

الجلسة الثالثة: تقويم إسهامات المصارف المركزية في الموازنة الشرعية والرقابة والتنظيم

للصناعة المالية الإسلامية

الموازنة الشرعية والرقابة والتنظيم للصناعة المالية الإسلامية: تجربة البنك المركزي الماليزي

(Shariah Harmonisation and Regulatory Consolidation: BNM Experience)

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وبعد:

INTRODUCTION

Islamic banking and finance has different business activities if compared to conventional banking and finance. The business activities of Islamic banks and financial institutions are premised primarily on trading, leasing, participatory contracts and fee-based arrangements. This is in contrast with the conventional banking business that is based mainly on lending and borrowing contracts. As a result, the legal relationship and consequences of the Islamic banking and financial contracts are different from those of the conventional banking and finance. In other words, Islamic banking and finance activities give rise to different contractual features from the Shari`ah as well as legal perspectives. Thus, it is important that the legal and regulatory framework of the country that has Islamic banking and finance operations recognizes and addresses the differences properly so as to prevent inappropriate regulation and regulatory arbitrage.

In the past or perhaps even in the present time, this aspect of concern has not been addressed adequately. This paper attempts to highlight the main issues and conflicts that occur between the legal framework and the Shariah requirements of Islamic banking transactions; and the Malaysian experience, in particular, that of the Central Bank of Malaysia (BNM), in trying to harmonize the legal framework with the Shariah, to facilitate better implementation & Shariah compliance of Islamic banking & finance in the country.

MALAYSIAN EXPERIENCE IN HARMONISING THE LEGAL & REGULATORY ISSUES WITH SHARIAH REQUIREMENTS

1. LEGAL RECOGNITION AND LICENSING OF ISLAMIC BANKS & FINANCIAL INSTITUTIONS

In general, one of the main legal issues and challenges is the lack of legal recognition for Islamic banking and finance, resulting in difficulties in getting license to do Islamic banking. Islamic banking and finance activities are not the normal way of doing banking and finance. In Islamic banking, the deposit taking and financing are not about lending and borrowing. Most of the time, they involve trading, i.e., buying, selling and leasing; or partnership, i.e., joint ventures (mudarabah) and equity partnership (musharakah); or agency (wakalah). Are these activities conducted by Islamic banks recognized as banking business under the legal and regulatory framework of the country?

In many countries, the legal definition of banking and financial services may not recognize Islamic banking and financial transactions due to their nature as trade and investment, hence, no legal recognition as banking & financial institutions. In these countries, the legal environment is based on either civil law or common law. These legal traditions provide conventional definitions to banking and financial services, which, primarily concentrate on financial intermediation by way of deposit taking and giving of loans. In this type of legal set-up, an Islamic financial institution which main activities are trade and investment may not be recognized as carrying out banking and financial activities as defined in the conventional definition. Thus, an Islamic financial institution cannot legally exist as a proper banking institution; and may only exist as a non-bank financial institution. Even when the Islamic financial institutions exist as non-bank financial institutions, their financial activities are still constrained by the conventional structures and framework as envisaged by financial regulations and laws of the country.

To overcome this problem, special laws have been promulgated and passed in Malaysia to allow for the recognition and licensing of Islamic banks and financial institutions. The Central Bank of Malaysia (BNM), together with the Attorney General Chambers played a major and crucial role in the amendment, drafting & preparation of all the laws to be discussed below.

To begin with, the Malaysian Parliament passed the Islamic Banking Act 1983 (IBA)¹ to allow for the licensing and regulation of Islamic banks, and legally recognize “Islamic banking business”.² At the same time, the Malaysian government also passed the Government Investment Act 1983³ to enable the Government of Malaysia to issue Shariah-compliant, non-interest bearing certificate known as Government Investment Certificates (GIC), under the concept of qard hasan.⁴ This arrangement enables Islamic banks to hold high quality liquid papers to meet the statutory liquidity requirements and its other liquidity needs. The introduction of both laws makes the establishment of the first Malaysian Islamic bank, Bank Islam Malaysia Berhad (BIMB) possible.

In the following year, the Takaful Act 1984⁵ was passed to allow for the registration and regulation of Takaful companies, and provide legal recognition of takaful business and operations. This enables the establishment of the first takaful company in the country, Syarikat Takaful Malaysia Berhad in 1984.

In addition to the above, section 124 of the Banking and Financial Institutions Act (BAFIA) 1989⁶ was amended in 1996 to statutorily allow the licensed conventional banks to do Islamic banking and financial business.

A major change in the Malaysian law that gives clear-cut statutory recognition to Islamic banking and finance is the passage of the new Central Bank of Malaysia Act in 2009 that repealed the earlier Central Bank of Malaysia Act 1958. For the first time, the Central Bank of Malaysia Act (CBMA) 2009 unequivocally declared that Malaysia is to have a dual financial system. Section 27 of CBMA 2009 provides:

“The financial system in Malaysia shall consist of the conventional financial system and the Islamic financial system.”

This statutory provision effectively accords a conclusive legal recognition of Islamic banking and finance as part of the dual financial system in Malaysia.

¹ This Act is now repealed by the Islamic Financial Services Act (IFSA) 2013.

² The definition of Islamic Banking business was given in Section 2 of the Islamic Banking Act 1983.

³ This Act is now known as the Government Funding Act 1983.

⁴ The use of qard hasan, however, did not qualify the GIC (now known as the GII-i) as tradable instruments in the secondary market. Thus, on 15 June 2001, the Government of Malaysia, with the advice of BNM, issued a 3-year GII-i of RM2.0 billion using bay' al-'inah arrangement, which allowed the GII-i to be traded in the secondary market via the concept of bay' al-dayn (debt trading).

⁵ This Act is now repealed by IFSA 2013.

⁶ This Act is now repealed by Financial Services Act (FSA) 2013.

Another major change in the Malaysian legal framework is the introduction of two omnibus legislations effective on 1 July 2013. They are the Financial Services Act 2013 that caters for the licensing and regulation of conventional banks and financial institutions (including insurance); and the Islamic Financial Services Act 2013 that caters for the licensing and regulation of Islamic banks and financial institutions (including takaful). The new laws reaffirm the legal recognition of Islamic financial services as one of the two components of the Malaysian dual financial system.

2. TAXATION LAW AND ITS EFFECTS

The fact that Islamic banking and finance transactions are mostly trade and investments may cause them to attract higher taxation assessment, especially when taxation laws do not legally recognize them as banking and financial transactions. Examples are double taxation for stamp duty, real property gain taxes etc. When this happens, it will result in higher costs of operation for Islamic financial institutions and consequently, they cannot compete on equal footing with conventional banks.

To overcome this problem, the Malaysian government made a number of amendments and exemptions to the taxation laws so as to provide a level playing field to Islamic financial institutions. Among others were the 1989 amendment to s. 14A of the Stamp Duty Act 1949 to prevent double taxation on Islamic financing documents; the 1985 amendment to the Real Property Gains Tax Act 1979 also to prevent double taxation; and other tax exemptions and incentives to achieve tax neutrality for Islamic financial transactions.

3. LEGAL AMBIGUITY?

In the past, there used to be ambiguities in the law on Islamic banking and finance. For instance, there were some ambiguities in the IBA 1983, such as, the definition of Islamic banking business under section 2 which was considered to be not clear. Section 2 of IBA 1983 read:

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

The term “banking business” in the definition was not defined. Further, the meaning of “approved by Religion of Islam” was not clarified in the Act.

The ambiguity in section 2 of IBA 1983 was clearly illustrated in the case of *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya* (2008) where the Malaysian High Court referred to section 2 in considering the validity or otherwise of the bay` bithaman ajil (BBA) financing. The court decided that in order to be valid, BBA must be approved by the religion of Islam as required under section 2. The court construed that “approved by the religion of Islam” meant BBA must be approved by all recognised madhhab. Since BBA was not approved by some of the madhhab the court held that the BBA financing was not valid. This decision was later reversed upon appeal, but it clearly illustrates the ambiguity in the definition given in section 2 of IBA.

In order to provide for a clearer statutory definition to Islamic banking and financial business, amendments have been made to some of the laws. For example, under the Central Bank of Malaysia Act 2009 that repealed the previous Act of 1958, a new definition to “Islamic financial business” is made in section 2 that reads: “Islamic financial business” means any financial business in ringgit or other currency which is subject to the laws enforced by the bank and consistent with the Shariah.

The new Islamic Financial Services Act (IFSA) 2013 also attempts to provide for a better definition of Islamic banking business. Section 2 of IFSA provides that “Islamic banking business” means the business of accepting Islamic deposits, accepting money under an Islamic investment account, provision of finance, and such other business as prescribed by sub-section (3).

Section 28 (1) of IFSA further provides that an Islamic financial institution shall at all times ensure that its aims and operations, business, affairs and activities are in compliance with Shariah. Section 28 (2) clarifies that compliance with any ruling of the Shariah Advisory Council of the Central Bank shall be deemed to be compliance with Shariah.

4. LACK OF SUBSTANTIVE LAW

The laws and regulations on Islamic banking and finance were mostly procedural and were not substantive. The IBA 1983 for example, was regulatory in nature with no substantive rules. Generally, the substantive rules in Islamic banking and finance were derived from the rulings and decisions of Shari`ah boards or committees. However, the rulings and decisions of the Shariah boards or committees are internal to the IFI and normally are not publicly available. There may also be differences in the rulings and decisions between one IFI and the other.

Nonetheless, in Malaysia, there are centralized Shari'ah advisory bodies at the regulator's level, i.e., the Shariah Advisory Council (SAC) of Bank Negara Malaysia (BNM) and the Shariah Advisory Council (SAC) of Securities Commission Malaysia to make Shariah rulings and resolutions for Islamic banking, finance, takaful and capital market respectively.⁷ The rulings and resolutions of both SACs are published and are available to the public in book forms that are revised from time to time. Access to the resolutions is also possible electronically via the web-site of the BNM.

The SAC of BNM was first established in 1997 via section 16B (1) of the Central Bank of Malaysia Act 1958. On the other hand, the SAC of the Securities Commission Malaysia was first established in 1996 under section 18 of the Securities Commission Act (SCA) 1993. The initial mandate for both the SACs was to advise the respective regulators on Shariah matters pertaining to Islamic banking, finance, takaful and capital market. However, in a series of amendments made to the Central Bank of Malaysia Act 1958 and later Central Bank of Malaysia Act 2009 (CBMA 2009), as well as the Capital Market and Services Act (CMSA) 2007, the role and functions of both the SACs were further reinforced whereby they were accorded the status as the sole authoritative bodies on Shariah matters in their respective industries. The rulings of the SAC shall prevail over any contradictory ruling by a Shariah body or committee (in Malaysia). The Malaysian court and arbitrator are also obliged to refer any Shariah matters in the Islamic banking and finance proceeding before them to the resolutions of the SAC and such resolutions shall be binding upon them.⁸

This year, the Malaysian Parliament passed another major law, i.e., the Islamic Financial Services Act (IFSA) 2013, effective on 1 July, which repealed IBA 1983 and Takaful Act 1984. The principal regulatory objectives of this Act are to promote financial stability and compliance with Shariah.⁹ This piece of legislation effects major changes in the law of Islamic financial services and provides a relatively comprehensive legal and statutory framework for the introduction of substantive law and rules on Islamic banking and financial transactions. Under section 29 (1) of IFSA, the Central Bank of Malaysia may, in accordance with the advice or ruling of the SAC, specify standards: (a) on Shariah matters in respect of the carrying of business, affair or activity by an institution which require the ascertainment of Islamic law by the SAC; and (b) to give effect to the advice or rulings of the SAC.

Pursuant to this provision in section 29 (1) of IFSA, the BNM together with its SAC, ISRA and other selected industry players are actively working on producing Shariah standards for various contracts that are used in Islamic banking and financial transactions, such as murabahah, mudarabah, musharakah, ijarah, istisna` etc. These Shariah standards, once they are finalized, will inshaAllah

⁷ Since 1997 for BNM, and 1996 for Securities Commission Malaysia.

⁸ See for example, sections 51, 52, 55, 56, 57 and 58 of CBMA 2009.

⁹ Section 6 of IFSA 2013.

serve as the substantive rules for Islamic banking and financial transactions in the near future. This will hopefully guide the industry towards better implementation and compliance in the application of the Shariah contracts to the Islamic financial products and instruments.

The Shariah standards to be issued by the Central Bank will have the force of law. Section 29 (3) of IFSA requires that every institution, its director, chief executive officer, senior officer or member of a Shariah committee shall at all times comply with the standards specified by the Central Bank under sub-section (1) which is applicable to such person. Failure to comply with the standards is considered as an offence under IFSA and is punishable upon conviction with imprisonment up to eight years or fine up to twenty five million ringgit or both.¹⁰

5. DISPUTE RESOLUTION & JUDICIAL ISSUES

The jurisdiction to hear Islamic banking and financial cases in Malaysia rests with the civil courts. This is based on the provision in the Federal Constitution of Malaysia that delineates the jurisdictions of the Federal Government and State Governments.¹¹ When this happened, early reported cases on Islamic banking transactions have shown that the civil courts were inclined to decide Islamic Banking disputes strictly based on civil laws and procedures without considering the Islamic dimension of Islamic Banking contracts and documents. This inclination was understandable because the judges and legal counsels at the civil courts were not trained in Shariah and most of them were not exposed to Islamic banking concepts and practices, especially during the early period of its introduction in the 1980s and 1990s.

Thus, it had been observed by many writers and commentators that the decisions made by the civil courts in the early Islamic banking disputes were based on the general laws of Malaysia that were mostly based on English common law, and not Islamic law. Some of the case laws even suggest potential conflicts with Shari`ah principles and philosophies. In fact, some of the court decisions did not reflect appropriate Islamic legal principles, or may even contravene those principles. The absence of substantive laws on Islamic banking and financial transactions that might serve as guidance and reference to the court further aggravate the problem.

To overcome this problem, a number of strategies were attempted. First, the authority decided to have a dedicated High Court to hear Islamic banking cases. This was achieved by assigning one of the four High Courts in Kuala Lumpur to be the Muamalat High Court, which was dedicated to hear

¹⁰ Section 29(6) of IFSA 2013.

¹¹ See List 1 and 2 of the Ninth Schedule in the Federal Constitution of Malaysia.

and decide Islamic banking disputes. Unfortunately, this strategy initially did not achieve its main objectives for the mere fact that the judge presiding the Muamalat High Court was still a civil court judge who was not trained in Shariah and did not have adequate exposure to Islamic banking concepts and practices. This resulted in the Court continuing to give awkward decisions in a few Islamic banking cases.¹²

Then, the CBMA 1958 was amended to further empower the SAC of BNM. Section 16B (1) established the SAC and accorded to it the authority for ascertainment of Islamic Law for purposes of Islamic banking business, Islamic financial business, takaful business, Islamic development financial business and any other Business which is based on Shari`ah principles and is supervised and regulated by BNM. The CBMA of 1958 further provides that any court or arbitration proceedings involving Shariah Issue may refer to BNM's directive or refer to SAC for ruling. Upon referral, the rulings by SAC might be considered by the court and was binding on arbitrator. However, this amendment was not adequate because the court might still refuse to refer the Shariah matter to the SAC.¹³

This prompted the passage of CBMA 2009 that repealed CBMA 1958. The new CBMA of 2009 further strengthened the power of SAC of BNM. The SAC of BNM was re-established under Sec 51 of CBMA 2009 as the final authority for ascertainment of Islamic law in Islamic financial business. Their mandates include among others:¹⁴

- Ascertain the Islamic law on any financial matter and issue a ruling upon reference made to it
- Advise BNM and IFI on any Shariah issue relating to Islamic financial business, activities or transactions
- Mandatory reference to SAC by the court or arbitrator
- SAC rulings binds IFIs, the court and arbitrator

After the enforcement of CBMA 2009, a number of Shariah issues had been referred to the SAC by the Court and arbitrator. This can mitigate the occurrence of awkward deliberations and decisions by the court in determining Islamic banking disputes.

¹² See for example, the case of *Affin Bank v Zulkifli bin Abdullah* (2006).

¹³ See for example the consolidated judgment of the High Court in *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya* (2008)

¹⁴ See s.s. 52, 55, 56, 57& 58 of CBMA 2009.

Moreover, the Shariah standards to be issued by the BNM pursuant to section 29(1) of IFSA 2013 will provide substantive laws on Islamic financial contracts that will serve to guide the court in understanding and deciding cases involving Islamic financial contracts. At the end of the day, this will aid the court in arriving at appropriate decisions for the cases.

6. CONFLICTS BETWEEN THE APPLICABLE LAW & SHARIAH REQUIREMENTS

In Malaysia, there are a number of general laws of the country that apply to Islamic financial transactions. When this happens, there is a possibility of conflicts, constraints and adverse legal effects to Islamic banking and Financial transactions because the general laws are not originally legislated to facilitate or support IBF.

For instance, in the case of contradictions between the general laws and the Shari`ah requirements, there is no clear-cut provision on which one will prevail. Examples of the contradictions can be seen in a number of case laws, such as, the case of BIMB v Adnan bin Omar (1994) (potential conflict with Rules of High Court) and Nik Mahmud v BIMB (1998) (potential conflict with Kelantan Malay Reserve Enactment 1930).

To overcome this problem, BNM and the Attorney General Chambers spearheaded previous as well as current efforts to harmonize the general law of the country with the Shari`ah requirements so as to facilitate IBF. An example of such effort can be seen in the recent amendment to High Court Rules where the previous provision on interest charges on judgment debt was amended to recognise late payment charges on judgment debt based on the concept of ta`wid and/or gharamah as prescribed by the SAC of BNM. Currently, the committee for harmonization of laws and Shariah is reviewing other laws as well, including: Contract Act 1950, Companies Act 1965, National Land Code, Hire Purchase Act etc.

ENSURING SHARIAH COMPLIANCE & SHARIAH GOVERNANCE FRAMEWORK

Initially when the Islamic banking started in Malaysia, there was only one Islamic bank in Malaysia, i.e., Bank Islam Malaysia Berhad (BIMB). The law governing Shariah compliance was provided for in Islamic Banking Act (IBA) 1983.

Section 3 (5) of the IBA 1983 provided among others that the Central Bank shall not recommend the grant of a licence, unless (a) 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 Syariah 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.

Thus, the Shariah governance framework for BIMB at the time (between 1983 until 1997) was solely reliant on BIMB's own Shariah advisory body. The nature and scope of Shariah governance at the time was straight forward, simple and limited to approval of concepts and structures of the financial product or instrument, without any requirement for more rigorous compliance governance, such as, to vet through legal documents or to conduct further Shariah audit. This Shariah governance framework worked fairly well in the environment where there was only one Islamic bank, and the market was new and just beginning to familiarize themselves with Islamic financial services. However, undeniably, there might have been flaws and possible non-compliances that could be inferred from issues arising in the case laws and a reading of the legal documents used during that period in time.

The year 1993 marked an important development when conventional banks in Malaysia were allowed to offer Islamic banking and financial services via an "interest-free banking scheme".¹⁵ The Guidelines on Interest-Free Banking Scheme was issued to guide the market. As a result, the Islamic banking players increased drastically from just one (BIMB) to approximately 40 players (Islamic windows in conventional banks) within a short time span.

Interestingly, this development necessitates a different approach to Shariah compliance governance. In 1996, an amendment was made to section 124 of the Banking and Financial Institutions Act 1989 (BAFIA) to allow conventional banks licensed under BAFIA to carry on Islamic banking or financial business provided that they shall consult the Central Bank beforehand.¹⁶ Section 124 (3) further provided that any licensed institution carrying on Islamic banking or financial business may from time to time seek the advice of the Syariah Advisory Council of the Central Bank to ensure that the operation of its business does not involve any element which is not approved by the Religion of Islam. Additionally, section 124 (7) mandated the establishment of a Syariah Advisory Council by the Central Bank to advise on the Shariah relating to Islamic banking or financial business. Pursuant to

¹⁵ This was later renamed to "Islamic banking scheme" in 1996.

¹⁶ See section 124(1) of BAFIA 1989.

this, the Central Bank of Malaysia Act (CBMA) 1958¹⁷ was amended to allow for the establishment of the said Shariah Advisory Council in 1997.

The Shariah governance framework was enhanced in 2003 when the CBMA 1958 was amended and further supported by the issuance of the Guidelines on the Governance of Shariah Committee for the IFIs by BNM in 2004. In essence, the effects of the 2003 amendment to CBMA 1958 and the 2004 Guidelines were as follows:

- No member of the SAC can be a member of any Shariah body, or act a Shariah consultant or Shariah advisor with any banking institution or other financial institutions regulated by BNM (section 16B(6) of CBMA 1958)
- Mandatory requirement for IFIs to establish their own Shariah committee
- Procedures on establishment of Shariah committee are detailed out, e.g. regarding appointment and reappointment, application procedures, qualifications of Shariah committee members, composition (at least 3 members), disqualifications, etc.
- Restrictions on Shariah committee, i.e., members of SAC of BNM cannot be appointed as Shariah committee at IFIs, and a member of Shariah committee in one IFI cannot be appointed as Shariah committee in another IFI of the same industry; to avoid conflict of interest & to preserve confidentiality.
- Duties and responsibilities of the Shariah committee & the IFIs were detailed out
- Reporting structure was also detailed out

IBA 1983 was also amended in 2003 to synchronize the relationship between the Shariah advisory board of Islamic banks established under IBA and SAC of BNM established under CBMA. Under the amendment, a new Section 13A was added to IBA 1983, providing inter alia:

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

The amendment to the IBA with the inclusion of Section 13A enabled the Islamic banks to seek the advice of the SAC; and it was mandatory for the Islamic banks to comply with the advice given by the SAC pursuant to such request. This indicated that the SAC has advisory powers over the Islamic

¹⁷ See section 16B (1) of CBMA 1958. This Act is now repealed by Central Bank of Malaysia Act (CBMA) 2009.

banks, where liaison and common understanding between Islamic bank's Shariah board and SAC was expected

Then, the new Shariah governance framework (SGF) was introduced in 2011. A lot have been written by researchers and writers on the SGF of 2011. Hence, this paper does not intend to go into the details of the new SGF. It suffices to state here that the main objectives of the new SGF were to provide for a comprehensive Shariah governance framework that can be understood and implemented by the industry. In short, the SGF 2011:

- Sets out the expectations of BNM on an IFI's Shariah governance structures, processes and arrangements to ensure that all its operations and business activities are in accordance with Shariah;
- Provides a comprehensive guidance to the board, Shariah Committee and management of the IFI in discharging its duties in matters relating to Shariah
- Outlines the functions relating to Shariah review, Shariah audit, Shariah risk management and Shariah research

The Diagram below illustrates the main principles under the SGF 2011.

SHARIAH GOVERNANCE FRAMEWORK & ITS PRINCIPLES

General Requirements	IFI must establish a sound & robust Shariah governance structure with emphasis on roles of key functionalities
Oversight, Accountability & Responsibility	IFI shall set out the accountability and responsibility of every key functionary (BOD, SC, Mgt) involved in the implementation of SGF
Independence	Independence of the Shariah Committee shall be observed at all times in exercising their duties to make objective and informed judgment
Competency	Any person bearing responsibilities in SGF shall possess the necessary competency and continuously enhance their knowledge
Confidentiality & Consistency	<ul style="list-style-type: none"> • Internal & privileged information obtained by the SC in the course of their duties shall be kept confidential at all times • Professional ethics, judgment and consistency shall be maintained in ensuring Shariah compliance
Shariah Compliance & Research Functions	Robust Shariah compliance functions comprising: Shariah review; Shariah audit; Shariah risk management and Shariah research

The Guidelines on SGF of 2011 was later statutorily adopted and enhanced by IFSA 2013. Division 2 of Part IV of IFSA provides detail provisions on Shariah Governance. Additionally, Division 3 of Part

IV of IFSA provides for Audit on Shariah compliance. It goes without saying that BNM plays a major role in overseeing the implementation of SGF both under the SGF Guidelines 2011 and IFSA 2013 to ensure its effectiveness and true Shariah compliance by the IFIs.

والله أعلم بالصواب والحمد لله رب العالمين