

Standardisation of legal documentation in Islamic home financing in Malaysia

448

Received 1 February 2017
Revised 30 December 2017
8 February 2018
2 March 2018
Accepted 14 March 2018

A literature survey

Syarah Syahira Mohd Yusoff
*IIUM Institute of Islamic Banking and Finance,
International Islamic University, Kuala Lumpur, Malaysia, and*

Umar A. Oseni
*Istanbul Sabahattin Zaim University, Halkalı Mahallesi, Halkalı Caddesi,
Küçükçekmece, İstanbul, Turkey*

Abstract

Purpose – This paper aims to provide an analytical literature survey of selective studies on legal documentation in Islamic home financing with particular reference to Malaysia.

Design/methodology/approach – This study adopts the legal positivist methodology, with particular reference to inclusive legal positivism which takes into consideration the possibility of moral values challenging positive law. Within the context of this study, though positive law provides for rules that govern contractual matters in Islamic home financing, standardisation is a functionality of *maslahah* (or public interest) which transcends the mandatory provisions of positive law but helps to protect the interest of all stakeholders. This is analysed through a systematic literature review which aims to provide practical insights into industry practices relating to Islamic home financing in Malaysia.

Findings – This paper provides information on the standard documentation used by conventional banks and existing practices of diverse models of legal documentation in the home financing sector within the Islamic financial services industry in Malaysia. It also recognises the need for standard documentation that is not only *Shari'ah*-compliant but also consumer-friendly, as the terms of any standard financing agreement ought to ensure consumer protection. There is also the need for a *Shari'ah*-compliant Sales and Purchase Agreement, as it forms part of the complete set of legal documentation for Islamic home financing.

Research limitations/implications – It is not an exhaustive study, as it did not consider practices in other jurisdictions offering Islamic financial services and products but only focusses on Malaysia. Though one may not generalise the findings of this study, Malaysia remains a leading model and a global hub for Islamic financial services and products.

Practical implications – A very useful source of information on the current state of legal documentation in Islamic home financing in Malaysia and the prevailing practices in the industry, which may serve as a guide for policymakers such as the Association of Islamic Banks in Malaysia (AIBIM) to embark on a full scale project of standardisation of all the legal documentation used in Islamic home financing.

Originality/value – This study fulfils an identified need of standardisation of legal documentation used in Islamic home financing in Malaysia and offers practical help to policymakers and future researchers starting out on systemic reforms.

Keywords Malaysia, Islamic home financing, Islamic finance documentation, Legal documentation, Standardization of agreements

Paper type Literature review



1. Introduction

Just as it is in other jurisdictions, home financing is indeed an important banking product in Malaysia because people depend on different financing schemes to finance the purchase of a house, which is a basic necessity in life (Meera and Abdul Razak, 2005). Without home financing facility, it is always difficult for people to buy a house by way of cash. Such financing requires installment payments of the financing amount to the banks at successive fixed times (Meera and Abdul Razak, 2005). In Malaysian conveyancing practice, customers have the option to choose either the conventional loan or the Islamic home financing products to finance their purchase of properties. The Muslims will usually opt for *Sharī ah*-compliant home financing realising that *riba*' is impermissible in Islam. However, the realisation is worthless due to the complexity of the legal documentation which might create confusion to the bank's customer. The language used in the legal documentation and legal jargons make it harder for the average customers to comprehend the content of the contract (Razak, 2015). Realising this issue, it is the aim of this paper to review the existing studies on legal documentation focussing particularly on modern trends in Islamic home financing perspectives.

In a study on the underlying reason behind the resilient nature of the Islamic financial services industry, Rosly (2010) finds that besides the unique structuring of Islamic financial products, sound legal documentation is one of the major factors that contribute to the stability of Islamic financial system. Legal documentation plays a vital role in both conventional and Islamic home financing. It consists of a string of agreements that lay down all the terms and conditions of the contracts that have been mutually agreed between the financial services provider and the customers. Its purpose is to provide certainty for the parties and ensure that the rights and obligations of the parties have been clearly laid down in the agreements (Lahsasna, 2014; Oseni, 2015a; Rosly, 2010). A sound legal documentation will protect the interest of all parties and provide appropriate avenue for remedies in case there is a breach (Lee, 2014).

From the *Sharī ah* perspective, a solid legal documentation could be used to ascertain the validity of the legal transaction. An effective legal documentation would have a number of criteria, which will not only ensure that the terms and conditions in the documents are valid according to Islamic law but must also comply with the existing legal requirements (Trakic, 2013) and should be structured in a manner that would allow for enforcement in the civil courts (Lee, 2014). Moghul and Ahmed (2003) claimed that commercial contract must be properly documented in accordance to the *Sharī ah* principles and the local laws. Furthermore, poorly drafted legal documentation will affect the viability, credibility, and acceptability of a financial transaction (Jalil and Rahman, 2010). Essentially, proper legal documentation could enhance public awareness about, and confidence in, Islamic finance (Eddy Yusof, 2009).

This is possible because effective legal documentation would contain terms that are in the best interest of both the financial services provider and the customer. A customer-friendly kind of legal documentation should be able to describe the type and the nature of contract in a manner that can be easily understood by the public. In England, for example, the Financial Conduct Authority provides that the financial firms must provide clear and fair contracts and any unfair contract terms are unenforceable. Such clear, fair and comprehensive legal documentation would reflect the objective of *Sharī ah* and a detailed rendering of industry-wide acceptable fair terms, which should be incorporated in a standard documentation. Therefore, while ensuring an end-to-end *Sharī ah* compliance in the whole spectrum of a typical transaction, does the current "Islamized" legal documentation used for home financing represent the ideal arrangement under the Islamic

law? Will standardisation promote fair contractual terms that represent true sale? What are the core aspects of the current Islamic home financing legal documentation that require standardisation?

In answering the above questions, this study adopts the methodology of a literature survey using a conceptual framework, which Waluchow (1991) considers as “inclusive legal positivism” where the validity of a “purportedly valid” law might be, in some certain circumstances, be considered as a function of its “moral merit”. This tends to agree with H.L. A. Hart’s rule of recognition which portends that the ultimate criteria for legal validity for a legal positivist might be considered as the moral test or such moral filter through which such positive law might need to go through. Within the context of this study, it thus appears that in spite of the positive law relating to contractual arrangements in Islamic home financing, there seems to be an additional moral filter of *Shari’ah* compliance which applies in the overall legal universe in a different dimension. Standardisation of legal documentation is not a requirement of the positive law but a functionality of *maslahah* (public interest) where the diverse interests of all parties to the contract are proactively protected.

Against the above backdrop, this objective of the study is to present a literature survey on Islamic home financing documentation in Malaysia while identifying key areas that require further research. This paper also aims to provide an analytical literature survey of selective studies on legal documentation in Islamic home financing with particular reference to Malaysia. This is done through the selection of a wide range of relevant studies published in the past three decades, which aim to provide practical insights into industry practices in the Islamic financial services industry in Malaysia. Furthermore, general works on legal documentation are critiqued to unravel grey areas which require future focus of researchers who are keenly interested in legal documentation in Islamic finance.

The remainder of this paper is organised as follows. Section 2 presents the significance and scope of the preliminary literature surveyed, followed by prevailing practices in Islamic home financing documentation in Section 3. This is then followed by reviews on the current trend of the existing literatures regarding the Islamic home financing documentation in Section 4 and end with concluding remarks on the need for future studies relating to specific transaction documents in Islamic home financing in Section 5.

2. Significance and scope of the preliminary literature survey

Despite significant developments in the Islamic financial services industry in Malaysia, it is often argued that the salient features of the industry and the financing products used are a replication of conventional finance. One such features, which is a *sine qua non* in all *Shari’ah*-compliant transactions is legal documentation. From current practices in the industry, one may argue that the present documentation used in the Islamic financial services industry does not portray the ideal arrangement in Islamic law, as it is always difficult to ascertain whether a true transfer of ownership from the customer to the financial services provider and vice versa had occurred in the string of financing arrangements. Nevertheless, though it is often argued that there is no physical transfer of the property, it is pertinent to note that there is an implied constructive ownership. A sale contract between the financial services provider and a customer is usually a transfer of beneficial ownership, which may be justified under the *Shari’ah* (Oseni, 2015b).

Similarly, Rosly (2010) opined that the legal documentation used by the current market is just a mere form void of substance, and hence, needs to be reconsidered. To a large extent, this is true, as there is room for improvement in the current legal documentation used in Islamic finance, particularly the home financing documentation. One noticeable feature in practice is that the clauses in the legal documentation are drafted with complicated legal

jargons. The *Shari'ah* terms are in Arabic and would be hard to be explained by lawyers who have no background in Islamic law and are sometimes non-Muslims. In some marginal cases, the sets of legal documentation are pure replica of conventional financing documentation with just find-and-replace amendments to insert some *Shari'ah* or Arabic terms. Such unnecessary complexity makes it difficult for the customers to understand the terms and conditions of the contract.

Thus, more than 33 years down the line after its initial debut in Malaysia, the Islamic financial services industry is still grappling with operational challenges to be at par with conventional banking. The challenges in legal documentation involve both legal and operational challenges, which undoubtedly require the attention of major stakeholders. For instance, the Malaysian court acknowledged the challenges in legal documentation and constantly plays its role in interpreting legal documentation beyond their literal meanings to ensure that Islamic home financing could compete with its conventional counterpart (Hasan and Asutay, 2011). The current trend is for judges to progressively interpret the documentation by identifying the intention behind the financing facilities. For example, the attitude of the court towards the contract of *Bay Bithaman Ajil* (BBA) in Malaysia has undergone a major transformation. In the late 1980s and early 1990s, the courts were only concerned with civil and technical terms and used the classical common law approach (Hasan and Asutay, 2011). Today, the court referral process to the SAC has enhanced the interpretation of Islamic finance legal documentation, as it is well guided by either the published resolutions of SAC or specific resolutions made pursuant to an outright referral under Sections 56 and 57 of the Central Bank of Malaysia Act 2009.

In *Bank Islam Malaysia Berhad v. Adnan Omar*, [1994] 3 CLJ 735, the High Court held that the defendant was bound to pay the full amount of the selling price based on the fact that he already knew the terms of the contract and willingly entered into the financing arrangement. This judgement has led to many criticisms, as it was oppressing to the customer regardless of the fact that he knew about the default clauses beforehand (Rosly, 2010; Mohd. Yasin, 2007). What was lacking at that time was the formula to calculate the selling price in the event of default. The Central Bank of Malaysia had since issued relevant guidelines to cater for such situations. Since then, the court's attitude to Islamic finance cases had become more reasonable as the judges are of the view that the cases should be determined not only based on merit but there is also a need to look at the law of choice of the parties as well as the intention behind the transactions. In *Dato Haji Nik Mahmud bin Daud v. Bank Islam Malaysia* [1996] 1 CLJ 576 at p. 585, Idris Yusoff J dealt with this issue and said:

Unlike in the instant case, it was never the intention of the parties in as much as it can ever be said to be within their contemplation to involve any transfer of proprietorship. It so happened that the execution of the property purchase agreement and the property sale agreement constituted part of the process required by the Islamic banking procedure before a party can avail itself of the financial facilities provided by the defendant (*paragraph F*).

Furthermore, as the legal documentation involves *Shari'ah*-compliant financing, the court is also bound to look at the underlying *Shari'ah* principles as well to ensure that justice is served to both parties. Among the first cases that used this different approach are *Affin Bank Berhad v. Zulkifli Abdullah* [2006] 3 MLJ 67 and *Malayan Banking Berhad v. Marilyn Ho Siok Lin* [2006] 7 MLJ 249. In these two cases, the court was of the view that if the Islamic banks treat the selling price of the BBA as it was, then it would be more onerous than conventional banking products and that would be against Islamic law. The court further argued that the Islamic banks should not claim the unearned profits, as it is similar to an interest-bearing transaction. One should bear in mind that the courts in question are civil

courts and do not have jurisdictions on *Shari'ah* matters. This has been remedied in a way by introducing a procedure for reference to the *Shari'ah* Advisory Council of BNM (Engku Ali *et al.*, 2015).

As a matter of fact, in *MK Associates Sdn Bhd v. Bank Islam Malaysia Berhad* [2015] MLJU 1954, the court had to determine an issue relating to late payment charges or *ta'widh* and in addition to other claims, the claimant asked the court to award interest "against the defendant at a rate deemed appropriate [...] until full payment of any such sum this Court orders the defendant to pay the plaintiff". In his well-reasoned judgment, which has its premise on the current trend in legal documentation in Islamic finance, expressly held that the: "claim for interest is denied as this is forbidden in *Shari'ah* and Islamic financing framework". This laudable judicial submission is based on the following clause commonly used in both domestic and cross-border *Shari'ah* financing agreements:

The parties recognise that interest is repugnant to *Shari'ah* and accordingly to the extent that *Shari'ah* principles apply to them and any legal system would (but for the provisions of this clause) create (whether by contract, by statute or by any other means) any right to receive interest, the parties irrevocably, unconditionally and expressly waive any entitlement to recover interest from each other.

The above issues highlight how legal documentation had led to some legal challenges in Islamic financing products due to the fact that Islamic finance agreements are open to many interpretations. This makes a case for standardisation of Islamic home financing agreements which dominate most subject matter in Islamic finance litigation in Malaysia. It is believed that some measure of standardisation in Islamic legal documentation will result in speedy growth of the Islamic financial services industry (Ali and Kamal, 2009; Ibrahim, 2010; Tahir, 2003; Yaacob *et al.*, 2011).

One may add that the conventional finance industry, particularly in home financing, has moved towards standardising its legal documentation. Effective from 2013, BNM had made it compulsory for all commercial banks in Malaysia to adopt standardised documentation for home financing with a purchase price not more than RM500,000.00. According to the Circular on Standardised Documentation for Description of Key Terms for Housing Loan/Home Financing Agreements, the objective of the standardisation is to ensure the terms and conditions of the agreements are clear, consistent, and easy to understand. It also aims to promote customer understanding of their rights and obligations and enable them to make an informed decision that best meets their financial needs.

Having standardised documentation for products also helps the consumer differentiate between the financial products and services offered by the banks. Another objective is to improve the turnaround time in processing the loan facility, particularly the approval and the disbursement process that would affect the efficacy of the financial system. The scope of this study is therefore limited to the standardisation of legal documentation of Islamic home financing arrangement and does not include legal documentation of other Islamic banking products such as retail banking or personal or car financing. This is particularly due to the report from Bank Negara Malaysia that shows Islamic home financing is the most popular product of Islamic banking sector and higher in demand compared to other retail and commercial products (Figure 1).

3. Islamic home financing documentation: prevailing practices

Before specifically analysing the trends in the existing literature, it is appropriate to briefly examine the prevailing practices in Islamic home financing documentation in Malaysia. Undoubtedly, the legal documentation currently used by the Islamic banks are

Islamic Banking System-Financing by Purpose

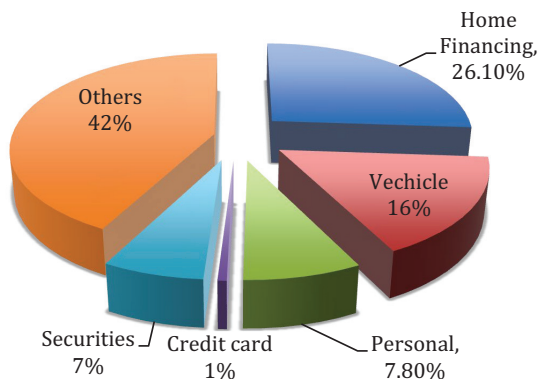


Figure 1. Islamic banking system by purpose as at November 2016

comprehensive as the relevant agreements were drafted by leading lawyers with considerable knowledge in Islamic finance, and such agreements have been certified by the respective *Shari'ah* Committees of the Islamic banks. The implication of this is that different Islamic banks adopt various types of *Shari'ah* contracts for home financing products, unlike its conventional counterpart that only offers the standard lending contract. For example, Bank Islam Malaysia Berhad (BIMB) and Maybank Islamic Bank Berhad (MIBB) are using the Tawarruq or Commodity Murabahan for its home financing product. On the other hand, OCBC Al-Amin Berhad and Kuwait Finance House Berhad prefer to use *Ijarah* contract as home financing product, while HSBC Amanah Berhad and RHB Islamic Bank Berhad opt to use *Musharakah Mutanaqisah* as its home financing product. Table I provides the details of the products and contracts adopted by the Islamic banks in Malaysia.

It is thus clear that the Islamic commercial banks use different Islamic contracts for home financing, and this has significant implications on the legal documentation involved. However, the reasons for their selection of the respective contracts for home financing products remain unclear. It is also noted that even when the Islamic banks adopt the same Islamic contract as their home financing product, the terms and conditions contained therein differ between one Islamic bank to another. While there is nothing wrong with this, there is a need to standardise certain generic terms and conditions while giving room for some specific legitimate divergences.

On top of that, the Islamic banks also use other relevant Islamic contracts to facilitate the main Islamic home financing product depending on the type of the principal contract it adopts. For example, if the bank uses the Tawarruq agreement, the principal contract is known as the Master Tawarruq Agreement. In addition, the customer is also required to execute other types of supporting documents such as the wakalah agreement, the letter of offer and purchase agreement. This bundle of relevant and related agreements forms the totality of the legal documentation required. However, there may be variations in some of the agreements if not properly drafted and linked through cross-references. More often than not, such variations may lead to contractual inconsistencies in the bundled documentation,

No.	Islamic banks	Shariah contract	Home financing products
1	Affin Islamic Bank Berhad	i) <i>Musharakah Mutanaqisah</i> ii) Tawarruq	<i>Musharakah Mutanaqisah</i> : i) AFFIN Home Invest-i ii) AFFIN Home Assist Plus-i iii) AFFIN Credit Plus-i iv) AFFIN Invest Plus- i v) AFFIN BNM Priority Sector Home Financing-i vi) AFFIN Premier Corporate Home Financing-i vii) AFFIN Extra Plus-i viii) Affin Tawarruq Home Financing-i
2	Al-Rajhi	Bai Bithaman-Ajil	i) Structured Home Financing – completed construction ii) Structured Home Financing-under construction
3	Alliance Islamic Bank Berhad	i) Bai Bithaman-Ajil ii) Tawarruq	i) i-Wish Home Financing-i ii) Home Complete-i Personal Financing
4	Ambank Islamic Berhad	Tawarruq	Home Financing-i
5	Asian Finance Bank	i) Tawarruq ii) Istisna	i) Tawarruq Home Financing-i ii) Istisna' Home Financing-i
6	Bank Islam Malaysia Berhad	Tawarruq	i) Property Financing-i (Tawarruq) – Baiti Home Financing
7	Bank Muamalat Malaysia Berhad	i) Tawarruq ii) Istisna	i) Property Financing-i (Tawarruq) ii) Muamalat House Financing (Istisna')
8	CIMB Islamic Bank Berhad	i) Commodity <i>Murabahah</i>	i) Term Financing-i ii) Variable Home/Business Premises Financing-i iii) Flexi Home Financing-i
9	HSBC Amanah Malaysia Berhad	<i>Musharakah Mutanaqisah</i>	HomeSmart-i
10	Hong Leong Islamic Bank Berhad	Tawarruq	CM Flexi Property Financing-i
11	Kuwait Finance House Berhad	i) Ijarah Muntahiah Bi-Tamlik ii) Ijarah Mawsufah Fi-Zimmah	i) Ijarah Muntahiah Bi Al-Tamlik Asset Acquisition Financing-i ii) Ijarah Mawsufah Fi Al-Zimmah Asset Acquisition Financing-i
12	Maybank Islamic Berhad	Tawarruq	Commodity Murabahah Home Financing-i
13	OCBC Al-Amin Bank Berhad	Ijarah Muntahiah Bi-Tamlik	Home/Term Financing-i
14	Public Islamic Bank Berhad	i) <i>Musharakah Mutanaqisah</i> ii) Bai al-Inah iii) Ijarah Mawsufah fi-Zimmah	i) Home Equity Financing-i ii) ABBA House Financing-i iii) ABBA HomeSave Financing-i
15	RHB Islamic Bank Berhad	<i>Musarakah Mutanaqisah</i>	Equity Home Financing-i
16	Standard Chartered Saadiq Berhad	<i>Musarakah</i>	Saadiq MyHomeOne-i Saadiq MyHome-i

Table I.
Products and contracts adopted by Islamic banks in Malaysia as at November 2017

which would eventually culminate into a legal risk for the transaction (Oseni, 2015a). The tedious process and complex set of legal documents in most Islamic home financing transactions are not customer-friendly, as it is tough for clients to understand the terms and conditions stated in the contracts. Therefore, the question is whether the lack of standardisation in legal documentation affects the level of effectiveness of the Islamic finance products. This is why this study seeks to explore relevant literature on the feasibility of formalising and standardising certain terms and conditions of the Islamic home financing legal documentation.

4. Islamic home finance documentation: trends in existing literature

Legal documentation plays a vital role in all type of transactions. The contents of the legal documentation lay down the rights and obligations of the contracting parties, the dos and the don'ts, enforceability, governing law and dispute resolution and the effect of default (Lee, 2014; Rosly, 2010). The terms and conditions contained in the agreement bear significant legal effect and legal risk making it compulsory for the parties to be aware of their implications. It bestows an obligation towards the parties that needs to be fulfilled failing which the parties might have to face litigation proceedings. Legal documentation, then, can be considered the heart of the contract as the parties will always refer to what the documents say about the terms and conditions of the contract. Proper legal document should secure the parties' interest and prevent any frivolous litigation exercise (Adams, 2004). This is especially important because there are numerous product innovations in the Islamic financial services industry nowadays (Rosly, 2010; Trakic, 2012).

The legal documentation is binding on the parties, as the court will decide the case based on the expressed terms and conditions in such documentation provided there is no clause that goes against the general principle of the law of contract or any other extant law in force in the country. Lee (2014) summarised the importance of having proper legal documentation in threefold, namely, to bind the parties so as not to go against the underlying principles of contract, evidence in the event of disputes, and to highlight the underlying principles and operations of the contracts including the rights and obligations of the parties so that they can understand the contract they have entered into. Legal documentation is physical evidence to prove the intention of the parties. Therefore, the following review of literature will cover the existing literature and the gap under two main sub-headings focussing on standardisation in conventional legal documentation and legal documentation in Islamic home financing. Under the main literature bloc on legal documentation in Islamic home financing, which is the main focus of this study, the following five aspects are explored:

- (1) terms and conditions;
- (2) governing law, dispute resolution and waiver of *Sharī'ah* defence;
- (3) Islamic sale and purchase contract;
- (4) standardisation of legal documentation in Islamic home financing; and
- (5) consumer protection.

4.1 Legal documentation, home financing and conventional banks

Before reviewing the relevant literature on Islamic home financing, it is pertinent to briefly discuss trends in the documentation of home financing by conventional banks and the implications of such for Islamic home financing documentation. Conventional banking consists mainly of lending and borrowing. The bank will be the lender while the customer is the borrower (Pheng, 1995). The nature of banking business is usually a contractual

relationship whereby one party is the debtor, and the other is the creditor (Mohd Yasin, 2004a). This has long been decided by Lord Cottenham in the case of *Foley v. Hill* [1848] 2 HL Cas 28. Abdul Aris *et al.* (2012) further stated that conventional banking values money based on the time frame of the agreement and is a capital based investment, which means the lending activity by the banks is a sort of investment activity because the banks are making money out of the loan contract.

Previously, all the commercial banks in Malaysia used the loan contract, but different banks used different types of loan documentation with various terms and conditions which can be considered as homogeneously mixed. There were no standardised key components, as most banks had their legal departments in charge of drafting the loan agreements. This resulted in uncertainty and confusion to the customers as to their obligations when taking up the loans. In fact, the laymen could not understand the terms of the legal documentation for such loans. Adams (2013) argued that the language of the contract should be precise to ensure that it reached the customer. He further stated that there should not be any barrier between the contract and the parties.

This was further supported by Wright (2014) where it is argued that what is important is the accurate terms that give impact to the contract. Cohen (2009) believes that lawyers should not use legalese in contract drafting, which means the legal documentation should not contain archaic terms, repetitive and redundant phrases, and unnecessary boilerplate. Contracts, then, should be drafted in layman terms that can be easily understood by the parties to the contract. Adams (2013) even pointed out that it is the duty of the lawyer who drafts the agreement to make certain that his client or parties to the agreement understand the terms and conditions and the effect of the agreement.

In 1978, the New York State passed the Plain English statute, which requires the lender, and the lessor dealing with property, to use plain, concise, and everyday meanings of English in their contract. Currently, in the USA, nine states including Pennsylvania have passed the Plain English law making it compulsory for the parties in the housing and property contract to use and execute only the contract that they understood (Cohen, 2009). It is timely that the Malaysian financing market follows suit rather than using the archaic language in the contract to ensure its effectiveness, competitiveness and compatibility in the market.

In Malaysia, effective on 1 January 2013, BNM required the commercial conventional banks to adopt standardised legal documentation for property involving a maximum principal sum of RM500,000.00. BNM in its Circular on Standardised Documentations (2013) mentioned that a standard legal document would promote customer's understanding of their rights as well as their obligations towards the loan, and ensure the effectiveness of the turnaround time for the loan to be processed and disbursed. This is a wake-up call for the market players such as bankers and solicitors to ensure that the loan is settled in due time, particularly the conventional banks because the banks now have to follow the standardised legal documentation prepared by the Association of Banks Malaysian (ABM). In Malaysian conveyancing practice, it is provided in the sale and purchase agreement of a house that the purchase price must be paid within three months. If the purchaser pays the total purchase price after the three months lapsed, he is then subject to the 8 per cent per annum interest to be calculated at a daily basis. Thus, by having a standard documentation, it will save the time of the parties to submit, process and disburse the money on time.

As conventional loan financing documentation was standardised in Malaysia, there has not been adequate research on the performance of the conventional home loans and the factors that led to the standardisation. This could also be a key element that requires the Islamic finance sector, particularly the home financing component, to have a standardised legal documentation to make it more competitive with its conventional counterpart. One

cannot deny the fact that the Islamic financial services industry in Malaysia is growing rapidly and is at its peak of success; however, to maintain and sustain the growth, it is pertinent to have standardised documentation (Ali and Kamal, 2009). Hence, it is pertinent to evaluate the factors that lead to the standardisation of the conventional home loans and the effect of such standardisation. The findings of this question can be used as a benchmark to determine whether standardisation is a must for the Islamic home financing component.

4.2 Legal documentation in Islamic home financing

Islamic home financing is an asset-based product offered by the Islamic bank to the customer who wishes to purchase a house. It is unique as compared to the conventional loan because it offers a multi-contractual relationship between the banks and the customers (Mohd Yasin, 2004b). This contractual relationship is backed by the legal documentation which is agreed and executed by both parties. Due to the fact that Islamic finance is a multi-contractual relationship, it leads to variations of products in the market. Currently, Malaysian Islamic banks offer numerous products approved by BNM such as BBA, *Musharakah Mutanaqisah*, *Ijarah* and *Tawarruq* or commodity *Murabahah*.

The Islamic finance legal documentation is not, however, a new issue. When customers are searching for financing to part finance the purchase of a house, the legal documentation will come into the picture to secure the rights and obligations of the customers and the banks. Since its inception in 1984, when Bank Islam Malaysia Berhad offered the first Islamic financing product, Bay al-Inah, there were some recurring issues surrounding the legal documentation. Among the first problems was when the Bay al-inah, which is a sell-and-buy-back contract, followed the contractual terms used in the conventional loan documents. In one of the earliest litigated cases in Islamic finance, *Bank Islam Malaysia Berhad v. Adnan Omar*, [1994] 3 CLJ 735, the central issue was full repayment demanded by the bank when the customer defaulted to pay. In *Bank Islam Malaysia Berhad v. Azhar Bin Osman and 3 Other cases* (2010) MLJ 192, at page 206, Justice Rohana Yusuf, in deciding on the issue of *ibra'* (rebate), held that the Islamic home financing documentation should not follow the conventional terms:

The legal documentations used by Islamic banks should have addressed the peculiarity of Islamic banking transaction, instead of adopting a cut and paste approach of the conventional banking documents. If the documents of the banks had in fact specified a formula of rebate or *ibrā'*, it will demystify the intricacies of a BBA transaction. It will be easily understood by the customer who would then not be put in the dark as to what is *ibrā'* and what would be the amount of *ibrā'* he should be receiving. In that way, the court need not have to interfere with the terms of the agreement or to add implied terms as I am now doing. (para 23)

For example, in most of the early cases, the bank that offers the facility was referred to as the lender and the term profit was referred as interest (*riba'*) which goes against the underlying principles of Islamic financial intermediation. However, over the years, some of the issues were resolved and the market players be they Islamic bankers or the customers seem to be aware of the situations, and the SAC of BNM had played a vital role in resolving such issues.

In addition, there have been concerns that the legal documentation for Islamic finance transactions was poorly drafted and affected the spirit of the Islamic contract (Moghul and Ahmed, 2003). This was supported by Mohd Yatim (2009) when he pointed out that the legal documentation for Islamic financing products was still using the normative approach and was inequitable to the customer. To this end, in the following literature review, among the pertinent legal issues of the legal documentation that are discussed and examined, is whether the standardisation of legal documents can solve the current legal challenges being faced by the industry.

4.2.1 *The terms and conditions.* Islamic home financing in Malaysia currently offers a few Islamic products such as Bay al-Inah, Bay Bithaman al-Ajil, Tawarruq or Commodity *Murabahah* and the *Musharakah Mutanaqisah* models. Various Islamic banks adopt different products with numerous sets of legal documentation with various terms and conditions. While the validity of the contracts is not an issue, the clauses in the legal documentation provided by the Islamic banks somehow lead to confusion hence raising the question whether such documentation serves the original value proposition of Islamic law or *Maqasid al-Sharī ah*.

As correctly pointed out by (Rosly, 2010), Islamic finance is to be determined based on four major factors, namely the *aqd* (contract), *Maqasid al-Sharī ah*, the accounting and reporting of finance, and the legal documentation. Non-standardised general terms and conditions in the legal documentation raises the question whether the *Maqasid al-Sharī ah* has been served. Mohd Yatim (2009) raised a similar view when he suggested that numerous factors must be taken into consideration in administering and monitoring Islamic finance products. The legal documentation for these products will ascertain the nature of the contract, the parties, the subject matter, the price, etc. This is vital to ensure that the *Maqasid al-Sharī ah* is achieved. Kahf (2006) opined that a sound Islamic contract should consist of general principles of contract that are acceptable by Islamic law as well as other legal systems and must uphold Islamic ethical principles. He added that what constitutes a good Islamic contract from the *Sharī ah* viewpoint is a contract that is morally sound (Kahf, 2006). Hence, the legal documentation in Islamic banking must be able to reflect the true definition of *Sharī ah* principles (Mohd. Yasin, 2012).

Currently, there is no specific standardised legal documentation used for Islamic home financing products. Most of the Islamic commercial banks use the legal documentation that is prepared by Islamic bank's solicitors and approved by the *Sharī ah* Committee. Eddy Yusof (2009) was of the opinion that there is a pattern among the Islamic banks whereby similar clauses are used in the present legal documentation although there is no specific or standardised Islamic legal documentation. Eddy Yusof (2009) further highlighted that the current sets of legal documentations are more or less similar with conventional documents but generally adhere to Islamic law. In other words, the legal documentation used in Islamic home financing is the replication of the conventional documentation but incorporating *Sharī ah* values so as to make it *Sharī ah* compliant. He further opined that the true Islamic finance documentation should be different from the conventional documentation and imitating the conventional documents would not make it different with conventional practice. Additionally, Subky *et al.* (2017) claimed that Islamic legal documentation is faced with higher documentation costs due to the string of documents that needs to be prepared and stamped. Though to a large extent this submission may be true, one must realise that the Islamic financial services industry operates within a conventional legal system based on English law principles. This accounts for the heavy reliance on conventional documentation and principles in certain situations which is inevitable in practical terms.

There is also the danger in adopting the terms and conditions in the conventional documentation to the Islamic legal documentation without caution as such practice may lead the Islamic contract to be null and void as it fails to adhere to the *Sharī ah* principles (Rosly *et al.*, 2000). While there is no harm in borrowing a leaf from the conventional practice of legal documentation, legal experts who draft such documentation must ensure that the terms are fair, just and mutually beneficial to the parties without necessarily skewing the sets of agreement in favour of the financial services provider.

In addition to the above, it is also proposed that the Islamic financing legal documentation must have its unique identity by having specific terms used in the Islamic

home financing products. Rosly *et al.* (2000, p. 5) argue that the terms and conditions should portray the spirit of the Islamic commercial contracts:

Any uncertainties and ambiguities about the principles of a sale contract can tantamount to a contract be rendered null and void. Likewise, the terminologies used in the sale contract must reflect the rules and principles governing it.

The authors also mentioned that the legal documentation should lay down the rights, obligations and liabilities of the parties, and it is prohibited for one party to transfer all the risks to another party (Rosly *et al.*, 2000). Legal documentation, in other words, must outline all the principles of the Islamic contract by having a clear provision in construing and interpreting the legal documents. Some of these concerns have been addressed in the prevailing sets of legal documentation used in Islamic home financing in Malaysia after series of amendments over the years.

Nevertheless, there are still some noticeable variations in the different sets of legal documentation used by Islamic banks in Islamic home financing arrangements. Abdul Aris *et al.* (2012) argued that the variation issue in Islamic home financing is not only on the contract used but also can be seen from the bank's rate, ratio and products. According to the study, this is because the *Shari'ah* Committee in each Islamic bank might have different views and rulings which may result in such variations. As the Islamic banks are running a business, it is unlikely to avoid such variations to enable the banks to be more competitive in offering their Islamic financing products. However, Abdul Aris *et al.* (2012) were silent as to whether such variations in Islamic home financing are positive or not. It is thus clear that none of the above literature provides an answer on the possibility of having standardised general terms and conditions in the legal documentation, especially for the home financing.

4.2.2 Governing law, dispute resolution and waiver of Shari'ah defence clause. Some of the clauses in the Islamic home financing documentation that could be standardised without any controversy are the *Governing Law* clause, *Dispute Resolution* clause and *Waiver of Shari'ah Defence* clause. In practice, the *Governing Law* of Islamic home financing products in Malaysia is obviously the Law of Malaysia, while there is usually nothing on *Dispute Resolution*. It is argued that sustainable practices on dispute management may be introduced to reflect the existing institutional mechanisms for dispute resolution such as the Ombudsman for Financial Services (OFS), i-Arbitration Rules of the Kuala Lumpur Regional Centre for Arbitration, and court-annexed dispute resolution through the Kuala Lumpur Court-annexed Mediation Centre (Oseni and Ahmad, 2016). The Islamic financial services industry must adopt a clear-cut policy on dispute resolution which would make litigation the last resort upon the exploration of mediation, adjudication and cost-effective arbitration (Engku Ali *et al.*, 2015).

The *Waiver of Shari'ah Defence* clause is also a standard term that should be included in every Master Agreement for Islamic home financing to avoid the *Shari'ah* defence often raised by defaulting parties when they are unable to make repayments in accordance to the agreement. This clause is seen in some new Islamic home financing agreements as a reaction to several Islamic finance cases that have been litigated in both the English and Malaysian courts (Oseni, 2015). The courts have been very consistent on this kind of defence, as it is considered as a mere "lawyer's construct defence" as held in the English case of *Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd and others* (2003) EWHC 2118 (Comm), (2003) 2 All ER (Comm) 849, and Malaysian cases of *Bank Islam Malaysia Bhd v Rhea Zadani Corp Sdn Bhd and ors* [2012] 10 MLJ 484, and *Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd* [2004] 6 MLJ 1.

Though the above list of standardised clauses is not exhaustive, it however makes a case for the focus of future research, which should identify all clauses that can be standardised generally in legal documentation used for Islamic home financing.

4.2.3 *Can a sale and purchase agreement be Shari'ah-compliant?* Customers are usually searching for financial assistance, particularly home financing to secure the purchase of a house. House or property is an asset that is essential and provides shelter and falls under the category of *daruriyyah* or utmost necessity. Hence, home financing be it the conventional loan or Islamic home financing assists people to purchase property. Studies have shown that most customers opt for Islamic financing facility due to the fact that *riba'* as practised by the conventional banks is prohibited in Islam (Khan, 2010; Siswanto, 2012). The practice in Malaysia is that before a customer seeks financial assistance, they will first execute the sale and purchase agreement (SPA) with a vendor or the seller who can be an individual seller or licensed developer. In the sale and purchase agreement, a financial assistance clause is provided which states that the purchaser intends to take up the loan or housing financing from a bank of their choice. Interestingly, the focus point that needs to be highlighted is that the purchaser is given three months to pay the purchase price in full to the seller failing which the 8 per cent interest per annum on a daily basis is to be imposed on the buyer. The wording used in the majority of the SPA in Malaysia is: "interest" which entails the issue of *riba'* as the amount is compounded from the original purchase price. The purchaser will then, with the same SPA, seek the financial assistance from the Islamic banks.

This situation is somehow distorting the value of Islamic finance because the Islamic home financing contract between the purchaser and the Islamic bank comes from the SPA. In other words, without the interest-based agreement, there will be no Islamic home financing product. It is like an Islamic contract in one hand and *riba'* based contract on the other. It is pertinent to note that the SPA forms part of the full set of legal documentation for Islamic home financing. With this in mind, one would ask whether legal experts need to come up with a *Shari'ah*-compliant SPA for an all-encompassing *Shari'ah*-compliant legal documentation for Islamic finance. Surprisingly, to date, there is no literature addressing this issue.

4.2.4 *Standardisation of legal documentation.* Standardisation is a process through documents established by consensus and approved by an organised body that provides for repeated and common use, rules, guidelines or characteristic of activities or their result aimed at the achievement of the optimum degree of order in a given context (Ping, 2011). The benefit of the standardisation of documents has been discussed in the light of cost efficiency as standardised documents save the cost; standardised documents can also reduce the risk of the business which then leads to maximising premiums. Likewise, standardisation of Islamic finance legal documentation is vital to ensure the growth of the industry (Ali and Kamal, 2009). Standardised documentation will help improve the communication between the parties involved in the project and enhance the efficiency in a project (Perumal and Abu Bakar, 2002).

In addition, Ibrahim (2010) in his keynote address during the ISRA-IIBI 2nd Annual International Thematic Workshop, emphasised that to have a comprehensive legal structure for Islamic finance is to have standardised legal documentation. He highlighted the importance of the effective legal documentation as it is considered a bridge between Islamic bankers and customers. He also explained that standard documentation will lead to fair, efficient, and transparent business. Apart from this, he is of the opinion that standardised documentation will regulate innovation in Islamic finance as not to deviate from its original objective. Similarly, Tahir (2003) also viewed that while the door for financial innovation should remain open, there must be some measurement and standardisation with regards to the legal documentation to ensure that the Islamic finance can perform better. Thus, it is proposed that the effort to standardised is not to stifle the innovation of Islamic banking product, but to provide standardised key terms of the legal documentation to avoid any unfair treatment to the customers.

Efforts towards the standardisation of legal documentation in Islamic finance are not new. In 2009, the Association of Islamic Banking Institutions Malaysia (AIBIM) launched

two standardised documents for deposit-taking and placement transactions, namely, the Interbank Murabahah Master Agreement (IMMA) and Master Agency Agreement (MAA) (AIBIM, 2009). According to the then President of AIBIM, Dato' Zukri Samad, the two standardised documents would foster greater transparency, robustness, operational efficiencies, and consistency in Islamic financial transactions.

From the global perspective, the effort to standardise the products and practices in the Islamic financial services industry is not alien to Islamic finance. In fact, this is the main objective of the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI), that is, to set compliance standards for the global Islamic finance market. Similarly, the Islamic Finance Services Board (IFSB) which was established in 2002 also focuses on developing standardised global prudential market practices of Islamic financial services. In addition, the International Islamic Financial Market (IIFM), which was established in 2002, develops best practices by preparing standardised legal documentation for *Shari'ah*-compliant capital and money market transactions. Likewise, the United Kingdom Loan Market Association has made efforts to standardise the *Murabahah* Agreement by having guidelines on how to draft the agreement.

The Bank Negara Malaysia through its SAC has vigorously issued *Shari'ah* Standards and guidelines to develop the productivity of the Islamic finance products and to ensure the practices are in compliance with *Shari'ah*. Section 59 of the Central Bank of Malaysia Act 2009 (CBMA) provides that the bank may issue any circulars, guidelines or notices on any *Shari'ah* matter relating to Islamic finance to the Islamic financial institutions to be adopted in their practice. In addition, Section 29(1) of the Islamic Financial Services Act (IFSA) allows the SAC to specify standards on *Shari'ah* matters in respect of carrying on with business affairs or activities by an institution. Section 29(2)(b) further provides that SAC may specify standards in any other matter relating to the business, affair and activity of institutions. Based on this, all the *Shari'ah* Standards issued by BNM are in line with this Section 29 of IFSA. In fact, IFSA makes it an offence should an institution fail to follow and comply with any of the standards issued as mentioned in Section 29(6) of IFSA.

As of to date, BNM has issued *Shari'ah* Standards on *Shari'ah* and operational standards for the key *Shari'ah* contracts such as *Mudarahah*, *Murabahah*, *Musharakah*, *Tawarruq*, *Qard*, *Hibah* and *Istisna'*. These standards aim at promoting clarity and transparency in *Shari'ah* operations to upgrade further and strengthen the *Shari'ah* compliance of products and to provide more options to the customers in dealing with Islamic finance products (Laldin and Furqani, 2015). Laldin and Furqani (2015) also believed that standardisation is a bridge in achieving uniformity in Islamic finance and support a comprehensive financial system, but much effort is needed to achieve it. While this article promotes the standardisation of the operational conduct of Islamic finance system, it only provides for the general aspect of Islamic finance and does not focus on which aspects need to be standardised. However, this can be considered a conclusive proof that standardisation is indeed an important tool in regulating the Islamic financial services industry. Such standards and guidelines issued by the BNM should be incorporated in the legal documentation.

4.2.5 Consumer protection. Whatever form of legal documentation that is used in any financial transaction, one key element often emphasised in both theory and practice is consumer protection (Benston, 2000). The customers are also at the receiving end because they need financing facility from the bank. Therefore, consumer protection does not only include relevant policies for financial literacy but also extends to fair and reasonable terms to protect the interest of the customers in the legal documentation. It should be borne in mind that the legal documentation, which consists of a string of agreements is pre-prepared by the Islamic bank, and the customer will execute the said documentation without the

opportunity to bargain the terms and conditions stated therein. This is when the issue of consumer protection arises but very few studies have discussed this at length. To the customers, what matters is the financing amount they will receive and not specific terms of the contract. This is due to the lack of financial literacy as mentioned by [Tahir \(2003\)](#). In his paper, he suggested that one way to overcome this issue is to have a comprehensive legal documentation comprising a *Sharī ah* perspective and a detailed explanation of the contract.

While the contract seems to be entered into by the customer freely and without force, the reality is that the customer is not aware of the consequences of the said contract. This gives rise to a pertinent legal question that is whether a contract entered into by the customer without understanding the terms and conditions and the obligations therein can amount to elements of duress, ignorance or excessive uncertainties from the *Sharī ah* perspective. The legal documentation is supposed to be entered into based on the customer's free will after understanding the rights and obligations arising from the contract and at the same time protecting the interest of both parties. Therefore, certain terms and conditions need to be taken into consideration so that the terms and conditions in the set of legal documentation would protect the interests of all parties (Yusof, 2009). These terms and conditions that may be reconsidered include the default clauses, warranties and representations and *Sharī ah* terms.

The customer and their legal counsel, on the other hand, see the above issue as an advantage when the issue of default arises. The lawyer will bring the matter of non-*Sharī ah*-compliance based on the legal documentation and request from the court to declare the contract as null and void. This phenomenon is considered as *Sharī ah* legal defence ([Hasan and Asutay, 2011](#)) as discussed above. The judge in *Tan Sri Abdul Khalid bin Ibrahim v. BIMB and Anor* [2009] 6 MLJ 416, at page 424 observed that:

[...] questioning of the validity of an agreement after benefiting from it and upon default, in itself lacks bona fide. I say this because Tan Sri Khalid was in the position to obtain any *Sharī ah* or legal advice at the time he entered into these agreements with the bank. To turn around and challenge the validity of an agreement entered voluntarily after reaping the benefit under it appears to be a mere afterthought. This is also akin to a case of a Muslim who goes into a restaurant, had a meal, only to inquire after the meal if the food is non-halal and when told that is so, refuses to pay for it. Such conduct cannot reflect a serious concern of the *Sharī ah* compliance, but more of an attempt to renege contractual obligations which have been voluntarily agreed and acted upon by the other party.

The judge condemned the act by the defaulting customer in trying to avoid his legal obligation after benefitting from the financing. The defence lawyer, however, took this issue as a way to protect his client. This is, in fact, a serious problem that shows the level of knowledge and understanding not only of the customers but the lawyers as well. By bringing this *Sharī ah* legal defence in court proved that the lawyers are unaware of the Islamic financing mechanism. Such lack of awareness must be addressed carefully so that the customer can be protected rightfully in the court of law rather than trying their luck through the superficial *Sharī ah* legal defence.

Based on the above, it can be seen that there is a lacuna in the existing literature in resolving the issue of consumer protection. Very few studies have discussed this issue and offered solutions on how to protect the consumers' rights, and it also gives an advantage to the defaulting customer to attack the validity of the underlying contract itself.

5. Conclusion: the need for further studies

The above analysis proves that there are numerous issues with regards to the Islamic finance legal documentation, particularly the home financing documentation that are yet to be resolved. These problems have not been addressed in any meaningful way nor have

solutions been proposed. In summary, there is need for further studies to identify the gaps addressed in this study.

From the above analysis, one may conclude that standardised legal documentation is a critical component for the Islamic home financing sector, as the subject matter of most Islamic finance cases litigated in the courts is default in the repayment of home financing facility. All the details of the contracts, rights and obligations of the parties should be placed within the legal documentation and parties should understand and consent to the agreements. As such, further research on legal documentation in Islamic home financing is indeed vital because the existing literature on the subject is not exhaustive. At least, for a start, minimum general guidelines on clauses relating to Islamic home financing should be addressed. This includes rights and obligations of the parties, repayment terms, default scenario, governing law and dispute resolution and waiver of *Shari'ah* defence. The stakeholders should also consider the need for a *Shari'ah*-compliant SPA which is conspicuously missing in the Islamic home financing documentation.

References

- Abdul Aris, N., Othman, R., Mohd Azli, R., Arshad, R., Sahri, M. and Yaakub, A.R. (2012), "Islamic house financing: comparison between bai' bithamin ajil (BBA) and musharakah mutanaqisah (MM)", *African Journal of Business Management*, Vol. 6 No. 1, pp. 266-273, available at: <https://doi.org/10.5897/AJBM11.2042>
- Adams, K.A. (2004), *A Manual of Style for Contract Drafting*, American Bar Association, Chicago, IL.
- Adams, K.A. (2013), *A Manual of Style for Contract Drafting*, 3rd ed., ABA Publishing, Chicago, IL.
- AIBIM (2009), *Islamic Banking Industry Adopts Standardized Master Agreements for Deposit Taking and Placement Transactions*, Association of Islamic Banking Institutions Malaysia, available at: www.yumpu.com/en/document/read/38874262/association-of-islamic-banking-institutions-malaysia-mifc (accessed 15 April 2009).
- Ali, R. and Kamal, M. (2009), "Standardising Islamic financing: possibility or pipe dream?", *Business Law International*, Vol. 10 No. 1, pp. 19-26.
- Benston, G.J. (2000), "Consumer protection as justification for regulating financial-services firms and products", *Journal of Financial Services Research*, Vol. 17 No. 3, pp. 277-301.
- Cohen, M. (2009), "A brief history of 'legalese' and the plain English movement", available at: www.cohenslaw.com/articles/plainenglish.html (accessed 20 January 2016).
- Eddy Yusof, E.F. (2009), "A holistic view of legal documentation from Shari'ah perspective a holistic view of legal documentation from Shariah perspective", *Munich Personal RePEc Archive*, available at: <http://mpra.ub.uni-muenchen.de/20721/>
- Engku Ali, E.R.A., Oseni, U.A., Adeyemi, A.A. and Mohd. Zain, N.R.B. (2015), "Dispute resolution mechanisms in the Islamic finance industry in Malaysia: towards a legal framework", *Al Shajarah*, Vol. 20, pp. 19-40.
- Hasan, Z. and Asutay, M. (2011), "An analysis of the courts' decisions on Islamic finance disputes", *ISRA International Journal of Islamic Finance*, Vol. 3 No. 2, pp. 41-72.
- Ibrahim, M. (2010), "Keynote address by Muhammad Ibrahim deputy governor, bank Negara Malaysia ISRA-IIBI 2", ISRA-IIBI 2nd Annual International Thematic Workshop 2010 London, pp. 1-11.
- Jalil, M.A. and Rahman, M.K. (2010), "Islamic law of contract is getting momentum", *International Journal of Business and Social Science*, Vol. 1 No. 2, pp. 175-193.
- Kahf, M. (2006), "Innovation and risk management in Islamic finance: Shari'ah considerations innovation and risk management in Islamic", *Seventh Harvard International Forum on Islamic Finance*, pp. 22-33.

- Khan, F. (2010), "How Islamic is Islamic banking?", *Journal of Economic Behavior and Organization*, Vol. 76 No. 3, pp. 805-820.
- Lahsasna, A. (2014), *Shari'ah Non-Compliance Risk Management and Legal Documentations in Islamic Finance. Shari'ah Non-Compliance Risk Management and Legal Documentations in Islamic Finance*, John Wiley and Sons, Singapore, available at: <https://doi.org/10.1002/9781118809181>
- Lee, M.J. (2014), *Legal Documentation for Islamic Banking*, IBFIM, Kuala Lumpur.
- Meera, M.K.A. and Abdul Razak, D. (2005), "Islamic home financing through musharakah mutanaqisah and al-Bay' bithaman Ajil contracts: a comparative analysis", *Review of Islamic Economics*, Vol. 9 No. 2, pp. 5-30.
- Moghul, U.F. and Ahmed, A.A. (2003), "Contractual forms in Islamic finance law and Islamic inv. Co. of the Gulf (Bahamas) ltd. v. symphony gems n.v. and ors.: a first impression of Islamic finance", *Fordham International Law Journal*, Vol. 27 No. 150, available at: <https://doi.org/10.1525/sp.2007.54.1.23>
- Mohd Yasin, N. (2004a), "Legal aspects of Islamic Banking-Malaysian experience", in Ali, S.S. and Ahmad, A. (Eds), *Islamic Banking and Finance: Fundamentals and Contemporary Issues*, Islamic Research and Training Institute (IRTI-IDB) in collaboration with International Association of Islamic Economics (IAIE), Qatar Faculty of Islamic Studies, Brunei Darussalam, pp. 197-214, available at: www.ses.ac.ir/files/takmili/islamic_econ/islamic_banking/222.pdf#page=203
- Mohd Yasin, N. (2004b), "Legal aspects of Islamic banking: Malaysian experience", in Ali, S.S. and Ahmad, A. (Eds), *Islamic Banking and Finance: Fundamentals and Contemporary Issues*, Islamic Research and Training Institute: Brunei Darussalam, p. 215, available at: <http://trueislamtaawheed.com/Books/EnglishBooks/IslamicFinance/IslamicBankingandFinance.pdf#page=221>
- Mohd. Yasin, N. (2007), "Legal aspects of Islamic banking – Malaysian experience", in Ali, S.S. and Ahmad, A. (Eds), *Islamic Banking and Finance: Fundamentals and Contemporary Issues*, Islamic Research and Training Institute, Islamic Development Bank, Jeddah, pp. 215-238.
- Mohd. Yasin, N. (2012), "Regulation of Islamic banks in relation to anti-money laundering and counter financing of terrorism (AML/CFT): the Malaysian scenario", in Trakic, A. and Tajuddin, H.H.A. (Eds), *Islamic Banking & Finance: Principles, Instruments & Operations*, The Malaysian Current Law Journal Sdn Bhd, Ampang, Selangor, Vol. 1 No. 2, pp. 296-314.
- Mohd Yatim, M.N. (2009), "A review on conflicting issues in a deferred payment sale product of a Shari'ah-compliant banking business", *International Journal of Economics and Finance*, Vol. 1 No. 2, pp. 253-257.
- Oseni, U.A. (2015a), "Legal documentation in Islamic finance: the court's approach in reconciling contractual inconsistencies", *10th International Conference on Islamic Economics and Finance, Islamic Research and Training Institute (IRTI-IDB) in Collaboration with International Association of Islamic Economics (IAIE), Qatar Faculty of Islamic Studies, Doha, Qatar*, pp. 1-13.
- Oseni, U.A. (2015b), "The legal and beneficial ownership conundrum in Sovereign Sukuk structuring", *Al Shajarah*, Vol. 20, pp. 111-148.
- Oseni, U.A. and Ahmad, A.F. (2016), "Towards a global hub: the legal framework for dispute resolution in Malaysia's Islamic finance industry", *International Journal of Law and Management*, Vol. 58 No. 1, pp. 48-72.
- Perumal, V.R. and Abu Bakar, A.H. (2002), "The needs for standardization of document towards an efficient communication in the construction industry", *Acta Technica Corviniensis-Bulletin of Engineering*, Vol. 4 No. 1, pp. 23-30.
- Pheng, L.M. (1995), *Banking Law*, 1st ed., Butterworths Asia, Kuala Lumpur.
- Ping, W. (2011), "A brief history of standards and standardization organizations: a Chinese perspective", *Economic Series*, No. 117, East-West Center Working Papers, available at: <https://scholarspace.manoa.hawaii.edu/bitstream/10125/21412/econwp117.pdf>

- Razak, A.H.A. (2015), "The fundamentals of Islamic banking and finance: a prologue", *European Journal of Islamic Finance*, No. 2, pp. 1-12.
- Rosly, S.A. (2010), "Shariah parameters reconsidered", *International Journal of Islamic and Middle Eastern Finance and Management*, Vol. 3 No. 2, pp. 132-146, available at: <https://doi.org/10.1108/17538391011054372>
- Rosly, S.A., Santusi, M. and Mohd Yasin, N. (2000), "The role of khiyar al-'ayb in Al-Bay' bithaman ajil financing", *International Journal of Islamic Financial Services*, Vol. 2 No. 3, pp. 1-9.
- Siswanto, D. (2012), "The awareness, preference and distinctiveness of Islamic home financing type in Indonesia", *Buletin Studi Ekonomi*, Vol. 17 No. 2, pp. 192-201.
- Subky, K.H.M., Liu, J.Y., Muhammad Muzzammil, M.M., Mokhtar, Z.F. and Faizrahman, A. (2017), "The implication of Musharakah Mutanaqisah in Malaysian Islamic banking arena: a perspective on legal documentation", *International Journal of Management and Applied Research*, Vol. 4 No. 1, pp. 17-30.
- Tahir, S. (2003), "Current issues in the practice of Islamic banking", *course on Islamic Banking and Finance*, Tehran, Iran, pp. 2-6, available at: <https://doi.org/10.1111/j.1467-7660.1995.tb00570.x>
- Trakic, A. (2013), "The adjudication of Shari'ah issues in Islamic financial contracts: is Malaysian Islamic finance litigation a solution?", *Humanomics*, Vol. 29 No. 4, pp. 260-275.
- Trakic, A.T. (2012), "Offer and its significance for formation of contracts", *Malayan Law Journal Articles*, Vol. 5, pp. 1-13.
- Oseni, U.A. (2015), "Dispute management in Islamic financial services and products: a maqāṣid-based analysis", *Intellectual Discourse*, Vol. 23, pp. 377-400.
- Waluchow, W.J. (1991), "Charter challenges: a test case for theories of law", *Osgoode Hall LJ*, Vol. 29, pp. 183-214.
- Wright, S. (2014), *The Handbook of International Loan Documentation*, 2nd ed., Palgrave Macmillan, Basingstoke.
- Yaacob, H., Muhammad, M. and Smolo, E. (2011), "International convention for Islamic finance: towards standardisation", *ISRA Research Paper*, Vol. 29, pp. 1-58.

About the authors

Syarah Syahira Mohd Yusoff is currently an Academic Trainee at IIUM Institute of Islamic Banking and Finance, International Islamic University of Malaysia while she is also pursuing her PhD. She obtained her LLM from International Islamic University Malaysia. Prior to that, she was an advocate and solicitor at J. Lee and Associates as a conveyancing lawyer dealing largely with drafting Sale and Purchase Agreement as well as loan and Islamic financing legal documentation.

Dr Umar A. Oseni is an Adjunct Association Professor at Istanbul Sabahattin Zaim University, Turkey; and the Executive Director, Legal and Compliance of the International Islamic Liquidity Management Corporation (ILLM). Umar is also an adjunct Associate Professor at Istanbul Sabahattin Zaim University, Istanbul, Turkey. Prior to this, he was an Associate Professor of Law and Regulation of Islamic Finance at the International Islamic University Malaysia. Umar was also a visiting post-doctoral fellow at the Islamic Legal Studies Program of the Harvard Law School, Harvard University. Apart from being a Harvard-certified negotiator and dispute resolution expert, Umar has consulted for numerous bodies in the areas of law and regulation of Islamic finance, Islamic finance research and publication and alternative dispute resolution in Islamic law. Umar A. Oseni is the corresponding author and can be contacted at: umaroseni@gmail.com

For instructions on how to order reprints of this article, please visit our website:

www.emeraldgrouppublishing.com/licensing/reprints.htm

Or contact us for further details: permissions@emeraldinsight.com