



UNIVERSITI SAINS ISLAM MALAYSIA

جَامِعَةُ الْعُلُومِ الْإِسْلَامِيَّةِ الْمَالِيزِيَّةِ

ISLAMIC SCIENCE UNIVERSITY OF MALAYSIA

Legal Aspects of Islamic Finance

LCA4592

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- Salient Features of
 - the IBA
 - The BAFIA and
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Section 3 (5) of the IBA

- (5) The Central Bank shall not recommend the grant of a licence, and the Minister shall not grant a licence, unless the Central Bank or the Minister, as the case may be, is satisfied—*(a)* that the aims and operations of the banking business which it is desired to carry on will not involve any element which is not approved by the Religion of Islam; and
- *(b)* that there is, in the articles of association of the bank concerned, provision for the establishment of a Syari'ah advisory body, as may be approved by the Central Bank, to advise the bank on the operations of its banking business in order to ensure that they do not involve any element which is not approved by the Religion of Islam.

Sec 2

- “Islamic banking business” means banking business whose aims and operations do not involve any element which is not approved by the Religion of Islam;

Sec 2

- “Islamic bank” means any company which carries on Islamic banking business and holds a valid licence; and all the offices and branches in Malaysia of such a bank shall be deemed to be one bank;
- “international Islamic bank” means any company or an office of any foreign institution which carries on international Islamic banking business and holds a valid licence under section 30B;

Section 13A (1)

- **13A.** (1) An Islamic bank may seek the advice of the Syariah Advisory Council on Syariah matters relating to its banking business and the Islamic bank shall comply with the advice of the Syariah Advisory Council.
- (2) In this section, “Syariah Advisory Council” means the Syariah Advisory Council established under subsection 16B(1) of the Central Bank of Malaysia Act 1958.

Sec 30A. (1)

- No person shall carry on international Islamic banking business unless it is—
 - (a) an Islamic bank; or
 - (b) a company or a foreign institution and holds a valid licence under section 30B to carry on such business.
- (2) Any person who contravenes the provisions of this section commits an offence and shall, on conviction, be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding three years or to both such fine and imprisonment.

Sec 31

- **31.** The Central Bank shall from time to time investigate, under conditions of secrecy, the books, accounts and transactions of each Islamic bank and of any branch, agency or office outside Malaysia opened by an Islamic bank.

Sec 53A

- Power to issue guidelines, *etc.*
- **53A.** The Central Bank or the Minister may, from time to time, issue such guidelines, circulars or notes as the Central Bank or the Minister may deem expedient or necessary for carrying into effect the objects of this Act.

S 55 of the IBA 1983

- An Islamic bank which is incorporated under the Companies Act 1965 shall be subject to the provisions of that Act as well as to the provisions of this Act, save that where there is any conflict or inconsistency between the provisions of that Act and the provisions of this Act the provisions of this Act shall prevail.
- IBA prevail over Companies Act.
- What about other acts?
- The IBA silent on this aspect.

Sec 124 of the BAFIA

- **124.** (1) Except as provided in section 33, nothing in this Act or the Islamic Banking Act 1983 shall prohibit or restrict any licensed institution from carrying on Islamic banking business or Islamic financial business, in addition to its existing licensed business, provided that the licensed institution shall consult the Bank before it carries on Islamic banking business or any Islamic financial business.
- (2) For the avoidance of doubt, it is declared that a licensed institution shall, in respect of the Islamic banking business or Islamic financial business carried on by it, be subject to the provisions of this Act.

- (3) Any licensed institution carrying on Islamic banking business or Islamic financial business, in addition to its existing licensed business may, from time to time seek the advice of the Syariah Advisory Council established under subsection (7), on the operations of its business in order to ensure that it does not involve any element which is not approved by the Religion of Islam.
- (4) Any licensed institution carrying on Islamic banking business or Islamic financial business shall comply with any written directions relating to the Islamic banking business or any other Islamic financial business, carried on by such licensed institution, issued from time to time by the Bank, in consultation with the Syariah Advisory Council.

- (5) Any licensed institution carrying on Islamic banking business or Islamic financial business shall be deemed to be not an Islamic bank.
- (6) This Act shall not apply to an Islamic bank.
- (7) For the purposes of this section—
 - (a) “Syariah Advisory Council” means the Syariah Advisory Council established under section 16B(1) of the Central Bank of Malaysia Act 1958;
 - (b) “Islamic banking business” has the meaning assigned thereto under the Islamic Banking Act 1983; and
 - (c) “Islamic financial business” means any financial business, the aims and operations of which, do not involve any element which is not approved by the Religion of Islam.

S 66 BAFIA

- **66.** (1) Except as may be provided in any regulations made under section 116 (2), no licensed institution shall acquire or hold—
- (*b*) any immovable property or any right or interest therein, except such as may be reasonably necessary for the purpose of conducting its business, or of providing housing or other amenities for its staff, and as may in either case be approved by the Bank.
- **Bank cannot acquire shares of immovable property.**
- **IB involves with buying and selling of properties.**
- **Solution- S 116 (2) (a)- BNM's supervision**

CBA 2009

- “Islamic financial institution” means a financial institution carrying on Islamic financial business;
- “Shariah Advisory Council” means the Shariah Advisory Council on Islamic Finance established under section 51;

SAC

- S 51 (1) The Bank may establish a Shariah Advisory Council on Islamic Finance which shall be the authority for the ascertainment of Islamic law for the purposes of Islamic financial business
- (2) The Shariah Advisory Council may determine its own procedures

S 52 of the CBA

- S 52: (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;

S 52 of the CBA

- (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

Appointment

- **53.** (1) The Yang di-Pertuan Agong 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.

Appointment

- (2) If a judge of the High Court, the Court of Appeal or the Federal Court, or a judge of the Shariah Appeal Court of any State or Federal Territory, is to be appointed under subsection (1), such appointment shall not be made except—
 - (a) in the case of a judge of the High Court, the Court of Appeal or the Federal Court, after consultation by the Bank with the Chief Justice; and
 - (b) in the case of a judge of the Shariah Appeal Court of any State or Federal Territory, after consultation by the Bank with the Chief Shariah Judge of the respective State or Federal Territory, as the case may be.

S 53 of the CBA

- (3) A member of the Shariah Advisory Council appointed under subsection (1) shall hold office on such terms and conditions as may be provided in their respective letters of appointment, and shall be eligible for reappointment.
- (4) The members of the Shariah Advisory Council shall be paid such remuneration and allowances as may be determined by the Board from the funds of the Bank.

Secretariat

- S 54 (a) establish a secretariat and such other committees as it considers necessary to assist the Shariah Advisory Council in carrying out its functions; and
- (b) appoint any officer of the Bank or any other person to be a member of the secretariat or such other committees.

S 55 of the CBA

- Shall consult the SAC (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 Shariah,
 - which requires the ascertainment of Islamic law by the Shariah Advisory Council.
 - (2) Any Islamic financial institution in respect of its Islamic financial business, may—
- (a) refer for a ruling; or
- (b) seek the advice, of the Shariah Advisory Council on the operations of its business in order to ascertain that it does not involve any element which is inconsistent with the Shariah.

Reference to SAC

- The court or arbitrator shall (a) take into consideration any published rulings of the Shariah Advisory Council; or
- (b) refer such question to the Shariah Advisory Council for its ruling.
- (2) Any request for advice or a ruling of the Shariah Advisory Council under this Act or any other law shall be submitted to the secretariat.

Effect of Rulings

- S 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.
- 58. 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 Shariah Advisory Council, the ruling of the Shariah Advisory Council shall prevail

Shari'ah governance Framework for IFIs

- The SGF consists of two parts and one appendix with part I consists of five sections and part II, six sections. Part I provides an overview of *Shari'ah* governance consisting of objectives, scope of application, legal provision, effective date and compliance deadline and approach. Part II details out the *Shari'ah* governance arrangements and these include general requirement for *Shari'ah* governance framework, oversight, accountability and responsibility, independence, competence, confidentiality and consistency and *Shari'ah* compliance and research functions. All IFIs licensed under the IBA, the BAFIA, the DFIA and the TA are required to comply with the SGF.

SGF

- In terms of appointment of the *Shari'ah board*, section 3.8 mentions that the BOD of IFIs upon recommendation of its Nomination Committee should appoint the members of the SHC and subject to the approval of the BNM and the SAC. Appendix 2 on qualification requires the *Shari'ah board* members to at least either have qualifications or possess the necessary knowledge, expertise or experience in Islamic jurisprudence or Islamic commercial law.
- To ensure that the SHC is able to function effectively, the SHC should consist of a minimum of five members and its activities and functions will be coordinated by the *Shari'ah* secretariat of the respective IFIs (section 2.3).

SGF

- With the purpose of mitigating the risk of potential of conflict of interest and confidentiality issues, IFIs are not allowed to appoint any member of the SC in another IFI of the same industry (section 5.4).
- Appendix 2 on disqualification provides that an SHC member may be disqualified if he fails to satisfy that he is fit for the position, fails to attend 75% of meetings in a year without reasonable excuse, has been declared bankrupt, or a petition under bankruptcy laws is filed against him, was found guilty for any serious criminal offence or any other offence punishable with imprisonment of one year or more, or is subject to any order of detention, supervision, restricted residence or banishment.

SGF

- Appendix 4 of the SGF provides the clear duties and responsibilities of the SHC and these include: to advise the BOD on *Shari'ah* matters in its business operations; to endorse *Shari'ah* compliance manuals; to endorse and validate relevant documentations; to assist related parties on *Shari'ah* matters for advice upon request; to advise on matters to be referred to the SAC; to provide written *Shari'ah* opinions; and to assist the SAC on reference for advice

SGF

- The SHC is legally required to produce a *Shari'ah* report expressing their observations on IFIs' compliance with *Shari'ah* principles as illustrated in Appendix 3 of the SGF. In this aspect, the BNM/GP8-i specifies the minimum requirements of the *Shari'ah* report. The BNM/GP8-i requires content of the *Shari'ah* report to be at least, declaration of *Shari'ah* compliance endorsed by the *Shari'ah* committee members.
- In terms of reporting structure, the SHC will report functionally to the BOD as this reflects the status of the SHC as an independent body of the IFIs. The BOD is bound by any decision of the SHC and they have to consider their views on certain issues related to operational matters, policy or business transactions.

RPGT

- S 2 (8) Any reference to disposal of asset or a lease shall “ exclude any disposal of asset or lease by or to a person pursuant to a scheme of financing approved by the Central Bank , Securities Commission or LOFSA as a scheme which is in accordance with principles of Syariah where such disposal is strictly required for the purposes of complying with those principles not required with other financing schemes.

Real Property Gains Tax Act

- **Any transfer of ownership- pay the tax.**
- The sale and purchase of assets required under the Islamic Financing shall not be treated as a sale as defined under Real Property Gain Tax or Property Gains Tax and therefore this sale and purchase shall not be taxable.

ITA 1967

- S 2 (7) Any reference to interest shall apply mutatis mutandis to gains or profits received and expenses incurred in lieu of interest in transactions conducted in accordance with principles of Syariah
- Profits charged under Islamic Banking shall be treated similar to interest and therefore tax deductible

Stamp Duty Act

- The budget 2007 has made amendment to Stamp duty Act 1949 giving a discount of 20% on all Islamic Financing document using Islamic product approved by Bank Negara Malaysia.
- **Every transfr of property- Stamp Duty.**
- **The govt amended the stamp duty act 1949.**

Thank You

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