



RESOLUTION OF ISLAMIC BANKING AND
TAKAFUL DISPUTES IN INDONESIA AND
MALAYSIA: A COMPARATIVE STUDY

BY

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ABSTRACT

Islamic banking and takaful institutions in Indonesia and Malaysia have increased significantly both in numbers and number of services and products offered. A well-framed regulation is essential to support and develop their activities, more particularly in the sphere of disputes resolution. As *shari'ah* based institutions, their dispute resolution mechanism ought to be based on Islamic principles. This study examines the law of Islamic banking and takaful, and focuses on the dispute resolution mechanism in Indonesia and Malaysia. This study indentifies some Islamic dispute resolution mechanisms which might be appropriate for resolving disputes in Islamic banking and takaful. This research uses a qualitative approach; data were collected through various methods i.e. interviews, library and documentary searches. The collected data is then used in a comparative manner for analysing the issues and problems. The findings of this study show that laws governing Islamic banking and takaful in Malaysia are far ahead of Indonesia. In relation to resolution of disputes, the two countries have different approaches. In Indonesia, the Religious Courts have jurisdiction to settle Islamic banking and takaful disputes, while in Malaysia such disputes come under the jurisdiction of the Civil Court with its *Mu'āmalat* Bench/Division. In addition to this court, alternative institutions such as BASYARNAS and KLRCA as well as FMB are also established in Indonesia and Malaysia respectively. This study suggests that for Indonesia, a special takaful law should be enacted in order to enhance its further development. The Religious Court and BASYARNAS must be the sole bodies for the resolution of Islamic banking and takaful disputes. Section 55(2) of Law No. 21 of 2008 concerning Islamic banking deserves to be repealed. Furthermore, to strengthen the role of BASYARNAS, a special regulatory law, based on Islamic law of arbitration, is needed and it should have a good infrastructure and professionally managed. FMB like body is also required to be established in Indonesia. In Malaysia, Islamic Banking Act and Takaful Act must be amended in order to bring institutional and procedural improvements of substantive nature. Following the example of Indonesian Religious Court, Mahkamah Shari'ah in Malaysia should also be given similar jurisdiction in settling Islamic banking and takaful disputes. To achieve this, Federal Constitution needs to be amended; alternatively, a special court for this purpose may be established. The setting up of a new Islamic Arbitration Centre for resolution of Islamic banking, takaful and finance is also suggested.

ملخص البحث

لقد ظهر ازدياد المؤسسات المصرفية الإسلامية وشركات التكافل الإسلامية في إندونيسيا وماليزيا بشكل كبير سواء من حيث الأرقام والخدمات والمنتجات المقدمة. ولذلك فإن وجود القانون المنضبط أمرٌ ضروريٌ لدعم أنشطتها وتطويرها، وخاصةً فيما يتعلق بحلّ النزاعات. وبوصفها مؤسسة إسلامية فإنه من البديهي أن تكون الآلية التي تضبط القانون الذي يحلّ الخصومات والنزاعات مبنيةً على المبادئ الإسلامية. ولذا فإن هذه الدراسة تبحث عن قانون الصيرفة الإسلامية والتكافل، كما أن الدراسة تركز على آلية حلّ النزاعات في إندونيسيا وماليزيا. وهذه الدراسة تصف بعض آليات حلّ النزاعات التي قد تكون مناسبةً لحلّ النزاعات في مجال الخدمات المصرفية الإسلامية والتكافل. وأما المنهج، فإن الدراسة تستخدم المنهج النوعي، وتمّ جمع البيانات من خلال وسائلٍ مختلفةٍ مثل المقابلات والدراسة المكتبية والبحث الوثائقي. ومن ثمّ استخدام البيانات التي تمّ جمعها بطريقة نسبية لتحليل القضايا والمشكلات. وأما نتائج هذه الدراسة فتظهر أن القوانين التي تنظم العمل المصرفي الإسلامي والتكافل في ماليزيا تختلف اختلافاً كبيراً عن القوانين ذاتها في إندونيسيا. وفيما يتعلق بحلّ النزاعات، فإن للبلدين توجهات مختلفة. وذلك لأن في إندونيسيا أن المحاكم الدينية لها ولاية قضائيةٌ لحلّ النزاعات المصرفية الإسلامية وقضايا التكافل، في حين أن مثل هذه النزاعات في ماليزيا تأتي في إطار اختصاص المحكمة المدنية التي تنظم شؤون المعاملات. وبالإضافة إلى هذه المحكمة، فقد أنشئت أيضاً مؤسسات بديلة مثل BASYARNAS ومؤسسة KLRCA وكذلك مؤسسة FMB في كلٍّ من إندونيسيا وماليزيا على التوالي. وهذه الدراسة توصي بضرورة سنّ القانون الخاصّ بالتكافل في إندونيسيا من أجل تعزيز ما هو موجود الآن ولزيادة تطويره. ويجب على المحكمة الدينية ومؤسسة BASYARNAS أن تكونا في هيئة ومظلة واحدة لحلّ المنازعات المصرفية الإسلامية وقضايا التكافل. كما أن البند رقم 55 (2) من القانون رقم 21 لسنة 2008 بشأن المصارف الإسلامية يستحق أن يلغى. وفضلاً عن ذلك، من أجل تعزيز دور BASYARNAS، بوصفه قانوناً خاصاً منضبطاً، لا بد أن يبنى على مبادئ الشريعة الإسلامية، والمطلوب كذلك أنه ينبغي أن يكون لها بنية تحتية جيدة كما أنه من الضروري أن تدار باحتراف. والمطلوب في إندونيسيا إنشاء مؤسسة مثل FMB. وكما أنه يقترح في ماليزيا أن يعدل قانون المصارف الإسلامية والتكافل حسب الحاجة من أجل تحقيق التحسينات المؤسسية والإجرائية ذات طابع موضوعي اقتداءً بالمحكمة الدينية الإندونيسية، وينبغي أيضاً للمحكمة الشرعية في ماليزيا أن تُعطي ولايةً مماثلةً في حلّ النزاعات المصرفية الإسلامية وقضايا التكافل. ولتحقيق ذلك، فإن الدستور الاتحادي يحتاج إلى تعديل، وبدلاً من ذلك، يمكن إنشاء محكمة خاصة لهذا الغرض. ويقترح أيضاً إنشاء مركز إسلاميٍّ لتحكيم القضايا التي تتعلق بالمصرفية الإسلامية والتكافل والمعاملات المالية.

APPROVAL PAGE

The thesis of Abdul Rasyid has been examined and is approved by the following:

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Abdul Rasyid

Signature.....

Date.....

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

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Dedicated to

My father, H. Mahidin AR and mother, Hj. Faizah, my wife,

Herlina Hasan and my two sons, Abdul Hannan Rasyid and Abdul Wafi Rasyid and

the rest of my family

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Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution

Procedural Rules of BASYARNAS

MALAYSIA

Article of Association of Financial Mediation Bureau

Banking and Financial Institutions Act 1989

Central Bank of Malaysia Act 1958 as amended by Central Bank of Malaysia Act 2009

Development Financial Institutions Act (DFIA) 2002

Federal Constitution of Malaysia

Guideline pertaining to the Governance of *Shari'ah* Committee for the Islamic Financial Institution (BNM/GPSI) 2004. This was superseded by *Shari'ah* Governance Framework for Islamic Financial Institutions 2011.

Hire Purchase Act 1967

Islamic Banking Act 1983

Income Tax Act 1967

KLRC Rules for Islamic Banking and Financial Services Arbitration

Memorandum of Association of Financial Mediation Bureau

Real Property Gains Tax Act (RPGT) 1976

Stamp Duty Act 1949

Takaful Act 1984

LIST OF ABBREVIATIONS

ADR	:	Alternative Dispute Resolution
AITAB	:	<i>Ijārah Thumma al Bayʿ</i>
BAFIA	:	Bank and Financial Institutions Act
BAMUI	:	Indonesian Mualamat Arbitration Body
BASYARNAS	:	National <i>Sharīʿah</i> Arbitration Body
BBA	:	<i>Al-Bayʿ Bithaman Ājil</i>
BIR	:	Bank Indonesia Regulation
BMI	:	Bank Muamalat Indonesia
BIMB	:	Bank Islam Malaysia Berhad
BMMB	:	Bank Muamalat Malaysia Berhad
BNM	:	Bank Negara Malaysia
CBMA	:	Central Bank of Malaysia Act
DGT	:	Director General of Takaful
FMB	:	Financial Mediation Bureau
PMFB	:	The Pilgrims Management and Fund Board
FSMP	:	Financial Sector Masterplan
FSP	:	Financial Service Provider
IBA	:	Islamic Banking Act
IBS	:	Islamic Banking Scheme
IBU	:	Islamic Banking Unit
ICMI	:	The Association of Indonesian Muslims Intellectuals
IDB	:	Islamic Development Bank

IMF	:	International Monetary Fund
IUC	:	Indonesia <i>Ulama</i> Council
KLRCA	:	Kuala Lumpur Regional Centre for Arbitration
Med-Arb	:	Mediation - Arbitration
NSB	:	National <i>Shari'ah</i> Board
NU	:	<i>Nahdlatul Ulama</i>
PBNU	:	Central Board of the <i>Nahdlatul Ulama</i>
OIC	:	Organization of Islamic Conference
SAB	:	<i>Shari'ah</i> Advisory Board
SAC	:	<i>Shari'ah</i> Advisory Council
SPTF	:	Skim Perbankan Tanpa Faedah
SSB	:	<i>Shari'ah</i> Supervisory Board
STMB	:	Syarikat Takaful Malaysia Sendirian Berhad
UNCITRAL	:	United Nations Commission on International Trade Law
UUS	:	<i>Unit Usaha Shari'ah</i>

TRANSLITERATIONS

ء	'	خ	kh	ش	Sh	غ	Gh	ن	N
ب	B	د	D	ص	ṣ	ف	F	هـ	H
ت	T	ذ	dh	ض	ḍ	ق	Q	و	W
ث	Th	ر	r	ط	ṭ	ك	K	ي	Y
ج	J	ز	z	ظ	ẓ	ل	L		
ح	ḥ	س	s	ع	ʿ	م	M		

Short Vowels	
َ	a
ِ	i
ُ	u

Long Vowels	
ا + َ	ā
ي + ِ	ī
و + ُ	ū

CHAPTER 1

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

This chapter aims at giving a preliminary introduction to the various issues examined in this study. Detailed discussion of these is contained in the coming chapters. The growth of Islamic banking and takaful in Indonesia is relatively new compared to its neighbor i.e., Malaysia. Officially, the operation of Islamic banking in Indonesia was initiated in 1992, in line with the enactment of Banking Law No. 7 of 1992 which included provisions for the development of Islamic banks. It was followed by the establishment of Bank *Mu'āmalat* Indonesia (BMI), the Indonesia's first official Islamic bank. Based on this Law, Indonesia recognized the existence of a dual banking system, that is a system where the conventional banking existed side by side with Islamic banking and both grew together to serve the economy.¹

However, the Law No. 7 of 1992 does not expressly mention about Islamic banking. It only says that the bank can lawfully offer a credit facility on the basis of repayment or profit sharing.² In 1998, Law No. 7 of 1992 on Banking was amended by a new Banking Law No. 10 of 1998, which provided an opportunity and a legal foundation for Islamic banking operations. A notable change that was brought by this Law was the opportunity offered to the conventional banks to open Islamic banking unit by recognizing dual system of banking.³ In addition to this, the Law No. 23 of

¹See, Mulya E. Siregar and Nasirwan Ilyas, "The Experience of Indonesia in Developing Islamic Banking", a paper presented at *Fifth Harvard Forum on Islamic Finance*, April 6-7 2002, Harvard University, Cambridge, Massachusetts, USA, 2.

²Sutan Remy Sjahdeini, *Perbankan Islam dan Kedudukannya Dalam Tata Hukum Perbankan Indonesia*, (Jakarta: Grafiti, 2nd edn., 2005), 122.

³Ibid.

1999 concerning Central Bank was amended by Law No. 3 of 2004 in which Indonesian central bank was allowed to conduct monetary control through Islamic banks with instruments that were based on Islamic principles.⁴ Since 1999, some new players have come into the industry of Islamic banking and it has made a steady progress.⁵

However, the available regulations are insufficient for the progress of Islamic banking development, because both the Islamic and conventional banking are still regulated through the same regulation and it controls only small part of Islamic banking.⁶ Therefore, there should be a comprehensive and special law for the regulation of Islamic banking because of its different nature, essence, market segment and operational system. In addition, the development of Islamic banking is strongly influenced by the government policy which has separate regulation for the Islamic banks.⁷

Islamic banks have their own special characteristics and operational detailed as compared with conventional banks. Therefore in 2008, the Indonesia Parliament approved the Islamic Banking Law No. 21 of 2008, which had opened a new chapter in Islamic banking in Indonesia. Currently, in Indonesia there are eleven (11) Islamic

⁴Central Bank of Indonesia on the basis of Law. No. 23 of 1999 has functions as regulator and auditor, and regulates establishment of banks. There are many regulations that have been issued by Bank Indonesia to support Islamic banking activities such as licensing regulation, inter-*sharī'ah* bank financial instrument, *sharī'ah* monetary instruments, and minimum statutory reserve for *sharī'ah* banking etc.

⁵ Mulya E. Siregar and Nasirwan Ilyas, 2-3.

⁶ Dhani Gunawan Idat, "Analisis Yuridis Pembentukan Undang-Undang Perbankan Syariah", *Buletin Hukum Perbankan dan Kebanksentralan*, Direktorat Hukum Bank Indonesia, vol. 3, no. 1 (April 2005): 4.

⁷ Harisman, "Peran Bank Indonesia Dalam Implementasi Undang-Undang Perbankan Syariah Sebagai Landasan dalam Pengembangan Perbankan Syariah Nasional", a paper presented at *Seminar Urgensi Undang-Undang Perbankan Syariah Indonesia*, conducted by the Indonesian Student Association in Malaysia, at Indonesian Embassy Kuala Lumpur September 16, 2006.

commercial banks, twenty-three (24) Islamic Business Units of a Conventional Bank, and one hundred and fifty six (156) Islamic Rural Banks.⁸

In Malaysia, the development of Islamic banking is fully supported by the government. The legal framework was provided early before the establishment of Islamic banking. There are three important Acts issued by the government as the legal basis for the operation of Islamic banks in Malaysia i.e., Islamic Banking Act 1983 (IBA), Banking and Financial Institutions Act 1989 (BAFIA) and Development Financial Institutions Act (DFIA) 2002. Development of Islamic banks in Malaysia presents some impressive features. Recently, in Malaysia there are seventeen (16) Islamic Banks, four (5) International Islamic Banks, and fifteen (15) Development Financial Institutions (DFIs) offering Islamic Banking Services⁹

However, there have been criticisms that the IBA does not set out details of the commercial transactions allowed in the *sharī'ah* such as *muḍārabah*, *ijārah*, *waḍī'ah* etc. Furthermore, the Act is only regulatory and does not provide any statement of substantive law to be applied in cases of dispute. Bank Islam Malaysia Berhad (BIMB), Bank *Mu'āmalat* Malaysia Berhad (BMMB) and banks operating under the Islamic Banking Scheme (IBS), being Islamic banks, would carry on these transactions in accordance with the *sharī'ah*. One problem, however, is that as disputes in regard to commercial matters are brought to the Civil Courts and not to the *Sharī'ah* Courts, such disputes continue to be dealt with in accordance with common law principles.¹⁰

⁸See *Islamic Banking Statistics*, May 2012, <http://www.bi.go.id/web/id/Statistik/Statistik+Perbankan/Statistik+Perbankan+Syariah/sps_0512.htm> (accessed 28 July 2012).

⁹See *List of Islamic Banks*, last updated 22 June 2011, <http://www.mifc.com/index.php?ch=menu_know_ibt_ib&pg=menu_know_ibt_ib_list>, (accessed 28 July 2012).

¹⁰ Nik Norzrul Thani, Mohamed Ridza Mohamed Abdullah and Megat Hizaini Hassan, *Law and Practice of Islamic Banking and Finance*, (Selangor: Sweet & Maxwell Asia, 2003), 90.

Along with Islamic banking, takaful in Indonesia is developing rapidly as well. Officially, it was established in 1994 which marked by the operation of Islamic insurance or takaful by P.T. Syarikat Takaful Indonesia.¹¹ The legalization of takaful is based on Law No. 2 of 1992 concerning Labor of Insurance System. This Law, however, does not regulate the existence of the takaful itself. In carrying out its work, takaful based its operations on the *fatwa* of National *Shari'ah* Board - Indonesian *Ulama* Council (NSB-IUC)¹² as a guideline. This *fatwa* was issued because the then existing regulation did not provide guidelines for takaful. The problem is that this *fatwa* has no legal authority in the Indonesian national legal system.¹³ Hence, in order to support the development of takaful, a special law is required. As of June 2010, the takaful business was conducted by forty four (44) companies, out of which four (4) were takaful companies, thirty seven (37) insurance companies having *shari'ah* unit and three (3) *shari'ah* reinsurance units.¹⁴ The number of takaful companies is expected to increase in future.¹⁵

In Malaysia, takaful has been introduced since 1984 by virtue of the Takaful Act 1984 (TA). This Act is considered as the legal basis for the operation of takaful which is in line with the Islamic principles. However, although this Act introduces a new scheme which is supposed to comply with Islamic principles, the Act itself has few provisions as to how the scheme should operate, that it must be in accordance with *shari'ah* principles.¹⁶ In other words, this Act is only a regulatory Act and is not a substantive law. The operation of takaful is regulated and supervised by Bank

¹¹Wirnyaningsih, et. al, *Bank dan Asuransi Islam di Indonesia*, (Jakarta: Kencana, 2005), 269-270.

¹² The original term of NSB in Indonesian language is *Dewan Syariah Nasional* (DSN), while IUC is *Majelis Ulama Indonesia* (MUI).

¹³ Gemala Dewi, *Aspek-Aspek Hukum dalam Perbankan dan Perasuransian Syariah di Indonesia*, (Jakarta: Kencana, 2004), 128-129.

¹⁴ "Market Share Asuransi Syariah Masih Kecil", *Media Asuransi*, August 2010, No. 235, 9.

¹⁵ *Ibid.*

¹⁶ Nik Ramlah Mahmood, "Takaful: the Islamic Insurance System of Mutual Insurance - the Malaysian Experience", *Arab Law Quarterly*, vol. VI, part 3, (1991): 288.