Islamic Finance Cases

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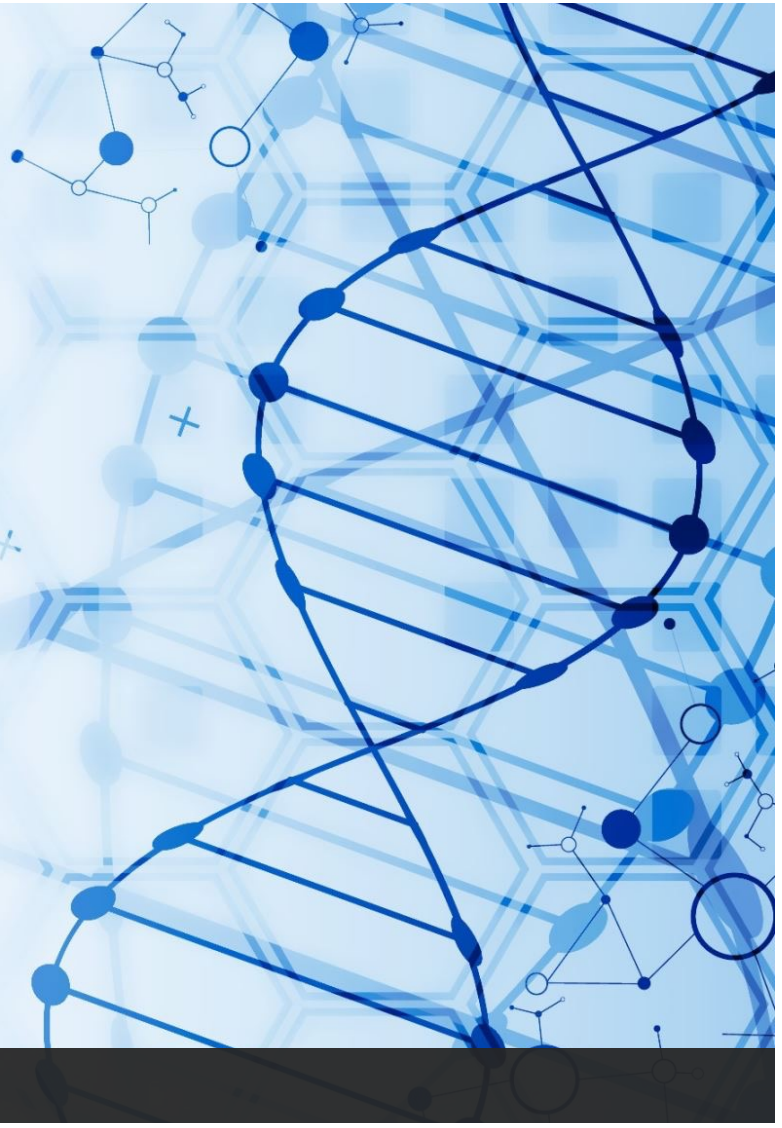
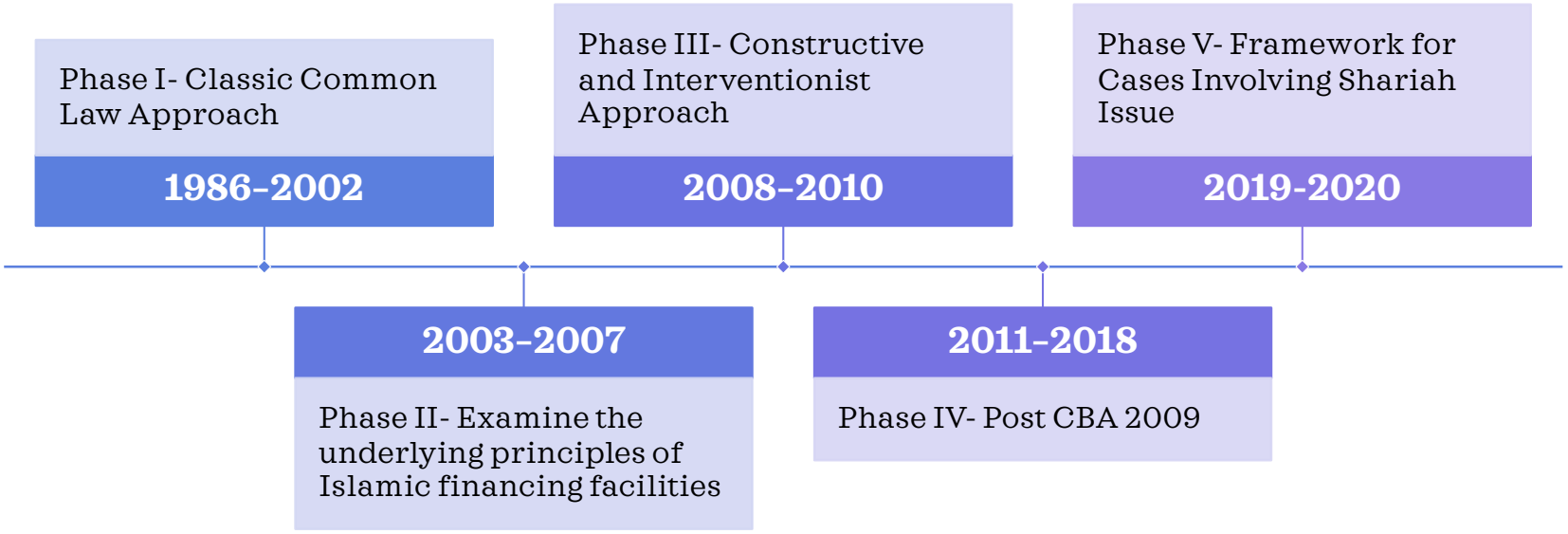


Islamic Finance Cases in Malaysia



1986-2002

Tinta Press Sdn Berhad v BIMB (1986) 1 MLJ 256; 1 CLJ 474 (Ijarah)

Bank Islam Malaysia Berhad v Adnan Omar [1994] 3 CLJ 735; [1994]3 AMR 44; [1994] 4 BLJ 372 (BBA)

Dato ' Nik Mahmud Bin Daud v Bank Islam Malaysia Berhad [1996]4 MLJ 295 (BBA Malay Reserve)

Bank Islam Malaysia Bhd v Shamsuddin Bin Haji Ahmad [1999] 1 LNS 275; [1999] MLJ 450 (BBA)

Bank Kerjasama Rakyat Malaysia Bhd v Nesaretnam Samyveloo [2002] 8 CLJ 95; [2002] 7 MLJ 103 (BBA)

Observation

The application of Islamic Banking Act 1983.

The judges are more concerned on the application of classic common law approach by emphasizing the civil technical aspects and did not tackle the actual *Shari'ah* issues.

The court applied the classic common law interpretational approach where the parties are bound with the terms and conditions of the contract. The court did not look into the issue further whether BBA facility involves an element not approved by the *Shari'ah* as stipulated under the IBA and the BAFIA.

Tinta Press Sdn Berhad v BIMB (1986) 1 MLJ 256

The plaintiffs had leased certain printing equipment to the first defendant. The first defendant having defaulted in payment of the lease rent, the plaintiffs brought an action to recover possession of the equipment and to recover the arrears of rent. The plaintiffs also made an ex parte application for a mandatory injunction to enable the plaintiffs to recover possession of the equipment.

It is clear that the relationship between the plaintiff bank and the first defendant in this case was that of lessor and lessee. There had been a clear breach of the agreement by the first defendant and the plaintiff bank as the owner of the equipment was entitled to recover possession of the equipment;

Bank Islam Malaysia Berhad v Adnan Omar [1994] 3 CLJ 735

BBA for 15 years.

Ranita Hussin J: The defendant was bound to pay the whole amount of the selling price based on the grounds that he knew the terms of the contract and knowingly entered into the agreement.

The court held that the defendant did not have a right to the rebate as the rebate or *muqasah* was practised by the plaintiff on a discretionary basis.

BIMB is a corporate body which has no religion, and consequently it is not within the jurisdiction of Syariah Courts. List II (State List) of the Ninth Schedule to the Federal Constitution stated that the Syariah Courts shall have jurisdiction only over persons professing the religion of Islam and in respect only of any matters included in the State List. The matter was rightly brought before the civil court because Islamic Institutions such as BIMB and Syarikat Takaful are corporate institutions created by statute and do not have a religion.

Dato' Hj Nik Mahmud bin Daud v. Bank Islam Malaysia Bhd [1996]4 MLJ 295

BBA financing agreement to develop piece of land in Kelantan. The land is held under the Kelantan Malay Reservation Enactment 1930; whereby section 7(i) prohibits any transfer or transmission or vesting of any right or interest of a Malay in reservation land to or in any person not being a Malay. The issue here is whether there is a transfer or a vesting of right or interest involving a non-Malay. This is due to the fact that BIMB is a bank with neither a Malay nor a native of Kelantan.

Nik Yussof J: The bank to register the charge, Schedule D of the 1930 Enactment allows Rulers in Council to grant Malay status to a bank for the purpose of registering a charge document

2003-2007

Bank Kerjasama Rakyat Malaysia Berhad v Emcee Corporation Sdn. Bhd. [2003] 2 MLJ 408; 1 CLJ 625 (BBA)

Bank Islam Malaysia Berhad v Pasaraya Peladang Sdn Berhad [2004] 7 MLJ 355 (BBA)

Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Berhad [2004] 6 CLJ 25; [2004] 6 MLJ 1 (*Istisna*)

Arab Malaysian Merchant Bank Berhad v Silver Concept Sdn Bhd [2005] 5 MLJ 210 (BBA)

Malayan Banking Berhad v Marilyn Ho Siok Lin [2006] 7 MLJ 249; 3 CLJ 796 (BBA)

Affin Bank Berhad v Zulkifli Abdullah [2006] 3 MLJ 67 (BBA)

Malayan Banking Berhad v Yakup bin Oje & Anor [2007] 6 MLJ 398 (BBA)

Bank Kerjasama Rakyat Malaysia Bhd v PSC Naval Dockyard Sdn Bhd [2008] 1 CLJ 784; [2007] MLJ 722 (Bai INah)

Observation

Section 16B of the Central Bank of Malaysia Act 1958. Section 16B (9) states that any ruling made by the Shariah Advisory Council pursuant to a reference made shall, for the purposes of the proceedings in respect of which the reference was made **if the reference was made by a court, be taken into consideration by the court in arriving at its decision; and if the reference was made by an arbitrator, be binding on the arbitrator.**

In the second phase, the court indicates its interest to examine critically the underlying principles and financing facility offered by the IFIs. Unlike the earlier cases in the first phase, several judges initiated a different approach in resolving issues involving Islamic finance particularly in the case of *Affin Bank Berhad v Zulkifli Abdullah* and *Malayan Banking Berhad v Marilyn Ho Siok Lin*.

This position indicates the improvement of judges' level of awareness and understanding of Islamic finance.

Bank Kerjasama Rakyat Malaysia v Emcee Corporation (2003) 2 MLJ 408

The appellant granted the respondent a facility under the Islamic banking principle of BBA. Both parties executed two agreements on the same date. Under the first agreement, the respondent sold 22 pieces of land to the appellant for RM20Million.

The second agreement, the appellant sold to the respondent the same properties upon deferred payment terms for 36 monthly installments. 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 NLC.

Abdul Hamid Mohamad, Richard Malanjum and Arifin Zakaria JJCA: "The law 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 the conventional banking".

Arab Malaysian Merchant Bank Berhad v Silver Concept Sdn Bhd [2005] 5 MLJ 210

Al-Bai Bithaman Ajil facility with a sale price of RM216,687,000, in aggregate made up of a purchase price of KM125,000,000, and a profit element over the land.

The defendant here has ventilated that the impugned contracts cannot be enforced on several grounds, inter alia it being tainted by interest or riba.

Suriyadi J: All the participating parties had agreed to the type of contract, ie Islamic based, the type and number of facilities, the amount, the mode of payment, period of payment, the profit margin of the plaintiff, the format of the securities, and all the other necessary details

S 16B does not make reference to the SAC mandatory. Only binding to the arbitrator.

Affin Bank v Zulkifli Abdullah

[2006] 3 MLJ 67

BBA 25 years Purchase Price: RM394k paid RM33k claimed by the Bank RM958k

Abdul Wahab Patail J: Profit up to the date of judgment plus penalty.

The learned judge indirectly criticized the attitude of early court by using narrow interpretation and heavily applying classic common law approach.

The proper approach is that for the court to examine further as to the implementation of Islamic banking whether it is contrary to the religion of Islam. The courts held that the Islamic banks could not claim the unearned profit because it is equal with interest calculation.

If the customer is required to pay the profit for the full tenure, he is entitled to have the benefit of the full tenure. 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

It is not a question of shariah law. It is the conclusion of this court. There is no necessity to refer the question to another forum.

Malayan Banking Berhad v Yakup bin Oje & Anor [2007] 6 MLJ 398

Islamic Home Finance facility to the defendants under the principle of syariah al-Bay 'Bithaman al-Ajil.

The Defendant defaulted on repayment of the instalment. the plaintiff took a legal action for an order for sale of the property pursuant to section 148(2)(c) of the Sarawak Land Code. The defendant was demanded to settle the debt (the full sale price).

The defendant alleged that the amount requested by the plaintiff was excessive and extreme, contravening the principle of justice and thus applied to the court for a just and fair decision.

Hamid Sultan J: The plaintiff was entitled to the order for sale. However, the plaintiff must provide a substantial rebate to the customer purchaser on the sale price (defendant's debt and liability) based on the principle of justice as required by Islam.

2008-2010

- *Arab Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)* [2008] 5 MLJ 631; [2009] 1 CLJ 419 (BBA)
- *Light Style Sdn Bhd v KFH Ijarah House (Malaysia) Sdn Bhd* [2009] CLJ 370; [2009] 1 LNS 193 (Murabahah)'
- *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor And Other Appeals* [2009] 6 CLJ 22; [2009] 6 MLJ 839 (BBA)
- *Tan Sri Khalid Ibrahim v Bank Islam Malaysia Berhad* [2009] 6 MLJ 416 *(BBA)*
- *Bank Islam Malaysia Bhd v Azhar Osman & Other Cases* [2010] 5 CLJ 54 [2010] 1 LNS 251 (BBA)
- *CIMB Islamic Bank Bhd v LCL Corp Bhd & Anor* [2011] 7 CLJ 594

Observation

In the case of *Arab Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors* that the application of the BBA is contrary to the IBA and the BAFIA.

Clearly indicates the new constructive approach of the court towards Islamic banking cases particularly in resolving issues pertaining to BBA facility. This judgment may affect the Islamic financial sector in Malaysia as the expert estimates that 70 per cent of Islamic financing facility was granted under BBA facility.

For the first time, the court made reference to the SAC on matter pertaining to Shari'ah.

Arab Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors) [2008] 5 MLJ 631

The beginning of pro-active attitude of the court in examining the validity and determining issues involved in Islamic banking cases.

The Federal Constitution, the IBA and the BAFIA do not provide the interpretation of which *madhhab* is to prevail. BBA facility must not contain any element which is not approved by the religion of Islam under the interpretation of any of the recognized *maddhab*.

Abdul Wahab Patail J

The court accepts that BBA facility is a bona fide sale transaction and the interpretation of selling price in the case of *Affin Bank Berhad v Zulkifli Abdullah* was referred to where the court rejects the plaintiffs' interpretation and applies the equitable interpretation.

Where the bank recalls BBA facility at a higher price in total, the sale is not a bona fide sale but a financing transaction and rendered the facility contrary to the IBA and the BAFIA.

The court holds that the plaintiffs are entitled under section 66 of the Contracts Act 1950 to return the original facility amount they had extended. It is equitable that the plaintiffs must seek to obtain price as close to the market price as possible and account for the proceeds to the respective defendants.

Case analysis

In BBA facility, the court uses an equitable interpretation as to the definition of selling price whether the defendant was bound to pay the whole amount of the selling price even in the event of early termination of the contract.

The classic common law approach will require the defendants to pay the whole amount of the selling price as they are bound by the terms of the contract but the court in this case chooses to apply an equitable principle.

An equitable interpretation of the selling price removes the excessive amount of profit derived from BBA transaction and therefore the defendants will only have to pay the principal sum of the facility.

Profit portion of BBA facility is unlawful and contrary to the religion of Islam

1. The court considers deferred payment of the selling price is a credit or a loan and any profit claimed or charged by the bank as an additional to the facility amount is interest. The court signifies that the profit derived from BBA facility is lawful if the transaction is considered as a bona fide sale. Nevertheless, BBA facility in this case abandon the element of bona fide sale in which making the profit derived from it would be prohibited as *riba*

2. In addition, the court also mentions that excessive selling price under BBA facility imposed a heavier burden upon the defendants that would be contrary to the intent and purpose of verses 275-280 of *surah al-Baqarah*. Al-Ghazali insists the practice of *ihsan* or doing good deeds in business rather than merely advocating the maximization of profit. The element of tolerance and benevolence should be the basis upon which the Islamic banking business transactions are conducted.

3. The issue of *iwad* in BBA transaction. Although the court in the current case does not mention anywhere this specific issue, it is observed that BBA facility has apparently neglected the requirement of *iwad* (equal counter value or compensation) where the obligation of warranty to the properties sold has been shifted to the vendor and not the plaintiffs as the sellers. Moreover, it is evident in most of BBA legal documentations that the bank holds no liability arising from all defective assets sold.

Cont...

4. The true nature of contracts and transactions is the substance and not the words and the structure. The distinction between a sale and a loan is not maintained in its form alone but it must also be maintained in substance. The court opines that BBA facility may be classified as pretence of sale transaction unless there was a novation agreement to make the bank a genuine seller.

5. In interpreting the requirement under the IBA and the BAFIA that the financing facilities offered do not involve any element not approved by the religion of Islam, the court declares that the facility must not contain any element not approved by any of the recognized *madhab* unless the financing agreement states the specific to a particular *madhhab*. Since *Bay al-Inah* concept is only acceptable in *madhhab Shafi'i*, it fails to meet the IBA and the BAFIA's requirement and renders the transaction null and void.

BIMB V Lim Kok Hoe & Anor and Other Appeals [2009] 6 CLJ 22

The High Court judge questioned the validity and enforceability of the BBA contracts on two main grounds, namely that he found the BBA contracts to be more onerous than the conventional loan and that he found that the BBA contract practised in this country was not acceptable by all the four mazhabs in Islam. He thereby concluded that the BBA contracts were contrary to the basic principles of Islam.

Issues :

- whether the BBA contract was more onerous than the conventional loan agreement with riba? and
- whether the BBA contract was prohibited in Islam?

BBA is a sale agreement and not conventional loan transaction

Raus Sharif, Abdul Hamid Embong and Ahmad Maarop JJCA:

A BBA contract was a sale agreement whereas a conventional loan agreement was a money lending transaction. As such, the profit in a BBA contract is different from the interest arising in a conventional loan transaction.

S 2 of the IBA 1983 does not mean banking business whose aims and operations are approved by all the four mazhabs.

"Similarly, **the law applicable to BBA contracts is no different from the law applicable to loan given under the conventional banking. The law is the law of contract and the same principle should be applied in deciding these cases.** Thus, if the contract is not vitiated by any vitiating factor recognised in law such as fraud, coercion, undue influence, etc. the court has a duty to defend, protect and uphold the sanctity of the contract entered into between the parties."

The Court will have to assume that the SAC and the SC would have discharged their duty to ensure that the operation of Islamic banks are complied with the Syariah. The judge should not have taken upon himself to rule otherwise without having regard the view of the SAC.

Tan Sri Khalid Ibrahim v Bank Islam Malaysia Berhad [2009] 6 MLJ 416

Two murabaha facilities to redeem and acquire more shares in 'Kumpulan Guthrie Berhad'. Due to repeated breaches, the facilities were restructured into a revolving al-Bai Bithaman Ajil facility.

The plaintiff challenge the validity of the BBA facility agreement on various grounds, inter alia, for want of compliance with the principles of Shariah.

The bank entered a summary judgment under O 14 of the Rules of the High Court 1980 for a sum of USD18,521,806.13.

Issue: (i) the BBA facility agreement either read together with the security documents or even independently will denote that they are financing arrangement and not sale transaction as they purport to be.

(ii) the BBA facility agreement become 'bay al-inah' as the recital of the agreement shows there is connection between the asset purchase agreement ('APA') and asset sale agreement ('ASA').

(iii) the disposal of the pledged Guthrie shares by the bank without notifying Tan Sri Khalid is contrary to Islamic principle known as 'al-Rahnu' which requires consent of pledgees.

Learned counsel contends that the mode of execution of APA and ASA was **improper**.

For the first time in the history of the Malaysian court that the judge made reference to the SAC

Rohana Yusuf J:

The SAC states that BBA agreement is acceptable and a recognised transaction in Islam.

"To my mind, **this issue is based on mere technicality and a trivial one**. The **consensus between parties has been arrived at the point the letter of offer was accepted** by Tan Sri Khalid. **The agreement to be bound is subject to the formalities of the execution of various documents**. Signing of the written agreements is **to formalise and to translate the consensus of parties in the terms clearly agreed upon"**.

A written confirmation from the bank's own Shariah Council confirmed that the mode employed for the execution of the documents in the present case is in order and has no bearing from Shariah perspective.

Azhar bin Osman & 3 Other Cases (2010) 9 MLJ

Counsel for the bank contended that in a BBA contract the Bank has a legal right to claim for the full sale price as stipulated in the Property Sale Agreement.

Rohana Yusuf J: The HC observed that in specifying the amount due, the issue which confronts a BBA contract is the agreement is silent on:

Since the tenure of the contract has not completed, **normally the bank will further deduct as ibra (a term used in Islamic banking for rebate)** what it refers to as 'unearned profit", i.e. the amount which has yet to be earned by the bank, based on an Amortization table.

When a BBA contract is prematurely terminated upon default by the borrower, the court cannot allow the bank to enforce the payment of the full sale price in a premature termination.

Therefore, where the BBA contract is silent on issue of rebate or the quantum of rebate, as an implied term, the bank must grant a rebate and such rebate shall be the amount of unearned profit as practiced by Islamic banks.

SAC Rulings on Ibra 2010

Guidelines on Ibra 2011

IFIs are required to grant ibra' to all customers who settle their financing before the end of the financing tenure. Settlement prior to the end of the financing tenure by the customers shall include, but is not limited to the following situations:

(i) Customers who make an early settlement or early redemption, including those arising from prepayments;

(ii) Settlement of the original financing contract due to financing restructuring exercise;

(iii) Settlement by customers in the case of default; and

(iv) Settlement by customers in the event of termination or cancellation of financing before the maturity date.

CIMB Islamic Bank Bhd v LCL Corp Bhd & Anor [2011] 7 CLJ 594

*****A year after the SAC resolution on ibra' (May 20, 2010) was made and about five months before the Guidelines on Ibra' came into effect (November 1, 2011).

Issue on BBA and Rebate upon default or early settlements.

Zawawi Salleh J: SAC resolved that Islamic banking institutions may incorporate the clause on undertaking to provide ibra' to customers who make early settlement in the Islamic financing agreement and with the inclusion of ibra' clause, the bank is bound to honour that promise. This resolution is made pursuant to the practice of the bank giving rebate solely on their discretion which caused confusion amongst the customer whether they are eligible to receive ibra' when they make early settlement.

2011-2016

***Mohd Alias Ibrahim V RHB Bank Bhd & Anor* [2011] 4 Clj 654 [2011] 3 MLJ 26 (BBA)**

Bank Islam Malaysia Berhad v. Azhari Md Ali [2012] 5 CLJ 920 (BBA)

Public Bank Bhd v. Mohd Isa Mohd Nafidah [2013] 1 CLJ (Sya) 448 (BBA)

Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd [2013] 4 CLJ (BBA)

Low Chin Meng v CIMB Islamic Bank [2015] 5 CLJ 324 (BBA)

MK Associates Sdn Bhd v. Bank Islam Malaysia Bhd [2015] 6 CLJ (BBA)

Maybank Islamic BHD v M-10 Builders Sdn Bhd & Anor (2015) 1 SHR (*Murabaha*)
Maybank Islamic BHD v M-10 Builders Sdn Bhd & Anor (2017) 2 MLJ 69 (*Murabaha*)

Bank Kerjasama Rakyat Malaysia Berhad v Koperasi Belia Nasional Berhad [2016] MLJU 685 (*Bay al-Inah*)

Observation

Challenged **the validity of s 56-57 of the CBA 2009.** Section 56: Reference to SAC for ruling from court or arbitrator. Section 57: SAC ruling shall be binding on IFI and court/arbitrator.

Whether the impugned provisions usurped the judicial power of the court to decide the ultimate issues in dispute between the parties by transferring such power onto the SAC?

For the first time, the court decided the issue on the imposition of *ta'widh* (compensation) in Islamic financing facilities.

The BNM Guidelines has no retrospective effect.

Mohd Alias Ibrahim V RHB Bank Bhd & Anor [2011] 4 Clj 654 [2011] 3 MLJ 26

BBA facility and cash line facility based on Bai' 'Inah principle.

Plaintiff challenged **the validity of s 56-57 of the CBA 2009**. Ultra vires the Federal Constitution

Issues: 1. Whether the impugned provisions were worded to the effect that they usurped the judicial power of the court to decide the ultimate issues in dispute between the parties by transferring such power onto another body, which in this case was the SAC?

2. Whether by imposing a duty on the court to refer any Shariah banking matter to the SAC and making the decision of the SAC binding on the court the litigants were deprived of any chance to be heard?

Ascertainment of Islamic Law not a determination

Zawawi Salleh J: If the court referred any question under s 56(1)(b) of the Act to the SAC, the latter was required to merely make an ascertainment and not a determination of the Islamic laws related to the question.

The sole purpose of establishing the SAC was to create a specialised committee in the field of Islamic banking to ascertain speedily the Islamic law on a financial matter. As such there was no reason for the court to reject the function of the SAC in ascertaining which Islamic law was to be applied by the civil courts in deciding a matter.

Bank Islam Malaysia Berhad v. Azhari Md Ali [2012] 5 CLJ 920

Purchase of land together with a bungalow house to be constructed on the land under BBA facility.

The defendant alleged that the BBA so entered was an illegal transaction under Islamic law as it involved a non-existent housing unit at the time when the agreement was signed.

Suraya Othman J: The Court ruled that in accordance with the decided cases involving BBA and on the basis of the defendant's own testimony, the BBA's financing contract was valid and binding on the defendant as there was no evidence indicating that there were any elements of fraud, coercion or an undue influence during the signing of the BBA agreement.

Public Bank Bhd v. Mohd Isa Mohd Nafidah [2013] 1 CLJ (Sya) 448

Islamic home facility of *Bay 'Bithaman al-Ajil* (BBA) to finance a purchase of a property of a single storey-bungalow

Issues: (i) The house does not exist at the conclusion of the contract. (ii) The house was not suitable to be a security for the facility granted because the Dt had not yet obtained the right of ownership of the property.

Zawawi Salleh J: Malaysian Islamic jurists allowed the use of BBA as they considered the BBA/*Bai al-Inah* can be applied for pending completion houses not just involving the physical sale of completed house. According to the majority of Islamic jurists, customers can sell their proprietary and financial rights (*haq maliyy*) to banks. The house was clearly in existence and might be existed and delivered in the future, this would not lead to *gharar al-fahish*. The Shariah Advisory Council recognizes the effect of the transfer of legal title of sale and purchase of a legitimate right even though there is no change in the name of the registrar (beneficial ownership).

Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd [2013] 4 CLJ

Low Hop Bing. Zaharah Ibrahim and Aziah Ali JJCA: It is settled law that ss 56 and 57 of the Act are valid federal laws enacted by Parliament and as such were not in contravention of the FC.

Difference of opinion on Shariah issues relating to Islamic banking should be resolved within the SAC. It is advisable and practical that a special body like the SAC should ascertain the Islamic law most applicable to the Islamic banking industry in Malaysia

SS 56 and 57 Retrospective Effect.

Low Chin Meng v CIMB Islamic Bank [2015] 5 CLJ 324

LCL Corporation Berhad ('**LCL Corp**'), and its major shareholder and managing director, Mr. Low Chin Meng. The bank had granted LCL Corp the financing facility styled as BBA with Mr. Low as the security provider.

LCL Corp defaulted on its monthly instalments and the bank eventually exercised its rights under the Memorandum by selling the charged shares at RM3,666,822.80. This was not sufficient for the bank to recover its selling price under the Asset Sale Agreements. Consequently, the bank filed a suit against LCL Corp and Mr. Low claiming for RM54,442,744.78.

The High Court referred this issue to for the determination by the Shariah Advisory Council of the Central Bank of Malaysia ('**SAC**') pursuant to section 56(1)(b) of the Central Bank Act 2009.

ROHANA YUSUF, IDRUS HARUN, ABDUL RAHMAN SEBLI JJCA: The Court of Appeal decided that the SAC's ruling pursuant to the reference by the High Court was binding on 'the Court' by virtue of section 57.

MK Associates Sdn Bhd v. Bank Islam Malaysia Bhd [2015] 6 CLJ

In this case the plaintiff, MK Associates Sdn Bhd defaulted in the installments of *al-Bay Bithaman Ajil*. The defendant, Bank Islam Malaysia Bhd claimed the outstanding balance of the facility together with *ta'widh* or compensation for late payment in the amount of RM10, 384, 262.88 for the period of 30 months i.e. from January 2000- June 2012. The plaintiff contended that the defendant was not entitled to charge *ta'widh* since it was not part of the terms agreed upon at the time of the agreements were signed. The defendant on the other hand claimed that it has rights to do so pursuant to the BNM's letter dated 10 December 1998 and the *Shari'ah* Advisory Council Resolution in 1998.

There are there main issues involved in this case namely: (i) whether the defendant was entitled to charge the plaintiff, *ta'widh* pursuant to the Agreements; (ii) whether the defendant was entitled in law to charge the plaintiff *ta'widh*; and (iii) whether the defendant was entitled to charge *ta'widh* in the sum of RM10, 384, 262.88.

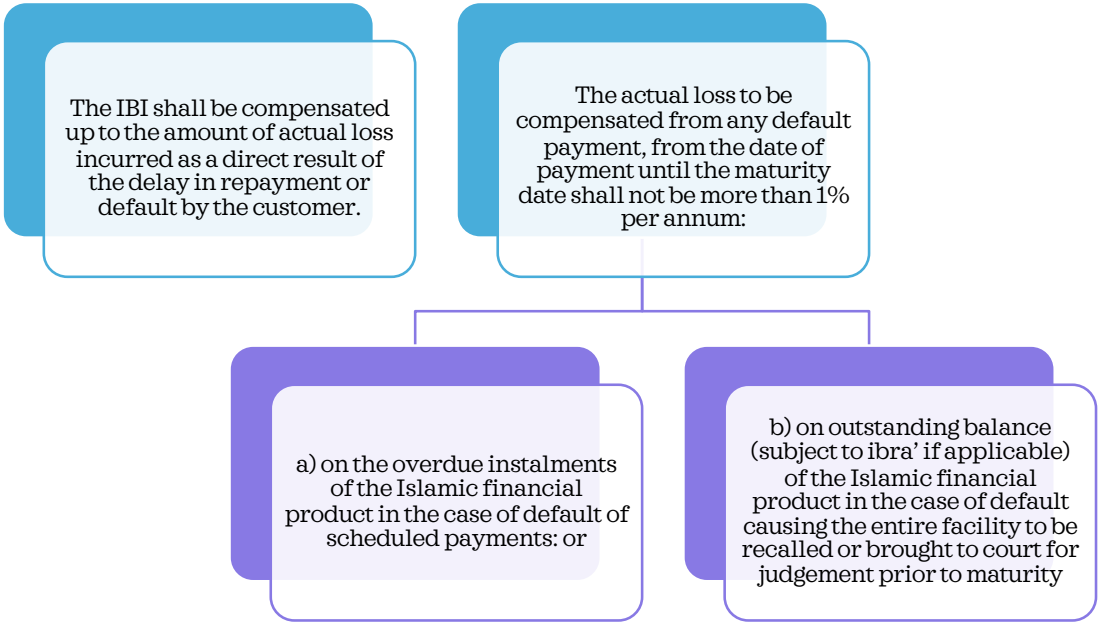
Ta'widh is only applicable after 1998

Asmabi Muhammad J:

After giving due consideration of all factors and arguments, the learned judge made decision in favour of the plaintiff and *ta'widh* was not relevant in this case.

The court held that the plaintiff must know of the imposition of *ta'widh* so that consent would be valid. The plaintiff in this case did not know the term *ta'widh* as at the time the agreements were entered into in 1998, it was not practised by IFIs. The learned judge opined that *ta'widh* was only introduced after the SAC's Resolution in 1998 and the said resolution was only effective on 1 January 1999. It is unfair for the imposition of *ta'widh* where the agreements are silent on it and therefore it shall be applicable only on or after 1 January 1999.

Guidelines on Late Payment Charges for Islamic Banking Institutions 2012



Maybank Islamic BHD v M-10 Builders Sdn Bhd & Anor (2015) 1 SHR

(a) an Islamic term financing ('BBA') for RM2m;
(b) *murabahah* overdraft facility ('MOD facility') for RM3m,
(c) Islamic bank guarantee ('BG') for RM4m; and
(d) *murabahah* overdraft against progress claim ('MOD/PC') for RM5m.

Arguments: By their conduct, both parties were privy to the illegality and had camouflaged the MOD facility as murabahah and both had benefited from this illegality. This transaction had clearly violated the basic tenets of the financing premised on the Islamic concept.

Further, the contract involving the MOD facility which the parties termed as murabahah was contrary to the basic tenets of financing based on murabahah as there were no fresh ASA and APA having been executed.

High Court: M*urabahah* Overdraft Facility had violated the *murabahah* concept of financing and therefore null and void and has no effect. Due to the said non-compliance, the said *murabahah* Overdraft financing is illegal and so the same cannot be enforced by the Court.

Kuwait Finance House (Malaysia) Berhad v OBNET Sdn BhdD-22A-595-2011 (2015)

HIGH COURT (KUALA LUMPUR)ASMABI MOHAMAD JC

The Government of the State of Selangor had appointed Obnet Sdn Bhd toprovide broadband services and application to all government departments,statutory bodies and municipalities in the State of Selangor.In order to finance the Project, Obnet Sdn Bhd had obtained MusyarakahMutanaqisah Facility of up to RM24.0 million from Kuwait Finance.

(a) Kuwait Finance formed a Musyarakah together with Obnet Sdn Bhd with the singlepurpose of undertaking the Project in relation to the Subscription Agreement;•(b) for that joint venture, Kuwait Finance had injected up to RM24.0 million, while Obnet SdnBhd had injected up to RM6.0 million as the initial capital contributions;•(c) Obnet Sdn Bhd was appointed as the Project Manager to deliver the scope of works underthe Musyarakah Venture;•(d) both had agreed that any profits for distribution shall be distributed among them basedon the agreed Profit Sharing Ratio which is 1% for Kuwait Finance and 99% for Obnet SdnBhd;•(e) in the event of loss, the Musyarakah Partners shall bear the losses in accordance to theprevailing share holding of the Shares. However, if the said losses have been caused due tomisconduct of Obnet Sdn Bhd, the Company shall be solely liable for the entire losses;•(f) all of the above are transpired in the Financing-i Facility Agreement (MusyarakahMutanaqisah) dated 9.7.200

Maybank Islamic BHD v M-10 Builders Sdn Bhd & Anor (2017) 2 MLJ 69

Rohana Yusuf, Abdul Aziz Abdul Rahim and Hamid Sultan JJCA: The BNM Guidelines on *murabahah* 'The Principle and Practices of Shariah in **Islamic Finance** -- Shariah parameter Reference 1-*murabahah* year 2009' has no retrospective effect. the MOD facility was granted in 2003.

The purported non-compliance with the *murahabah* principles did not render the contract illegal and unenforceable. The validity of the contract in this case should be viewed from the law that generally governs the contract between parties in this country. The provisions of the Contracts Act 1950 still govern Islamic contracts.

Bank Kerjasama Rakyat Malaysia Berhad v Koperasi Belia Nasional Berhad [2016] MLJU 685

Summary judgment for the sum of RM67,378,497.42 premised on *Term Finance - i Facility Bay al-Inah*

Issue raised by the Defendant is that there was no actual agreement between the parties to buy the commodities, Crude Palm Oil ('the CPO') because the Defendant did not have the intention nor the agreement to buy the said CPO. In breach of section 31 and 32 of the Sale of Goods Act 1957 as there was no intention on the part of the Plaintiff to give possession of the said CPO to the Defendant. Therefore, the Defendant submits that Asset Sale Agreement dated 11.4.2013 is null and void as it is in breach of the Contracts Act 1950 and the Sale of Goods Act 1957.

Several breaches of the Syariah Advisory Council (SAC) Circular on the resolution on *Bai' 'Inah*, and this renders the Asset Sale Agreement dated 11.4.2013 to be null and void.

There must be a valid possession (*qabd*) of the assets in accordance with Syariah practice

"*The sale and purchase* ***agreements must not stipulate any terms and conditions or create an obligation for both transacting parties to repurchase or resell the subject matter of sale****. Failure to observe this Syariah requirement may render the agreements to be void from Syariah perspective...*"

Cont..

Azizah Nawawi J: The title and beneficial ownership in the assets shall pass to the Customer (the Defendant) upon the execution of the said Agreement.

The Letter of Offer and the Asset Sale Agreement, there is nothing in these documents which stipulate that there must be an obligation for both transacting parties to repurchase or resell the subject matter of sale.

2019-2020

JRI Resources Sdn Bhd v Kuwait Finance House (Malaysia) Berhad; President of Association of Islamic Banking Institutions Malaysia & Anor (Interveners) [2019] 3 MLRA 87 (*Ijarah*)

Pan Northern Air Services Sdn Bhd v Maybank Islamic Bhd [2020] MLJU 2206 (BBA)

Observation

Framework for cases involving Shari'ah issues.

Settled law : SS 56-57 of the CBA 2009 are constitutional.

The Court interpreted the imposition of late payment charge or Ta'widh and formulated the steps for civil courts to consider when faced with a Shariah issue.

JRI Resources Sdn Bhd v Kuwait Finance House (Malaysia) Berhad; President of Association of Islamic Banking Institutions Malaysia & Anor (Interveners) [2019] 3 MLRA 87

- Whether ss 56 and 57 of the CBA 2009, had the legal effect of encroaching on the judicial power of the courts, hence, were unconstitutional having contravened Part IX of the FC.

- **HC**: The respondent's claim at the High Court premised on the applicant's failure to make payment of the amount outstanding to the respondent under various Islamic Facilities Agreements granted, was allowed.
- **COA**: Allowed the applicant's appeal and directed that the question relating to the Shariah compliance of clause 2.8 of the facilities agreements granted by the respondent to the applicant be referred to the SAC. The SAC decided that the said clause was Shariah compliant. Dissatisfied, the applicant filed the present application for reference.

Federal Court

RICHARD MALANJUM, CJ AHMAD MAAROP, PCA ZAHARAH IBRAHIM, CJM DAVID WONG DAK WAH, CJSS RAMLY HAJI ALI, FCJ AZAHAR MOHAMED, FCJ ALIZATUL KHAIR OSMAN KHAIRUDDIN, FCJ MOHD. ZAWAWI SALLEH, FCJ IDRUS HARUN, JCA

Dismissing the application and holding that ss 56 and 57 of the 2009 Act were not in breach of the FC and unconstitutional.

The ascertainment of Islamic laws for the purposes of Islamic financial business was a function or power delegated by the legislative branch to the judicial branch and the SAC.

Pan Northern Air Services Sdn Bhd v Maybank Islamic Bhd [2020] MLJU 2206

The appellant obtained BBA Facility Agreements. After resolving a wrongful termination of contract dispute, the Customer made an enquiry to the Bank about the settlement of the Facility. The Bank requested payment of a settlement sum of RM42 million, with a waiver of Ta'widh of RM1 million, if settlement was made before a stipulated date. The Customer contended and disagreed with the Bank's charging of Ta'widh, both on the rate and calculation, and brought an action for recovery of the overpaid money.

High Court: the Appellant's claim was dismissed.

COA:

- What is the correct Ta'widh rate that is chargeable under an Islamic banking financing facility?
- Whether Ta'widh issue should be referred to SAC for determination?

Steps for Civil Courts to Consider When Faced with a Shariah Issue

AB KARIM AB JALIL JCA; LEE SWEE SENG JCA; S NANTHA BALAN JCA:

There was an excess Ta'widh paid by the Customer to the Bank upon termination of the Facility before the maturity date. The Ta'widh rate of 1% per annum must be based on the balance sale price as if there had been no default and the full sale price would have been paid upon maturity date

The steps for civil courts to consider when faced with a Shariah issue:

1. whether the issue raised is a Shariah issue.

2. if it is a Shariah issue, whether there is existing guideline, ruling or resolution issued by BNM or the SAC. If there is such existing guideline, ruling or resolution of BNM or the SAC, then there is no need to refer the matter to the SAC;

3. if there is more than one guideline, ruling or resolution of BNM or the SAC on that Shariah issue, the civil courts should determine which of these is the applicable one, taking into account the facts of the case before the civil courts;

4. if there are no applicable guidelines, rulings or resolutions of BNM or the SAC (as the case may be), only then should the civil courts refer the Shariah issue to the SAC.

International Islamic Finance Cases

- *Investment Company Of The Gulf (Bahamas) Limited v Symphony Gems N.V. and Ors* [2002] West Law 346969, QBD (Comm. Ct.) (*Murabahah*)
- *Shamil Bank of Bahrain v Beximco Pharmaceuticals Limited and Others* [2004] 1 Lloyd's Rep 1 28 (*Wakalah*)
- *Investment Dar Co KSSC v Blom Developments Bank Sal* [2009] All ER (D) 145 (*Murabahah*)
- *Dr. Surbahmaniam Swamy v State of Kerala WP* (C) No. 35180 of 2009 (S) (Constitutional Issue)
- *Kevin J. Murray v Henry M. Paulson Jr.* No. 2:08- cv-15147 (Constitutional Issue)

Investment Company Of The Gulf (Bahamas) Limited v Symphony Gems N.V. and Ors [2002] West Law 346969, QBD (Comm. Ct.)1

The plaintiff agreed to finance the defendant via a revolving facility to purchase precious stones and gems. The defendant defaulted and the plaintiff brought the case to court.

Issues: The validity of the murabahah agreement.

Held: The contract was vividly valid from the English law point of view and dismissed the argument of Shariah non-compliance.

Investment Dar Co KSSC v Blom Developments Bank Sal [2009] All ER (D) 145,

TID failed to perform its obligation under the wakalah agreement and the BDB sued them in the High Court of England and applied for summary judgment on the grounds of default in payment and the deposits held on trust. The wakalah agreement entered into was governed by the English law.

TID argued that the wakalah agreement did not comply with the Shariah and was therefore void. The BDB argued that the transaction was Shariah compliant and in fact was duly certified by TID's own Shariah board and any argument of the invalidity of such a deal was therefore void.

General referral to the applicability of Shariah in the contractual agreements did not suffice for the English courts to regard it as the governing law of any Islamic financial transactions. Due to various reasons, TID finally withdrew the case.

Shamil Bank of Bahrain v Beximco Pharmaceuticals Limited and Others [2004] 1 Lloyd's Rep 1 28.

The defendant Beximco Pharmaceuticals Ltd and others entered into a *murabahah* agreement with the plaintiff in 1995. The defendants defaulted and the plaintiff finally brought the case to court and made an application for summary judgment.

Issues: The *murabahah* agreements contained the following governing law clause: "*Subject to the principles of the Glorious Shariah, this Agreement shall be governed by and construed in accordance with the laws of England*." Based on this clause, the defendants argued that the agreements were invalid and unenforceable because they were in truth disguised loans charging interest. It was further argued that the agreements were then unenforceable due to Shariah non-compliance.

The court held that the principles of Shariah did not apply to the *murabahah* agreements. The reference to the Shariah in the governing law clause was not meant to replace the English law as the governing law but merely intended to reflect the plaintiff's nature of business.

Dr. Surbahmaniam Swamy v State of Kerala WP (C) No. 35180 of 2009 (S)

The petitioner, Surbahmaniam Swamy, challenged the legality of the implementation of Islamic finance in the state of Kerala. He raised the constitutional issue in the courtof whether Kerala State Industrial Development Corporation's (KSIDC) 11% equity in Al Barakh Financial Services Ltd., committed to offering Shariah-compliant financial services, constituted "undue association with a religious activity amounting to State favoring or promoting a religion" which is against Article 27 of the Indian Constitution.

Judges, J. Chelameswar and P. R. Ramachandra Menon, agreed that any commercial activity for the purpose of development did not tantamount to the maintenance or promotion of religion which was prohibited by the Constitution. T

Kevin J. Murray v Henry M. Paulson Jr.
No. 2:08- cv-15147

The petition challenged the validity of the government's bailout to the AIG on the ground of constitutional violation. They also challenged the legality of the Emergency Economic Stabilization Act of 2008 (EESA) that appropriated USD 70 billion of taxpayer money to financially support the AIG.

The court held that merely rescuing AIG through bailout did not violate any constitutional provision. Involvement in any business activity for commercial purposes did not amount to the act of indoctrination of religion