However, even though the amendment was hardly two months old, the learned Judge did refer to it and even quoted subsection (8) of section 16B and then concluded: “That would be food for thought. But in the context of adjudicating encl 2, the ruling of the Syariah Advisory Council was not sought after. Perhaps the parties knew that the whole banking transaction in the present case was Islamic in nature.”

On 7<sup>th</sup> April 2004, i.e., four months after CBM(A)A 2003 came into force, Dato' Zainal Adzam J delivered his judgment in *Bank Islam Malaysia Berhad v Pasaraya Peladang Sdn. Bhd* (2004: 1 LNS 280). It was an application for an order for sale arising from a charge in a BBA transaction. No Sharī'ah issue arose, and the learned Judge quoted the judgment of the Court of Appeal in *Bank Kerjasama Rakyat Malaysia Berhad v Emcee Corporation Sdn Bhd* (2003: 2 AMR 177) reproduced above.

In the following year, *Arab-Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd* (Suriyadi J, 2005: 5 AMR 381), was decided. It is a case arising from a BBA transaction. The bank applied for an order for sale, and the issue was whether there was cause to the contrary. However, there were two issues that touched on the Sharī'ah, i.e., whether a BBA transaction was prohibited by the Sharī'ah and the issue of deprivation of the defendant's right to a rebate (*muqāṣṣah*). These two issues could have been the first questions to be referred to the SAC. On the competency of civil court judges to decide Sharī'ah issues, the learned Judge observed: “In the event any litigation is commenced, it must be appreciated that not every presiding judge is a Muslim, and even if so, may not be sufficiently equipped to deal with matters which ulamaks take years to comprehend.”

To that we would like to add as a reminder to everyone, including ourselves, that the ability to download the English translation of the Qur'ān and *hādith* from the internet does not make a person a *mujtahid* capable of *ijtihad*. Neither is anyone with a degree from Al-Azhar or any Arab-speaking university, or for that matter a degree in Sharī'ah from a local university, nor is every Sharī'ah Court judge automatically an expert in Islamic banking, finance and *takāful*. Experience in the SAC and other Sharī'ah

---

<sup>6</sup> Judgment dated 23 February, 2004 (Abdul Malik Ishak J).



Committees shows that it now requires a number of persons coming from a variety of disciplines to make a ruling on a Sharī'ah issue in Islamic banking, finance and *takāful*.

On the SAC, the learned Judge remarked:

Under the Central Bank of Malaysia (Amendment) Act 2003 (Act A 1213), the new provision of 16B(8) was inserted where in any proceedings relating to Islamic banking business, etc. before any court or arbitrator, any question that arises concerning a Syariah matter, the court may refer such question to the Syariah Advisory Council. The court thus may even refer the matter to that body in the midst of any proceedings....

With the above mind-boggling minefield awaiting lawyers and judges alike, it is small wonder that the Syariah Advisory Body has been mandated to be formulated. It is when rulings are required that the latter body must give its opinion. Under the above new s 16B of Act A1213, the Syariah Advisory Body appears to have a rather wide scope of referral, and not merely confined to the issue of whether the matter at hand involves any element which is not approved by the religion of Islam. Needless to say the final say must rest with the presiding judge (see s 16B (9) (a)).

The learned judge, however, did not find it necessary to refer the Sharī'ah issues to the SAC nor, from the record, was there any request for him to do so. Instead, the learned Judge took it upon himself to expound the Sharī'ah principles involved, perhaps the first civil court judge to do so in an Islamic banking case in this country. We will not comment on his exposition of the Sharī'ah. However, we will quote his conclusions.

With regard to the first issue the learned Judge, *inter alia*, said:

I am unable to acquiesce to any argument too that, just because a larger sum is agreed to be paid back founded on a buy-back concept, with the defendant openly having requested for deferred payment, and with the differential sum resembling interest, the agreement must be void. I am unable to acquiesce to such a suggestion as there is no clear text that prohibits such a transaction entrenched with all those ingredients....I therefore reject the argument of the defendant that, just because the defendant pays more than what was needed to buy the impugned property, such sum (here called profit) must be interest *per se*.

On the second issue, the learned Judge concluded:

That right to rebate, if any, thus had dissipated not only with the precipitation of the default instalment, but also the exhaustion of time with the completion contractual time having arrived. Based on all these grounds, the issue of the defendant being deprived of the rebate by reason of the recalling of the facilities cannot qualify as a “cause to the contrary”.

Thus, in this case, which appears to be the first reported case after 1<sup>st</sup> January, 2004, even though there were Sharī'ah issues, the Court, though aware of the existence of the SAC, did not find it necessary to refer the issues to the SAC, presumably because the opinion of the SAC would not be binding on him, as the law then was. In addition, it could also be because there was no application by either party for him to do so.

In December 2005, Abdul Wahab Patail J decided the case of *Affin Bank Bhd v Zulkifli bin Abdullah* (2006: 3 MLJ 67). Again it was a BBA transaction. The issue before the court was the actual amount that a customer has to pay to the provider of a BBA facility in the event of a default. On the question of whether the Court should refer Sharī'ah issues to the SAC or not (obviously the learned Judge must have meant the SAC even though he did not say so specifically), the learned Judge said:

Since the question before the court is the interpretation and application of the terms of the contractual documents between the parties and of the decisions of the courts, reference of this case to another forum for a decision would be an indefensible abdication by this court of its function and duty to apply established principles to the question before it. It is not a question of Syariah law. It is the conclusion of this court, therefore, that there is no necessity to refer the question to another forum.

He accordingly held that:

(1) If the customer is required to pay the profit for the full tenure, he is entitled to have the benefit of the full tenure. It follows that it would be inconsistent with his right to the full tenure if he could be denied the tenure and yet be required to pay the bank's profit margin for the full tenure. To allow the bank to also be able to earn for the unexpired tenure of the facility means the bank is able to earn a profit twice upon the same sum at the same time.

(2) The profit margin that continued to be charged on the unexpired part of the tenure cannot be actual profit. It was clearly unearned profit. It contradicted the principle of Al-Bai Bithaman Ajil as to the profit margin that the provider was entitled to. Obviously, if the profit had not been earned it was not profit, and should not be claimed under the Al-Bai Bithaman Ajil facility.

Note that, despite the provision of the law, in practice a judge may avoid referring a Sharī'ah issue to the SAC by saying that it is a question of "interpretation and application of the terms of the contractual documents between the parties". That is even more likely when there is no application by a party for the court to make a reference. If there is an application, then the party dissatisfied with the decision may pursue the issue on appeal.

In June 2006, David Wong J delivered his judgment in *Malayan Banking Bhd. v Marilyn Ho Siok Lin* (2006: 7 MLJ 249). This is perhaps the first reported case decided by a non-Muslim judge and, perhaps, the first reported case from Sabah and Sarawak. As usual, the bank applied for an order for sale of the property charged by the defendant, a non-Muslim, who had obtained a BBA facility from it. The contention of the defendant, which the learned Judges considered to be the crux of the case, was whether or not the plaintiff was entitled to claim for the full sale price less what had been paid, i.e., RM928,589.12 as at 21 February, 2005. In our view, that clearly was a Sharī'ah issue. Let us look at his conclusion first:

Sale price is defined in both documents to be the sum of RM 995,205.64.

Faced with such plain language in the aforesaid clauses, does this court have the option to ignore it?

In my view, the answer is in the affirmative, and my ground for saying so lies in the words used in s148(2)(c) Sarawak Land Code (Cap 81), and they are '... and the court after hearing the evidence may make such order as in the circumstances seems just'. These words empower the court with the flexibility (as opposed to the imperative power in s 256 of the National Land Code 1965) to make any order **even if it means ignoring the terms contained in the BBA documents** provided it is just in the circumstance. Needless to say, the court must have good reasons **to ignore or, put in another way, rewrite the terms therein**. This involves the process of taking

into consideration 'all the circumstances of the case'. That would include the public interests, the peculiarities of the contract, and the compliances by the parties of the agreed terms contained therein. Of course at the end of the day, the primary aim must be to make an order **as in the circumstance seems just.** (emphasis added by author).

How did he arrive at such a conclusion? Under the topic "Approach of this court", the learned Judge started off by quoting the oft-quoted passage from the Court of Appeal's judgment in *Bank Kerjasama Rakyat Malaysia Berhad v Emcee Corporation Sdn Bhd* (2003: 2 AMR 177) and said: "Not only do I agree with the sentiments stated in the above case, I am bound by them under the principle of stare decisis." With respect, the learned Judge had missed a very pertinent point: in that case, unlike this case, there was no Shari'ah issue at all.

The learned judge relied on the Court of Appeal judgment in *Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd* (2004: 4 CLJ 793) for the law on order for sale under the Sarawak Land Code (Cap 81). He said:

In Sarawak, the relevant law is s 148(3) of the Sarawak Land Code (Cap 81), which was the subject of deliberations in *Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793, where his Lordship, Gopal Sri Ram JCA at pp 800-801 stated as follows:

Now, although s 148(3) of the Sarawak Land Code is similar in effect to s 254(1) of the National Land Code (see *Citibank v Mohamad Khalid bin Farzalur Rahaman & Ors* [2000] 4 MLJ 96), ss 148(1) and (2) of the former are differently constructed from s 256 of the latter. **Under s 148(2) of the Sarawak Code, the court is given a choice of making one of the three orders: the only consideration being that of justice in the circumstances of the case.** Thus, if a chargee applies for an order for sale, the court, by virtue of s 148(2), may if it does not in the circumstances seem just, refuse that order and in its stead make, for example, an order directing that the chargee receive the rents and profits from the charged land. Such an order may well be made in cases where the value of the charged property far exceeds the sum owing and the charged property is producing sufficient income to repay the loan within a reasonable time.

Contrast this with s 256 of the National Land Code the terms of which are imperative. In essence it says that the court 'shall' make an order for sale unless there is shown 'cause to the contrary'. So, the court is under a duty to make an order for sale when no cause to the contrary is shown.

Regrettably, even the passage that the learned Judge cited as authority does not support his conclusion. The judgment of the Court of Appeal is very clear. **“Under s 148(2) of the Sarawak Code, the court is given a choice of making one of the three orders”**. What are the three orders? They are clearly provided by subsection (2) of section 148:

(2) If the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court -

(a) for an order entitling him to enter into possession and to be registered as proprietor of the charged land;

(b) to receive the rents and profits of the charged land; or

(c) for the sale of the charged land.

The whole of section 148 was reproduced in the Court of Appeal judgment. Indeed, the judgment of the Court of Appeal went on to give an example of one of the choices that a court could make. That is to be found in the two sentences following the highlighted sentence, which the learned Judge himself quoted! We find it difficult to understand how the learned Judge could have misread the passage he quoted to arrive at his unwarranted conclusion that he could ignore and rewrite the BBA agreement!

Lastly, the learned Judge relied on a statement in the judgment of the Supreme Court in *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal* (1991: 3 MLJ 163):

The power of this court under s 148(2) of the Sarawak Land Code (Cap 81) is a discretionary one as held in *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 3 MLJ 163, where the Supreme Court in dealing with the aforesaid section said (at p 166):

It is common ground that the power to grant the order for sale under the section is discretionary.

With respect, the learned Judge again seems to have his own idea on the meaning of the word “discretion” used in the judgment. That discretion clearly refers to one of the three choices provided by subsection (2) of section 148. It does not give him the power to do anything as he pleases. It is trite law that the granting of an injunction is discretionary; so are costs and a host of other things. But there are rules that must be followed. Otherwise, appeals and the principle of *stare decisis* would be meaningless.

We find the conclusion of the learned Judge very disturbing. Imagine a non-Muslim Judge deciding an Islamic banking case involving a non-Muslim customer of an Islamic bank saying that he is entitled to ignore and to rewrite the term of the BBA contract which Sharī'ah scholars and bankers took years to develop and to market, if it seems unjust to him!

In August 2007, Hamid Sultan JC (as he then was) delivered the judgment in *Malayan Banking Berhad v Ya'kup bin Oje & Anor* (2007: 6 AMR 135). Again the case arose from a BBA facility. The issue was whether the court should allow the order for sale for the repayment of the sum in the original form, or limit the sum to be repaid under the order for sale, or make other orders or directions as the justice of the case required. The learned JC wrote a lengthy treatise on Islamic jurisprudence, Islamic economics, Islamic banking, the concept of justice and Sharī'ah, the doctrine of *Ī'lah* and other topics, quoting extensively from the English translation of the Qur'ān and other sources, and held:

- (a) The sum of RM167,797.10 that the defendants had to pay to the plaintiff as the amount due and owing under the BBA when the defendants only received RM80,065 to finance the purchase of the property was clearly excessive and abhorrent to the notion of justice and fair play when compared and contrasted with secular banking facilities. [see p 138 lines 34–41]
- (b) The syllogism that the Quranic injunction required parties to honour the contract they entered into, and consequently that a contract under the BBA must be honoured, was a fallacy within the framework of Islamic jurisprudence. A contract under the BBA, like any other Islamic commercial transaction, was subjected first and foremost to the Quranic injunction to act with justice and equity. [see p 145 line 34 - p 146 line 13]

In July 2008, Abdul Wahab Patail J delivered his judgment in *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya dn Bhd & Ors; Koperasi Seri Kota Bukit Cheraka Bhd (third Party) and Other Cases* (2009: 1 CLJ 419). Again, this case arose from a BBA transaction. There was default in the payment of instalments, and the bank went to court to apply for an order for sale under the National Land Code.

The defendants argued that the transaction herein, comprising as it were of the letter of offer, the PPA, the PSA and the charge or assignment in question, became transparently financing in nature and smacked of transactions for profits, and in the circumstances, beseeched the court to examine the same and determine whether it involved elements not approved by the religion of Islam – or had otherwise contravened the provisions of the Islamic Banking Act 1983 or the Banking and Financial Institutions Act 1989.<sup>7</sup>

The learned judge, on his own, made Shari'ah rulings such as no Shari'ah Committee anywhere in the world had ever done; for example:

The Islamic financing facilities are presented as Islamic to Muslims of all mazhabs. The facilities do not say they are offered only to Muslims of a certain mazhab, for example Syafi'e. If a facility is to be offered as Islamic to Muslims generally, regardless of their mazhab, then the test to be applied by a civil court must logically be that there is no element not approved by the Religion of Islam under the interpretation of any of the recognised mazhabs. That it is acceptable to one mazhab is not sufficient to say it is acceptable in the Religion of Islam when it is not accepted by the other mazhabs.

The learned Judge also wrote a lengthy judgment covering topics such as: religion and law, civil court and Islamic finance cases, Islamic banking and financing, *ribā* and usury, common law and equity, other elements, form and substance, concept and implementation, equitable interpretation, *ibrā'* or *muqāṣṣah*, *bay' bi thaman ājil* and others, citing numerous versus from the Malay and English translations of the Qur'ān, as well as from the Old and the New Testaments. The learned Judge finally granted the order for sale to the Plaintiff banks and ordering the Defendants to return the original facility amount to the Plaintiff banks.

---

<sup>7</sup> (per Head Note).

We notice that in the last three cases decided between 2005 and 2008, three different judges began to get more and more deeply involved in expounding the Sharī'ah, including giving a fatwa (ruling) that as the facility is to be offered as Islamic to Muslims generally, regardless of their *madhhabs*, then there must be no element not approved by the Religion of Islam under the interpretation of any of the recognised *madhhabs*! Ironically, if that is the principle, why limit it to “recognised *madhhabs*”? Recognised by whom? It is like saying that the Imām at al-Masjid al-Ḥaram must take ablution and conduct the prayer in a way that is consistent with the practice of all the *madhhabs* (as well as the practice of people who do not subscribe to any *madhhab*) because he leads the prayer for people of all *madhhabs* as well as those without *madhhabs*. The short answer is that there will be no prayer at all.

As it turned out, the drafting of the CBMA 2009 bill was in its final stages around that time. That judgment shocked the industry and the Sharī'ah scholars. We believe that it was that judgment that was responsible for the change in the law regarding the requirement to refer Sharī'ah issues to the SAC and make the ruling of the SAC binding on the Courts.

The Bill was passed by Parliament, subsequently received the Royal Assent on 19 August, and was published in the gazette on 3 September, 2009. However, it came into force on 25 November, 2009 except for paragraph 23(8)(b) and sections 61 to 66 [PU(B) 533/2009].

During that period, two more judgments were delivered. The first is *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Berhad (and Another Suit)* (21<sup>st</sup> August, 2009). (Rohana Yusuf J, 2009: 6 AMR 609).

For those who are not very familiar with civil procedure, the case was only at the stage of an application for a summary judgment, i.e., the issue to be determined by the court was whether there were issues to be tried. So long as there is even one issue to be tried, summary judgment should be refused and the case must go for full trial.

Tan Sri Khalid challenged the validity of the BBA facility agreements for want of compliance with the principles of Sharī'ah on three main grounds. First, the BBA facility agreement, either read together with the security documents or even independently, denotes a financing arrangement, not the sale transaction that it is purported to be. Secondly, the BBA facility agreement is *bay' al-ṭmah*, as the recital of the agreement shows a connection between the asset purchase agreement (“APA”) and asset sale



agreement (“ASA”). Thirdly, the disposal of the pledged Guthrie shares by the bank without notifying Tan Sri Khalid is contrary to the Islamic principle known as *al-rahm*, which requires the consent of the pledgee before any disposal of it. Consequently, the learned counsel for Tan Sri Khalid submitted that the BBA agreement was contrary to law or public policy and could not be enforced under s 24 of the Contracts Act 1950. He also produced three Shari‘ah opinions raising issues about the validity of the BBA agreement from a Shari‘ah perspective.

On the issue that the agreement was null and void, the learned Judge said:

Encik Malik Imtiaz contends that since BBA agreement is not in line with Islamic law the BBA agreement is an illegal contract or agreement against public policy and are [*sic*] null and void under s 24 of the Contracts Act 1950.

I would like first to appraise myself with the legislative provision that deals with this issue as found in s 16B of the Central Bank Act 1956. Section 16B creates the Syariah Advisory Council (“SAC”) under the aegis of the Bank Negara Malaysia (“Bank Negara”). Section 16B designates the SAC to be the authority for the ascertainment of Islamic law for the purposes of Islamic banking business, takaful business or Islamic financial business. Bank Negara, under s 16B(7) must consult the SAC on Syariah matters relating to Islamic Banking Business, Takaful Business, Islamic Financial Business, Islamic Development Financial Business, or any other business which is based on Syariah principles. Bank Negara, may issue written directives to banks and financial institutions in relation to Islamic banking or Islamic financing businesses in accordance with the advice of the SAC. Its membership as determined under s 16B(2) is made of members from related disciplines, besides Syariah scholars. Looking at s 16B(7), I would not be wrong to assume that when Bank Negara issues directives involving Syariah matters it would have the approval or the advice of the SAC. Thus an approval of Bank Negara for financial institutions to offer Islamic banking products would and must have had the benefit of the advice of the SAC. I raise this point also because in the submission of Encik Tommy Thomas for the bank, he confirmed that the restructuring of this particular BBA facility agreement received the sanction of Bank Negara, which in return would have had the benefit of the SAC’s advice.

Under s 16B(8), it is provided that in any proceedings before the court when a question arises concerning a Syariah matter, the court or the arbitrator may take into consideration any written directives issued pursuant to subsection (7) or refer such question to the SAC for its ruling. Relying on this clause in fact, after the submissions were made before me by both counsels on the Syariah issue raised; I had caused an enquiry to be made to the SAC as to whether a ruling has been made on the status of BBA agreement. The secretariat to SAC responded with a written ruling from the SAC which states essentially, that BBA agreement is acceptable and a recognised transaction in Islam. I have furnished the said written ruling from the SAC to both counsels...

Returning now to the SAC, it is clear from s 16B that the SAC is the body empowered for the “ascertainment of Islamic law for the purpose of Islamic banking business...” The Legislature had intended the SAC to be a legally recognised body under the law to ascertain the Islamic law applicable to Islamic banking and finance. With such specific legislative provision it is obvious that the SAC is a body empowered and recognised under the legislation to issue ruling and direction on the applicable Syariah law in Islamic banking business.

To my mind there is good reason for having this body. A ruling made by a body given legislative authority will provide certainty, which is a much needed element to ensure business efficacy in a commercial transaction. Taking cognisance that there will always be differences in views and opinions on the Syariah, particularly in the area of muamalat, there will inevitably be varied opinions on the same subject. This is mainly due to the permissive nature of the religion of Islam in the area of muamalat. Such permissive nature is evidenced in the definition of Islamic banking business in s 2 of the Islamic Banking Act 1983 itself. Islamic banking business is defined to mean, banking business whose aims and operations do not involve any element which is not prohibited by the religion of Islam. It is amply clear that this definition is premised on the doctrine of “what is not prohibited will be allowed”. It must be in contemplation of the differences in these views and opinions in the area of muamalat that the Legislature deems it fit and necessary to designate the SAC to ascertain the acceptable Syariah position. In fact, it is well accepted that a legitimate and

responsible government under the doctrine of *siasah-as-Syariah* is allowed to choose which amongst the conflicting views is to be adopted as a policy, so long as they do not depart from Quran and Islamic injunction, for the benefits of the public or the *ummah*. The designation of the SAC is indeed in line with that principle in Islam.

Having examined the SAC, its role and functions in the area of Islamic banking, I do not see the need for me to refer this issue elsewhere though I am mindful that under s 16B(7) I am not bound by its decision. From its constituents in s 16B(2) the members are made of people of varied disciplines besides *Syariah* scholars. This, I believe will enable the body to arrive at a well informed decision instead of deciding the *Syariah* issue in isolation. **Bearing in mind the response from the SAC to this case, namely, that BBA is a recognised form of transaction and is within *Syariah*, I have no hesitation to accept that view and will not venture any further into its finding...**

We would like to interject here that at that point of time it was not yet mandatory for the court to refer a *Shari'ah* issue to the SAC, the ruling of the SAC was not binding on the court, the procedure for reference had not been established yet, and this is the first known case where a Judge made an inquiry of the Secretariat regarding the validity of the BBA Agreement. However, it appears that since there were rulings of the SAC on the matter, the issue was not brought before the SAC. Under the new provision and the procedure for reference, the matter would have to be brought to the SAC and, as will be seen later, the reply could take a different form. In other words, the SAC would not say whether the Agreement is valid or not but would only state the principle as required by *Shari'ah*, and it is for the court to make a finding of facts, apply the principles to the facts and arrive at a decision. In any event, the observation of the learned Judge on the SAC is heartening. Perhaps, that is understandable as the learned Judge was a Senior Manager in the Islamic Banking Department of Bank Negara Malaysia before her appointment as a Judicial Commissioner and later Judge.

Five days after Rohana Yusuf J delivered *Tan Sri Khalid's* case, the Court of Appeal came out with the judgment in *Bank Islam Malaysia Berhad v Lim Kok Hoe & Anor (and 8 Other Appeal)* (2010: 2 AMR 647).<sup>8</sup> This is how Raus Sharif JCA (as he then was), delivering the judgment of the court, began his judgment:

---

<sup>8</sup> (26<sup>th</sup> August 2009).

On July 18, 2008, the Kuala Lumpur High Court delivered a common judgment for 12 cases concerning Islamic financing which sent shock waves to the Islamic banking industry. The learned judge declared that the *bay' bi thaman ājil* ("BBA") contract, a financial instrument in Islamic financing which had been in existence and practised in this country for the past twenty-five years, was contrary to the religion of Islam.

The only issue was whether the BBA contracts were valid and enforceable. The Court of Appeal, *inter alia*, held:

3. The trial judge in this instance, had questioned the validity and enforceability of the BBA contracts on two grounds, firstly, that the contract was far more onerous than the conventional loan with *riba* and secondly, that the BBA contracts practised in this country are only acceptable by one *mazhab* and not by all four *mazhabs* in Islam, which is a requirement under s 2 of the Islamic Banking Act 1983 ("the Act"). [see p 658 para 21 lines 8–15]

4. It is accepted that *riba* is prohibited in Islam, but it is not appropriate for the trial judge to make a comparison between a BBA contract and conventional loan agreement. The BBA contract is a sale agreement whilst a conventional loan agreement is a money lending transaction. The two transactions are diversely different and indeed diametrically opposed. It is therefore plainly wrong for the judge to equate the profit earned by the appellant as being similar to *riba* or interest. [see p 659 para 24 lines 17–24]

5. The comparison between a BBA contract and a conventional loan agreement is of no relevance. It serves no purpose as the law applicable in relation to a BBA contract is no different from the law applicable to a conventional loan agreement. The law is the law of contract. Thus if the contract is not vitiated by such factors as fraud, coercion, undue influence etc. the court has a duty to defend, protect and uphold the sanctity of the contract. The court cannot rewrite the contract for the parties. [see p 659 para 26 line 30 – p 660 para 27 line 10; para 28 lines 19–20]...

7. Judges in civil courts should not take it upon themselves to declare whether a matter is in accordance with the religion of Islam or otherwise. In the civil court, not every presiding judge is a Muslim, and even if so, may

not be sufficiently equipped to deal with matters which ulamas take years to comprehend. Thus whether the banking business is in accordance with the religion of Islam or not, needs consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence. [see p 661 para 32 lines 15–23] \*649

8. The law requires all Islamic banks in this country to have a Syariah Advisory Board to advise it on the operations of its banking business in order that it does not involve any element which is not approved by the religion of Islam. The trial judge should not have taken it upon himself to rule that the BBA contracts were contrary to the religion of Islam without having regard to the resolutions of the Syariah Advisory Council on the validity of the said contracts. [see p 661 para 34 lines 33–37].

The observation by the Court of Appeal whether a judge could rewrite the contract as expounded by Abdul Wahab Patail J in *Affin Bank Bhd v Zulkifli Abdullah* (2006: 1 CLJ 438), and David Wong J in *Malayan Banking Bhd. v Marilyn Ho Siok Lin* (2006: 7 MLJ 249) is worth quoting in full:

Thus, the learned Judge in coming to the conclusion that BBA contract is in fact a loan agreement and consequently by:

(a) replacing the sale price under the property purchase agreement with an “equitable interpretation” of the same; and

(b) substituting the obligation of the customer to pay the sale price with a “loan amount” and “profit” computed on a daily basis,

as he expounded in *Affin Bank Bhd v Zulkifli Abdullah* (supra), was in fact rewriting the contract for the parties. It is trite law that the court should not rewrite the terms of the contract between the parties that it deems to be fair or equitable. This principle has been clearly expressed in numerous cases. (See *Shell Malaysia Trading Sdn Bhd v Lim Yee Teck & Ors* [1982] 2 MLJ 181; *Wong Pa Hock v American International Assurance Co Ltd & Anor* [2002] 2 CLJ 267; *M Paikam v YP Devathanjam* [1952] MLJ 58; and *Charter Reinsurance Co Ltd v Fagan* [1996] 3 All ER 46.

That ended the era.

### 3.2.3 *The Period after 24<sup>th</sup> November, 2009*

On 28 January 2010, about three months after CBMA 2009 came into force, Rohana J delivered her judgment in *Bank Islam Malaysia Berhad v Azhar bin Osman (and 3 Other Suits)* (2010: 3 AMR 363). After the decision of the Court of Appeal in *Bank Islam Malaysia Berhad v Lim Kok Hoe & Anor (and 8 Other Appeals)* (2010: 2 AMR 647), this case was one of the many cases sent back to the High Court for determining the quantum the customer should pay to the bank. The issue is really whether the bank is entitled to the full sale price when default occurs in a BBA contract. Put it this way: we think it is a Sharī'ah issue. However, the learned Judge framed the issue in a way that made it look like a question of interpretation of the contract. Approached in that way, the question of referring the issue to the SAC did not arise at all. From the judgment, it appears that even the counsel did not request the court to refer the question to the SAC. Briefly, the learned Judge distinguished *Bank Islam Malaysia Berhad v Lim Kok Hoe & Anor (and 8 Other Appeals)* (2010: 2 AMR 647); followed *Affin Bank Bhd v Zulkifli Abdullah* (2006: 3 MLJ 67) and *Malayan Banking Bhd v Ya'kup b Oje & Anor* (2007: 6 AMR 135); (2007: 6 MLJ 389); and decided that the bank was not entitled to the full sale price. There was no mention of the SAC even though the CBMA 2009 had already come into force.

However, the judgment (*Azhar*) was reversed by the Court of Appeal on 20<sup>th</sup> October, 2010. What is important during this period is that the court and arbitrators started referring Sharī'ah issues to the SAC.

## 4. REFERENCES MADE BY THE COURT AND ARBITRATORS TO THE SAC

We have seen from the cases discussed above that in *Tan Sri Abdul Khalid's* case (21<sup>st</sup> August, 2009), Rohana J had caused an enquiry to be made to the SAC as to whether a ruling had been made on the status of the BBA agreement.

However, the first “real” reference came sometime in the middle of 2011, it was from arbitrators and, interestingly, the signatory of the letter making the reference was the former Chief Judge (Malaya)! Since this was the first reference ever made, it is quite brief and both the questions and the answers are in English, perhaps we should reproduce it for record purposes:

1. Whether an Arbitrator can make an order for interest in his Award for late payment charges against a judgment debtor that is licensed under the Islamic Banking Act 1983?

Interest is prohibited in Shariah. Therefore, making an order for interest in an award given to an institution licensed under the Islamic Banking Act 1983 is strictly prohibited from the Shariah perspective.

However, in recognition of the loss incurred by the judgment creditor as a result of late payment and as a deterrent against delay in payment by the judgment debtor, the Shariah Advisory Council of Bank Negara Malaysia (SAC) has decided that:-

- i) The Court may impose late payment charge on judgment debt in cases involving Islamic banking and *takaful* based on *tawidh* (compensation) and *gharamah* (penalty) mechanism;
- ii) *Tawidh* refers to compensation for actual loss which may be recognised as income by the judgment creditor; and
- iii) *Gharamah* refers to penalty imposed as a preventive measure to late payment by the debtor and shall not be recognised as an income by the judgment creditor.

The SAC is of the opinion that the above decision is also applicable to arbitration. However, the decision mentioned above is purely from the Shariah perspective. The full resolution is attached at Appendix 1 for reference.

2. Whether such late payment charges can be given for the periods covering pre and post Award?

Late payment charge (as described in our answer to question no.1) on the awarded sum may only be given for the period covering post award.

3. What is the rate of such late payment charges that can be awarded?

The SAC has made a ruling that late payment charge for judgment debt shall be based on its rate as stipulated in the rules of court. In

the context of arbitration, the rate may be as stipulated in the rules applicable to arbitration. The late payment charge on judgment debt shall not be compounded.

Very soon after that, the first reference came from the court, the Muamalat Division of the High Court, Kuala Lumpur, and the Judge who made the reference was none other than Mohd Zawawi J, whose judgments we have referred to in this paper. His question was whether the rate of *ta'wīd* could be fixed or agreed upon (predetermined) by contracting parties in an agreement without any proof of the loss suffered by the bank?

The SAC answered as follows:

1. It is not permissible for parties to a contract to fix or agree beforehand (predetermine) the rate of *tawidh* based on mutual agreement.
2. However, parties to a contract may agree with the rate fixed by the authority. In the context of Islamic banking, the authority refers to the Bank Negara Malaysia.
3. *Tawidh* refers to compensation for actual loss. In view of the difficulty to determine the amount of actual loss and the need for uniformity in the industry, the rate of actual loss shall be fixed by Bank Negara Malaysia as the authority. The rate that could be applied to determine the rate of actual loss is the daily overnight Islamic interbank rate uploaded in Islamic Interbank Money Market ([iimm.bnm.gov.my](http://iimm.bnm.gov.my)) as at the date the judgment is given and calculated monthly based on daily rest basis. Information regarding guidance on the imposition of *tawidh* may be found in paragraph 5.9.2 of the “Guidelines on the Imposition of Fees and Charges on Financial Products and Services” attached herein.<sup>9</sup>

In March 2012, another reference was made by Mohd Zawawi J. There were more questions now; each was divided into several parts; and the SAC gave a seven-page answer. Part of the answer was later adopted as Illustration IV of the Manual.

The third reference from the court and the last to date again came from the same Judge and the same court. It was on the subject of *al-rahm*.

So the system has started to function.

---

<sup>9</sup> Our own translation.



## 5. CONSTITUTIONALITY OF THE SAC

As often happens, to avoid having to repay a loan or a facility, Islamic or conventional, defaulting customers put up all kinds of defences. We have seen that one of them is that the product is not Shari'ah compliant. That is ironical as they did not raise the question when they were applying for and enjoying the facility; more so in the case of non-Muslim customers. Why do they want to be "pious Muslims" when they have to repay their debts when they do not even accept the religion? In any event, to all who raise such a defence: Is it Shari'ah compliant to not repay one's debt?

With the establishment of the SAC with power to determine Shari'ah issues arising in Islamic banking cases, the defaulters have found another defence: that the SAC itself is unconstitutional. The challenge is raised on two grounds: first, it usurps the power of the civil court; second, there is a denial of the right to be heard.

In *Mohd Alias Ibrahim v. RHB Bank Bhd & Anor*, (2011: 4 CLJ 654) the High Court's reference of Shari'ah issues to the SAC of the Central Bank of Malaysia, pursuant to sections 56 and 57 of the CBMA, was contested by the plaintiff. Plaintiff contended that the impugned provisions are unconstitutional as they usurp the judicial power of the court, provided under Article 121(1) of the Federal Constitution, and delegate the courts' decision-making power in relation to the Islamic financial business to the SAC. In addition, the binding nature of the SAC rulings on the court, by virtue of impugned provisions, allegedly affects the parties' natural right to be heard. These are some of the reasons why the plaintiff claimed that sections 56 and 57 of the CBMA should be declared invalid for being unconstitutional.

Mohd Zawawi Salleh J, inter alia, held:

In Malaysia, although Islamic law falls under the jurisdiction of the Syariah Courts, in cases involving banking transactions based on Islamic law principles, it is the civil courts that will have jurisdiction to hear the matters. The reason is that the law relating to finance, trade, commerce and industry falls within the Federal List (List I) in the Ninth Schedule of the Constitution. That notwithstanding, by virtue of Act 701 and the Impugned Provisions, for questions concerning a Syariah matter, the civil court is bound to take into consideration any published rulings of the SAC or refer such questions to the SAC for its ruling and any such ruling made shall be binding on the court.....

The Constitution has given the power to Parliament to make laws with respect to any of the matters enumerated in the Federal List which includes “the ascertainment of Islamic law and other personal laws for purposes of federal law” (see art. 74 and Item 4(k)). Act 701 is a federal law and its contents are consistent with the words employed in the Constitution...

The issue of whether the facility is Syariah compliant or not is only one of the issues to be decided by the court. And although the ascertainment of Islamic law as made by the SAC will be binding on the court as per the Impugned Provisions, it will be up to the court to apply the ascertained law to the facts of the case. The court still has to decide the ultimate issues which have been pleaded. Consequently, the final decision remains with the court. (para. 96)

The sole purpose of establishing the SAC is to create a specialized committee in the field of Islamic banking to speedily ascertain the Islamic law on financial matters so as to command the confidence of all in terms of the sanctity, quality and consistency of the interpretation and application of Syariah principles pertaining to Islamic finance transactions before the court. The SAC cannot be said to be performing a judicial or quasi-judicial function as the process of ascertainment has no attributes of a judicial decision. Hence, this is not an attempt by the executive to take over the judicial power traditionally exercised by the courts. (paras. 102, 105 & 106)

The rulings as passed by the SAC constitute a form of expert opinion in the matter of Islamic finance. Further, considering that its members were [*sic*] highly qualified in the fields of Syariah, economics, banking, law and finance and appointed based on standards enunciated in s. 53 of Act 701, every such ruling, in the context of Islamic banking and *takaful*, can also be regarded as a collective *ijtihad*. Within the contexts of administration of Islamic laws in Malaysia, these rulings, however, are not fatwas (paras. 107, 109- 110 & 120).

This judgment has been confirmed by the Court of Appeal in Court of Appeal Civil Appeal No. W-02-1420-2011.

On 2<sup>nd</sup> December, 2011, Mohd. Zawawi Salleh J delivered another judgment in *Tan Sri Khalid Ibrahim v. Bank Islam Malaysia Berhad* (2012: 3 CLJ 249):

(1) Sections 56 and 57 of the CBMA were procedural in nature. There was no adverse impairment of any pre-existing substantive right of Tan Sri Khalid. It entailed nothing more than the application of a new procedure as far as Syariah issues were concerned; the only difference being that as from 25 November 2009, the court's discretionary power, that existed under s 16B (8) of the repealed Central Bank Act 1958, was taken away and the ruling of the SAC was binding on the Court (paras. 36 & 43).

(2) The proposition that Tan Sri Khalid had a vested right to lead expert evidence was untenable because the SAC was a statute-appointed expert tasked with ascertaining Islamic law for Islamic financial business since the amendment to the Central Bank Malaysia Act 1958 in 2003, well before the instant action was brought before the court (para. 44).

(3) Sections 56 and 57 of CBMA were valid federal laws enacted by Parliament pursuant to Item 4(k) of the Federal List (List I) in the Ninth Schedule of the Federal Constitution. Should there be any question concerning a Syariah matter, the Court had to invoke s. 56 (para. 45).

(4) The letter from the court to the SAC at the summary judgment stage merely enquired if there was any existing resolution passed by SAC in respect of BBA contracts. It was not a reference to SAC for a ruling on a Syariah issue (paras 28-29).

(5) The SAC did not perform a judicial or quasi-judicial function. Its function was confined to the ascertainment of Islamic law on a financial matter. The court still had to decide the ultimate issues which had been pleaded (para. 45).

On the role of the SAC, the learned Judge reiterated: "Looking at the purpose of s. 56 of Act 707, it is clear that SAC is required to ascertain the applicable Islamic law to the above Syariah Issues. Upon ascertainment of the Islamic Law, the court would then apply it to the facts of the present case."

This statement is consistent with paragraphs 7 and 8 of the Manual reproduced earlier. It is interesting to note that at the time the judgment was delivered, the Manual had not been issued yet. The drafters of the Manual, too, were not aware of the judgment. However, their understanding of the role of the role of the SAC is similar.

The learned Judge went on to say:

Before I conclude, perhaps it would be useful for me to add a few words as to why civil courts may not be sufficiently equipped to deal with the issue whether a transaction under Islamic banking is in accordance to the religion of Islam or otherwise. Civil courts are not conversant with the rubrics of Fiqh al-Muamalat which is a highly complex yet under-developed area of Islamic jurisprudence. In applying Islamic law to determine the parties' right under a contract, a civil judge had to conduct an extensive inquiry into Islamic law and make an independent determination of Syariah principles...

In my considered opinion, it is advisable and practical that the question as to whether Islamic banking business is in accordance with the religion of Islam or otherwise be decided by eminent jurists properly qualified in Islamic jurisprudence and not by judges of the civil courts. This is to avoid embarrassment to Islamic banking cases as a result of incoherent and anomalous legal judgments. The applicable law to Islamic banking has to be known with certainty. Otherwise, lawyers, bankers and their customers are left to wonder which law is in fact the correct law.

Even if expert evidence is allowed to be given in court to explain or clarify any point of law relating to Islamic banking, civil judges would be in a difficult situation to decide because the divergence of opinions among Islamic jurists and scholars to which the opposing experts might have and which they will urge the court to adopt may be so complex to enable civil judges to make an independent determination of Syariah principles.

Thus, as has been expounded in Alias's case, the necessity of a special body like SAC to ascertain the Islamic law most applicable in Malaysia especially in this Islamic banking industry is undeniable. Difference of opinion on Syariah issues relating to Islamic banking should be resolved within SAC.

These observations by the learned are very heartening indeed. There lies the difference between a Judge with some Sharī'ah educational background and those without. He who knows the seriousness of the matter understands the problem. As time goes on it is hoped there will be more judges with a Sharī'ah background to handle Islamic banking

and similar cases. The difficulty is finding candidates who are well versed in both civil law and the Shari'ah. Quite often, besides those who are quite well versed in either the civil law or the Shari'ah, those who are supposed to know both are neither here nor there. Of course, experience counts.

While we wait for the final decision on the issue, it is hoped that both counsels who argue a case and the judges who will finally decide it will look at the scheme of the Malaysian Constitution and its peculiarities in the Malaysian context and not merely to rely on the words of judges from other jurisdictions. In comparison to England, for example, Malaysia has a written constitution, which England does not. Not only did Dr. Mahathir declare Malaysia to be an Islamic country; the whole Muslim world looks upon Malaysia not only as an Islamic state but as a model modern Islamic state. England is not. England is a member of the European Union, bound by certain conventions. Malaysia is not.

So, if there is any constitutional issue, we should look at Malaysian Constitution first, not the judgments of the Law Lords or the judgments of the Supreme Court of India. Indian judges would, likewise, look at their own constitution, not Malaysia's, much less the judgments of Malaysian courts. English judges have no written constitution to refer to, so they look at their own judgments, not at Malaysian judgments.

Nowhere does the Malaysian Constitution say that the power to decide Shari'ah issues vests in the civil courts. Indeed, the Constitution clearly enumerates that Shari'ah matters in List II of Schedule Nine are state matters, which means that the forum for determining Islamic law regarding those matters are either the State Fatwa Committee or the Shari'ah Court. Based on that alone, the civil courts cannot claim to be the sole authority for the determination of Shari'ah issues under the guise that "Shari'ah" is "law".

We should also look at the history of Article 121. The Constitutional (Amendment) Act 1988 (Act A704) deleted the words "the judicial power of the Federation shall be vested in two High Courts" in article 121(1) and substituted for them the words "There shall be two High Courts of co-ordinate jurisdiction and status...the High Courts and inferior courts **shall have such jurisdictions and powers as may be conferred by or under federal law**" (Emphasis added). Abdul Hamid Mohamad PCA (as he then was), in *PP v Kok Wah Kuan* (2007: 6 CLJ 341), observed as follows:

After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. What it means is that there is no longer a declaration that “judicial power of the Federation” as the term was understood prior to the amendment vests in the two High Courts. If we want to know the jurisdiction and powers of the two High Courts, we will have to look at the federal law. If we want to call those powers “judicial powers”, we are perfectly entitled to. But to what extent such “judicial powers” are vested in the two High Courts depends on what federal law provides, not on the interpretation of the term “judicial power” as prior to the amendment. That is the difference, and that is the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent?

Indeed, the same passage was relied on by Mohd. Zawawi J. in *Mohd Alias Ibrahim v. RHB Bank Bhd & Anor* (2011: 4 CLJ 654).

We have also seen in the answer given by the SAC how meticulous the SAC has been in trying to avoid encroaching upon the power of the court to decide the case. That part of the answer has now been adopted in the Manual; see Paragraph 7 and Illustration IV. The right to be heard has also been provided in the Manual; see Paragraph 12.

## **6. THE ROLE OF THE SAC IN MALAYSIA'S QUEST TO BE THE HUB OF ISLAMIC FINANCE**

There are many advantages to referring Sharī'ah issues on Islamic finance arising in court to the SAC, but the most noticeable are as follows:

- It enables a product to be thoroughly screened to spot the Sharī'ah issues, if any. This is the most difficult part. Each SAC (i.e., Bank Negara's and that of the Securities Commission) has a Secretariat manned by officers who not only have a Sharī'ah background but have been exposed to Islamic finance. From our own observation, the Sharī'ah officers at Bank Negara and the Securities Commission are among the best in the country, if not the best, for the job. The officers in the Secretariats are assisted by their colleagues from other departments, Islamic or conventional, when the need arises. Other institutions under Bank Negara, like the International Sharī'ah Research Academy (ISRA) and the International Centre for Education in Islamic Finance (INCEIF), are

also there to assist. The Secretariats have access to the industry. The officers are in a position to call on the people in the industry for consultation and feedback. Bank Negara and the Securities Commission have regulatory and supervisory powers over the banking institutions, insurance companies, *takāful* operators and capital market institutions under their respective jurisdictions. Bank Negara and the Securities Commission are in a position to ensure that the rulings are complied with. No other religious department, religious council or fatwa committee has such power and expertise. With such expertise and facilities, the Secretariats are able to present very comprehensive papers for consideration of the respective SACs. Whenever there is a common issue, the two SACs hold a joint meeting.

- Having the SACs at the national level enables speedy ruling on an issue. The Secretariat has to prepare and present the case for deliberation and ruling to one council only. Otherwise, it would have to do it, at least fourteen times, at fourteen different Fatwa Committees. That would take time, and the rulings might differ from one state to another. (This is not taking into account the issue of jurisdiction.)
- It promotes consistency of rulings on Shari'ah issues. Imagine having those issues determined by fourteen Fatwa Committees or fourteen Shari'ah Courts of Appeals, or leaving them to the respective Shari'ah Committees of the financial institution. We are concerned about uncertainty in contracts, but uncertainty in Shari'ah rulings is even worse.

Actually, the Malaysian model has received favorable report from other countries. We will only quote two passages. The first is from the book *The Art of Islamic Banking and Finance*, by Yahia Abdul Rahman, page 79:

This approach saves a lot of confusion and conflicts within different Shariah Boards. The involvement of the Central Bank adds credence and weight to the rulings. In addition, because the Shariah Board is operated and supervised by the Central Bank, there is no potential for conflict of interest because the individual banks are not paying their own hand-picked scholars for their services.

The second is from *GIFR Report 2011*, page 165:

The existence of a structured and powerful National Supervisory Advisory Council (NSAC) was originally intended to ensure clarity in terms of fiqh muamalat practices, but today it also has the power of final arbiter on Shariah issues in any IBF dispute. By having legal authority, there will be coherence and assurance of validity of pronouncements by Shariah scholars. In most other jurisdictions, the status of Shariah pronouncements for IBF contracts remains vague and ambiguous when it comes to enforcement under the law.

## 7. CONCLUSION

Malaysia has done what it thought best under the circumstances it is in. While it may not be a perfect model, so far, despite challenges, it has started to show that it is working. Experience will determine whether changes and improvements will have to be made. We believe that there will be.

Think what would happen, not only to Islamic banking and *mu'āmalāt*, but also to Sharī'ah, when civil court judges, though Muslims, try to become *mujtahids*, and non-Muslim judges rewriting a contract approved by the SAC as Sharī'ah-compliant even before its introduction, if they find it "unjust"! We dread to think of the consequences. That is why we believe that, at least in the Malaysian context, this is the best arrangement that we have at the moment. As usual, Malaysia is open to changes for the better. Other countries may take a look at Malaysia's solution to determine if it suits them.



**BIBLIOGRAPHY**

- Abdul-Rahman, Y. (2010). *The Art of Islamic Banking and Finance: Tools and Techniques for Community-Based Banking*. New Jersey: John Wiley & Sons.
- Ashgar Ali Ali Mohamed. (2008). Al-Bai' Bithaman Ajil – Its Consistency with Religion of Islam: With Special Reference to Arab-Malaysia Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors and Other Cases. *Malayan Law Journal*, Vol. 6, xiv.
- Bank Negara Malaysia (2012). Global Islamic Finance Forum Report (GIFF 2012). <https://www.giff.com.my/download>.
- Bank Negara Malaysia (June 19, 2012). *Manual Rujukan Mahkamah dan Penimbang Tara Kepada Majlis Penasihat Syariah Bank Negara Malaysia*. Malaysia: Bank Negara Malaysia.
- BMB Islamic (2011). *Global Islamic Finance Report (GIFR 211)*. (Ed.) Humayon Dar and Talha Ahmad Azami. UK: BMB Islamic Publication.
- Dato' Abdul Hamid bin Haji Mohamad (2002). Cadangan Mewujudkan Bahagian Mu'amalat di Mahkamah Tinggi. [www.tunabdulhamid.my](http://www.tunabdulhamid.my).
- Dato' Muhammad Ibrahim (2010). Islamic Finance and Malaysia's Role. Address at the 21<sup>st</sup> Conference of Presidents of Law Associations in Asia, 27 July 2010, Kuala Lumpur Convention Centre.
- Delorenzo, Y. T. and McMillen, M. J. T. (2007). Law and Islamic Finance: An Interactive Analysis. In Archer, S. and Abdel Karim, R. A. (ed.), *Islamic Finance: The Regulatory Challenge* (pp.132-197). Singapore: John Wiley & Sons (Asia).
- Engku Rabiah Adawiah bt Engku Ali (2008). Constraints and Opportunities in Harmonization of Civil Law and Shari'ah in the Islamic Financial Services Industry. *Malayan Law Journal*, Vol. 4, i.
- Hakimah Yaacob (2011). A Critical Appraisal of International Islamic Finance Cases, and the Way Forward. *ISRA Research Paper No. 19*. Kuala Lumpur: International Shari'ah Research Academy for Islamic Finance (ISRA).

- Hakimah Yaakob (2011). Analysis of Legal Disputes in Islamic Finance and the Way Forward: With Special Reference to a Study Conducted at Muamalat Court, Kuala Lumpur, Malaysia. *ISRA Research Paper No. 25*. Kuala Lumpur: International Shari'ah Research Academy for Islamic Finance (ISRA).
- Hanifah Haydar Ali Tajuddin (2012). Dispute Settlement Mechanisms – the Malaysian Approach, in *Islamic Banking and Finance: Principles, Instruments & Operations* (pp. 315-347). (Ed.) Trakic, A. and Hanifah Haydar Ali Tajuddin. Malaysia: Current Law Journal.
- Hasan, Z. and Asutay, M. (2011). An Analysis of the Courts' Decisions on Islamic Finance Disputes. *ISRA International Journal of Islamic Finance*, Vol. 3, Issue 2, 41-71.
- International Shari'ah Research Academy for Islamic Finance (ISRA) (2011). *Islamic Financial System – Principles & Operations*. Kuala Lumpur: International Shari'ah Research Academy for Islamic Finance (ISRA).
- Laldin, M. A. (2008), "Islamic Financial System: The Malaysian Experience and the Way Forward", *Humanomics*, Vol. 24, No.3, 217-238.
- Malaysia International Financial Centre (2010). *Future Finance: Malaysia, Your Business Connection to Global Islamic Finance*. Kuala Lumpur: Bank Negara Malaysia.
- Munawirah Mohamad (2010). "Dispute Resolution in Islamic Finance in Malaysia: Current Position and the Way Forward", *Arsa Shariah Insight*, 13-21.
- Nik Norzul Thani, Mohamed Ridza Abdullah, and Megat Hizaini Hassan (2010). *Law and Practice of Islamic Banking and Finance*. Second Edition. Malaysia: Sweet & Maxwell Asia.
- Noor Inayah Yaakub (2007). The Misconception of Bai Bithaman Ajil (Sale with Deferred Payment) in Malaysia (Malayan Banking BHD v Marilyn Ho Siok Lin). *Journal of International Banking Law and Regulation*, Vol. 22, Issue 8, 442-443.

- Norhashimah Mohd. Yasin (2001). Islamic Banking in Malaysia: Legal Hiccups and Suggested Remedies. *Malayan Law Journal*, Vol. 9, 5.
- Norhashimah Mohd. Yasin (2007). Islamic Commercial Contracts Cases Heard in Civil Courts under Common Law: A Case Study of Malaysia and England. *Journal of Islamic Law Review*, Vol. 3, 104.
- Norhashimah Mohd. Yasin (2007). Legal Aspects of Islamic Banking: Malaysian Experience. In *Islamic Banking and Finance: Fundamentals and Contemporary Issues* (pp. 215-238). (Ed.), Ali, S. S. and Ahmed, A. Jeddah: Islamic Research and Training Institute, Islamic Development Bank.
- Norhashimah Mohd. Yasin. (1997). Islamic Banking: Case Commentaries Involving Al-Bay' Bithaman Ajil, *Malayan Law Journal*, Vol. 3, cxcii.
- Nuarrual Hilal Md Dahlan and Sharifah Zubaidah Syed Abdul Kader Aljunid (2010). Shariah and Legal Issues in the Bay' Bithaman- Al-Ajil (BBA): A Viewpoint. *Malayan Law Journal*, Vol. 6, lxxv.
- Rusni Hassan, Uzaimah Ibrahim, Nurdianawati Irwani Abdullah, Akhtarzaite Abd Aziz, and Mohd. Fuad Sawari (2010). An Analysis of the Role and Competency of the Shari'ah Committees (SCs) of Islamic Banks and Financial Services Providers. *ISRA Research Paper No.18*. Kuala Lumpur: International Shari'ah Research Academy for Islamic Finance (ISRA).
- Ruzian Markom and Noor Inayah Yaakub (2012). Litigation as Dispute Resolution Mechanism in Islamic Finance: Malaysian Experience. *European Journal of Law and Economics*.
- Satkunasingam, E. and Shanmugam, B. (2012). Governance of Islamic Banks in Malaysia: Challenges and Prospects. In *Islamic Banking and Finance: Principles, Instruments & Operations* (pp. 430-432). (Ed.) Trakic, A. and Hanifah Haydar Ali Tajuddin. Malaysia: Current Law Journal.
- Sudin Haron and Wan Nursofiza Wan Azmi (2009). *Islamic Finance and Banking System: Philosophies, Principles and Practices*. Malaysia: McGraw-Hill Education.

- Trakic, A. (2012). Supervision of Islamic Banks: With Reference to Malaysia. In *Islamic Banking and Finance: Principles, Instruments & Operations* (pp. 435-462). (Ed.) Trakic, A. and Hanifah Haydar Ali Tajuddin. Malaysia: Current Law Journal.
- Trakic, A. and Ashgar Ali Ali Mohamed (2012). Islamic Banking Business in Malaysia: the Regulatory Aspect. In *Islamic Banking and Finance: Principles, Instruments & Operations* (pp. 257-292). (Ed.) Trakic, A. and Hanifah Haydar Ali Tajuddin. Malaysia: Current Law Journal.
- Tun Abdul Hamid Mohamad (2009). Harmonization of Common Law and *Shariah* in Malaysia: A Practical Approach. *Malayan Law Journal*, Vol. 2, xiii.
- Tun Abdul Hamid Mohamad (November 1, 2012). Issues and Challenges Pertaining to the Role of Shariah Advisory Council in Upholding Shariah Principles in Islamic Banking and Finance. A speech delivered during a Seminar on Islamic Banking and Finance, organized by the Attorney General's Chambers Malaysia. [www.tunabdulhamid.my](http://www.tunabdulhamid.my).
- Tun Abdul Hamid Mohamad and Trakic, A. (2012). Enforceability of Islamic Financial Contracts in Secular Jurisdictions: Malaysian Law as the Law of Reference and Malaysian Courts as the Forum for Settlement of Disputes. *ISRA Research Paper No.33*. Kuala Lumpur: International Shari'ah Research Academy for Islamic Finance (ISRA).

## Notes

---



**ISRA** الأبحاث العالمية للبحوث الشرعية  
International Shari'ah Research Academy for Islamic Finance

International Shari'ah Research Academy for Islamic Finance  
ISRA @ INCEIF (718736-K)  
Lorong Universiti A  
59100 Kuala Lumpur

Tel : + 603 7651 4200  
Fax : + 603 7651 4242  
Email : info@isra.my