Dr Noor Suhaida Kasri
researcher at Int'l Shariah Research Academy for Islamic Finance (ISRA

Malaysian Islamic Financial Services Authority 2013 – The Extent of Shariah Inclusivity

Malaysia has once again proven itself to be a leading player in the Islamic banking and financial market. On June 30, 2013, another building block was added to the regulatory structure: the Islamic Financial Services Act 2013 (IFSA). The IFSA provides for "regulation and supervision of Islamic financial institutions, payment systems and other relevant entities and the oversight of the Islamic money market and Islamic foreign exchange market to promote financial stability and compliance with Shariah". To local as well as international industry players, the IFSA symbolises the effort and commitment of the Malaysian government to enhance and develop its legal infrastructure in order to accommodate the dynamic growth of the Islamic banking and finance industry. A similar commitment was shown prior to IFSA where a number of pieces of legislation were enacted and modified to cater for the Islamic banking and finance industry: the Islamic Banking Act 1983, the Central Bank Act 2009 and the Government Investment Act 1983. Compared to its predecessors, the IFSA gives more focus on enforcing closer adherence to the Shariah. Due to the importance of Shariah adherence, this article examines the extent of Shariah inclusivity taking into consideration its application in Malaysian judicial system.

The abovementioned pieces of legislation were the products of decades of legal evolution and have positioned Malaysia as one of the leading Islamic financial markets. However, this legal development falls short of addressing the very foundation of Malaysian law: the constitutional issue of court jurisdiction. Provisions pertaining to court jurisdiction are enshrined in the Federal Constitution. As it is now, jurisdiction for matters pertaining to Islamic banking and finance are under the purview of the civil judiciary. Article 74(1) of the Federal Constitution stipulates that Parliament has the power to make laws with respect to any matters enumerated in the Federal List (First List in the Ninth Schedule) or the Concurrent List (Third List in the Ninth Schedule). It follows that matters enumerated under these lists fall under the jurisdiction of civil courts as they are deemed to be federal courts. On the other hand, Article 74(2) states that the State Legislatures may make laws with respect to any matter enumerated in the State List (Second List in the Ninth Schedule) or on the Concurrent List. Accordingly, all matters listed under these lists are under the jurisdiction of Shariah courts.

The State List spells out matters pertaining to Islamic law, personal and family law of person professing the religion of Islam, determination of matters of Islamic law and doctrine and Malay custom. However, this far-reaching ambit of determination of Islamic law and doctrine is capped if these involve matters which have already been listed in the Federal List. The Federal List enumerates quite an extensive list of matters, including contract, property and mercantile law (under Item 4(e)); finance (Item 7), banking (Item 7(e)) and stock and commodity exchange (Item 7(m)); trade, commerce and industry, insurance (under Item 8); including ascertainment of Islamic law and other personal laws for the purposes of federal law (Item 4(k)). Though the Federal and State List are silent on matters pertaining to Islamic banking and Islamic finance, the civil judiciary acted to remove the ambiguity in a number of cases. The Malaysian Federal Court in the case of Latifah Mat Zin v Rosmawati Sharibun&Anor expounded Item 4(k) of the Federal Constitution as follows:

"Item 4(k) provides: "Ascertainment of Islamic Law and other personal laws for purposes of federal law" is a federal matter. A good example is in the area of Islamic banking, Islamic finance and takaful. Banking, finance and insurance are matters enumerated in the federal list, items 7 and 8 respectively. The ascertainment whether a particular product of banking, finance and insurance (or takaful) is Shariah-compliant or not falls within item 4(k) and is a federal matter. For this purpose, the Parliament has established the Syariah Advisory Council – see s. 16B of the Central Bank of Malaysia Act 1958 (Act 519)."

In 2009, the Central Bank Act 1958 (CBA) was amended to incorporate provisions which have the effect of elevating the position of the Syariah Advisory Council (SAC) and empowering its resolution. Being the supreme reference for Islamic banking and finance in Malaysia, SAC resolutions are to be considered, referred to and held binding upon the industry, judiciary as well as arbitrators. However due to the structure of the Federal List and the State List, the civil judiciary argues that civil courts still retain the power to determine whether such financial instruments are Shariah compliant or not. This is perhaps due to the interpretation of section 56 of CBA. Mohammad Zawawi Salleh J. interprets section 56 of CBA in the case of Mohd Alias Ibrahim v RHB Bank Bhd & Anor where he states:

If the court refers any question under section 56(1)(b) of the Act 701 (Central Bank of Malaysia Act 2009) to the SAC, the SAC is required mainly to make an ascertainment, and not determination, of Islamic Law related to the question…In this sense it can be seen that the SAC is not in position to issue a new hukm Syara' but to find out which one of the available hukm is the best applicable in Malaysia for the purpose of ascertaining the relevant Islamic laws concerning the question posed to them. For example, in a matter where there are differences of opinion regarding the validity of a certain Islamic finance facility, SAC can be referred to ascertain which opinion of the jurists is applicable in Malaysia. This ascertainment of Islamic law will be binding upon the courts as per the Impugned Provisions. It will then be up to the courts to apply the ascertained law to the facts of the case. And at the end of the matter, the application and final decision of the matter remains with the court. The court still has to decide the ultimate issues which have been pleaded by the parties. After all, the issues whether the facility is Shariah compliant or not is only one of the issues to be decided by the court. (own italic)

What has been the industry's response to this state of affairs? Interestingly, a study was conducted in 2012 on the trend and pattern of decision making by civil court on matters pertaining to Islamic banking and finance for a period of twenty-five years, from 1987 till October 2012 (2012 Study). This study found that the pattern of court judgements has stirred a string of controversies and worried the market. For example, in 2009, in Bank Islam Malaysia Berhad v Lim Kok Hoe & Anor And Others , the Kuala Lumpur High Court ruled that the bank's Bay' bi-thamanal-'Ajil (BBA) home financing facility, which had operated and existed in Malaysia for the past twenty five years, was contrary to the religion of Islam. These have impacted negatively on the market's confidence and stability. To address these issues, the 2012 study proposed for a stronger legal framework and that the judiciary appointed are amongst those who are qualified and conversant in the field of Shariah and civil laws.

As such, the promulgation of the IFSA is seen as one of the anticipated solutions in addressing the need for a stronger legal framework. The IFSA was drafted to ensure mandatory Shariah compliance by industry players. Compliance with SAC resolutions is deemed as compliance with the Shariah; failure to do so would make the responsible person(s) liable to imprisonment or a hefty fine or both. Additionally, the IFSA also provides for a more detailed version of Islamic banking and financial provisions as well as other Islamic financial instruments. This is done in the hope that the practice of the industry will be regulated enough to prevent surprises or controversial decisions by the judiciary in the future. To know whether these would be translated into a well determined court judgement is yet to be seen. However, if one was to take a cue from the findings of the 2012 Study, it might be suggested that real Shariah inclusion would mean that matters pertaining to Islamic banking and finance would be placed under a Shariah judiciary whose bench is already fit and equipped with Shariah knowledge. It is a point worth pondering.

REFERENCES:

- * Dr Noor Suhaidah Kasri is currently a researcher at Int'l Shariah Research Academy for Islamic Finance (ISRA). She can be contacted at noor@isra.my

1. Please see IFSA Title.
2. [2007] 5 CLJ 253.
3. See Section 56 and 57 of CBA. Section 56 stipulates that "(1) 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 Syariah Advisory Council; or (b) refer such question to Syariah Advisory Council for its ruling." Section 57 states "Any ruling made by the Syariah Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under section 55and the court or arbitrator making a reference under section 56."
4. [2011] 4 CLJ 654, 682. Please also see Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Berhad (Guaman No: D4-22A-216 TAHUN 2007).
5. Section 56(1)(b) of the Central Bank of Malaysia Act 2009) and section 316F of the 2007 Act carries a similar provision.
6. Apnizan Abdullah and Hakimah Yaacob. (2012). The Trend of Legal Suits Involving Islamic Financial Transactions in Malaysia: Evidence from the Reported Cases. ISRA Research Paper, (N0. 48/2012).
7. [2009] 6 CLJ 22.
8. The validity of the BBA financing facility was also tested in Bank Islam Malaysia Bhd v Adnan Omar(1994) 3 CLJ 735,Dato' HjNik Mahmud Daud v Bank Islam Malaysia Bhd[1998] 3 CLK 605,Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation SdnBhd, [2003] 1 CLJ 625,Arab-Malaysian Finance Bhd v Taman Ihsan Jaya SdnBhd&Ors; Koperasi Seri Kota Bukit CherakaBhd (Third Party) And Other Cases [2010] 9 CLJ 577, Affin Bank Berhad v Zulkifli Abdullah[2006] 1 CLJ 438, CIMB Islamic Bank Bhd v LCL Corporation Bhd&Anor[2011] 7 CLJ 594 and Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Berhad& Another Case [2010] 4 CLJ 388.The validity of the bank's leasing financing facility is also challenged in the case of Tinta Press SdnBhd v Bank Islam (M) Berhad[1987] CLJ (Rep) 396.
9. See section 27 of IFSA.