

THE ROLES AND RESPONSIBILITIES OF THE SHARIAH COMMITTEE OF THE ISLAMIC FINANCIAL INSTITUTIONS IN MALAYSIA*

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Abstrak

Mutakhir ini, banyak negara merujuk Malaysia sebagai salah sebuah model bagi sektor kewangan dan perbankan Islam di dunia. Hingga kini, Malaysia mempunyai 9 bank Islam tempatan dan 3 bank Islam asing. Pada tahun 2004, asset perbankan Islam di Malaysia telah mencapai RM89 bilion iaitu 9.9 peratus daripada jumlah asset perbankan keseluruhan dan pada suku tahun pertama 2005 sahaja ianya mencecah sehingga 10.5 peratus¹. Pembangunan sektor perbankan dan kewangan Islam di Malaysia sememangnya memerlukan sokongan infrastruktur menyeluruh dan salah satu daripadanya yang sangat penting ialah penubuhan Ahli Jawatankuasa Syariah atau "Shariah Committee" (SC). SC kebiasaannya dianggotai oleh cendekiawan fiqh, pengamal perbankan dan juga ahli akademik untuk menasihati institusi kewangan Islam perihal memenuhi kehendak syariah dalam semua aspek dan operasinya. Artikel ini akan mengkaji peranan dan tanggungjawab sebenar SC kepada institusi kewangan Islam dengan merujuk kepada undang-undang bertulis dan garis panduan dan prosedur yang dikeluarkan oleh Bank Negara Malaysia. Kertas ini juga akan menerangkan cabaran-cabaran masa hadapan yang akan ditempuhi oleh SC di dalam membantu untuk meningkatkan perkembangan perbankan dan kewangan Islam di Malaysia dan pada masa yang sama mereka juga mempunyai kewajipan untuk memastikan institusi kewangan Islam ini memenuhi segala kehendak syariah.

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¹ *Governor Of Bank Negara's Speech During The Launching Ceremony Of Commerce Tijari Bank Berhad.* <http://www.bnm.gov.my>, 15 December 2006

INTRODUCTION

Malaysia is now being regarded as the 18th largest trading nation in the world and respected as the model of Islamic and developing country, which is progressive and successful. It is noted that Malaysia's aspiration is to transform the country into the "Global Halal Hub" and one of the efforts is through the development of Islamic banking and finance.

Malaysia practices dual banking system whereby the Islamic banks and Islamic banking scheme banks operates side by side with the conventional banks. Currently with nearly 23 years experiences, Malaysia has 12 full fledge Islamic banks from local and foreign players². In terms of shariah compliance, it is a legal requirement for each Islamic bank to establish the SC which consists of *fuqahā'*, practitioners and academicians.

This paper will mainly focus on the roles and responsibilities the SC of the Islamic financial institutions in Malaysia including its regulatory and shariah frameworks. The SC is an independent body with high level of integrity plays very important roles to the Islamic financial institutions in ensuring the shariah compliance of their operations.

REGULATORY FRAMEWORKS

The legality and Islamicity of any banking product, its documentation and operation depends on the finding and resolution of the SC. By looking at the organization chart of the Islamic financial institutions, the SC ranks at the same level of the Board of Directors (BOD) or in other words any decision made by the SC could not be overruled by the BOD³.

The establishment of the SC is a statutory requirement to all banks which offer Islamic banking products pursuant to section 3 (5) (b) of the Islamic Banking Act 1983 (IBA) for Islamic banks, section 124 (7) of the Banking and Financial Institution Act 1989 (BAFIA) for Islamic banking scheme banks, and section 16B of the Central Bank Act (Amendment) 2003 (CBA) for Central Bank of Malaysia.

The main objective of the establishment of the SC is to advise the Islamic financial institutions on any shariah matter and also to ensure compliance with the shariah

² *Ibid.*

³ For example, organisation chart of Bank Muamalat Malaysia Berhad., <http://www.muamalat.com.my>. n.a.12 May 2006.

principles and requirements in their operations. Section 3 (5)(b) of IBA provides that the Central Bank shall not recommend the grant of a license, and the Minister shall not grant a license, unless he is satisfied that there is, in the articles of association of the bank concerned, provision for the establishment of an advisory body. Section 124 (7) of BAFIA provides for the establishment of Advisory Council to advise the Bank Negara on the matter relating to Islamic banking business or Islamic financial business. Section 16B (1) of CBA provides that the Bank may establish an Advisory Council which shall be the authority for the ascertainment of Islamic law for the purposes of Islamic banking business, *takâful* business, Islamic financial business, Islamic development financial business, or any other business which is based on principles and is supervised and regulated by the Bank Negara. Based on those provisions it is understood that the statutory functions of the advisory body are to advise the Islamic financial institutions on shariah matters and to ensure that their operations do not involve any element, which is not approved by the religion of Islam.

Even though the *madhhab* of the *muslim* population in Malaysia is Shâfi'î in the aspects of *ibâdah*, *munâkaḥah* and etc, but it is observed that there is no provision in IBA, CBA and BAFIA which gives clarification to the *madhhab* applicable to the Islamic financial institutions. The definition of Islamic banking business which means any element that is not approved by the religion of Islam" in the IBA and BAFIA lead to various interpretation. The tendency is that only Sunnî *madhhab* will be acceptable and *madhhab* Shâfi'î will be the main priority followed by other three *madhâhib* ie the Ḥanafî, the Mâlîkî and the Hanbalî schools⁴.

To sum up, IBA, BAFIA and CBA only provide the regulatory frameworks of the SC. At the moment, there is no substantive law, which provides comprehensive provisions on the application of Islamic banking system in Malaysia. The Islamic financial institutions may involve in any banking business and introduce any product under various concepts provided that it does not contradict to the shariah principles. In terms of different juristic approach amongst *madhâhib*, the Islamic financial institutions through their SC may follow any *madhhab* and there was no restriction and requirement to practice the legal thought of *madhhab* Shâfi'î only. This approach creates flexibility to

⁴ Section 54 of the Administration of Religion of Islam (State of Selangor) Enactment 2003 provides that in issuing fatwa, the Fatwa Committee shall ordinarily follow the accepted views of the *madhhab* Shâfi'î and if the opinion will lead to situation which is repugnant to public interest, the Fatwa Committee may follow any of the *Madhhab Ḥanafî* or the *Mâlîkî* or the *Hanbalî* schools.

the banks to offer creative products with the purpose to meet the market and people need.

Shariah Frameworks

Shariah is a divine law revealed by Allah S.W.T to the Prophet Muhammad S.A.W. The main sources of shariah are *al-Qur'ân* and *al-Sunnah*. Muslim scholars classified shariah into *Jinâyât*, *Ibâdât* and *Mu'âmalât*. The main issue here is what are the actual shariah frameworks of the SC of each Islamic financial institution in Malaysia? Do they have to advise the banks in all aspects of shariah?

The nature of the business of the Islamic financial institutions mainly refers to the Islamic law of transaction classified under *fiqh mu'âmalât*. Hence, the SC frameworks on shariah matter will only confine within the matter under *fiqh mu'âmalât*. They may give advice to the banks on any matter related with *fiqh mu'âmalât* and their decision will determine the Islamicity and permissibility of certain product. That is why the selection of the SC members will be based on the expertise in Islamic law of transaction and *uṣūl fiqh*. The expertise in these two areas are very important so as to ensure the smoothness of making decision or *ijtihad* to any complex issues involved in Islamic banking and finance.

For example in clause 4 (15) of Bank Islam Malaysia Berhad (BIMB) Memorandum of Association provides that BIMB may carry on the business of buyers, sellers, importers, exporters, manufactures of, and dealers in motor cars, cabs, bicycles and other vehicles. It shows that the core business of the Islamic financial institutions in Malaysia mainly refers to the sale and purchase transaction.

It is different with the conventional banking system while the nature of the business refers to loan transaction. This is based on what Allah S.W.T. says in the *al-Qur'ân* *ṣūrah al-Baqarah* verse 275.

“Those who live on usury will not rise up before Allah except like those who are driven to madness by the touch of Shaytân. That is because they say: Trading is no different than usury, but Allah has made trading lawful and usury unlawful⁵”.

⁵ Muhammad Farooq-I-Azam Malik (1997), *English Translation of the Meaning of Al-Qur'an*. Texas: Institute of Islamic Knowledge. p. 155.

⁶ Hadith narrated by Bayhaqī as the Prophet SAW said: “All benevolent loans which are involved additional is *riba*”.

The basic position in Islam is that money lending or *qard* is a benevolent act worthy of being rewarded highly by Allah the Almighty. Money lending is not allowed for the purpose of profit-making activities⁶. In the conventional banking system, lending is primarily for profit in the form of *ribâ'* or interest.

Therefore the SC roles to the Islamic financial institution are to advise the bank mainly to the matter in the Islamic law of transaction and this will include various types of shariah principles under the various contracts such as '*Uqūd Tamlikât* (contract of ownership), '*Uqūd Ishtirāk* (contract of partnership), '*Uqūd Tawthīqât* (contract of guarantee), '*Uqūd Iṭlâqât* (general contract), '*Uqūd Taqyīdât* (contract of restriction), '*Uqūd Isqâṭât* (contract of waiver) and '*Uqūd Ḥifz* (contract of deposit) ⁷.

Qualification and Procedures

Before December 2004, there are no specific guidelines on the qualification of the SC for each Islamic financial institution. The appointment of the SC normally will be based on the notability and expertise of the personnel. Various banks will appoint the SC members who are famous and noted by the industry and they will be the main reference for industry for any issue involved.

Bank Negara Malaysia (BNM) has issued Guidelines on the Governance of the SC for the Islamic Financial Institutions (BNM/GPS 1) that regulates the governance of Shariah Committee of an Islamic financial institution. This is a first guideline, which is binding on every Islamic financial institution including *Takâful* operators and Development Banks in Malaysia. BNM/GPS 1 provides very clear guidelines in terms of membership of the SC, appointment, procedures, qualification, composition, secretariat, disqualification, resignation and termination, restrictions including duties and responsibilities. Islamic financial institutions have to comply with the guideline by 1st April 2005⁸ and the dateline has been extended to a development financial institution prescribed under the Development Financial Institutions Act 2002 (DFIA) which carries on Islamic Banking Scheme to 1st September 2005.

⁷ Wahbah al-Zuhaili (2002) *Fiqh dan Perundangan Islam*, Md. Akhir Haji Yaacob et.al (terj.). Vol IV. Kuala Lumpur: Dewan Bahasa dan Pustaka. p 246-247. See also 'Abd al-Nāṣir Mūsā Abū al-Basī (1999) *Al-Qānūn al-Madānī al-Urdūnī al-Nazriah al-'Āmmah Li al-'Aqd*. Jordan: Dār al-Nafais. p 41.

⁸ Section 23 of BNM/GPS1

The Central Bank of Malaysia Act 1958 was also amended in order to enhance the role and functions of its Shariah Advisory Council (SAC) of BNM. This amendment has accorded the SAC as the sole Shariah authority in Islamic finance it will be referred to by the court or arbitrator in disputes involving Shariah issues in Islamic banking, finance and takaful cases⁹.

A member of the SC shall possess necessary knowledge, expertise and experience in areas of Islamic jurisprudence or *uṣūl al-fiqh* or Islamic law of transaction or *fiqh al-mu'āmalāt*¹⁰. The SC shall consist at least a minimum of three members. The affairs of the SC will be dealt with by shariah officer who is person with knowledge in shariah

Every Islamic financial institution has its own procedures for the SC. There are no standard guidelines for the SC whether to the aspects of management, products approval and etc. The practice is that there will be shariah secretariat to organize and handle the shariah matter. The shariah officer in the secretariat will compile and collect any document and issue involved, which are to be presented during the SC meeting.

In terms of technical procedures, the SC will have to attend monthly shariah meeting of its respective Islamic financial institutions. It will take about 3-4 hours per meeting. The SC meeting will be attended by chief executive officer, head of product department, legal officer, lawyers, representative from branches and etc. It depends on the issue involved either operational or product matters.

The SC will receive all relevant documents, which need shariah clarification from respective Islamic financial institutions at least one week or two weeks before the date for meeting. Shariah officer will record all minutes, the findings and resolutions of the meeting. It will be compiled and distributed to relevant parties, departments and personnel in the banks. The SC shall ensure that the decision be implemented by the respective Islamic financial institutions. There are no standard and uniform procedures in coming out with certain resolution or fatwa in Malaysia.

ROLES AND RESPONSIBILITIES OF THE SC

The implementation of Islamic banking and finance must be in accordance with the shariah principles. The SC has specific duty to ensure and monitor the operation of the

⁹ Section 1-4 of BNM/GPS1

¹⁰ Section 11 of BNM/GPS1

Islamic financial institutions. In general the main duties and responsibilities of the SC specifically will confine to the following matters:

- (a) To advise the Islamic financial institutions on the shariah compliance to the concept and structure of new and existing Islamic banking products and services;
- (b) To ensure the documentations used by the Islamic financial institutions meet the shariah requirements;
- (c) To assist related parties on shariah matters for advice upon request and any matter to be referred to the SC;
- (d) To advise the Islamic financial institutions regarding with the business operations in order to ensure that it complies with shariah principles at all times; and
- (e) General tasks and duties.

Concept and Structure Of The Products

The SC will evaluate the concept and structure of the new product and will review the existing products. Islamic banking products can be classified into Consumer Banking Products, Trade Finance Products, Corporate Banking Products, Investment Banking Products, Credit Card and others.

Islamic banking products can be under various concepts such as *'uqūd tamlikât* refers to *al-mu'âwadât* (exchange) and *al-tabarru'ât* (charity), *'uqūd isytirâk* refers to *muḍârabah* (profit sharing) and *musyâraakah* (profit and loss sharing), *'uqūd tawthîqât* refers to *kafâlah* (guarantee), *rahn* (pawnbroking) and *hawâlah* (transfer), *'uqūd Itlâqât* or *'a'mâl Insân* refers to *wakâlah* (agent), *'uqūd taqyidât* refers to *taflîs* (bankruptcy), *'uqūd isqâtât* refers to *ibrâ'* (rebate), *muqasṣah* (set-off) and *'uqūd ḥifz* refers to *wadî'ah* (saving).

For instance home financing-i under the concept of *Bay' Bithaman Ājil*, credit card under the concept of *Bay' al-'Inah*, project financing-i under the concept *Bay' al-Istiṣnâ'*, Letter of credit under the concept of *Bay' al-Dayn* and machinery financing-i under the concept of *Bay' al-Murâbahah*. From the observation Islamic banking products under the concept of "al- Bay'" or contract of exchange classified under *'uqūd tamlikât* are the biggest contributor in terms of growth and profit to the Islamic financial institutions in Malaysia¹¹. Malaysian-based Islamic banks have been applying

¹¹ Islamic Banking Statistics. <http://www.bnm.gov.my> 26 May 2006.

mainly three basic concepts, namely, *Bay' Bithaman Ājil*, *Bay' al-'Inah* and *Bay' al-Dayn* since its introduction in 1983.

Another example is *Bay' al-'Inah* products as widely used by the Islamic Banks in Malaysia such as Credit Card¹². *Bay' al-'Inah* concept is not acceptable by majority fuqahâ' because it was considered as the *hilah* or legal trick or backdoor to *ribâ*. *Madhhab* Shâfi'î viewed *Bay' al-'Inah* as permissible if it is fulfilled the pillars of contract. A contract was valued by what is disclosed and any individual intention was up to Allah *S.W.T.*. From the observation almost all of the SC in Malaysia accepted *madhhab* Shâfi'î's view and allow such practices.

It is important to note that even though majority members of the SC in Malaysia consist of Shâfi'î's *fiqh* scholars¹³, they are not fanatic with the *madhhab*. The SC practices moderate approach to the various opinions amongst *madhâhib* in making any resolution or ruling. It is very essential to the SC not to stick with *madhhab* Shâfi'î only in order to guarantee the flexibility and to meet the current needs related with Islamic banking operations.

The SC's approach can be illustrated through the case of the permissibility of *Bay' Ma'dûm*¹⁴. This specifically refers to the issues of warrants and futures contracts on crude palm oil. The Shâfi'î's view pronounced that the subject matter of the sale must be existent at the time of the contract and therefore *Bay' Ma'dûm* is prohibited. This is based on *hadîth* whereby Prophet SAW prohibited a sale of an unborn baby camel and a sale of non-existing object. In this regard the SAC takes the Ḥanbalî's view. *Madhhab* Ḥanbalî did not require the subject matter to be existed but the most important thing was the contract did not contain element of *gharār* or uncertainty, which is forbidden by Shariah.

¹² Bank Islam credit card is based on Shariah principle of *Bay' al-'Inah*, to be offered to Muslim and non-Muslim. n.a. 27 May 2005. <http://www.bankislam.com.my>.

¹³ In 1997 to 1999 Dr. Ahmad Ali Abdullah (Ḥanbalî's *madhhab*) from Central Bank of Sudan was one of the SC members of BNM. n.a. 26 May 2005. <http://www.bnm.gov.my>. Prof. Dr Hashim Kamali (Ḥanafî's *madhhab*) is one of the SC members for Commerce International Merchant Bankers Bhd. n.a. 2005. *CIMB Makes Appointments To CIMB Shariah Committee*. The Edge, 18 April RHB Bank has appointed two foreign scholars to be members of the SC ie Sheikh Sir Dr Mohamed Abdul Khair, London Muslim College Director and Dr Ahmed Mohieddin Ahmad, Saudi Arabia-based Al-Baraka Banking Group's Shariah panel member. n.a.. 6 May 2006. <http://biz.thestar.com.my>.

¹⁴ n.a., 2002. *Resolutions of the Securities Commission Shariah Advisory Council*. Kuala Lumpur: Perpustakaan Negara Malaysia. pp. 23-25.

Documentation

The SC will vet the documents meticulously to all documents involved. They will review the documents and will give their comments in order to ensure the compliances to the shariah principles. The SC is expected to endorse and validate all relevant documentations and this includes the term and condition, the product manual, marketing advertisement, sales illustration and brochures used to describe the product¹⁵.

Each Islamic financial institution has their own structure of the documentations and it varies according to the products. The SC may give advise to the banks whether the documents is in accordance with the shariah principles and they may reject the documents which is contrary to shariah or require the banks to do some amendments so as to meet the shariah principles.

For instance, home financing product under the concept of *Bay' Bithaman Ājil*. Home Financing-i is a contract of deferred payment sale at an agreed selling price, which includes a profit margin agreed by both parties. Profit in this context is justified since it is derived from the buying and selling transaction as opposed to interests accruing from the principal lent out. The documents involved in this type of financing are the Letter of Offer, Property Purchase Agreement and Property Sale Agreement.

Letter of Offer will consist of the terms and conditions of the financing including the purchase price, the selling price, financing period, payment schedule, method of financing, covenants and representatives and warranties. Property Purchase Agreement¹⁶ will consist of the terms and conditions of the purchase transaction. In this document it will state that the Bank will purchase the property (eg. house) from the Customer in cash. The Bank will disburse the amount of the purchase price to the Customer after execution of this agreement. Property Sale Agreement¹⁷ will state the terms and conditions of the selling transaction. In this document the Bank will sell

¹⁵ Section 20 (b) and (c) of BNM/GPS 1.

¹⁶ Property Purchase Agreement refers to the agreement between the Bank and the Customer whereby the Bank will purchase the property owned by the Customer in cash basis. For example, the Bank purchases a house owned by the Customer in the amount of RM100,000.00.

¹⁷ Property Sale Agreement refers to the subsequent agreement after the Property Purchase Agreement whereby the Bank will sell it back the property to the Customer and he has to pay the selling price through deferred payment. For example, the Bank subsequently sell the house to the Customer in the amount of RM180,000.00. The additional of RM80,000.00 is considered as a lawful profit from the sale contract.

back the property (eg. house) to the Customer. The Customer will have to pay the amount of the selling price to the Bank through deferred payment or installments.

The SC of the Islamic financial institutions in Malaysia accepts that such documents evidence a valid sale and purchase transaction. If the SC opines that the documents contain elements which are prohibited under the Islamic law, then the respective Islamic financial institutions would have to do the amendment, modification and addition based on the advice and comments given by the SC.

Reference For Advise On Shariah Matters

The SC shall assist any related party on shariah matters for advice¹⁸. The related parties such as legal counsel, auditor, lawyers, officers from various departments, branches of the Islamic financial institution may seek advice from the SC. BNM/GPS 1 requires the SC to provide written shariah opinion where the Islamic financial institution makes reference to the SC for advice or where relevant parties submit application to BNM for new products approval. This written opinion normally will be recorded by the shariah officer during the SC meeting and he will compile all resolution or opinion of the SC.

The written opinion must consist of issues involved, explanation and the recommendations for a decision. Any opinion must be supported by relevant shariah jurisprudential literature from established and recognized sources. Authority or sources from other than *sunnī madhhab* for example Syī'ah are strictly prohibited and can not be a supported authority for the opinion¹⁹. The SC shall ensure that all its decision is properly implemented by the Islamic financial institutions.

For example the SC's opinion on the status of Amanah Saham Bumiputra (ASB) as a security or guarantee for bank's financing facility²⁰. The SC decided that certificate of ASB couldn't be regarded as security for any financing facility based on the uncertainty of the business activities running by the companies in terms of their investment and other things. The SC has a duty to ensure that its decisions that being referred to be properly implemented by Islamic financial institution.

¹⁸ Section 20 (e) of BNM/GPS 1.

¹⁹ "Muzakarah Khas Jawatankuasa Fatwa Kebangsaan Bagi Hal Ehwal Ugama Islam Malaysia" on 5 May 1996 decided that the term "*hukum syarak*" refers to only *madhhab ahli sunnah wa al-jamāah*. See <http://www.e-fatwa.gov.my/jakim>.

²⁰ SC's Resolution of Bank Muamalat Malaysia Berhad for 2003.

Business Operations

The SC will monitor Islamic banking operations from time to time. They shall advise the bank on shariah matters in order to ensure that the business operations of the Islamic financial institutions comply with shariah principles at all times²¹. It includes the procedures for transaction, actual business operations, system applicable to the banking operations. If the bank intends to introduce new information system to all its products, they need to clarify with the SC for the determination of the system so as to comply with the shariah requirements.

As an illustration, we may refer to the issue of securitization on the sale and purchase of vehicles as practiced by Bank Islam Malaysia Berhad (BIMB)²². Bank requires the customer to charge his vehicles as a security so that in the case of default payment, it may take that vehicle. This is based on the view of *madhhab* Shâfi'î upon hadith of Prophet S.A.W. whereby the Prophet allowed the companion to ride the animal and to take its milk which is charged to him²³. The SC follows that opinion and therefore it is permissible for the bank to make condition for their customer so that the car will be a security for the vehicle financing offered to him.

In addition, we may refer also to the SC's decision on the permissibility of *Bay' al-Ma'dūm*²⁴. This specifically refers to the issues of warrants and futures contracts on crude palm oil. The *madhhab* Shâfi'î pronounced that the subject matter of the sale must be existent at the time of the contract and therefore *Bay' al-Ma'dūm* is prohibited. This is based on *hadith* whereby Prophet S.A.W. prohibited a sale of an unborn baby camel and a sale of non-existing object. In this regard the SC takes the Ḥanbalī's view. *Madhhab* Ḥanbalī did not require the subject matter to be existed but the most important thing was the contract did not contain element of *gharār* or uncertainty, which is forbidden by shariah. They interpret the above hadith as to refer to the issue of uncertainty of the subject matter. Ibn Qayyim and Ibn Taymiyyah supported this view²⁵. Therefore the bank must ensure that banking operations related with the warrants and future contracts on crude palm oil must be free or lack of element of uncertainty.

²¹ Section 20 (a) of BNM/GPS 1.

²² Mohd Nazri Chik and Nasrudin Yaakub (2004). "Aplikasi Teori 'Usul AL-Fiqh Dalam Keputusan-keputusan Majlis Pengawasan Shari'ah BIMB 1983-2004". *Prosiding Seminar Usul Fiqh*. Kuala Lumpur: Kolej Universiti Islam Malaysia. p. 108.

²³ Hadith narrated by *al-Dâruqutnī* and *al-Hâkim*.

²⁴ n.a. 2002. *Resolutions of the Securities Commission Sharī'ah Committee*. Kuala Lumpur: Perpustakaan Negara Malaysia. pp. 23-25.

²⁵ Ibn Qayyim (1991). *I'lām al-Muwaqī'īn*. Beirut: Dār al-Kutub al-Ilmiyyah. Vol 2, pp 8-10.

General Tasks and Duties

The SC also will deal with certain general duties and tasks relevant to their job scope and this includes to assist the related parties on shariah matter for advice upon request²⁶ and to determine the *zakât* policy of the banks. Some Islamic banks pay *zakât* for their depositors and some bank requires their depositors to pay *zakât* by themselves It depends on the SC's approach to the policy of *zakât*.

For instance, we may look at the BIMB's policy of *zakât*. The SC of BIMB will revise the policy of distribution of *zakât* and approve the amount of *zakât* including *zakât asnâf* that should be paid by the bank. BIMB paid *zakât* on behalf of all their depositors. This policy actually was adopted from the practice of Faisal Islamic Bank Egypt. BIMB pays *zakât* for all their depositors based on the concept of *shakhṣiyyah I'tibâriyah*²⁷.

FUTURE CHALLENGE

In discussing the future challenge of the SC, this paper will specifically refers to the issues of globalization. In Arabic term, the globalisation is called '*al-'Awwlamah*' or '*al-'Ālamiyyah*'. The word '*al-'Ālamiyyah*' is referred to an openness and enthusiasm in knowing other nations around the world²⁸. The impact of globalisation studied number of key areas includes economic globalisation, technological globalisation and cultural globalisation. Globalisation will give a great impact on the economic system of a country such as drastic development in privatization of companies in the country, deregulating of market system, and the market will be efficient, competitive and controlled by the free-trade regulation²⁹.

The effect of economic globalisation may increase the numbers of foreign players from all over the world to Malaysian market business. The coming of these global players will affect the practice of Islamic financial institutions in terms of various understanding to the teaching of their *madhhab*.

²⁶ Section 20 (d) of BNM/GPS 1.

²⁷ *Shakhṣiyyah I'tibâriyah* known as body corporate or company.

²⁸ Mohd Salleh, H. & Musa, A. H (1999) "Gejala globalisasi: Peranan dan Tanggungjawab Institusi Ilmu". *Jurnal Pendidikan Islam*. 8 (3), 33-46.

²⁹ Grzybowski, C., *Civil society's responses to globalisation*. <http://www.Corpwatch.org/trac/feature/planet/gr-twn.html>, 2 May 2006.

Based on Malaysian experience so far in the implementation of Islamic banking, the problem of different of opinions amongst the *madhāhib* is not so significant. However, by referring to the issue of globalisation, Malaysia has granted license to foreign players to set up their Islamic banks in Malaysia. The coming of this foreign bank may affect Islamic banking operations in Malaysia especially when Kuwait Finance House, Saudi Arabia's Al Rajhi Banking & Investment Corporation and a consortium led by Qatar Islamic Bank Al Rajhi established their Islamic Banks here. All those companies are coming from different countries and they are practicing different *madhhab*. The legal frameworks of the IBA, BAFIA and CBA do not describe which *madhhab* is applicable and the definition of Islamic banking business is too general.

For example, the status of *Bay' al-'Īnah* products as widely used by the Islamic banks in Malaysia. The SC in Malaysia decided to accept the Shāfi'ī's view and therefore *Bay' al-'Īnah* is permissible. *Bay' al-'Īnah* concept is actually not acceptable by many *fuqahā'* and scholars in the Middle East. The implication is that what could be happened if these foreign Islamic Banks declared that the *Bay' al-'Īnah* product is *ḥarām* and forbidden in Malaysia. This will lead to many negative impacts and bad image to the development of Islamic banking in Malaysia.

Beside, in order to ensure the flexibility of Islamic banking products in Malaysia, each Islamic financial institution should be creative enough to introduce new products, which is outside the territorial of *Bay' al-'Īnah* such as credit card under the concept of *al-Kafālah* which is acceptable not only by *madhhab* Shāfi'ī but also by other *madhāhib*. Now there is a movement by Islamic financial institutions to depart from *Bay' al-'Īnah*. The current scenario is that a lot of new products have been introduced under the various concepts in the market.

The technological innovation in the globalisation era allows people in exchanging ideas, services as well as products and at the mean time it speeds up the production³⁰. In the era of technological globalisation many Islamic financial institutions introduced a new information technology system in their banking operations. Through this system the banking operations will be more effective, faster, customer friendly and IT savvy.

For example Bank Muamalat Malaysia Berhad (BMMB), a second full fledge Islamic banks in Malaysia introduced a new information technology system to its retail banking

³⁰ Hallak, J. (2000), "Globalisation and its impact on education". In Mebrahtu, T., Crossley, M. & Johnson, D.(Eds.). *Globalisation, Educational Transformation, and Societies in Transition*. United Kingdom: Symposium Books. p.22-24.

operations namely Triton. This system will cover the whole operations of the financing process from offering of the financing facility stage until the process of recovery. It includes the process of credit assessment and evaluation, documentation, financing approval, business transactions, default and recovery and monitoring and supervision. Through analyzing the system from the shariah perspective, the SC of the BMMB has approved the Triton system to be operated to the whole operation of retail banking business with some modifications for the purpose of shariah compliance. In facing the trend of information technology system, it could not be denied that the SC should apply lenient and liberal approach without forgetting the integral part of shariah principles.

Globalisation also will lead to the invention of more new and innovative products in the market such as derivative futures and option forwards sales, *muqāradah* bond, *Ijārah* sukuk and etc. For example, we may refer to the permissibility of *Bay' al-Dayn* or Sale of Debt to a third party. The Ḥanafī *madhhab* viewed that the *Bay' al-Dayn* or selling of debt to a third party is not permissible because of the risk cannot be overcome in the context of debt selling. The Shāfi'ī *madhhab* was of the opinion that selling of the debt to third party was allowed if the debt was guaranteed³¹ and was sold in exchange for goods that must be delivered immediately. When the debt is sold it should be in cash or tangible assets as agreed. The SC accepted the Shāfi'ī's view by looking to the practicality of such transaction in the modern days and therefore sale of debt to a third party is permissible such as the products of Letter of Credit for Trade finance business.

In facing the challenges of globalisation, the SC of each Islamic financial institution in Malaysia needs to be creative enough and at the same time follows the basic *fiqh* methodology laid down by *fuqahā'* before they may come out with certain resolution. This genuine methodology is used in order to ensure the Islamicity and viability of Islamic banking and finance in the eyes of the shariah.

³¹ al-Syirazi. (n.d). *Al-Muḥadhdhab*. Beirut: Dar A-Fikr, Vol. 1, p 262.

CONCLUSION

The SC plays very important roles to the development of Islamic banking and finance in Malaysia. Its establishment is a legal requirement for each Islamic financial institution in Malaysia as provided under IBA, BAFIA and CBA. The shariah frameworks of the SC will only confine to the matters in Islamic law of transaction or *fiqh mu'âmalât*.

In strengthening the governance of the SC, BNM has circulated BNM/GPS 1 i.e The Guidelines on the Governance of the Shariah Committee for the Islamic Financial Institutions. BNM/GPS1 provides very clear roles and responsibilities of the SC including rules on membership of the SC, appointment, qualifications, composition, disqualification, procedures, resignation, termination and etc.

Generally the main duties and responsibilities of the SC are to advise the Islamic financial institutions on the shariah compliance to the concept and structure of new and existing Islamic banking products and services, to ensure the documentations used by the Islamic financial institutions meet the shariah requirements, to assist related parties on shariah matters for advice upon request, to advise the Islamic financial institutions regarding with the business operations in order to ensure that it complies with shariah principles at all times and general tasks and duties.

Based on the foregoing discussion, we may conclude that the SC as a modern institution of fatwa plays major roles to the development of Islamic banking and finance in Malaysia. Even though there are various fatwa institutions such as National Fatwa Committee and State Fatwa Committee for each respective state, the SC has their own unique features whereby they only produce resolution or opinion regarding with matter under the *fiqh mu'âmalât*. The decision is binding and should be implemented by the respective Islamic financial institutions. The SC is a unique and effective institution of fatwa in order to solve any contemporary issue related to Islamic banking and finance and consequently will further enhance the growth of Islamic banking industry in Malaysia.

