

POSTSCRIPT TO “SHARIAH ADVISORY COUNCIL’S ROLE IN RESOLVING
ISLAMIC BANKING DISPUTES IN MALAYSIA: A MODEL TO FOLLOW?”

On 14th May 2012, the Court of Appeal (Low Hop Bing, Zaharah Binti Ibrahim and Aziah Binti Ali JJ.C.A.) decided the appeal in Tan Sri Abdul Khalid Bin Ibrahim v. Bank Islam Malaysia Berhad. (As far as we are able to ascertain, the judgment has not been reported yet. We obtain the information through the Legal Network Series, (2012) 1 LNS 634). The court unanimously upheld the judgment of Mohd Zawawi J and held that sections 56 and 57 of the Central Bank of Malaysia Act 2009 were “*valid and constitutional*”. The reasons given by the court are as follows:

“We take the view that the constitutionality of s. 56 and s. 57 is to be tested by reference to the legislative powers of Parliament to enact these sections. Article 74(1) empowers Parliament to make laws with respect to any of the matters enumerated in the Federal List (List 1), or the Concurrent List (List 3), of the Ninth Schedule to the Federal Constitution. Item 4(k) of List 1 clearly provides that Parliament is empowered to make laws in respect of:-

4. *Civil and criminal law and procedure and the administration of justice, including:-*
- ...
- (k) ascertainment of Islamic law and other personal laws for purposes of federal law”.*

[21] *Banking is a matter within the Federal List and the Islamic Banking Act 1983 as well as the Central Bank of Malaysia Act 2009 are clearly federal laws. Thus, s. 56 and s. 57 are within Parliament’s power to enact.....*

[22] *s. 56 and s. 57 are applicable without discrimination to all parties who are in the same circumstances and so cannot be said to have contravened Article 8 governing fundamental liberties generally and equality before the law as well as equal protection of the law specifically.*

[23] *On the issue as to whether there is any usurpation by the SAC of the powers and jurisdiction of the Courts, we need only to examine Part IX which provides for the Judiciary and the functions, powers and jurisdiction of the Courts. Under this Part, Article 121(1) vests the judicial powers of the Federation in the Courts in such manner as may be conferred by or under federal law. So long as Parliament in its wisdom enacts laws for this subject matter, our Courts shall be competent to perform the functions, or to exercise the powers and jurisdiction conferred thereunder.*

[24] *Next, the statutory duty and function of the SAC is to ascertain Islamic*

financial matters or business only. It does not hear evidence nor decide cases....

[25] S. 56 and s. 57 contain clear and unambiguous provisions to the effect that whenever there is any Shariah Question arising in any proceedings relating to Islamic financial business before eg, any Court, it is mandatory for the Court to invoke s. 56 and refer it to the SAC, a statutory expert, for a ruling. The duty of the SAC is confined exclusively to the ascertainment of the Islamic Law on financial matters or business. The judicial function is within the domain of the Court ie, to decide on the issues which the parties have pleaded. The fact that the Court is bound by the ruling of the SAC under s. 57 does not detract from the judicial functions and duties of the Court in providing a resolution to the disputes (which the parties have submitted to the jurisdiction of the Court. In applying the SAC ruling to the particular facts of the case before the Court, the judicial functions of the Court to hear and determine a dispute remain inviolate. The SAC, like any other expert, does not perform any judicial function in the determination of the ultimate outcome of the litigation before the Court, and so cannot be said to usurp the judicial functions of the Court. Hence, s. 56 and s. 57 are valid and constitutional.”

The judgment speaks for itself, very clearly indeed.

24th February 2013.

(This postscript should be read in connection with “SHARIAH ADVISORY COUNCIL’S ROLE IN RESOLVING ISLMIC BANKING DISPUTES IN MALAYSIA: A MODEL TO FOLLOW?”)