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# The Significance of Central Bank of Malaysia Act to Islamic Banking

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**Abstract**

Malaysia is considered as the cranium of Islamic banking. The purpose of this paper is to find out the significance of Central Bank of Malaysia Act (CBMA) to Islamic banking by analysing the relevant provisions of CBMA and the reported case law in Malaysia in this regard. This is a legal research where the provisions of this Act relevant to Islamic banking is reviewed and assessed in the light of reported case law. It is found that there is a need for the legislature to come up with the specific directions or practice notes in which Shariah issues of the case could be differentiated from factual issues/legal issues. It is hoped that the outcome of this paper will assist those jurisdictions aspiring to have a sophisticated legal framework for Islamic banking to comprehend the significance of having statutory provisions to establish the apex Shariah Advisory Council at the Central Bank level.

**Keywords**: Bank Negara Malaysia; Central Bank Act Malaysia; Islamic Banking; Central Bank of Malaysia

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## 1. Introduction

The significance of Central Bank of Malaysia Act or CBMA 1958 and CBMA 2009 to Islamic banking is that it creates provision to establish the National Shariah Advisory Council at Bank Negara of Malaysia. Amendment was made to the CBMA 1958 in 2003 to enhance the power and integrity of the Shariah Advisory Council.

As Engku Ali and Oseni (2017) observed, Islamic banking and finance should exist in an ecosystem comprising various interconnected sections that include legal and regulatory environment; tax regime; socio-economic norms and culture; political landscape; and financial reporting framework and other circumstances. As such, it can be said that having statutory provisions in CBMA to establish and regulate Shariah Advisory Council in Malaysia includes within the ambit of having a proper legal and regulatory environment. However, this approach found in Malaysia is unique as it is the first time ever in the world a legislation dealing with Central Bank of a country has provisions to create an apex Shariah Advisory Council to regulate Islamic finance industry in an effort to achieve Shariah compliance and Shariah harmony with Shariah uniformity via a statutory body. Not only this, but section 27 of CBMA 2009 is also a unique provision as it is the first time in the world where a legislation applicable to a Central Bank stated that the country's financial system consists both conventional and Islamic financial systems. Therefore, there is need to study and understand the significance of CBMA in this regard to Islamic banking as this will pave way for other countries aspiring to pioneer and sustain Islamic finance to replicate the model.

The purpose of this paper is to understand the significance of Central Bank of Malaysia Act (CBMA) to Islamic banking. This is a legal research where the provisions of this Act relevant to Islamic banking is reviewed and assessed in the light of reported case law. It is hoped that the outcome of this paper will assist those jurisdictions aspiring to have a sophisticated legal framework for Islamic banking would comprehend the significance of having statutory provisions to establish the apex Shariah Advisory Council at the Central Bank level.

This paper is divided into four parts. Followed by this introduction, part two of the paper discusses the overview of CBMA with reference to the old (1958) and new (2009) law. The third part of this paper discusses CBMA from case law and the final part of the paper deals with recommendations and the conclusion.

## 2. Overview of CBMA

One key area of difference between the old and the new Act for Bank Negara Malaysia is the reference to the Shariah Advisory Council, the body set-up under the central bank itself to bring about order and consistency in the Shariah rulings for Islamic banks and Takaful operators operating in Malaysia. Another key area is the introduction of the financial system concept. It is stated in section 27 of CBMA 2009 that the financial system in Malaysia shall consist of the conventional financial system and the Islamic financial system.

In the old CBMA 1958, section 16B led to the creation of Shariah Advisory Council at Bank Negara Malaysia. The sub-sections of 16B are summarised as below:

- Section 16B (1) states that Bank Negara Malaysia may establish a Shariah Advisory Council, which shall be the authority for the ascertainment of Islamic law for the purposes of Islamic banking business, takaful business, Islamic financial business, Islamic development financial business, or any other business which is based on Shariah principles and is supervised and regulated by the Bank.

- Section 16B (7) states that Bank Negara Malaysia shall consult the Shariah Advisory Council on Shariah matters relating to Islamic banking business, Takaful business, Islamic financial business, Islamic development financial business, or any other business which is based on Shariah principles and is supervised and regulated by Bank Negara Malaysia, and may issue written directives in relation to those businesses in accordance with the advice of the Shariah Advisory Council.

- Section 16B (8) states that where in any proceedings relating to Islamic banking business, Takaful business, Islamic financial business, Islamic development financial business, or any other business which is based on Shariah principles and is supervised and regulated by Bank Negara Malaysia before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, may take into consideration any written directives issued by Bank Negara Malaysia as provided in sub-section (7); or refer such question to the Shariah Advisory Council for its ruling.

- Section 16B (9) states that any ruling made by the Shariah Advisory Council pursuant to a reference made shall, for the purposes of the proceedings in respect of which the reference was made if the reference was made by a court, be taken into consideration by the court in arriving at its decision; and if the reference was made by an arbitrator, be binding on the arbitrator.

- Section 16B (11) states that any request for consultation or reference for a ruling of the Shariah Advisory Council under the Act or any other law shall be submitted to the secretariat.

- Section 16B (10) states that the Bank Negara Malaysia may establish a secretariat and such other committees as it considers necessary to assist the Shariah Advisory Council in the performance of its functions and may appoint any of the officers of the Bank or any other person to be a member of the secretariat or any of such committees.

CBMA 1958 was repealed by CBMA 2009. It was gazetted on 3rd September 2009 and came into effect on 25th November 2009. CBMA 2009 facilitates Bank Negara Malaysia to enhance its role in managing the “emerging risks and challenges in performing its role and responsibilities as the nation's central bank” (see Preamble of CBMA 2009). CBMA 2009 consists hundred sections and is divided into fifteen parts. Unlike the CBMA 1958, the new CBMA 2009 has a dedicated part on Islamic

financial business. Sections 51-58 of the CBMA 2009 are relevant to Islamic Banking in Malaysia, as these sections deal with the Shariah governance structure of Islamic Financial Institutions in Malaysia. In the new CBMA 2009, which has cleared all hurdles and is set to be underway anytime, a whole new section for Islamic finance has been carved out. Part IV of the new act is entitled 'Islamic financial business' and is broken into two chapters. Table below illustrates new additions to CBMA in relation to Shariah Advisory Council.

**Table 1: New additions to CBMA**

| Subject | CBMA 1958 | CBMA 2009 | Effect |
|---|---|---|---|
| Shariah Advisory Council ruling prevails | - | 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. | CBMA 2009 has a new provision in this regard. The implication of this provision is that it ensures harmonization of Shariah views in the country in the Islamic financial business regulated by Bank Negara Malaysia. |
| Islamic Financial Institutions to consult | In this regard, there is no equivalent provision found in CBMA 1958. | Any Islamic financial institution in respect of its<br>Islamic financial business, may—<br>(a) refer for a ruling; or<br>(b) seek advice, of the Shariah Advisory Council on the operations of its business in order to ascertain that it does not involve an element which is inconsistent with the Shariah. | The implication of this new provision is that it ensures the authoritative role of Shariah Advisory Council. |
| Term of Appointment | CBMA 1958 is silent on the term of appointment. | A member of the Shariah Advisory Council appointed shall hold office on such terms and conditions as may be provided in their respective letters of appointment and shall be eligible for appointment. | The implication of this new provision is the formal appointment of Shariah Advisory Council members. |
| Restrictions on Members | Unless the Bank otherwise approves in writing, no member of the Shariah Advisory | There is no provision found equivalent in this regard found in CBMA | It could be understood that this part could be covered under the provision where it is |

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| Council shall become a member of any Shariah advisory body of, or act as a Shariah consultant or Shariah advisor of, or assume any position or office to such effect for, or occupy any office or employment whether remunerated or not with, any banking institution or other financial institution. | 2009. | stated that a member of the Shariah Advisory Council appointed shall hold office on such terms and conditions as may be provided in their respective letters of appointment, and shall be eligible for reappointment. |

CBMA 2009 is silent on the definition of "Islamic banking business," but section 2 of this Act provides the definition of "Islamic financial business" as: "any financial business in ringgit or other currency which is subject to the laws enforced by the Bank and consistent with Shariah".

CBMA 2009 states that the financial system of Malaysia consists of dual banking systems; that is Islamic banking and conventional banking systems operating parallel to each other (Section 27 of CBMA 2009).

Part VII of CBMA 2009 deals with Islamic financial business. It is stated that Bank Negara Malaysia "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" (Section 51 (1) of CBMA 2009) and the Shariah Advisory Council may determine its own procedures (Section 51 (2) of CBMA 2009). The functions of the Shariah Advisory Council are also mentioned in the Act (Section 52 (1) of CBMA 2009). The functions of the Shariah Advisory Council is to ascertain the Islamic law on any financial matter and issue a ruling upon reference made to it in accordance with this Part; to advise the Bank on any Shariah issue relating to Islamic financial business, the activities or transactions of the Bank; to provide advice to any Islamic financial institution or any other person as may be provided under any written law; and such other functions as may be determined by the Bank (Section 52 (1) of CBMA 2009).

The meaning of "ruling" is defined under the Act 2009 as "any ruling made by the Shariah Advisory Council for the ascertainment of Islamic law for the purposes of Islamic financial business" (Section 52 (2), CBMA 2009).

The appointment of Shariah Advisory Council is also mentioned in CBMA 2009. Section 53 of the Act 2009 states that the Yang di-Pertuan Agong may, on the advice of the Minister of Finance after consultation with the Bank Negara Malaysia, 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 (Section 53 (1), CBMA 2009). Bank Negara Malaysia "may establish a secretariat and such other committees as it considers

necessary to assist the Shariah Advisory Council in carrying out its functions" (Section 54 (a) of CBMA 2009) and "appoint any officer of the Bank or any other person to be a member of the secretariat or such other committees" (Section 54 (b) of CBMA 2009).

Section 55 of CBMA 2009 states that Bank Negara Malaysia shall consult the Shariah Advisory Council on any matter-relating to Islamic financial business; and for the purpose of carrying out its functions or conducting its business or affairs under the CBMA 2009 or any other written law in accordance with the Shariah, which requires the ascertainment of Islamic law by the Shariah Advisory Council. In the same section, it is also stated that any Islamic financial institution in respect of its Islamic financial business; may refer for a ruling; or 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. According to section 56 of CBMA 2009, if any question arises concerning a Shariah matter in any proceedings relating to Islamic financial business before any court or arbitrator, the court or the arbitrator shall take into consideration any published rulings of the Shariah Advisory Council; or refer such question to the Shariah Advisory Council for its ruling.

Furthermore, section 57 states that the rulings made by Shariah Advisory Council shall be binding to Islamic Financial Institutions who seek advice under section 55 and to arbitrators or court referring for advice under section 56.

It is imperative to understand the differences between CBMA 1958 and CBMA 2009 to understand the improvements that have been made to enhance the role of Shariah Advisory Council. The following table illustrate these differences.

**Table 2: The Differences between CBMA 1958 and CMBA 2009**

| Subject | CBMA 1958 | CBMA 2009 |
|---|---|---|
| Establishment of Shariah Advisory Council | It is stated that Bank Negara may establish a Shariah Advisory Council, which shall be the authority for the ascertainment of Islamic law for the purposes of Islamic banking business, takaful business, Islamic financial business, Islamic development financial business, or any other business which is based on Shariah principles and is supervised and regulated by Bank Negara Malaysia. | Bank Negara Malaysia 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. |
| Appointment and Qualification of Members | The Shariah Advisory Council shall consist of such members as may be appointed by the Minister, on the recommendation of Bank Negara Malaysia, from amongst persons who have knowledge or experience or both in the Shariah and also—<br>(a) banking;<br>(b) finance; | The Yang di-Pertuan Agong (YDPA) 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 |

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| | (c) law; or<br>(d) any other related discipline. | Shariah Advisory Council. |
| Appointment of a Judge as a Member | 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 (2), such appointment shall not be made except—<br>(a) in the case of a judge of the High Court, the Court of Appeal or the Federal Court, **after consultation with the Chief Justice**; and<br>(b) in the case of a judge of the Shariah Appeal Court of any State or Federal Territory, after consultation with the Chief Shariah Judge of the respective State or Federal Territory, as the case maybe. | 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—<br>(a) in the case of a judge of the High Court, the Court of Appeal or the Federal Court, after **consultation by Bank Negara Malaysia with the Chief Justice**; and<br>(b) in the case of a judge of the Shariah Appeal Court of any State or Federal Territory, after consultation by the Bank Negara Malaysia with the Chief Shariah Judge of the respective State or Federal Territory, as the case may be. |
| Functions of Shariah Advisory Council | The Shariah Advisory Council shall have such functions as may be determined by Bank Negara Malaysia. | The Shariah Advisory Council shall have the following functions:<br>(a) to ascertain the Islamic law on any financial matter and issue a ruling upon reference made to it in accordance with this Part;<br>(b) to advise the Bank on any Shariah issue relating to Islamic financial business, the activities or transactions of the Bank;<br>(c) to provide advice to any Islamic financial institution or any other person as may be provided under any written law; and<br>(d) such other functions as may be determined by the Bank. |
| Bank Negara Malaysia to consult | The Bank shall consult the Shariah Advisory Council on Shariah matters relating to the Islamic banking business, and may issue written directives in relation to those businesses in accordance with the advice of the Shariah Advisory Council. | The Bank shall consult the Shariah Advisory Council on any matter relating to Islamic financial business; and 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. |
| Role to Consult in | Where in any proceedings relating to Islamic banking business, before any | Where in any proceedings relating to Islamic financial business before any |

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|---|---|---|
| Court cases and Arbitration matters | court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, **may**—<br>(a) take into consideration any written directives issued by the Bank pursuant to subsection (7); or<br>(b) refer such question to the Shariah Advisory Council for its ruling. | court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, **shall**—<br>(a) take into consideration any published rulings of the Shariah Advisory Council; or<br>(b) refer such question to the Shariah Advisory Council for its ruling. |
| The effect of Ruling made when referred by the Court and Arbitrator | Any ruling made by the Shariah Advisory Council pursuant to a reference made under paragraph (8)(b) shall, for the purposes of the proceedings in respect of which the reference was made if the reference was made by a court, be taken into consideration by the court in arriving at its decision; and if the reference was made by an arbitrator, **be binding on the arbitrator**. | 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. |
| Terms Defined | (a) "Islamic banking business" has the meaning assigned thereto in the Islamic Banking Act 1983;<br>(b) "Islamic financial business" means financial business whose aims and operations do not involve any element which is not approved by Shariah; and<br>(c) "takaful business" has the meaning assigned thereto in the Takaful Act 1984. | For the purposes of this Part, "ruling" means any ruling made by the Shariah Advisory Council for the ascertainment of Islamic law for the purposes of Islamic financial business. |

### 2.1. Differences between CBMA 1958 and 2009 their Implications

*Establishment of Shariah Advisory Council*

In substance, there is no difference. However, the language used has been changed as Islamic financial business is the broad term used to describe all kinds of Islamic business stated in the old CBMA 1958 in the new CBMA 2009.

*Appointment and Qualification of Members*

In the old CBMA 1958, the members are appointed by Minister charged with the responsibility for finance on the recommendation of Bank Negara Malaysia. However, in CBMA 2009, it is YDPA who appoints them on the advice of the Minister after consultation with the Bank Negara Malaysia. The qualification of the members under the old CBMA 1958 are persons who had knowledge or experience or both in the Shariah and also banking; finance; law; or any other related discipline. In CBMA 2009, the qualification of a member should be 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 of a Judge as a Member*
There is not much of a difference in the appoint of a judge as a member of Shariah Advisory Council except that under CBMA 2009 in the case of appointment of 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 in the case of a judge of the High Court, the Court of Appeal or the Federal Court, after consultation by Bank Negara Malaysia 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 Negara Malaysia with the Chief Shariah Judge of the respective State or Federal Territory, as the case may be. In the CBMA 1958, in the instances mentioned above, there was no requirement to consult with Bank Negara Malaysia.

*Functions of Shariah Advisory Council*
Under CBMA 2009 there are four statutory functions of Shariah Advisory Council is stated. However, in the old CBMA 1958, the onus to determine the functions vests with Bank Negara Malaysia and no statutory functions were provided.

*Bank Negara Malaysia to consult*
Under the old CBMA 1958, the terms used are different from the terms used in CBMA 2009 as, under CBMA 2009, Islamic financial business covers everything covered in the old CBMA 1958. In CBMA 2009, the part where it states Bank Negara Malaysia "may issue written directives in relation to those businesses in accordance with the advice" is not found.

*Role to Consult in Court cases and Arbitration matters*
Under the old CBMA 1958, if there is a Shariah matter related to Islamic finance case the court or the arbitrator may decide to take into consideration any published rulings of the Shariah Advisory Council; or refer such question to the Shariah Advisory Council for its ruling. It was discretionary under the old CBMA 1958. However, in the new CBMA 2009, in this case, it is mandatory upon the court to do so. The word "shall" in the section denotes this.

*The effect of Ruling made when referred by the Court and Arbitrator*
There is a substantial change in this regard. Under the old CBMA 1958, if the reference was made by the arbitrator to the Shariah Advisory Council, then only the decision of Shariah Advisory Council is binding. However, under CBMA 2009, the ruling given by Shariah Advisory Council will be binding on both the court and the arbitrator provided the matter for the ruling has been referred in accordance with the Act.

*Terms Defined*
There is only one term defined in CBMA 2009 and in CBMA 1958, three terms are defined (i.e. definitions of Islamic financial business, takaful business, Islamic banking business).

The meaning of "ruling" is defined under the Act 2009 as "any ruling made by the *Shariah* Advisory Council for the ascertainment of Islamic law for the purposes of

Islamic financial business" (Section 52 (2), CBMA 2009). The ruling was not defined under CBMA 1958.

CBMA 2009 is silent on the definition of "Islamic banking business," but section 2 of this Act provides the definition of "Islamic financial business" as: "any financial business in ringgit or other currency which is subject to the laws enforced by the Bank and consistent with *Shariah*".

### 2.2. Similarities between CBMA 1958 and 2009

There is no difference found in terms of Procedure, Remuneration, Secretariat, and the process to make a request for Consultation. The clauses for these matters remain unchanged.

## 3. CBMA from Case Law

It is imperative to mention that civil courts in Malaysia hear Islamic banking matters as held in the case of Bank Islam Malaysia Bhd (BIMB) v Adnan bin Omar [1994] 3 AMR 2291. In this case, the Defendant argued that since BIMB who is the plaintiff is an Islamic bank, the Civil Court has no jurisdiction to hear the case in view of Article 121 (1A) of the Federal Constitution 1957. The judge overruled that objection and submitted that the matter was rightly brought before the Civil Court as it is clear that List 1 of the Ninth Schedule enumerates the various matters in which Parliament can enact laws in Malaysia and the scope is very comprehensive, including banking. On the other hand court observed that List 11 in the State list provides for the constitution, organisation and procedure of Shariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included which exclude banking. It was further stated that that since BIMB is a corporate body, it does not have a religion and therefore is not within the jurisdiction of the Shariah Court in Malaysia.

CBMA 1958 has been discussed in *Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Bhd & another case* [2010] 4 CLJ 388*, Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other Appeals* [2009] 6 CLJ 22*, Malayan Banking Bhd v Ya'kup Oje & Anor* [2007] 5 CLJ 311*, Kuwait Finance House Malaysia Berhad v Adil Perdana Sdn Bhd* [2011] 1 LNS 424*, Mohd Alias Ibrahim v RHB Bank Bhd & Anor* [2011] 4 CLJ 654*, Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Bhd* [2004] 6 CLJ 25*, Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Berhad & Another Cases* [2011] 1 LNS 1259*,* and *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd.* [2006] 8 CLJ 9. CBMA 2009 is also discussed in the cases of *Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Berhad & another Cases* [2011] 1 LNS 1259, *Mohd Alias Ibrahim v RHB Bank Bhd & Anor* [2011] 4 CLJ 654 *and JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners) [2019] 3 MLJ 561.*

The provisions of CBMA 1958 related to Islamic banking has been deliberated by a number of Islamic banking cases in Malaysia as this Act deals with the jurisdiction of the Shariah Advisory Council. It could be observed that the main reason behind the

amendment of the provisions of CBMA 2009 is due to the constructive deliberations made by the court from time to time.

The most debated provision of CBMA 1958 is the sub-sections of section 16B of the Act which deals with the establishment of Shariah Advisory Council. This section was inserted by the Central Bank of Malaysia (Amendment) Act 2003 (Act A 1213) which was given its Royal Assent on 22 December 2003 and it was published in the Gazette on 31 December 2003. In the case of *Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Bhd* [2004] 6 CLJ 25*,* the court dealt with sub-section (8) of 16B of CBMA which stated the following:

> "Wherein any proceedings relating to Islamic banking business, takaful business, Islamic financial business, Islamic development financial business, or any other business which is based on Shariah principles and is supervised and regulated by the Bank before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, may: (a) take into consideration any written directives issued by the Bank pursuant to sub-section (7); or (b) refer such question to the Shariah Advisory Council for its ruling" (Section 16B (8) of CBMA).

The court in this case said that this sub-section is "food for thought". The effect of this section has been explained in the case of *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors.* [2009] 1 CLJ 419. It is held in this case that even if court refers the issue before the court to Shariah Advisory Council to determine whether the matter is within the ambit of Islamic law, the court is not bound to follow the decision made by the Shariah Advisory Council and the question to which the court had to decide by looking at the facts of the case is a matter for the court to decide. The exact words of the court on this matter are quoted below:

> "There is neither necessity nor reason to refer these concepts to the Shariah Advisory Council for any ruling, which in any case, while they are to be taken into consideration, are not binding upon the court. The function of this court is to examine the application of these Islamic concepts, as to whether as implemented, and in the particular cases before it, the transactions do not involve any element not approved in the Religion of Islam. It is a question of looking at the particular facts. That remains the judicial function of the court which it cannot abdicate" (*Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors.* [2009] 1 CLJ 419).

Furthermore, the interpretation of section 16B of CBMA 1958 can be understood from the judgment made by Suriyadi J. in the case of *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd*, in which he said that under section 16B of CBMA 1958, the Shariah Advisory Body appears to have a rather extensive scope or referral, that is not just confined to the question of whether the matter at hand involves any element which is not approved by the religion of Islam. But the final say must rest with the presiding judge.

In the case of *Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Berhad & Another Cases* [2011] 1 LNS 1259, the counsel for plaintiff submitted to seek expert opinion on the matter whether the Murabahah Facility Agreement entered between the parties were consistent with Islamic law or not. The counsel for the plaintiff asked for this by referring to the case of *Simon Mahanraj Appaduray & Anor v Reginald Ananda & Anor* [1981] CLJ 136 in which it was observed that in situations where the court is not in a position to form a correct judgment without the aid of persons who have acquired special skill or experience on a meticulous subject, the court should not allow summary judgment.

To answer this request made by the plaintiff's counsel, the court referred to the relevant provision (i.e. 16B) of CBMA 2009 and held the following:

> "Looking at s. 16B (7), I would not be wrong to assume that when Bank Negara issues directives involving Shariah matter it would have the approval or the advice of the Shariah Advisory Council. Thus, an approval of Bank Negara for Financial Institutions to offer Islamic Banking products would and must have had the benefit of the advice of the Shariah Advisory Council. I raise this point also because in the submission of Encik Tommy Thomas for the Bank, he confirmed that the restructuring of this particular BBA Facility Agreement received the sanction of Bank Negara, which in return would have had the benefit of the Shariah Advisory Council's advice" (*Simon Mahanraj Appaduray & Anor v Reginald Ananda & Anor* [1981] CLJ 136).

The first reported case in Malaysia dealing with sections 56 and 57 of CMBA 2009 is the case of *Mohd Alias Ibrahim v RHB Bank Bhd & Anor* [2011] 4 CLJ 654. In this case *inter alia* it raised the interesting question whether the provisions sections 56 and 57 of CBMA 2009 is inconsistent with Article 121 of the Federal Constitution. The reason for this contention is because when statutorily the ruling of the Shariah Advisory Council is made binding on the court, it is conflicting and overriding with the constitutional right of the court of law to determine the matters related to law. Definitely these are the questions which any sane person knowledgeable in law would ask as the legislator has left some loopholes. The court in this case has held that this section is not consistent with the Federal Constitution and that the Shariah Advisory Council is not usurping the function of the court.

Sections 56 and 57 of CBMA 2009 are also dealt in the case of *Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Berhad & Another Cases* [2012] 3 CLJ 249 in which the judgment in respect of the defendant's application pursuant to section 56 of CBMA 2009 to refer certain questions to the Shariah Advisory Council of Bank Negara Malaysia was made. The grounds of this application were that Bank Islam claimed that some Shariah issues raised by Tan Sri Khalid to be decided by the Court and, section 56 of CBMA legally compels such issues to be submitted to Shariah Advisory Council in which any ruling made shall be binding on this Court by virtue of section 57 of CBMA 2009. However, Tan Sri Khalid objected to this claim on grounds that prior reference to Shariah Advisory Council has been made by Rohana Yusuf J, at the

Summary Judgment stage; sections 56 and 57 of CBMA do not operate retrospectively; sections 56 and 57 of CBMA 2009 contravene the Federal Constitution, in particular Part IX, Article 74 and Article 8; the Shariah Issues are not appropriate for reference to and/or determination by Shariah Advisory Council; there is a potential conflict of interest on the part of Shariah Advisory Council by reason of Shariah Advisory Council is a body supervised and regulated by Bank Negara Malaysia (BNM) and BNM has been involved in many material aspects concerning the transaction between Tan Sri Khalid and Bank Islam; and last but not least, parties are entitled to tender expert evidence on matters of Islamic law. The court then summarized these issues into four broad issues: whether there is any issue before the Court related to a Shariah matter ("Shariah Issue"); whether the Court is estopped and/or *functus officio* from making any reference to Shariah Advisory Council when the question was duly referred by learned Rohana Yusuf J ("Estoppel Issue"); whether this Court should refer the Shariah Issues pursuant to section 56 of CBMA 2009 or section 16B (8) of CBMA 1958 ("Applicable Law"); and whether sections 56 and 57 of CBMA 2009 contravene the Federal Constitution (Constitutionality of s. 56 and s. 57 of CBMA 2009).

As for the first issue related to Shariah issue, the court was of the view that there are Shariah issues that need to be determined by Shariah Advisory Council. With regard to this issue, the court held the following:

> "Looking at the purpose of section 56 of Act 701, it is clear that Shariah Advisory Council is required to ascertain the applicable Islamic law to the above *Shariah* Issues. Upon ascertainment of the Islamic Law, the Court would then apply it to the facts of the present case. This approach is in consonance with the decision in *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor* [2009] 6 CLJ 22; [2006] 6 MLJ 839, where Raus Sharif JCA (as he then was) stated: "In this respect, it is our view that judges in civil courts should not take upon themselves to declare whether a matter is in accordance to the Religion of Islam or otherwise ..." (*Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Berhad & Another Cases* [2012] 3 CLJ 249).

As for the estoppels issue, the court did not deny the fact that Shariah Advisory Council was referred in the previous case between the parties that was given summary judgment by Rohana J. However, the court was of the view that the letter sent by the court asking for Shariah Advisory Council's view on Shariah matters in the case was actually to query if there was any subsisting resolution passed by Shariah Advisory Council on BBA contract. The Bank Negara Malaysia Circular sent as the reply to this query was not issued because of the disagreement between the parties before the Court. The court took note that this circular was an existing resolution which was issued even before the dispute arose and since the Court of Appeal had overruled the summary Judgment application, the court held that "in view of the conflict of opinion of the experts, the trial of the matter is still open and this Court is at liberty to refer the Shariah issue to Shariah Advisory Council" (*Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Berhad & Another Cases* [2012] 3 CLJ 249).

As for the applicable law issue the court discussed the effect of section 57 of CBMA 2009 when compared with 16B (8) of CBMA 1958. It is imperative to quote here the words of the judge in this respect:

> "I am sure that Tan Sri Khalid must have felt extremely uncomfortable and apprehensive for the implementation of Act 701 in particular s. 56 and s. 57 which supersede the Repealed CBA. This is because, prior 25 November 2009, it was the Repealed CBA that was applicable. Relying on s. 16B (8) of the Repealed CBA, if there was any question concerning a *Shariah* matter in any proceedings before the Court, the Court may take into consideration any written directive issued by BNM or the Court may refer such question to Shariah Advisory Council, the ruling of which shall be taken into consideration by the Court in arriving at its decision. However, the said position has changed since the introduction of Act 701 which came into effect on 25 November 2009. The non-binding effect under s. 16(B) (8) of the Repealed CBA had been taken away should a ruling have been passed by Shariah Advisory Council upon a reference by a court under s. 56(1)(b)" (*Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Berhad & Another Cases* [2012] 3 CLJ 249).

The court took note that there would be "no adverse implement of any pre-existing substantive right of Tan Sri Khalid" and it is just that under CBMA 2009 now the court is bound to follow the decision of Shariah Advisory Council and to the proposition that Tan Sri Khalid has a vested right to lead expert evidence, the court held that this claim is unsustainable as Shariah Advisory Council is a statute-appointed expert who has been given the function to decide Islamic law for the use of Islamic financial business ever since the amendment to CBMA 1958 in 2003.

In the case of Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor [2012] 1 SHLR 23, the plaintiff entered into a sale and purchase agreement to purchase properties situated within the Kota Warisan Project ('the land') and a building agreement to construct and complete a detached house on the land. On 29 January 2004, the first defendant granted the plaintiff a Bai Bithman Ajil facility and cash line facility ('the facilities agreements') to finance the said construction project. On 8 March 2005, all assets, rights and liabilities of the first defendant in respect of Islamic banking business were vested in the second defendant. The plaintiff then commenced an action against the defendants claiming, inter alia, a declaration that the facilities agreements dated 29 January 2004 executed between the plaintiff and the defendants were void and of no effect and damages for breaches of the facilities agreements with interest and costs.

On 18 May 2010 the first defendant's application under 18 and 19 of the Rules of the High Court 1980 to strike out the plaintiff's claim was dismissed. However, during the striking out application it was realised that there were some issues which merited a reference to the Shariah Advisory Council pursuant to sections 56 and 57 of CBMA 2009. Upon such realisation the plaintiff filed an interlocutory application seeking the court's determination as to whether sections 56 and 57 of CBMA 2009 ('the impugned

provisions') were inconsistent with art 121(1) of the Federal Constitution ('Constitution') and therefore to the extent of such inconsistency were void.

In his application, the plaintiff raised three questions for the court's consideration, namely, whether the impugned provisions were worded to the effect that they usurped the judicial power of the court to decide the ultimate issues in dispute between the parties by transferring such power onto another body, which in this case was the Shariah Advisory Council, when there was no enabling provision in the Constitution permitting it to do so; whether by imposing a duty on the court to refer any Shariah banking matter to the Shariah Advisory Council and making the decision of the Shariah Advisory Council binding on the court the litigants were deprived of any chance to be heard; and whether the impugned provisions could not have retrospective effect on the transaction as they were entered into before the Act came into effect. As the issues to be considered had a serious implication on the development of the Islamic banking industry in Malaysia, the court, with the consent of the parties, invited the Attorney General's chambers and the Bank Negara Malaysia as amicus curie to proffer their views on the matter.

In response the amicus curie submitted that the impugned provisions were enacted pursuant to item 4(k) of List I in the Federal List of the Ninth Schedule to the Constitution, which was to ascertain Islamic law and other personal law for the purposes of federal law, and that since the judicial power of the court was derived from federal laws the court was bound to rule that the impugned provisions were valid. This according to the amicus curie should negate the issue of unconstitutionality of the impugned provisions. The amicus curie also pointed out that according to s 51(2) of the Act the Shariah Advisory Council was given the liberty to set its own process and procedure when a Shariah matter was referred to it. As such, the amicus curie submitted that for the plaintiff to conclude that his right to be heard was denied at this stage when no request or rejection had been given was speculative in nature. The amicus curie further submitted that since the Act did not impose any limitations on the Shariah Advisory Council in the performance of its statutory duties, the court should not add or infer any term to suggest any cut off point to the Act. At the commencement of the hearing of this application, the plaintiff raised a preliminary objection regarding this court's jurisdiction to hear the present dispute. The plaintiff submitted that since the questions posed to the court in this application revolved around the power of Parliament to make a law concerning the judicial power of the Federation to the Shariah Advisory Council, the court should pursuant to s 84 of the Courts of Judicature Act 1964 ('the CJA') refer the questions to the Federal Court.

However, the amicus curie took the stand that this court had the jurisdiction to determine the questions posed by relying on two propositions of the relevant laws, namely art 121 of the Constitution, which determined the issue of judicial power, and item 4(k) of List I in the Federal List of the Ninth Schedule to the Constitution, under which the impugned provisions were passed. The court in this case dismissing the plaintiff's application with no order as to costs held that the impugned provisions were valid federal laws enacted by Parliament. As such it was within the jurisdiction and power of this court, as well as the non-mandatory wording of s 84 of the CJA, whether

to refer or not refer this matter to the Federal Court. In this case, the court requested all parties to proceed with the crux of the matter.

In Malaysia, Islamic laws fall under the jurisdiction of the Shariah Court, which derives its power under a state law enacted pursuant to art 74(2) of the Federal Constitution, but in cases involving banking transactions based on Islamic principles it was the civil courts that had the jurisdiction to hear these matters. However, with the development of Islamic financial instruments it became important to establish one supervisory authority to regulate the uniformed interpretation of Islamic law within the sphere of Islamic finance and banking, and in Malaysia, that supervisory authority is the Shariah Advisory Council. Based on s 52 of the Act, which sets out the functions of the Shariah Advisory Council, it was clear that the Shariah Advisory Council was established as an authority for the ascertainment of Islamic law for the purposes of Islamic banking business, Takaful business and Islamic financial business. Thus, if the court referred any question under s 56(1)(b) of the Act to the Shariah Advisory Council, the latter was required to merely make an ascertainment and not a determination of the Islamic laws related to the question.

The sole purpose of establishing the Shariah Advisory Council was to create a specialised committee in the field of Islamic banking to ascertain speedily the Islamic law on a financial matter. As such there was no reason for the court to reject the function of the Shariah Advisory Council in ascertaining which Islamic law was to be applied by the civil courts in deciding a matter (see paras 62–63, 78–80, 84–85, 105 & 122). The root word 'ascertain' that was used in s 51 of the Act was also similar to the word in item 4(k) of List I in the Federal List of the Ninth Schedule to the Federal Constitution, i.e. 'for the ascertainment of Islamic law and other personal laws for purposes of federal law'. The court found that such similarity was not a mere coincidence and that there were significant differences between the word 'ascertainment' and the word 'determination', which appears in List II in the State List of the Ninth Schedule to the Federal Constitution. Although both words were not defined under the Federal Constitution, the dictionary meaning of the words showed that there were differences between the two words. Based on the meaning of the word 'ascertain' as used in the Act, it was clear that the Constitution had given Parliament the power to make laws with respect to any of the matters enumerated in the Federal List which included the ascertainment of Islamic and other personal laws for purposes of federal law. Thus, in a matter where there were differences of opinion regarding the validity of a certain Islamic finance facility, the Shariah Advisory Council could be referred to so as to ascertain which opinion of the jurist was most applicable. This ascertainment of Islamic law would then be binding upon the courts as per the impugned provisions and it will then be up to the courts to apply the ascertained law to the facts of the case. As such, the final decision in the matter remained with the court in that it had to still decide the ultimate issues which had been pleaded by the parties.

The process of ascertainment by the Shariah Advisory Council had no attributes of a judicial decision and the ruling issued by the Shariah Advisory Council was an expert opinion in respect of Islamic finance matters and it derived its binding legal effect from the impugned provisions enacted pursuant to the jurisdiction provided under the Constitution (see paras 87–88, 90, 93–94, 96 & 109). Since the Shariah Advisory

Council had not published its procedure the plaintiff could not at this instance prove that he had a right to be heard or that he had been denied of his right to be heard. Since there was no limitation imposed on the Shariah Advisory Council in the performance of its statutory duties in the Act prior to 25 November 2009, the court should not add or infer any term to suggest any cut off point to the Act. In any case this case was registered on 28 January 2010, which was well after the Act came into force, and thus the retrospective issue was of no relevance.

The latest development in this regard is the case of JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners) [2019] 3 MLJ 561. In this case, the respondent had granted Islamic credit facilities to the appellant/applicant ('JRI') to finance JRI's leasing of shipping vessels owned by the respondent. When JRI defaulted in paying the amounts due under the facilities, the respondent sued and entered summary judgment against JRI in the High Court for the amount owing. In its appeal to the Court of Appeal ('COA') against the summary judgment, JRI argued that it was unable to generate income from the lease of the vessels because the respondent failed to carry out major maintenance works on the vessels. JRI argued that cl 2.8 in the facilities agreements, which stated that it was JRI's responsibility to carry out and bear the costs of the maintenance of the vessels, contravened the principles of Shariah and, accordingly, the High Court should have sought a ruling on the matter from the Shariah Advisory Council of Bank Negara Malaysia under s 56 of CBMA 2009. The COA allowed the appeal, set aside the summary judgment and directed the High Court to refer to the Shariah Advisory Council for a ruling the question of whether cl 2.8 was Shariah -compliant. After considering the differing expert opinions submitted to it by JRI and the respondent, the SAC notified the High Court of its ruling that although, in principle, the respondent should bear the maintenance cost of the vessels as their owner, it was permissible for the contracting parties to negotiate and agree as to who should bear the costs. In effect, the Shariah Advisory Council ruled that cl 2.8 was Shariah -compliant. As a result, JRI was obliged to bear the costs of the major maintenance works on the vessels as agreed between the parties.

On receiving the Shariah Advisory Council's ruling, the High Court fixed the case for trial, but before the trial could commence JRI applied under art 128(2) of the Federal Constitution ('the FC') and s 84 of the Courts of Judicature Act 1964 to have the High Court refer to the Federal Court for its determination the question whether sections 56 and 57 of CBMA 2009 (under which the Shariah Advisory Council gave its ruling) was constitutionally valid. The High Court dismissed the application but, on appeal, the COA directed the trial court to make the constitutional reference sought by JRI. In essence, the Federal Court in the instant reference was asked to determine whether by giving the Shariah Advisory Council the sole right and power to determine whether cl 2.8 was Shariah -compliant and then requiring the High Court to be bound by the Shariah Advisory Council's ruling, sections 56 and 57 of CBMA 2009 had usurped the court's judicial power and function to determine the Shariah issue on its own after considering all the evidence on the point; consequently, whether the provisions of the FC, in particular art 121, had been breached. JRI submitted that it was unconstitutional and against the doctrine of separation of powers for Parliament to assign the court's function of determining the Shariah issue to a non-judicial body like the Shariah

Advisory Council and, in addition, provide that the court was bound by the Shariah Advisory Council's ruling. The respondent and the interveners, on the other hand, submitted that the impugned sections of the CBMA did not vest any judicial power in the Shariah Advisory Council; that the Shariah Advisory Council's function as a body specialised in Islamic jurisprudence was only to ascertain the Islamic law applicable for the purposes of Islamic financial business and not to determine the dispute that the parties had before the court. By majority, it was held that sections 56 and 57 of CBMA 2009 were constitutional and did not breach the FC.

In delivering the majority judgement, Mohd Zawawi Salleh FCJ stated that the Shariah Advisory Council's ruling under s 57 of the CBMA did not conclude or settle the dispute between the parties arising from the Islamic financing facility at hand. The Shariah Advisory Council only 'ascertained' the Islamic law for the purposes of the Islamic financial business and did not 'determine' the liability of the borrower under the facility. The determination of a borrower's liability under any banking facility was decided by the presiding judge and not the Shariah Advisory Council. The duty to ascertain the Islamic law was conferred on the Legislature and the Shariah Advisory Council was the Legislature's machinery to assist it in resolving disputes in Islamic banking. It was open to the Legislature to establish the Shariah Advisory Council as part of regulatory statute and to vest it with power to ascertain Islamic law for the purposes of Islamic banking. The Shariah Advisory Council did not exercise judicial power at all. Its ruling was solely confined to the Shariah issue. The presiding judge who made the reference to the Shariah Advisory Council would exercise his judicial power and decide the case based on the evidence submitted before the court. Since no judicial power was vested in the Shariah Advisory Council, it did not usurp the judicial power of the court. The exercise of judicial power did not exist merely because there was an adjudication of an issue. He also stated that the parliament was competent to vest the function of the ascertainment of Islamic law in respect of Islamic banking in the Shariah Advisory Council and to provide that such ascertainment was binding on the court. It was for the court to apply the ascertained Islamic law to the facts of the case.

The Shariah Advisory Council's ascertainment of the Islamic law did not settle the dispute between the parties before the court. The Shariah Advisory Council did not determine or pronounce authoritative decision as to the rights and/or liabilities of the parties before the court and it did not convert the High court into a mere rubber stamp. He also pointed out that the civil courts were not sufficiently equipped to make findings on Islamic law. They were not in a position to appreciate and determine the divergence of opinions among the experts and to decide based on Shariah principles. Since its inception, the Shariah Advisory Council had been harmonising the proliferation of Shariah opinions in the industry. There was a need for certainty in the industry on Islamic banking principles. Therefore, the binding nature of the Shariah Advisory Council's ruling was justified as section 56 of CBMA 2009 was enacted for the purpose of conserving and protecting the public interest. If parties were allowed to lead expert evidence on Islamic law questions for Islamic financial business, it would fall upon the civil courts to ascertain what the applicable Islamic law was and then proceed to apply the ascertained law to the facts of the case. The practical questions which would then need to be addressed were: (a) what source would a judge refer to;

(b) which mazhab (Islamic jurisprudence) would the judge adopt if there were differing opinions among the experts; and (c) would civil law or Shariah law be the applicable law. The use of expert evidence would not be helpful to a civil court judge as, ultimately, the judge would have to decide which expert opinion to rely on and this could be further complicated if each expert based his/her opinion on different schools of jurisprudence. It was for a body of eminent jurists, properly qualified in Islamic jurisprudence and/or Islamic finance, to be the ones dealing with questions of validity of a contract under Islamic law and, in Malaysia, that special body was the Shariah Advisory Council.

In the judgement of this case, Azahar Mohamed FCJ, concurring with majority stated that the Federal List, Ninth Schedule of the Federal Constitution empowered Parliament to make laws for the ascertainment of Islamic law and other personal laws for the purposes of federal law. The ascertainment of Islamic law for the purposes of Islamic financial business therefore fell under the legislative's power and therefore the powers and discretion on such matters were neither inherent nor integral to the judicial function. Parliament was legally empowered to assign or delegate its power of ascertaining the applicable Islamic law in relation to any aspect of Islamic financial business to any branch of government or to any administrative body. To that end, Parliament established the Shariah Advisory Council to act as the single authority that would ascertain Islamic laws in relation to Islamic financial business to ensure consistency and certainty in the application of Islamic principles in such business.

Sections 56 and 57 of CBMA 2009 were introduced in line with Parliament's aim and policy of providing certainty and to prevent incoherent and anomalous decisions in Islamic financial cases. An unsatisfactory feature in the resolution of disputes before the civil courts in the past had been the reliance on various differing sources of Islamic principles. He also stated that within the framework of the Federal Constitution, the Shariah Advisory Council and the courts had to operate with some level of integration if Islamic banking and Islamic financial services in Malaysia were to function well. He also observed that ascertainment of Islamic laws, for the purposes of Islamic financial business, was a function or power delegated by the legislative branch to the judicial branch and the Shariah Advisory Council. As such, the impugned provisions could not and did not trespass or intrude onto the judicial power; the provisions did not violate the doctrine of separation of powers. The principle of separation of powers did not apply to invalidate any legislative delegation of powers to the Shariah Advisory Council and the courts to ascertain Islamic law for the purposes of resolving disputes on Islamic financial matters. The Judiciary had not been stripped of its powers and neither had the Executive nor the Legislature usurped or intruded into the sphere of judicial powers.

It is imperative to look at the dissenting judgement given in the case too. Richard Malanjum Chief Justice, who had dissenting opinion, stated that Section 57 of CBMA 2009 had to be struck down as being unconstitutional and void as it contravened art 121 of the Federal Constitution in so far as it provided that any ruling made by the Shariah Advisory Council pursuant to a reference was binding on the High Court making the reference. The effect of s 57 was to vest judicial power in the Shariah Advisory Council to the exclusion of the High Court on Shariah matters. He also stated

that with the striking down of section 57 of CBMA 2009, the High Court ought to accord persuasive weight to any ruling of the Shariah Advisory Council pursuant to a reference, taking into account its composition, expertise and special status as the statutory authority for the ascertainment of Islamic law for the purposes of Islamic financial business.

The approach to Shariah Advisory Council rulings could be similar to the treatment of fatwa of the muftis which had not become law under the respective State Enactments/Ordinances. Courts would ordinarily have no reason to justify the rejection of expert opinion, given that the opinion was expressed by the highest Islamic authority and that judges were not trained in this system of jurisprudence. If a judge disagreed with a particular ruling, he should be at liberty to do so but he should give his/her reasons for not agreeing with the ruling. The Shariah Advisory Council's function in this case fell clearly within the core area of judicial power it exercised an adjudicative function, it finally resolved the dispute on the issue of Shariah law, and it gave a decision which was immediately enforceable. The Shariah Advisory Council's ruling was binding not on the parties but on the High Court. It was a decision from which the High Court could not depart. In exercising its function, the Shariah Advisory Council was not subject to any check-and-balance mechanism. The Shariah Advisory Council's ruling was final with regard to the Shariah issue and it could not be challenged by the parties by contrary expert evidence nor be reviewed by the High Court nor overturned on appeal. In substance, the rights and obligations of the parties would be determined by the Shariah Advisory Council's ruling. The High Court could not be said to have retained judicial power by reason of the Shariah Advisory Council merely forwarding its ruling to it.

The Shariah Advisory Council's ruling bound the court and would necessarily be reflected in the order of the court. Because of that binding nature, the Shariah Advisory Council's ruling became an integral and inextricable part of the judicial process of determining the rights and liabilities of the disputing parties. It was not permissible for the decision of a non-judicial body to take effect as an exercise of judicial power. Although the legislative purpose behind the enactment of sections 56 and 57 of CBMA 2009 was commendable, that could not excuse a constitutional transgression and be at the expense of judicial independence and power. The same legislative purpose could have been achieved through other methods that did not involve an infringement of judicial power. For instance, parties to an Islamic finance agreement could agree to submit any disputed question of Shariah law to the Shariah Advisory Council for determination and be bound by its decision. Or, the agreement could include a form of 'conclusive evidence clause' stating that the Shariah Advisory Council's determination was conclusive evidence of the position of Shariah law so that the court could give effect to the agreement without questioning the correctness of the determination unless there was fraud, mala fide or manifest error.

According to David Wong CJ (Sabah and Sarawak) who also was giving the dissenting judgement stated that Sections 56 and 57 of the CBMA had to be struck down and new provisions had to be put in place to redefine the Shariah Advisory Council's role in respect of Shariah questions arising in proceedings related to Islamic financial business. The court should have the option to refer questions concerning Shariah to the

Shariah Advisory Council for its opinion and thereafter parties should be free to lead expert evidence for or against the Shariah Advisory Council's opinion. The court should consider the Shariah Advisory Council's opinion and all other expert evidence adduced before making a decision. Persuasive weight ought to be given to the Shariah Advisory Council's opinion taking into account its special role as a 'statutory expert'. The court should also have the liberty to disagree with the Shariah Advisory Council's opinion, giving its reasons for doing so.

## 4. Recommendation

From the above discussed cases such as *Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Berhad & Another Cases* [2011] 1 LNS 1259 it is evident that the court has sometimes difficulty in determining the Shariah issues from legal and factual issues. There is a need for the legislature to come up with the specific directions or practice notes in which Shariah issues of the case could be differentiated from factual issues/legal issues. This way it would be easier for the judges to ascertain whether a particular issue in case is a Shariah issue that needs to be referred to Shariah Advisory Council. Religion of Islam is something which needs to be interpreted by the experts as for even an ordinary Muslim with no knowledge of *usūl al fiqh* or Islamic jurisprudence it would be impossible to come up with the rulings for a matter and what more can we expect from non-Muslim judges. After deducing the above by referring to the case of *Mohd Alias Ibrahim v RHB Bank Bhd & Anor* [2011] 4 CLJ 654 the judge observed the following which is worth quoting here to prove that this is a persisting problem that needs a remedy:

> "Before I conclude, perhaps it would be useful for me to add a few words as to why civil courts may not be sufficiently equipped to deal with the issue whether a transaction under Islamic banking is in accordance to the religion of Islam or otherwise. Civil Courts are not conversant with the rubrics of *Fiqh Al-Muᶜāmalāt* which is a highly complex yet under-developed area of Islamic jurisprudence. In applying Islamic law to determine the parties' right under a contract, a Civil Judge had to conduct an extensive inquiry into Islamic law and make an independent determination of Shariah principles" (*Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Berhad & Another Cases* [2011] 1 LNS 266).

Hence, it was viewed that it would be prudent for the legislature to take a step ahead and amend the current CBMA 2009 to augment it with provisions to help the judges to differentiate between the issues of facts and issues of Shariah. In this regard, Shariah Advisory Council took a proactive role and has issued the Reference Manual for Courts and Arbitrators for Referrals to Shariah Advisory Council of BNM on 10 February 2014. Lee and Oseni (2015) states that the five-step procedure to be followed while referring a Shariah issue to Shariah Advisory Council is that firstly, the court/arbitrator refers the question to the SAC through the Secretariat of Shariah Advisory Council; secondly, the Secretariat will conduct preliminary analysis and research; thirdly, the analysis and research made by the Secretariat will be presented to the Shariah Advisory Council meeting for their decision; fourthly, Shariah Advisory Council makes decisions relating to the matters referred to it and the record will be made by the Secretariat; and finally, the decision of Shariah Advisory Council, as

confirmed by the Chairman of Shariah Advisory Council, will be notified to the court or arbitrator. It is also stated that subject to any unbearable unforeseen event, the SAC is required by the manual to issue its ruling within 90 days of the registration of a referral from the court or arbitral tribunal (Lee and Oseni, 2015). It is essential to note that this Reference Manual only lays down the internal procedures that need to be followed when a Shariah matter is referred by the court or the arbitrator to the Shariah Advisory Council. Therefore, still there is need to formulate a yardstick for the judges and arbitrators to follow in differentiating between Shariah matters and legal matters when hearing an Islamic finance dispute.

Furthermore, the dissenting view given in the case of JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners) [2019] 3 MLJ 561 by Richard Malanjum Chief Justice is also worth considering as he has stated that the Islamic finance agreement could include a form of 'conclusive evidence clause' stating that the Shariah Advisory Council's determination was conclusive evidence of the position of Shariah law so that the court could give effect to the agreement without questioning the correctness of the determination unless there was fraud, mala fide or manifest error. Therefore, this could be the future direction that could be followed in this regard to avoid the disputes on the interpretation of sections on Shariah Advisory Council in CBMA 2009. These amendments are necessary to develop the law in this regard as law reforms are imperative in strengthening the financial system especially when it comes to the requirement for a complete and comprehensive Shariaah compliance framework and consumer protection (Engku Ali and Oseni, 2017).

The findings of this paper indicates that CBMA plays a vital role in the development of Islamic banking in Malaysia as it has led to the creation of a statutory Shariah Advisory Council with statutory functions and powers with the objective of creating harmony and uniformity in Shariah views among the Islamic financial Institutions regulated by Bank Negara Malaysia and also in the stage of dispute resolution via litigation in courts or in arbitration. Not only this, but section 27 of CBMA 2009 is also a model section as in a legislation applicable to a central bank, it is unique to state and acknowledge that the country's financial system will not only consist a conventional financial system; but will consist of Islamic financial system too.

## 5. Conclusion

It can be concluded that the provisions on Shariah Advisory Council in CBMA are model provisions that could be adopted and applied by the other Central Banks in different jurisdictions that aims to sustain Islamic finance. When it comes to certainty and sustainability of Islamic banking and finance, statutory powers are important and establishment of Shariah Advisory Councils at the Central Bank level can help to merge Shariah with law ensuring that there are uniform Shariah standards that must be adhered across the industry when it comes to practice of Islamic banking and finance. It is anticipated that the outcome of this paper will assist to comprehend the importance of having statutory powers to establish and regulate Shariah Advisory Council as the apex body in the country to determine Shariah rules applicable to banking industry.

## 6. References


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14. *Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor* [2012] 1 SHLR 23

15. *Simon Mahanraj Appaduray & Anor v Reginald Ananda & Anor [1981] CLJ 136*

16. *Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Bhd* [2004] 6 CLJ 25

17. *Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Berhad & Another Cases* [2011] 1 LNS 266

18. *Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Bhd & another case* [2010] 4 CLJ 388