

***Shariah* is Immaterial in the Eyes of Civil Courts: Critical Analysis on the Cases Decided in Malaysia, Brunei and England**

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The problem in Islamic finance is that all disputes are decided in Civil courts that apply the Common law principles. Applying the common law principles which override the conventional banking system, are the primary reason Shariah values are being disregarded by the court of law. The objective of this paper is to analyse cases of Islamic finance decided in three (3) countries which are Malaysia, Brunei and England. These three countries were selected due to ease of access to information and cases. The research findings led to the conclusion that Shariah is not the main issue discussed in the courts of law. In some cases, the judges even refused to uphold Shariah principles under the ‘harmonisation’ concept and restricted covenants under the conventional law regime. These findings presented in this paper are that Islamic finance cases decided in court do not put emphasise on the importance of Shariah compliance. A further finding is that never in the history of cases decided in court in these jurisdictions has an attempt been made to define what ‘Shariah compliance’ and ‘Shariah’ are. Additionally, this paper argues that cases where judges have wrongly interpreted contracts exist. This is research based on literature, cases have been collected from the available reported and non-reported literary collections. The findings may lead to future research and strengthening of Shariah in policy making.

Key words: *Shariah, immaterial, dispute, harmonization, cases, court, Brunei, England, Malaysia.*

Introduction

The above title may trigger suspicious analogy, even more because it involves three countries that claim to be the hub of Islamic finance in their respective region. Shariah compliance is an issue of scarcity in the legal regime. In Malaysia, many efforts have been made in order to acquaint judges with shariah principles. However, strict adherence to the civil code implies holding back the values of shariah. In Brunei, there is not much discussion on the issue. To date, not many cases have been registered and reported in the High Court. Similarly, in Malaysia, all disputes are heard in the civil courts, relying very much on the Privy Council as the highest and final arbiter. In England, Shariah compliance is not the issue of interest where these disputes are subjected to various treaties and conventions under the European Union. Despite issuance of Shariah standards in Malaysia, the courts are reluctant to adopt the principles as indicated. They are referred to as a guide, but courts tend to resort to adapting their own 'equitable interpretation'. The objective of this paper is to study whether Shariah compliance is something material and whether the court should put emphasize on highlighted issues. This study is of important due to several factors as follows;

1. Shariah compliance is not a principle but an identity and features that differentiate it from the conventional. Failure to adopt the features may void contracts.
2. The duty of judges is to deliver fair and equitable decisions to both parties involved in a contract which utilizes Shariah principles either based on al-quran, Sunnah or SAC resolutions.
3. The public are exposed to cases in courts, but they are not exposed to the Shariah standards. Public confidence level must be achieved through support from various players including the financial institutions, regulators, judiciary and public. This is important to avoid *tohmah* or *fitnah* to Islam.

Malaysia

In Malaysia, the primary legislation that governs the Islamic banks is the Islamic Financial Services Act 2013. In this country, Islamic banks have their own standard and regulation as provided by Islamic Financial Services Act. Conventional banks, however, are governed by the Financial Services Act 2013 so Malaysia has actually separated the regulations between conventional and non-conventional banks. In addition to this, their central bank has its own Shariah Advisory Council which consists of prominent shariah scholars and is skilled in application of shariah law in banking and finance.

The principles laid down in *Bank Kerjasama Rakyat Malaysia Bhd versus Emcee Corporation Sdn Bhd*,¹ still applicable and are repeatedly referred to in the court of law in Malaysia. The court held that

¹ [2003] 1 CLJ 625 / [2003] 2 MLJ 408 Court of Appeal, KL / 29 January 2003

“Although the facility was an Islamic banking facility that did not mean that the law applicable in this application was different from the law that was applicable if the facility was given under conventional banking. The charge was a charge under the National Land Code. The remedy available and sought was a remedy provided by the Code. The procedure was provided by the National Land Code and the Rules of the High Court 1980. The court adjudicating it was the High Court. So, it was the same law that was applicable, the same order that would be, if made, and the same principles that should be applied in deciding the application.”

In the case above, the appellant granted the respondent a facility under the Islamic banking principle of Al-Bai Bithaman Ajil. Both parties executed two agreements on the same date. The first was the property purchase agreement (the first agreement). Under the first agreement, the respondent sold 22 pieces of land to the appellant for RM20m. The second agreement was the property sale agreement (the second agreement). By that agreement, the appellant sold to the respondent the same properties upon deferred payment terms. Clause 3.1 provided for 36 monthly instalments. As security for the repayment of the sale price under the second agreement, the respondent charged to the appellant 15 pieces of the land under the National Land Code. The respondent failed to pay the instalments under the second agreement. The appellant issued a Form 16D notice under the National Land Code against the respondent. The respondent failed to comply with the Form 16D notices and the appellant filed an originating summons against the respondent for an order for sale under s 256 of the National Land Code. The High Court dismissed the application. The appellant appealed to the Court of Appeal. The court allowed the appeal and granted the order for sale.

In *Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor* (Rohana Yusuf JCA), she adopted the approach of stated in the case of *Bank Rakyat v Emcee*. She opined and was of the view that the “*provisions of the Contracts Act 1950 still govern Islamic contracts*”. It follows therefore the MOD facility agreements are not ones that can be avoided under s 24 of the Contracts Act nor are they an illegal contract under s 25 and therefore this remains an enforceable agreement and must be adhered to. Post judgment interest of 5% is allowed pursuant to O 42 r 12A from 3 September 2014 until full realisation of the payment. As a matter of fact, the Rules of Court prohibit any interest on post judgment for Islamic finance contracts.

3. Brunei

With abundant natural resources and a small population, Brunei Darussalam has one of the highest levels of GDP per capita in Southeast Asia. Wawasan 2035 envisages that, by 2035, the financial sector's contribution to GDP will have expanded to 8% of GDP. Driven by a number of reforms, Brunei Darussalam is one of the most-improved countries in the World Bank's 2017 Doing Business Report.² Brunei Darussalam's membership to the Association of Southeast Asian Nations (ASEAN) increasingly represents a cornerstone of the economy. Founded in 1967, ASEAN today includes ten dynamic and diverse markets of substantial growth potential: Indonesia (1967), Malaysia (1967), Singapore (1967), Thailand (1967), the Philippines (1967), Brunei Darussalam (1984), Vietnam (1995), Myanmar (1997), Laos (1997), Cambodia (1999) and Kimengsi & Gwan 2017. If ASEAN were a single country, it would already be the seventh-largest economy in the world, with a combined GDP of USD2.4 trillion in 2013. Islamic finance activities in Brunei are regulated by the Islamic Banking Order 2008 and Takaful Order 2008. These two acts do not outline the contract involved in banking or takaful, delineating merely procedure. Section 2 of the Islamic Banking Order defines the words *shariah* or *Hukum Syara'* as the laws of Islam according to Shafie, Hanafi, Maliki or Hanbali sects of ahli sunnah wal jamaah. In addition the supervision of shariah activities is closely monitored by the Shariah Financial Supervisory Board. The Board derives their power and mandate from the Shariah Financial Supervisory Board Order 2006.

Currently, all disputes related to Islamic finance are heard at the High Court under the Civil Court jurisdiction. The banks in Brunei have a reputation for high Capital Adequacy Ratios (CAR). In 2015, the banking sector's average CAR was 21.5%, which is well above the minimum regulatory requirements of 10%. Current minimum (quantum of) capital requirements for locally incorporated banks and overseas incorporated banks are BND100 million and BND1 billion, respectively. These serve to ensure that banks operating in Brunei Darussalam are financially robust. The quality of banks in Brunei Darussalam is reflected by their unanimous investment grade credit ratings.³ The current banking system of Brunei Darussalam consists of eight banks comprising one Islamic bank i.e. Bank Islam Brunei Darussalam (BIBD) and seven conventional banks i.e. Baiduri Bank, HSBC (pulling out of Brunei as of October 2016), Maybank, RHB Bank, Standard Chartered Bank, UOB Ltd, and Bank of China, as well as an Islamic Trust Fund which is set up under its own statute. Of the eight banks, three are international, three regional and two domestic banks. In addition, there

²<http://www.ambd.gov.bn/SiteAssets/financial-sector-blueprint/Final%20Sector%20Blueprint%202016%20-%202025%20FINAL.pdf>

³<http://www.ambd.gov.bn/SiteAssets/financial-sector-blueprint/Final%20Sector%20Blueprint%202016%20-%202025%20FINAL.pdf>



are three licensed finance companies, two are conventional and one is Islamic. The three finance companies are wholly owned subsidiaries of three licensed banks in Brunei Darussalam.⁴

Islamic banking was first introduced in Brunei Darussalam in the early 1990s and has since seen tremendous growth. In 1993, the Islamic Bank of Brunei Berhad (IBB) was established. Baiduri bank was established later in 1994. In 2015, it held a significant role in Brunei Darussalam's banking industry with total assets of BND8.94 billion and deposits totalling BND7.34 billion which accounted for 52.4% and 51.5% of the total market share. The operations of the licensed banks are governed by the provisions of the Banking Order 2006 and the Islamic Banking Order 2008. All fully licensed banks and finance companies operating in Brunei Darussalam are mandatory members of the Brunei Darussalam Deposit Protection Corporation which was established in January 2011⁵. In 2005, the largest Islamic bank in Brunei was established known as Bank Islam Brunei Darussalam (BIBD).⁶ In 2006, Brunei issued Shariah Financial Supervisory Board (SFSB) Order.⁷ As per section 3 of the SFSB Act 2006, the establishment of the Board known as the Shariah Financial Supervisory Board, shall be the authority for the ascertainment of the Laws of Islam for the purposes of Islamic banking business, takaful business, Islamic financial business, Islamic development financial business and any other business which is based on Shariah principles and which is supervised and regulated by the authority.

In *Hj Abd Halim bin Hj Ahai and Bank Islam Brunei Darussalam Berhad*, the appellant in this case appealed to the court of appeal and argued that he wrote a letter to the second minister of finance requesting the authority to give views whether the BBA Islamic banking facility was contrary to shariah principles, however, the response he received was simply that the High court can only refer a shariah matter to the authority for a ruling by the shariah financial supervisory board under the shariah financial supervisory board order 2006. In this case the only comment was on the procedures and did not answer the shariah issue raised by the appellant. From this case, it can be seen that the courts were right in following the powers stated under the shariah financial supervisory board order 2006 however, if shariah risk was a material matter, it would have been a priority for the authority to reply to the letter by giving an opinion on the issue raised by the appellant; the shariah matter was not answered in this case.

⁴<http://www.ambd.gov.bn/SiteAssets/financial-sector-blueprint/Final%20Sector%20Blueprint%202016%20-%202025%20FINAL.pdf>

⁵<http://www.ambd.gov.bn/SiteAssets/financial-sector-blueprint/Final%20Sector%20Blueprint%202016%20-%202025%20FINAL.pdf>

⁶ <http://www.bibd.com.bn/about/board-of-directors/>

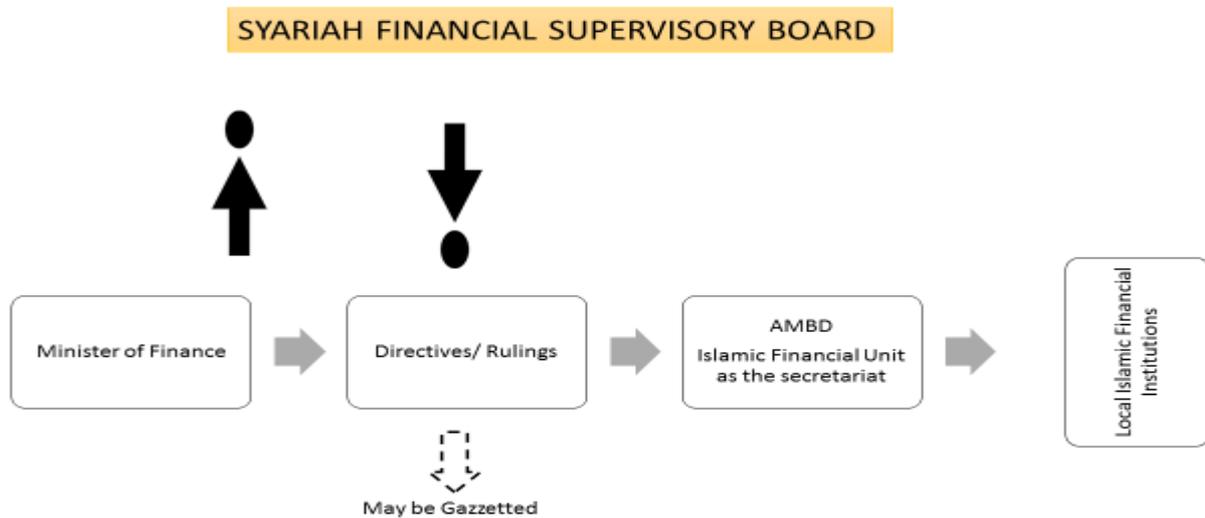
⁷ Section 3 Shariah Financial Supervisory Board 2006

The SFSB is regulated by the Ministry of Finance.⁸ The functions of the Board are as follows;

- a) The Board shall have such functions as may be determined by the authority.
- b) Every financial institution may consult the SFSB on Shariah matters relating to Islamic banking business, takaful business, Islamic financial business, Islamic development financial business and any other business which is based on Shariah principles.

The relationship between the SFSB and the Shariah Advisory Body is best described in the Diagram 1 below;

Diagram 1. Hierarchy of Shariah rulings in Islamic finance



(source: Author's own)⁹

The Ministry of Finance may issue any written directives in relation to Islamic banking business, takaful business, Islamic financial business, Islamic development financial business and any other business with the advice of the Board¹⁰. Any financial institution which fails to comply with or contravenes any written directives issued under subsection (1) is guilty of an

⁸ Section 2 Shariah Financial Supervisory Board 2006

⁹ For detail refer to <http://ambd.gov.bn/SiteAssets/Lists/Publications/AllItems/Autoriti%20Monetari%20Brunei%20Darussalam%20Annual%20Report%202015.pdf>

¹⁰ Section 14 (1), every financial institution shall apply to the Board for approval with respect to its submission that its Islamic product is in accordance with Hukum Syara' before it enters into any business transaction with respect thereto.

(2) In an application for approval under subsection (1), the financial institution shall comply with such requirements as the Board may determine.



offence and liable on conviction to a fine not exceeding \$500,000 and to a further fine not exceeding \$5,000 for every day during which the contravention continues.¹¹

A Shariah compliance matter of Islamic bank is unachievable if the matters are heard in the civil courts which is apparently what happens in Brunei. For instance, in the case of *Hj Abd Halim bin Hj Ahai and Bank Islam Brunei Darussalam Berhad*, the appellant appealed to the court of appeal and argued that he wrote a letter to the second minister of finance requesting the authority to give views regarding whether the BBA Islamic banking facility was contrary to shariah principles, however, the response was limited to a statement that the High court can only refer a shariah matter to the authority for a ruling by the shariah financial supervisory board under the shariah financial supervisory board order 2006. This was solely a comment on the procedures and did not answer the shariah issue raised by the appellant. From this case, it can be seen that the courts were right in following the powers stated under the shariah financial supervisory board order 2006. However, if shariah risk was a material matter, it would have been a priority for the authority to reply to the letter by giving an opinion on the issue raised by the appellant; the shariah matter was not answered in this case (Hussain et al., 2018).

Moreover, this case should be decided in a shariah court by a Muslim judge. For instance, in another case of *Morsima Sdn Bhd and Wong Yep Meng vs Perbadanan Tabung Amanah Islam Brunei*, the appellant argued that the loans made were in breach of shariah law and this case was decided in civil courts by three English judges. They gave judgment on the application of shariah law to the loans and transactions made by the parties, but at the same time also referred to the legislation on contracts and agreement which are not shariah law. Therefore, from these two cases it can be seen that in Brunei, although there a shariah supervisory board exists and the central bank legislation constraints regulate shariah compliance, when it comes to enforcing the law, there is limited success and the issue of shariah itself is not a priority. Shariah risk is material to this country but only at face value, it still falls short and more amendments and improvements need to be made to the act and the judiciary process. Initially, the cases in dispute in relation to Islamic banks should be heard in a shariah court only. Following this, proper standards of shariah compliance should be formulated by AMBD to give full power to the board to advise the Islamic banks on shariah compliance matters and avoid clash of powers.

¹¹ Sec 5 Shariah Financial Supervisory Board 2006

4. England

Shariah risk is clearly an immaterial matter when it comes to countries that are non-Muslim such as England itself. Even though this country has more Islamic banking than any other western country, it is a common law system and the legislation that governs conventional banking also regulates conduct of Islamic banking in this country.

The primary legislation that governs Islamic finance in the UK is set out in the Finance Act 2007. It characterizes Islamic finance transactions as ‘alternative finance arrangements’ and takes a relatively straightforward approach to folding Islamic finance instruments into the conventional legislative environment. For instance, anything described as profit will be treated in the same manner as the provisions of the previous finance act that deal with interest. This clearly shows that the approach in Islamic finance industry is of the same standard as the conventional finance industry in the UK.

Shariah law is not applied in the UK courts and they do not recognize shariah as a system capable of adjudicating shariah compliance cases. The first case pertaining to Islamic finance was the case of *Investment Company of The Gulf (Bahamas) Limited v Symphony Gems n.V and Ors [2002] West Law 346969, QBD (Comm. Ct.)* which involved issues in the question of the validity of the murabahah agreement. The court in this case called two experts to determine the validity of a murabahah contract for which both experts stated that the underlying contract was not based on an actual murabahah transaction and hence, was invalid. This is a good approach for the judge to refer to these experts, however, the judge in this case held that the contract was vividly valid from the English law point of view and dismissed the argument of shariah non-compliance. The court totally dismissed the argument of shariah non-compliance and disregarded the materiality of shariah risks.

In the case of *Shamil Bank of Bahrain v Beximco Pharmaceuticals*, this case looked at the question of conflict of laws between English law and shariah law. The facts are not relevant to this discussion but the important point is the wording of the governing law clause in the agreements that were in dispute. That clause read as ‘subject to the principles of the Glorious Sharia, this Agreement shall be governed by and construed in accordance with the laws of England.’ The defendants contended that in light of the agreements in dispute, the above governing law clause required that they be valid and enforceable both in accordance with principles of shariah and English law. The judge considered whether this gave rise to a conflict of laws. It was held that the defendants claim was rejected as it is not possible for a contract to be governed by two systems of law.

The courts were of the opinion that the validity of the contract should be decided according to English law and since then, this case has set the standard under English law that the courts in

this country will consider disputes on shariah compliance cases based on English law to the exclusion of questions of shariah. The case was read in light of the Rome Convention. The beginning of fatwa reference in the legal documentation in the conventional High Court was in the Shamil Beximco's case and the Aramco Petroleum's. These two cases reflect the intention of both parties to be governed by Shariah law. However, as regulated by the existing framework during that time, the courts and the arbitrators were bound to follow the existing regulatory framework. In light of Shamil Beximco's case, the lawyers had diminished the intention of both parties to contract in shariah. In fact, the court were bound by the Rome Convention¹² as applicable for the European Union (EU).

It has become a trend in drafting that incorporate waiver clauses against Shariah immunity. These clauses describe the parties agreement to waive any claim against shariah noncompliance in future or in any court of law. This reflects the agreement of both parties not to bring any action in a court of law in any matters related to Shariah. This practice is misleading. As submitted above, any transgression to the principles of Shariah is prohibited. The framework of shariah based contract is to ensure the supportive framework for the Islamic economics emphasising the integrity of shariah. Waiver provision is just another hilah to allow the execution of shariah noncompliance contracts.

In terms of the English judiciary, the courts have rarely relied on shariah as a basis for determining cases involving commercial transactions. Referring to the case of *Dana Gas PJSC v Dana Gas Sukuk Ltd & Ors*, in early 2017; Thomas, Fullerton & Saenz 2018, Dana Gas PJSC (Dana Gas), an Abu Dhabi Stock Exchange listed energy company announced that the sukuk in its present form is not shariah compliant and is therefore unlawful under UAE law. Then, Dana gas commenced legal proceedings in the English courts and contended that its sukuk was no longer shariah compliant therefore the obligations it had entered into under sukuk documentation were invalid and unenforceable under UAE law and the English law governed purchase undertaking used in the sukuk structure which included Dana Gas' core redemption payment obligation in the sukuk structure was unenforceable as a matter of English law. Mudarabah agreement underlying it is regulated by UAE law while the sukuk was regulated by English law. The High Court ruled against Dana Gas on all grounds. The issue that is relevant to this discussion is that there is clearly a conflict of law in this case. The position is that generally, in English courts, they apply the law that governs a contract when deciding on questions of validity and enforceability.

¹² The Rome Convention has been repelled in 2009 and replaced by the Rome Regulation 1.

5. Conclusion

Shariah non-compliance risk must be given the highest priority compared to other risks faced by Islamic banks because the bank needs to be in line with shariah principles. If the services offered by Islamic banks are not shariah compliant, the public will lose its confidence in the bank and the transactions made between the bank and the customers will be void. In order to ensure that all Islamic banks follow shariah principle by way of Islamic banking and finance, all Islamic banks are required to have a shariah advisory board whose function is to ensure that the practice and activities of the bank are shariah compliant. Proper training and audits are completed to manage non-compliance. Muslim countries that rely on Islamic law should regard shariah risk as material, however, that is not the case for Saudi Arabia. They do not even have legislation to govern Islamic institutions in their country.

Malaysia, on the other hand has adequate bodies and legislation to govern Islamic institutions, however, they lack the enforcement of compliance whereby the judiciary still decides cases based on English law and not purely on Islamic law. The same is the case for Brunei whereby the enforcement in the judiciary is still lacking and there is no independent shariah supervisory board in the central bank that distinguishes from the board that governs the conventional bank in this country. England is in a totally different position as it is a non-Muslim country offering Islamic banks but does not appreciate the importance of shariah compliance. Customers that approach the Islamic banks in their country are non-Muslim so it is a huge problem for them to be applying Islamic law and place importance on shariah compliance. In conclusion, Islamic finance itself bears the name of Islam and hence this is why compliance to the principles of Islamic law is important because the obvious purpose of shariah supervision is to certify for practicing Muslim consumers and clients that have the services offered to them as acceptable from an Islamic legal perspective. Alternatively, it will give a negative impact in that this is going against the commands of Allah and the financial impact is the invalidation of contract.

Based on the above, this paper submits the following findings;

1. In Malaysia and Brunei, the judges themselves seem to be confused with the principles. They have understood restrictions under shariah contracts are merely to prohibition of riba, maisir and gharar. Indeed, Islamic contracts are beyond those three elements.
2. There is too much dilution in the techniques of writing contracts influenced by conventional drafting which is obsessed with conventional terms and disregards values that are the main identity of shariah contracts.
3. In England, there are instances when the experts were called to justify the validity of contracts executed. For example, in the Investment Dar. However, the judges are restricted to conventional legal environment. There have been many instances when



judges resorted to the treaties applied within the region for example the Rome Convention that prohibits any non-state law to be the law to govern the contractual obligation in the case of Shamil Beximco.

4. This paper submits that maintaining shariah principles is the priority in shariah finance. Public banking faith entrusts the system to demonstrate obedience towards Allah. This sensitivity needs to be seriously observed within the rulings of courts.



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