

Challenging Shariah-Compliant Contract: A Latest Insight into the Malaysian Court Cases

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Abstract : In the last three decades, Malaysia has developed fundamental legal and regulatory structures that aim to accommodate and facilitate the growth of Islamic banking and finance industry. Important building blocks have been put in place, to cite a few, the elevation of the position of the Malaysian Central Bank Shariah Advisory Council (SAC) as the apex advisory body and the empowerment of their Shariah resolutions through the Central Bank Act 1958; the promulgation of the Islamic Financial Services Act 2013 that regulate and govern Islamic finance market with a robust statutory requirement of Shariah governance and Shariah compliance. Notwithstanding these achievements, enforceability of Shariah-compliant contract remains a contentious subject. The validity of Al Bai Bithaman Ajil concept that was commonly used by the Islamic financial institutions in their financing facilities structures and documentation has been unabatedly challenged by the customers in courts. The challenge was due to the manner in which the Al Bai Bithaman Ajil transactions were carried out. Due to this legal challenge, Al Bai Bithaman Ajil financing structure seems to no longer be the practitioners' favourite in Malaysia, though its substitute tawarruq and commodity murabahah financing structure may potentially face similar legal challenges. This paper examines the legal challenges affecting the enforceability of these underlying Shariah contracts. The examination of these cases highlights the manner in which these contracts were being implemented and applied by the Malaysian Islamic financial institutions that triggered Shariah and legal concern. The analysis also highlights the approach adopted by the Malaysian courts in determining the Shariah issues as well as the SAC in ascertaining the rulings on the Shariah issues referred to it by the courts. The paper adopts a qualitative research methodology by using textual and documentary analysis approach. The outcome of this study underlines factors that require consideration by industry stakeholder in order to ameliorate the efficacy of the existing building blocks that would eventually strengthens the validity and enforceability of Shariah-compliant contracts. This, in the long run, will further reinforce financial stability and trust into the Islamic banking and finance industry in Malaysia.

Keywords : enforceability of Shariah compliant contract, legal challenge, legal and regulatory framework, Shariah Advisory Council

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