

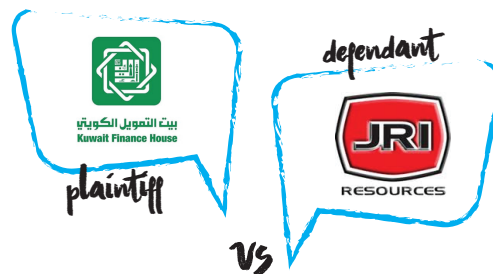
## first ever malaysian commercial case heard and to be decided by a 9-member bench in the federal court of malaysia

### THE PARTIES

Kuwait Finance House (Malaysia) Berhad (the Plaintiff/Respondent) had granted various Islamic facilities to JRI Resources Sdn Bhd (the 1st Defendant/Appellant) including an Ijarah (leasing) Facility. The Ijarah Facility involved leasing of shipping vessels by the Kuwait Finance House (Malaysia) Berhad (KFH) to JRI Resources Sdn Bhd (JRI Resources). The Ijarah Facility was guaranteed by the 2nd, 3rd and 4th Defendants. JRI Resources later defaulted and failed to make payments of the sums outstanding under the Ijarah Facility.

### FACTS OF THE CASE

On 02.09.2013, KFH filed a claim against JRI Resources for recovery of the amounts due under the Ijarah Facility in the High Court. Over the course of the suit in early 2014, KFH proceeded with the summary judgment against JRI Resource.



02.09.2013



clause 2.8 of the ijarah agreement



03.10.2014

high court allowed the plaintiff claim for the outstanding amount of



RM118,261,126.26

## SUBMISSION

In opposing the summary judgment application, JRI Resources, inter alia, argued that the responsibility to carry out the maintenance of the vessels was on KFH, as the owner of the vessels pursuant to clause 2.8 of the Ijarah Agreement. JRI Resources further argued that its failure to derive income from the leasing of the vessels was due to purported failure of KFH to carry out the major maintenance works on the vessels.

## HIGH COURT DECISION

On 03.10.2014, the High Court allowed KFH's claim for the outstanding amount of RM 118,261,126.26

## APPEAL TO COURT'S DECISION

Subsequently, JRI Resources appealed to the Court of Appeal against the summary judgment. At the hearing of the appeal, JRI Resources submitted, inter alia, that the learned High Court judge had erred in not referring the Shariah issues raised by the JRI Resources to the Shariah Advisory Council ("SAC"). The Court of Appeal allowed the appeal and remitted the case to the High Court for retrial and ordered that there should be a reference made to the SAC by the High Court on the question, namely "Whether clause 2.8 of the Ijarah agreements is Shariah-compliant (the issue)."

## THE SHARIAH ISSUE

The Shariah issue was then referred by the High Court to the SAC. Upon such reference, the SAC made a ruling that clause 2.8 is indeed Shariah-compliant. The SAC further ruled that the owner and the lessee may negotiate and contractually agree as to who shall bear the costs of maintaining the leased assets.

is clause 2.8 of  
the ijarah agreements  
shariah-compliant?

shariah advisory council



THE FEDERAL COURT SHALL, TO THE  
EXCLUSION OF ANY OTHER COURT, HAVE  
JURISDICTION TO DETERMINE IN  
ACCORDANCE WITH ANY RULES OF COURT  
REGULATING THE EXERCISE OF SUCH  
JURISDICTION.

article 128 of the  
federal constitution

AN ORDER STAYING PROCEEDINGS UNDER  
THIS SECTION MAY BE MADE BY THE JUDGE  
OF HIS OWN MOTION OR ON THE APPLICATION  
OF ANY PARTY AND SHALL BE MADE AT SUCH  
STAGE OF THE PROCEEDINGS AS THE JUDGE  
MAY SEE FIT HAVING REGARD TO THE  
DECISION OF SUCH QUESTIONS OF FACT AS  
MAY BE NECESSARY TO BE SETTLED TO  
ASSIST THE FEDERAL COURT IN DECIDING THE  
QUESTION WHICH HAS ARISEN AND TO THE  
SPEEDY AND ECONOMICAL FINAL  
DETERMINATION OF THE PROCEEDINGS.

section 89 of the courts  
of judicature act



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# QUESTIONS TO FEDERAL COURT

Dissatisfied with the unfavourable outcome of the reference, JRI Resources filed an application for referral under Article 128 of the Federal Constitution and Section 84 of the Courts of Judicature Act, whereby several questions were posed to the Federal Court on the ground of constitutionality of sections 56 and 57 of the Central Bank of Malaysia Act. The Federal Court granted leave to the following questions:

(1) Whether sections 56 and 57 of the Central Bank of Malaysia Act 2009 are inconsistent with the Federal Constitution and therefore, to the extent of such inconsistency, are void, for the following reasons:

a) It contravenes Article 74 of the Federal Constitution which read together with Ninth Schedule to the Federal Constitution because it gives power to the Shariah Advisory Council to ascertain and then determine particular questions referred to it on Shariah law.

b) It contravenes Part IX of the Federal Constitution by vesting judicial function to Shariah Advisory Council.

c) It contravenes Article 8 of Federal Constitution as it denying a litigant substantive due process.

(2) If the above is answered in the negative:

a) Whether the Court is nonetheless entitled to accept or consider the expert evidence in respect of any questions concerning a Shariah matter relating to Islamic finance business.

## IBFIM'S relatable modules

<b>GEN1011</b>	ISLAMIC FINANCE ARCHITECTURE
<b>GEN2031</b>	RECOVERY AND DISPUTE OF ISLAMIC FINANCE FACILITIES
<b>BKG2021</b>	ISLAMIC BUSINESS FINANCING PRODUCTS AND SERVICES
<b>LGR1011</b>	LEGAL ASPECTS & GOVERNANCE FOR ISLAMIC FINANCE
<b>SHA1051</b>	SHARIAH, ETHICS AND GOVERNANCE



## question 1

THE CONSISTENCY OF SECTIONS 56 & 57 OF CENTRAL BANK OF MALAYSIA ACT 2009 WITH FEDERAL CONSTITUTION

- a] ARTICLE 74 + NINTH SCHEDULE OF FEDERAL CONSTITUTION
- b] PART IX OF FEDERAL CONITUTION : JUDICIAL FUNCTION TO SAC
- c] ARTICLE 8 OF FEDERAL CONSTITUTION : DENYING A LITIGANT SUBSTANTIVE



## question 2

IF QUESTIONS 1A, 1B & 1C ANSWERED IN NEGATIVE:

- a] IS THE COURT ENTITLED TO ACCEPT OR CONSIDER EXPERT EVIDENCE?

**ANY PROCEEDINGS RELATING TO ISLAMIC FINANCIAL BUSINESS BEFORE ANY COURT OR ARBITRATOR ANY QUESTION ARISES CONCERNING A SHARIAH MATTER, THE COURT OR THE ARBITRATOR, AS THE CASE MAY BE, SHALL TAKE INTO CONSIDERATION ANY PUBLISHED RULINGS OF THE SHARIAH ADVISORY COUNCIL OR REFER SUCH QUESTION TO THE SHARIAH ADVISORY COUNCIL FOR ITS RULING.**

*sections 56 and 57 of the central bank of malaysia act*

This being a matter involving the Federal Constitution, by the initiative of the new Chief Justice of Malaysia, The Right Honourable Tan Sri Datuk Seri Panglima Richard Malanjum, the matter was fixed for hearing before an unprecedented 9-member bench.

The bench consists of:

- Tan Sri Dato' Sri Ahmad Bin Haji Maarop (President of the Court of Appeal)
- Tan Sri Zaharah Binti Ibrahim (Chief Judge of Malaya)
- Datuk David Wong Dak Wah (Chief Judge of Sabah & Sarawak)
- Tan Sri Dato' Sri Ramly Bin Haji Ali
- Tan Sri Dato' Sri Azahar Bin Mohamed
- Dato' Alizatul Khair Binti Osman Khairuddin
- Dato' Setia Haji Mohd Zawawi Bin Salleh
- Tan Sri Idrus Bin Harun

The case (the first ever case heard before a 9-member bench) was fixed for hearing on 28.08.2018. The lead counsel for JRI Resources was Datuk Malik Imtiaz Sarwar, while KFH was represented by Miss Yoong Sin Min and her team. The President of the Association of Islamic Banking and Financial Institutions Malaysia (AIBIM) and Bank Negara Malaysia (BNM) were allowed to intervene in this proceeding. During the proceeding, Dr Mohd Johan Lee and his team appeared and submitted for the AIBIM while Dato' Dr Cyrus V. Das and his team appeared and submitted for BNM.

## JRI RESOURCES'S SUBMISSION

Counsel for JRI Resources submitted that the SAC's role under sections 56 and 57 of the Act gives a clear implication that the SAC is exercising judicial power in so far as questions of Shariah are concerned.

"By virtue of section 56 and 57, this role goes beyond the function of ascertaining Islamic Law on any question of Shariah that arises in a dispute before a High Court," he said.

"Thus, by compelling the High Court to refer questions of Shariah to the SAC, and then binding the High Court with the ruling of the SAC, these provisions effectively usurp judicial function and power," he said

*The*  
**9-member bench**  
tan sri datuk seri panglima richard malanjum

& president of the court of appeal  
chief judge of malaya  
chief judge of sabah & sarawak

+ 4 federal court judges + 1 court of appeal judge



dr mohd johan lee  
& team for aibim

+  
dato dr cyrus v. das  
& team for bnm

section 56 and 57  
provisions effectively  
usurp judicial  
function and power

he said

lead counsel  
datuk malik imtiaz sarwar



He further submitted that the said sections deny JRI Resources the right and opportunity to present and argue their case fully in court in a manner consistent with their right to a fair trial.

## KFH'S SUBMISSION

Meanwhile, counsel for KFH submitted that the role of the SAC was merely to ascertain whether the transaction complied with the Islamic Law and did not decide on the commercial dispute.

"It does not affect the judgment or fact of the case in the High Court," she said.

*sac was merely to ascertain whether the transaction complied with the islamic law and did not decide on the commercial dispute.*

*she said*



*miss young sin min & her team*

## AIBIM'S SUBMISSION

The counsel for AIBIM, Dr Mohd Johan Lee submitted that judicial power is only vested in the hands of the judges. The rulings made by the SAC are solely confined to Shariah issues. It was further submitted that the learned judge who made the reference to the SAC will then exercises his judicial power and decides the case based on the evidence submitted before the court. It was also submitted that the facts of the case were not mentioned or cited by the SAC in any of its written rulings, as the SAC has no interest in knowing the facts of the case. It is thus obvious that the answers by the SAC in responding to the questions put by the judge/court are only to state the Shariah/Hukum Syarak's position on point. It was further submitted on behalf of AIBIM that the SAC does not have any characteristics of judicial power as laid down by the Federal Court in recent case of Semenyih Jaya. Such power lies with the courts. Since there is no judicial power vested on the SAC, the SAC does not usurp the judicial power of the court.

*sac are only to state the shariah or hukum syarak's position on point*

*the rulings made by the sac are solely confined to shariah issues.*



*the counsel for aibim dr mohd johan lee*

The counsel for AIBIM further submitted that section 56 (1) of the Act gives options to the court or arbitrator either to take into consideration of the published ruling of the SAC or refer Shariah issue to the SAC for rulings. The word "or" in that section signifies such options is provided to the court or arbitrator. It was submitted that the phrase "take into consideration" in that section implies that only the court or arbitrator has the exclusive judicial power to decide on the case by applying the ruling of the SAC to the facts of the case before them.

*according to section 56 [1] of the act*

# "OR"

*signified options*

It was further submitted by Dr Mohd Johan that the binding effect of the SAC ruling as stated in section 57 of the Act is only applicable if the court or arbitrator chooses to refer the Shariah question to the SAC for its ruling pursuant to section 56 (1) (b) of the Act. Therefore, section 57 of the Act which provides that the ruling of the SAC shall bind the court or the arbitrator cannot be said to limit the power of the judges or to take away the judicial power of the judges to decide. Upon such reference as decided by the judges under section 56(1)(b) of the Act, the judge or the arbitrator is only bound by the ruling of the SAC in respect of the position of Islamic law concerning financial matters. This is due to the fact that the ascertainment of the Islamic law is not the bread and butter of a civil court judge. The civil court judges are not trained and familiar with the Islamic law, and with all due respect, the civil judges are not competent to ascertain the position of Islamic law on financial matters.

Based on the arguments stated above, counsel for AIBIM answered Question 1(b) in the negative as sections 56 and 57 are consistent with the Federal Constitution.

With regards to the Question 1(c), Dr Mohd Johan further submitted that sections 56 and 57 of the Act do not deprive a litigant's due process. In case a reference is made pursuant to section 56(1)(b) of the Act, parties involved are allowed to provide their own Shariah expert's views on the Shariah questions. In fact, in this present appeal, JRI Resources provided to the SAC its own Shariah expert's view on the issue.

It was also submitted by the counsel of AIBIM that all the members of the SAC are statutory experts appointed by the YDPA. The SAC is a statutory expert body that serving the nation with such an appointment and its members do not have any personal interest in the case. The SAC provides an impartial expert opinion, which in turn sets out the rulings as being impartial as the SAC is not and cannot be hired by any of the litigants. As the SAC, they are only stating the position of the Hukum Syarak on point.

Question 1(c) involves the doctrine of "equal protection of the law" as stated in Article 8 of the Federal Constitution. As submitted by the counsel of AIBIM, the protection is not absolute and can be restricted by statute law, provided that the provision of written law that imposes a restriction can meet the test of reasonable classification.

**56 (1) (B) - REFER SUCH QUESTION TO THE SHARIAH ADVISORY COUNCIL FOR ITS RULING**

*reference to shariah advisory council for ruling from court or arbitrator*

**SECTION 57 : ANY RULING MADE BY THE SHARIAH ADVISORY COUNCIL PURSUANT TO A REFERENCE MADE UNDER THIS PART SHALL BE BINDING ON THE ISLAMIC FINANCIAL INSTITUTIONS UNDER SECTION 55 AND THE COURT OR ARBITRATOR MAKING A REFERENCE UNDER SECTION 56.**

*effect of shariah rulings*

**question 1 (b)**

**PART IX OF FEDERAL CONSTITUTION : JUDICIAL FUNCTION TO SAC**

**negative**

**question 1 (c)**

**ARTICLE 8 OF FEDERAL CONSTITUTION : DENYING A LITIGANT SUBSTANTIVE**

**SECTIONS 56 AND 57 OF THE ACT DO NOT DEPRIVE A LITIGANT'S DUE PROCESS**

**56(1)(B) OF THE ACT: PARTIES INVOLVED ARE ALLOWED TO PROVIDE THEIR OWN SHARIAH EXPERT'S VIEWS ON THE SHARIAH QUESTIONS**

**THE SAC IS A STATUTORY EXPERT BODY, IT PROVIDES AN IMPARTIAL EXPERT OPINION, CANNOT BE HIRED BY ANY OF THE LITIGANTS AND ONLY STATING THE POSITION OF THE HUKUM SYARAK ON POINT.**





The counsel for AIBIM also submitted that one of the objectives of the Bank Negara Malaysia is to promote a sound, progressive and inclusive financial system. Due to a corresponding rise in Islamic finance disputes, there is a need for a common understanding and ascertainment of Islamic law on Islamic financial business. The uncertainty of Shariah interpretation would be disruptive for the Islamic finance market to function well. Hence, section 51 of the Act provides for the establishment of SAC to serve a particular need for an authoritative view on Shariah matters in Islamic finance.

Its role would also be to assist the Civil Court in adjudicating on Islamic finance disputes. It was further submitted that the SAC has been harmonising the proliferation of Shariah opinions in the industry since its inception. It has already accustomed to the practical considerations at hand and the need for certainty in the industry on Islamic banking principles. The composition of its members is also diversified, comprising not only Shariah scholars specialising in financial matters, but also industry practitioners, legal practitioners and academicians to ensure robust and comprehensive deliberation of the rulings. It was submitted by the counsel of AIBIM that the binding nature of the ruling of SAC in Question 1(c) is to be justified as the section was enacted on the reason of conserving and protecting the public interest.

One final question remains: whether the court is nonetheless entitled to accept or consider the expert evidence in respect of any questions concerning a Shariah matter relating to Islamic finance business. In answering Question 2(a), Dr Mohd Johan submitted that there has never been an obstacle for the parties of a suit to bring their individual expert witnesses. As per the SAC's guidelines, the parties can always submit their expert(s)' opinion in writing to the SAC. The SAC may take into consideration the expert(s)' opinion before issuing any ruling. Therefore, the rights of the parties to call their individual expert witnesses cannot be said to have been denied by sections 56 and 57 of the Act. Furthermore, there is no express provision in sections 56 and 57 that prohibit the parties to bring Shariah experts or prevent the Court to refer or accept the opinion of other Shariah experts in respect of Islamic financial matters. In the light of the above submission, the final question was answered in affirmative.

*article 8 of the  
federal constitution*

THE PROTECTION IS NOT ABSOLUTE  
AND CAN BE RESTRICTED BY STATUTE LAW

*uncertainty in shariah  
interpretation*

*disruption*

*an authoritative  
view on shariah matters  
in islamic finance.*

**SAC**  
SHARIAH SCHOLARS SPECIALISE IN ISLAMIC FINANCE,  
INDUSTRY PRACTITIONERS, LEGAL PRACTITIONERS &  
ACADEMICIANS

*no obstacle to bring  
their individual  
expert witnesses*

*parties can always  
submit their expert(s)  
opinion in writing  
to the sac*

*sac may take into  
consideration the experts  
opinion before issuing  
any ruling*

question 2 (a)  
*affirmative*



## BNM'S SUBMISSION

The counsel for the Bank Negara Malaysia (the 2nd Intervener), submitted that there were three essential characteristics of judicial power, that is:-

- a) the power to make a final determination of the legal rights of the deputing parties;
- b) the power to make binding and authoritative decisions that affect the rights of persons; and
- c) the power to make decisions that were capable of being enforced.

In short, the counsel submitted that such powers are not vested in the hand of the SAC. The Federal Court reserved the court's decision to another date which is to be fixed by the court.

*3 essential  
characteristics  
of judicial power*

**THE POWER TO MAKE A FINAL  
DETERMINATION OF THE  
LEGAL RIGHTS**

**THE POWER TO MAKE  
BINDING AND AUTHORITATIVE  
DECISIONS THAT AFFECT  
THE RIGHTS OF PERSONS**

**THE POWER TO MAKE  
DECISIONS THAT WERE  
CAPABLE OF BEING ENFORCED**

Article by :



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