

Islamic Finance Litigation: Problems within the Malaysian Civil Courts Structure

(Litigasi Kewangan Islam: Permasalahan di dalam Struktur Mahkamah Sivil Malaysia)

HIZRI HASSHAN

ABSTRACT

Islamic finance litigation is an area of practice which involves application of Shari'ah law, civil legislations, rules of court and the common law. In the year of 2003, the Malaysian judiciary has taken an administrative step to establish a Muamalat Division at the Kuala Lumpur High Court for adjudication of Islamic financial cases. However, this research observes that the jurisdiction of the said Division is limited to certain types of legal proceedings and confined to certain territorial limit. Moreover, the Rules of Court 2012 contain no provisions to regulate Islamic finance litigation proceedings. Hence, this research will attempt to identify and critically analyse the problems and flaws with the Malaysian judicial framework in relation to Islamic finance cases.

Keywords: Islamic finance; dispute resolution; litigation; judicial framework

ABSTRAK

Litigasi kewangan Islam adalah satu bidang amalan yang melibatkan pemakaian undang-undang Shari'ah, perundangan sivil, kaedah-kaedah mahkamah dan undang-undang lazim Inggeris. Pada tahun 2003, badan kehakiman Malaysia telah mengambil langkah pentadbiran untuk menubuhkan Bahagian Muamalat di Mahkamah Tinggi Kuala Lumpur bagi pelupusan kes pertikaian kewangan Islam. Bagaimanapun, kajian ini memerhatikan bahawa bidang kuasa Bahagian Muamalat tersebut adalah terhad kepada beberapa jenis prosiding perundangan dan terikat dengan had bidang kuasa wilayah. Tambahan lagi, Kaedah-Kaedah Mahkamah 2012 tidak mengandungi peruntukan khusus bagi mengawal selia prosiding litigasi kewangan Islam. Oleh itu, kajian ini akan cuba mengenal pasti dan menganalisa secara kritikal masalah dan kecacatan di dalam kerangka kehakiman Malaysia berhubung kes-kes kewangan Islam.

Kata kunci: Kewangan Islam; penyelesaian pertikaian; litigasi; kerangka kehakiman

INTRODUCTION

The development of an effective dispute resolution mechanism is one of the key criteria for the growth and expansion of Islamic banking and finance industry. In Malaysia, a great emphasis is given towards strengthening the legal and regulatory framework, Shari'ah compliance and procedural mechanism to provide certainty, uniformity and predictability of dispute resolution outcomes. Despite the existence of various alternative dispute resolution (ADR) options, litigation through court process is still the popular mode among the contracting parties in this country. As such, this research will examine the adequacy of the existing litigation procedure and judicial framework for the adjudication and disposal of Islamic finance cases.

DUAL JUDICIAL SYSTEM IN MALAYSIA

In Malaysia, a dual judicial system is adopted whereby the civil court co-exists with the Shari'ah court. Both the civil and Shari'ah courts are creatures of statutes and

derive their powers and jurisdiction from statutes, namely the *Federal Constitution*, the Acts of Parliament and the State Enactments as the case may be.

Article 121(1) of the *Federal Constitution* provides for the establishment of the civil court with its powers and jurisdiction to be conferred by federal laws while *Paragraph 1 of List II of the Ninth Schedule of the Federal Constitution* grants the power to the State Legislature to pass laws for the constitution, organisation and procedure of Shari'ah court. Unlike the civil court, the Shari'ah court only has jurisdiction over persons professing the religion of Islam and on Islamic law pertaining to personal and family law, succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts, *wakafs* and other matters as provided in *Paragraph 1 of List II of the Ninth Schedule of the Federal Constitution*. Due to the existence of dual court system, the Parliament has made constitutional amendment in year 1988 by introducing *Article 121(1A)*¹ to the *Federal Constitution* with the object to avoid potential conflict of jurisdiction between the Shari'ah court and the civil court which had occurred in a number of cases prior to the amendment.²

JURISDICTION OF CIVIL COURT IN RESPECT OF ISLAMIC FINANCE CASES

Islamic banking and finance is not only subject to the Shari'ah laws but also governed by the federal laws passed by the Parliament such as the contract law, land law, company law and other laws of general application. As such, there was an issue raised as to whether Islamic banking and finance should fall under the jurisdiction of Shari'ah court or civil court. This jurisdictional issue was for the first time brought up in an unreported case of *Bank Islam Malaysia Bhd v. Adnan Bin Omar (Civil Suit No: S3-22-101-91)*³ whereby a preliminary objection was raised by Adnan (the defendant) challenging the jurisdiction of civil court in hearing this Islamic finance case. The judge in the said case (NH Chan J), in dismissing the preliminary objection, ruled that the civil court shall have the jurisdiction to hear Islamic financial disputes and Islamic commercial cases considering Islamic finance matters fall under the *List I of Ninth Schedule* of the *Federal Constitution*.⁴

Subsequently, in the case of *Mohd Alias Ibrahim v. RHB Bank Berhad & Anor*⁵, the High Court has re-affirmed this position by explaining as follows:

[62] In Malaysia, Islamic law falls under the jurisdiction of the Syariah Courts which derive its power under a State law enacted pursuant to art. 74(2) of the Federal Constitution following para. 1, List II, Ninth Schedule to the Constitution (State List).

[63] However, in cases involving banking transactions based on Islamic principles, it is the civil courts that will have jurisdiction to hear these matters.

[64] The reason is that the law relating to finance, trade, commerce and industry falls within the ambit of the Federal List in List I, Ninth Schedule to the Federal Constitution.

In terms of court procedure applicable to Islamic finance cases, the Court of Appeal in the case of *Bank Kerjasama Rakyat Malaysia Bhd v. EMCEE Corporation Sdn Bhd*⁶ has also held that the rules of civil court shall apply. According to Tun Abdul Hamid Mohamad (the former Chief Justice)⁷, the Shari'ah court is not considered as competent forum to adjudicate Islamic banking and finance cases due to the following reasons:

1. The disputes over Islamic finance transactions do not involve Islamic law only but also application of statutes under civil law such as *National Land Code*, *Companies Act 1965*, *Contracts Act 1950* and etc.
2. The power of enforcement and remedies available to Shari'ah court are very limited. The Shari'ah court cannot grant injunction, specific performance or declaration. Some modes of enforcement of judgments such as bankruptcy and winding up are not available at Shari'ah court.
3. Shari'ah courts are State courts independent of each other and with their own appellate courts. While the civil courts have only one Court of Appeal and

one Federal Court, there are 14 Shari'ah Appellate Courts in the country. This structure will lead to confusion in the law when the Shari'ah Courts of Appeal give contradictory judgments. The doctrine of *stare decisis* is not applied in Shari'ah courts.

4. Islamic finance customers are not confined to Muslims but include non-Muslims and corporations.

Based on the foregoing, it is now trite that the civil court shall have the competent jurisdiction to adjudicate on Islamic financial disputes. However, by having Islamic finance matter within the ambit of the civil court, it is not an indication that the civil court system is flawless. This research identifies some structural problems within the civil court system which may affect the proper and effective adjudication of Islamic finance cases.

STRUCTURE, POWER & JURISDICTION OF CIVIL COURT

Before looking into the structural problems of civil court in dealing with Islamic financial disputes, this research will first lay down the essential structure of the civil court. By having proper understanding on how the civil court functions, then it will be easier to explain the problems faced by judges, lawyers and litigants in Islamic finance litigation.

STRUCTURE AND HIERARCHY OF CIVIL COURT

Generally, the civil court may be classified into two main categories namely the 'superior court' and the 'inferior court'. The superior courts consist of the High Court, the Court of Appeal and the Federal Court, which is the apex of the judicial system.⁸ The inferior courts consist of the Sessions courts and the Magistrates' courts. The essential distinction between superior courts and inferior courts are found in relation to their jurisdiction.⁹

The superior courts, are regarded as courts of unlimited jurisdiction which have the inherent judicial powers to grant any reliefs and remedies. The judgment of superior courts is recognised in selected foreign jurisdictions subject to the provisions appeared in the statute for reciprocal enforcement of judgments between the countries. On the other hand, the inferior courts have a limited jurisdiction as expressly provided by the laws and subject to certain monetary threshold, territorial limitation and other restrictions. The powers and jurisdiction of the superior courts are governed by the *Courts of Judicature Act 1964* (hereinafter referred to as "CJA") while the powers and jurisdiction of the inferior courts or subordinate courts are provided in the *Subordinate Courts Act 1948* (hereinafter referred to as "SCA").

In addition, both the superior courts and inferior courts within the civil court system are structured according to the following judicial hierarchy:

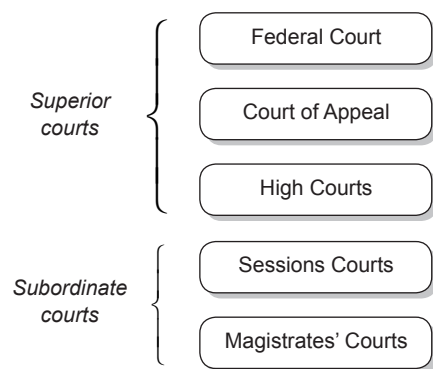


CHART 1. Hierarchy of civil courts in Malaysia

The rationale of having hierarchy of civil courts are threefold. Firstly, it provides for right of appeal to the unsuccessful litigants. By having a court hierarchy, this will give opportunity to the aggrieved party or unsuccessful litigant to file appeal to a higher court against the decisions of first instance court. The appeal process offers room to parties to further ventilate their arguments on questions of fact or law which may be wrongly decided by the lower court.

Secondly, it caters for specialisation and efficient distribution of workloads.¹⁰ Under the judicial hierarchy of civil courts, it appears that the lower courts are entrusted to adjudicate simple cases while superior courts will handle complex cases with substantial amount of claim and complicated legal issues.

Thirdly, it ensures certainty and consistency of laws by adopting the doctrine of *stare decisis*. A judicial hierarchy is important for the operation of doctrine of judicial precedent or *stare decisis*. Under this doctrine, a lower court is bound by the decision of a higher court. The decision of Federal Court as highest court will be binding on all other courts below it. The rationale of having this doctrine has been explained in the case of *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal*.¹¹ Further, this research also observes that the doctrine of *stare decisis* has been applied by civil court in Islamic finance proceedings. The Court of Appeal in the case of *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor and Other Appeals*¹² has held that:

[38] From the above cases, it is clear that the validity and enforceability of the BBA contract had been ruled upon by the superior courts. It is trite law that based on the doctrine of *stare decisis*, a decision of a superior court is binding on all courts below it. The importance of this principle must not be taken lightly.

CONSTITUTION AND COMPOSITION OF CIVIL COURTS

Since courts are creatures of statutes, its constitution and powers must be expressly provided in *Federal Constitution* and the federal laws.

Federal Court The Federal Court being apex court in Malaysia is established pursuant to Article 121(2) of the *Federal Constitution* and it shall consist of a Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judges of the High Court of Malaya and High Court of Sabah and Sarawak and four other judges and such additional judges as may be appointed by Yang di-Pertuan Agong.¹³ Every proceedings in the Federal Court shall be heard and disposed of by three Judges or such greater uneven number of Judges as the Chief Justice may determine.¹⁴ In the absence of Chief Justice, the most senior member of the Federal Court shall preside the proceedings.¹⁵ The proceedings at the Federal Court is governed by the *Rules of Federal Court 1995*¹⁶ and practice direction. No appeal shall be brought to the Federal Court except with prior leave of the Federal Court on novel issue of law or question of great importance to the public.

Court of Appeal The setting up of the Court of Appeal on 24th June 1994 was made through constitutional amendment whereby Article 121(1B) was introduced to the *Federal Constitution*. The Court of Appeal is the second highest court in Malaysian judicial hierarchy with appellate jurisdiction to hear both criminal and civil appeals. The Court of Appeal shall consist of a chairman who is known as the President of the Court of Appeal (PCA) and, until the Yang di-Pertuan Agong by order otherwise provides, of ten other judges.¹⁷ The proceedings at the Court of Appeal is governed by the *Rules of Court of Appeal 1994* and the practice direction.

High Courts There are two High Courts in Malaysia of co-ordinate jurisdiction and status, namely one in the States of Malaya, which shall be known as the High Court in Malaya and one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak.¹⁸ Each of the High Courts shall consist of a Chief Judge and not less than four other judges; but the number of other judges shall not, until the Yang di-Pertuan Agong by order otherwise provides, exceed (i) in the High Court in Malaya, forty-seven (47); and (ii) in the High Court in Sabah and Sarawak, ten (10).¹⁹

The jurisdiction of High Court is limited to the respective local jurisdiction as provided in section 23 of the CJA. Further, the High Court shall have special jurisdiction²⁰ to adjudicate the following civil cases:

1. Divorce and matrimonial cases;
2. Admiralty;
3. Bankruptcy and company cases;
4. Appointment and control of guardians of infants;
5. Appointment and control of guardians of disabled persons and their estate; and
6. Grant of probates and letter of administration.

As a superior court, the High Court has unlimited jurisdiction to try civil cases and possess the appellate

jurisdiction over decisions made by the subordinate courts²¹ and may exercise judicial review against acts or omission of government departments and the legislative bodies. All civil proceedings at the High Court are governed under the *Rules of Court 2012*.

Sessions Courts Under section 59 of the *Subordinate Courts Act 1948* (SCA), the Yang di-Pertuan Agong may by order constitute so many Sessions Courts as he may think fit and shall have power, if he thinks fit, to assign local limits of jurisdiction thereto. Sessions Court Judges must be appointed among members of the Judicial and Legal Service Department.²² The Sessions Court have the following civil jurisdiction²³:

1. Unlimited jurisdiction to try all actions and suits pertaining to running down cases, landlord and tenant, and distress;
2. jurisdiction to try all other actions and suits where the amount in disputes or the value of the subject matter does not exceed RM1 million;
3. jurisdiction to try all actions for specific performance or rescission of contracts or for cancellation or rectification of instruments, within the jurisdiction of civil court.

In addition, with the latest amendment to the SCA, the Sessions Court is now empowered to grant remedies of injunction and declaration.²⁴ Previously, those remedies can only be granted by the superior courts. These remedies are provided in the *Specific Reliefs Act 1950*. However, this research observes that not all Sessions court judges can exercise such power. As such, section 65(5) of SCA must be read together with the *Chief Registrar Circular No. 1 of Year 2013* dated 27/2/2013 whereby only Sessions Court Judges (Grade JUSA) can grant injunction and declaration while Sessions Court Judges (Grade L52 or L54) cannot grant such remedies. In the State of Selangor for instance, any application for injunction or declaration must be filed at Shah Alam Sessions court which is presided by a Judge (Grade JUSA) and cannot be filed at other Sessions courts such as in Bangi, Sepang, Kuala Kubu or Selayang. All civil proceedings at Sessions courts are governed by the *Rules of Court 2012*.

Magistrates' Courts Magistrates' courts are established by the Yang di-Pertuan Agong pursuant to section 76 of the SCA. There are two types of Magistrates namely First Class Magistrates and Second Class Magistrates.²⁵ A Second Class Magistrate shall only have jurisdiction to try civil actions where the plaintiff seeks to recover debt or damages not exceeding RM10,000.00.²⁶ On the other hand, the First Class Magistrate shall have jurisdiction to try all civil claims where the amount in dispute or value of the subject matter does not exceed RM100,000.00.²⁷ All civil proceedings at the Magistrates' courts are governed by the *Rules of Court 2012*.

CLASSIFICATION OF COURT'S JURISDICTION

Besides the structure, composition and hierarchy of court, another important feature within civil court system is the jurisdictional aspect of the court. The word "jurisdiction" literally means "authority." But, in legal usage, "jurisdiction" refers to "power of the court to hear and determine a cause or adjudicate or exercise any judicial powers in relation to it."²⁸ This research categorises court jurisdiction into four (4) main classifications as follows:

JURISDICTION BASED ON MONETARY LIMIT

Under this first classification, the jurisdiction of court will be determined based on monetary threshold as provided in the written legislation. The court cannot award damages in excess of monetary limit assigned to it. For a plaintiff to file legal suit for monetary claim, he or she must ensure that the amount of claim falls within the monetary jurisdiction assigned to the relevant court. For instance, for a recovery of debt amounting to RM45,000.00, the suit must be filed at the Magistrates' court since the maximum amount of damages which can be granted by Magistrates' court is RM100,000.00. In the event that the value or amount of claim exceeds the monetary jurisdiction of Magistrates' court, then the claim must be filed at a higher court who has such monetary jurisdiction i.e. either Sessions Court or High Court. By having this monetary jurisdiction, it appears that the lower court will adjudicate on smaller claims while higher court will decide on larger amount of claim.

JURISDICTION BASED ON TERRITORIAL OR GEOGRAPHICAL LIMITATION

Besides monetary limitation, each civil court has its own territorial jurisdiction. This means that each court can only hear cases or disputes arising within a designated area or place.²⁹ For example, if a dispute takes place in Peninsular Malaysia, the action cannot be filed in Sabah or Sarawak. The *Federal Constitution* has provided two (2) territorial jurisdiction for High Courts namely under High Court of Malaya for all states in Peninsular Malaysia and High Court of Sabah and Sarawak for cases in East Malaysia.³⁰ If a court proceeds to adjudicate on dispute outside its territorial jurisdiction, the entire proceedings may be invalidated. For the subordinate courts, each court shall have their own local limit of jurisdiction as prescribed by order of Yang di Pertuan Agong.³¹ Despite the absence of order from Yang di Pertuan Agong to set the local limit for lower courts, the local limit is currently provided administratively pursuant to the *High Court Practice Directions No. 2 and No. 4 of 1993*.³²

JURISDICTION BASED ON SPECIFIC JUDICIAL FUNCTION

For this third category, there are several sub-categories of jurisdiction based on specific function of the court as provided in statutes.

Original Jurisdiction All courts (other than Court of Appeal) have their respective original jurisdiction. This jurisdiction covers the right to hear and adjudicate cases by way of trial when the case is brought to court for the first time. Under this original jurisdiction, the court is concerned with the finding of fact and has the discretion to determine weightage of the evidence, credibility of the witnesses and admissibility of the documentary evidence adduced. The Court of Appeal does not have original jurisdiction and only possess appellate jurisdiction.

However, for the Federal Court, its original jurisdiction has been provided under Article 128 of the *Federal Constitution* whereby the Federal Court will sit as court of first instance to decide on:

1. any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and
2. disputes on any other question between States or between the Federation and any State.

Appellate Jurisdiction The appellate jurisdiction is a special jurisdiction granted to superior courts only and shall be exercisable after appeal has been made from the court inferior to it. At appeal stage, the appellate court will not be bothered with the taking of evidence but will confine its function to see whether the lower court judge has erred in fact and/or in law in arriving at the decision. The appellate court will only decide based on the records and notes of evidence as prepared by the inferior courts. Nevertheless, subject to certain strict conditions as laid down in the case of *Ladd v. Marshall*³³, the appellate court may admit fresh and further evidence which was not available at the court of first instance.

Revisionary or Supervisory Jurisdiction This type of jurisdiction is vested with the High Court to revise orders, rulings or decisions made by Magistrates' court or Sessions court in both criminal and civil proceedings.³⁴ Revision is different from appeal process as the court in exercising its revisionary jurisdiction must confine itself to the record of proceedings whereas under appellate jurisdiction, the appellate court may allow reception of fresh and new evidence. Revisionary powers may be exercised by High Court on its own motion in order to correct any injustice despite there is no appeal by the unsuccessful party.³⁵

Advisory Jurisdiction Advisory jurisdiction is a special jurisdiction conferred on the Federal Court only pursuant to Article 130 of the *Federal Constitution*. Under this advisory jurisdiction, the Federal Court will pronounce its advice and opinion to Yang di-Pertuan Agong on any question referred to by the Yang di-Pertuan Agong as to the effect of any provision of the Constitution which has arisen or appears likely to arise.

JURISDICTION BASED ON SPECIALISED AREA OF LAW AND CERTAIN RELIEFS

Under the fourth category of the court's jurisdiction, this jurisdiction is granted to certain courts to adjudicate of specialised area of law and grant certain reliefs. For instance, the High Court is given exclusive jurisdiction to adjudicate on matters pertaining to divorce and matrimonial causes, admiralty, bankruptcy and company law, probate and administration of estates.³⁶ The disputes pertaining to the above areas of law cannot be adjudicated by Sessions courts or Magistrates' courts. Further, the High Court is also given additional powers to deal with matters pertaining to prerogative writs such as *mandamus*, *habeas corpus*, *certiorari* as well as rights conferred by Part II of the Federal Constitution.³⁷ Besides High Court, the Sessions courts are also given special jurisdiction to try all actions and suits in respect of motor vehicles accidents, landlord-tenant disputes, distress and suits for specific performance, rectification and rescission³⁸. With the existence of special jurisdiction to certain courts, the efficiency of litigation process is increased.

PROBLEMS WITH THE EXISTING CIVIL COURT STRUCTURE IN ADJUDICATING ISLAMIC FINANCE CASSES

From the aforesaid, this research identifies that the current structure of civil court may not be adequate to cater for effective dispute resolution involving Islamic finance cases. The problems within the existing court structure are *inter alia* as follows:

ABSENCE OF SPECIAL JURISDICTION ASSIGNED TO A PARTICULAR COURT TO DEAL WITH ISLAMIC FINANCIAL DISPUTES

Islamic banking and finance is a special area of law which involves application of both Shari'ah law and civil law. Justice Suriyadi (now FCJ) in the case of *Arab-Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd*³⁹, has once described that Islamic banking cases involve the marriage of two distinctly diverse worlds, namely the Islamic world and the common-law sourced civil law, both protected and enabled by the *Federal Constitution*. The contractual transaction are governed by Shari'ah principles and also subject to the civil legislations. Hence, this research views that there should be special jurisdiction created

by the federal laws whereby Islamic banking and finance cases should be assigned to one particular court within the judicial hierarchy.

Upon perusing the provisions in *Courts of Judicature Act 1964*, it appears that special jurisdiction is created only for cases involving divorce and matrimonial causes, admiralty, bankruptcy and company law, probate and administration of estates. Those cases fall under exclusive jurisdiction of the High Court. Due to the existence of the special jurisdiction, those High Courts exercising such jurisdiction are called as Family court, Bankruptcy court and Companies court. Over the years, the High Court and their judicial officers are able to develop proper system for disposal of cases, improve court practice and increase efficiency. There are special rules such as *Bankruptcy Rules 1969* and *Winding Up Rules 1972* being made to govern the proceedings in those areas of practice. All the forms, precedents and templates have been standardised to facilitate judges and lawyers in the conduct of the legal proceedings. Those courts become specialised courts and the judges have been adequately trained in those areas of law.

Even at Sessions courts level, the provisions in *Subordinate Courts Act 1948* clearly reveal that the Parliament intended Sessions courts to have exclusive jurisdiction to deal with motor accident cases, landlord-tenant disputes and distress. Hence, those Sessions courts judges are well experienced in those areas since such disputes in those selected areas of law have been argued over and over at the Sessions courts level.

However, for Islamic finance, it is the finding of this research that there is no designated court being assigned with exclusive jurisdiction under the federal laws to adjudicate on Islamic financial disputes despite the fact that this industry has been developed in the country for almost 30 years ago.⁴⁰ This research observes that Islamic finance cases are filed at all levels of civil courts namely Magistrates' courts, Sessions courts and High Courts based on amount of claim involved even though not all the courts have dedicated judges who are well versed in Islamic law. As a result, this research views that this situation has caused difficulty towards development of a proper procedure to regulate Islamic finance litigation. Until todate, there is no special provision inserted in the *Rules of Court 2012* to set out the procedures for Islamic finance litigation. Some judges and lawyers may not aware of the various guidelines issued by Bank Negara Malaysia and Shari'ah standards to be issued under *Islamic Financial Services Act 2013*.

LACK OF JURISDICTION AND AUTHORITY OF LOWER COURT JUDGES TO DEAL WITH ILLEGALITY AND SHARI'AH NON-COMPLIANCE ISSUES

Previously, the Shari'ah court has been criticised as not competent to adjudicate on Islamic finance cases since Shari'ah court has no jurisdiction to grant remedies such

as injunction, declaration, rescission and rectification.⁴¹ However, after analysing the jurisdiction and structure of civil court, this research identifies that the lower courts such as Magistrates' courts and Sessions courts judges (Grade L52 and L54) are also not well equipped with the jurisdiction to grant injunction, declaration, rescission and rectification. These remedies or reliefs are crucial in dealing with issues of illegality and Shari'ah non-compliance.

In the case of *Majlis Amanah Rakyat v. Bass Bin Lai*⁴², Justice Hamid Sultan has stated his view that the proper procedure to adjudicate Shari'ah non-compliance issues is by filing application pursuant to the *Specific Relief Act 1950* for remedies such as declaration, rescission, rectification and etc. However, it must be noted that the Magistrates' courts and Sessions courts judges (Grade L52 and L54) have no jurisdiction to grant such reliefs. The provisions in CJA and SCA (read together with the Chief Registrar's circular⁴³) clearly indicate that only the High Court and Sessions courts judges (Grade JUSA) have the powers and jurisdiction to grant remedies of declaration, rescission, rectification and injunction. Thus, when Shari'ah non-compliance issues are raised before Magistrates' courts and Sessions courts judges (Grade L52 and L54), such issues cannot be effectively adjudicated by those courts. As a result, the proceedings may have to be transferred to court who has the competent jurisdiction. The process for transfer of proceeding will surely delay the disposal of the cases and additional costs will be incurred by litigants.

Looking at this scenario, it may be concluded that Islamic finance cases are not fit to be filed at Magistrates' courts and should not be heard by Sessions courts judges (Grade L52 and L54). As an alternative, this research proposes that all Islamic finance cases should be filed at Sessions courts and adjudicated by Sessions courts judges (Grade JUSA) only who has qualification in both Shari'ah law and civil law provided that the amount in dispute does not exceed RM1 million. For cases where the amount exceeds RM1 million, the cases should be filed at the High Court.

TRADITIONAL COURT STRUCTURE BASED ON TERRITORIALITY HINDERS ESTABLISHMENT OF SPECIALISED COURT TO ADJUDICATE ISLAMIC FINANCIAL MATTERS

This research identifies that the Malaysian court has been set up based on territoriality i.e. a court is established in a particular States or districts pursuant to the "local limit" as set out pursuant to the *High Court Practice Direction No. 2 and 4 of 1993*.⁴⁴ This traditional court structure focuses on geographical location of court with the intent to provide easy access to public and the litigants. The superior courts are commonly found in big cities while the lower courts are set up in smaller towns and districts. The concept of *forum conveniens* is applied by Malaysian courts whereby the court may transfer a case

to another court of co-ordinate jurisdiction in different State or area which is more convenient to the litigants and witnesses.⁴⁵

Nonetheless, this research discovers that the existing structure may hinder the proposal of having a specialised court dealing with Islamic finance cases. In order to have a specialised court, there is a need to channel high volume of Islamic finance cases to one particular court in certain districts. This will provide sufficient volume of cases to be disposed of by the specialised court. Perhaps, in one State, there should be only one (1) or two (2) courts dealing with Islamic finance cases. For instance, in Selangor, this research proposes that one Sessions Court in Shah Alam may be given special jurisdiction to deal with Islamic finance cases. With the improved public transportation and current infrastructure linking the districts, there is no difficulty for the public and litigants to gain access to courts.

In addition, it will not be prudent to set up specialised court in all courts in various districts since the volumes of Islamic finance cases in smaller towns are quite limited. Further, in terms of providing training to the judges in Islamic finance, it will be easier to train lesser number of judges compared with hundreds of judges and judicial officers all over Malaysia. Hence, there is a need to reform the existing court structure whereby a special court dealing with Islamic finance must be set up based on their functionality rather than territoriality.

According to Elaine Mak (2008)⁴⁶, in order to make the judicial organisation compatible with requirements of expertise, the allocation of jurisdiction based on subject matter is required. An analysis of the developments in the Netherlands, France and Germany revealed that the court structure based on functionality rather than territoriality has been introduced as part of judicial modernisation process in European countries⁴⁷. This research views that the Malaysian judiciary may embark on the modernisation process to restructure the setting up of courts in this country based on specialisation especially in Islamic finance area.

THE INADEQUACY OF EXISTING PROCEDURAL LAWS TO REGULATE LITIGATION PROCEEDINGS INVOLVING ISLAMIC FINANCE IN CIVIL COURT

The procedural law or adjective law is very crucial in order for Islamic financial institutions and their customers to gain access to the court of law to vindicate their rights and seek justice.⁴⁸ Procedural law is *lex fori* or law of the forum which litigants must comply with. At this juncture, it must be emphasised that the Malaysian judicial system follows the common law adversarial system of procedure as distinct from the inquisitorial system applied in civil law jurisdiction.⁴⁹ In adversarial system, the judge will adjudicate both questions of fact and law.⁵⁰ The judge is required and expected to hold balance between the contending parties without himself taking part in their disputations.⁵¹ Hence, the judge will

make adjudication based on issues, facts, pleadings, affidavits and submissions as presented by counsels for both litigants. In the event that both counsels are not well versed in Islamic law and/or Islamic finance practice, they may not be able to assist the court to arrive at the correct finding which is in line with the Shari'ah requirements.

In the case of *Bank Kerjasama Rakyat Malaysia v. EMCEE Corporation Sdn Bhd*⁵², the Court of Appeal held that the same laws and legal procedure will be applied for Islamic banking and conventional banking. But, with due respect, this research maintains the view that the Islamic finance cases should be litigated with some modifications to the procedure normally followed by conventional financial institutions. The relevant modifications should be clearly spelt out. According to Surianom Miskam et al. (2014), the time has come for relevant authority to set special procedure in dealing with Islamic finance cases in the civil court to ensure that the requirements of law and Shari'ah are complied with.⁵³

Upon perusing the *Rules of Court 2012* (hereinafter referred to as "RC 2012"), it is observed that there is no specific provision inserted to regulate the Islamic finance proceedings whereas there are other specific provisions in RC 2012 to deal with Arbitration Proceedings (Order 69), Admiralty Proceedings (Order 70), Probate Proceedings (Orders 71 and 72), Defamation Actions (Order 78), Moneylenders' Actions (Order 79), Charge Action (Order 83), Proceedings arising out of hire purchase agreement (Order 85A) and etc.

It is the finding of this research that special provision must be inserted into RC 2012 to provide for the requirement of pleadings for Islamic finance litigation. If we look at Order 85A RC 2012 or Order 79 RC 2012, the rules are clear as to what are the necessary particulars to be pleaded in the statement of claim. In Islamic finance litigation, the litigants must properly plead the nature of the transaction, the Shari'ah principle applied in the financial products and indicate to court whether they are imposing *ta'widh* and/or granting *ibra'*. By having a standardised procedure for Islamic finance, this will assist the court make adjudication of disputes in accordance with Shari'ah principles.

In addition, the RC 2012 is also silent on the procedural mechanism to make reference to Shari'ah Advisory Council (SAC). Even though Bank Negara Malaysia has issued a simple manual⁵⁴ for reference to SAC, this research maintains its view that the Rules Committee should provide a detailed procedure in RC 2012 on how to make application for reference to SAC. There must be certain form such as notice of application supported with affidavit to be filed in court. This research proposes that the Rules Committee may adopt with necessary modification the provision for reference to SAC as contained in the Rule 11 *KLRCA i-Arbitration Rules*⁵⁵. Notwithstanding the aforesaid, the Rules Committee has successfully introduced a provision in RC 2012 dealing with the imposition of late payment charges.⁵⁶

EFFECTIVENESS OF THE MUAMALAT DIVISION AT THE KUALA LUMPUR HIGH COURT

In this research, it is not denied that there are attempts made by the Malaysian authorities to set up a specialised court or commonly known as Muamalat Court to resolve the Islamic financial disputes. Bank Negara Malaysia in its *Malaysian Financial Masterplan 2001-2010*⁵⁷ has made recommendation to establish a dedicated Shari'ah commercial court to deal with legal matters on Islamic banking and takaful. Abdul Hamid Mohamad (2002)⁵⁸, being the judge of the Court of Appeal (as he then was), in welcoming the proposal by Bank Negara to establish the specialised court, was of the view that such proposal can be easily implemented through an administrative action by the judiciary.

On 6th February 2003, the Chief Judge of Malaya has issued a *Practice Direction No. 1 of 2003* whereby a Muamalat Court was set up under the Commercial Division of the Kuala Lumpur High Court to hear Islamic banking cases. Subsequently, the said Practice Direction was replaced by *Practice Direction No. 4 of 2013* and supplemented by *Practice Direction Nos. 6 & 7 of 2013*. From 1st March 2003 until 30th October 2013, there are 7,849 cases registered with the Muamalat Court.⁵⁹

Pursuant to this initiative by the judiciary, all Islamic banking and finance cases filed at the Muamalat Court at Kuala Lumpur High Court are given special registration code namely Code 22M (previously Code 22A) for civil suits based on writ action and Code 22MF (previously Code 24A) for foreclosure matter and action based on originating summons.⁶⁰ This Muamalat Court consists of one High Court judge, one deputy registrar and one senior assistant registrar.⁶¹

While the efforts by judiciary to set up the Muamalat court is commendable, some researchers opine that the current structure of Muamalat Court does not address the main issue faced in Islamic finance litigation. Ahmad Hidayat Buang (2007)⁶² viewed that the establishment of Muamalat Division at the Kuala Lumpur High Court could not provide a satisfactory solution since the crux of the matter is the application of laws other than the Shari'ah in Islamic finance cases. In this research, it has been discovered that there are several flaws with the structure and function of Muamalat Court as will be further discussed below.

NO DEDICATED JUDGES TRAINED IN ISLAMIC BANKING AND SHARI'AH TO HEAD THE MUAMALAT COURT

First and foremost, it is observed that the Muamalat court is not much different from other courts within the Commercial Division of the Kuala Lumpur High Court. They are all governed under the same procedure, practice direction and subject to same administration. The practice direction⁶³ issued by court does not provide any special procedure for adjudication of Islamic finance cases. This research finds that the practice direction is merely made

to assign filing codes for registration of Islamic finance cases and other type of cases.

For selection of judges to be appointed to head the Muamalat court, it appears that there is no requirement imposed that the judges must have adequate knowledge in Shari'ah laws and well trained in Islamic banking and finance. Tun Ariffin Zakaria being the Chief Justice also concedes that there is no specialist judge trained in Islamic banking or finance and thus he encourages the Islamic financial disputes to be referred to alternative dispute resolution avenues.⁶⁴ Due to absence of judges who are qualified and competent in both civil laws and Islamic finance practice to head the Muamalat Court, the setting up of Muamalat court *per se* does not provide antidote to the problems in Islamic finance litigation.

RESTRICTED FUNCTION OF MUAMALAT COURT TO CERTAIN LEGAL PROCEEDINGS

Based on the practice direction⁶⁵ issued by court and the reported cases, it appears that the function of the Muamalat Court at the Kuala Lumpur High Court is restricted to civil proceedings by writ action (Code 22M) and foreclosure proceedings and declaratory actions via originating summons (Code 22MF). After judgment is recorded, the execution proceedings such as winding up proceedings (Code 28) and bankruptcy proceedings (Code 29) will be heard by other courts in commercial division. This research finds that there is no special code assigned to distinguish between execution proceedings arising from Islamic financing judgment and the conventional one. As a result, it appears that the execution proceedings will be heard by ordinary commercial courts which are not specialised in Islamic finance. Hence, despite the fact that Muamalat Court has been established at the Kuala Lumpur High Court, the function and jurisdiction of Muamalat court is very limited and does not cover all legal proceedings arising from Islamic financial transactions.

LIMITED TERRITORIAL JURISDICTION OF MUAMALAT COURT

Pursuant to the Practice Direction⁶⁶ issued by the judiciary, it appears that Muamalat Court is formed under the commercial division of Kuala Lumpur High Court. Hence, the Muamalat Court shall have jurisdiction to hear Islamic finance cases filed within the local jurisdiction of Kuala Lumpur High Court. The Muamalat Court does not have any jurisdiction to hear Islamic banking cases filed in other States within High Court of Malaya such as Shah Alam High Court, Seremban High Court, Malacca High Court and etc. Further, this research discovers that there is no special division established at the other High Courts outside Kuala Lumpur and at the subordinate court level namely at Sessions Court and Magistrates' Court to cater for Islamic finance proceedings. Hence, this situation suggests that litigants may do 'forum

shopping' and elect to file their Islamic finance cases outside the Muamalat court's jurisdiction as there is no legal provision to provide that Muamalat court shall have exclusive jurisdiction over all Islamic finance cases. As such, this lacuna may defeat the object of having the Muamalat Court.

NO CO-ORDINATION BETWEEN MUAMALAT COURT AND OTHER COURTS WITHIN THE JUDICIAL HIERARCHY

As highlighted earlier in this article, the judicial hierarchy is important in litigation process to provide for rights of appeal and to ensure certainty of laws under the doctrine of *stare decisis*. However, this research finds that there is no proper system or co-ordination between Muamalat Court and other courts within the judicial hierarchy. Even though Muamalat court is considered as specialised court, any appeal from the Muamalat Court will go up to Court of Appeal and Federal Court which, for the time being, do not have specialised panel of judges in the area of Islamic finance. Any appeals arising from Islamic banking transaction will be given similar treatment as other commercial cases.

Besides, the same position applies to the lower court level such as Magistrates' courts and Sessions Courts where it is observed that there are no specialised courts or divisions set up at lower courts. The Islamic finance cases filed at lower courts will be heard by non-specialised judges and on appeal to High Court, the appeals from lower courts may not necessarily be heard by the Muamalat Court. This research agrees with the recommendation by Ruzian Markom et al. (2013)⁶⁷ that the way forward is to have the legal cases on Islamic banking and finance be adjudicated at appropriate Islamic law courts from the lowest to the highest levels. As such, there is a need to formulate a comprehensive system within the civil court structure to cater for adjudication of Islamic finance cases.

CONCLUSION

As a conclusion, this research finds that the litigation within the existing judicial framework is still the popular mode for dispute resolution in Islamic finance. However, there are several flaws under the present civil court structure which may affect the effective adjudication of Islamic finance cases. Considering the fact that Islamic banking and finance is a special area of law, this research proposes that the judiciary must take initiatives to create a dedicated judicial infrastructure to cater for Islamic finance industry. The current administrative steps taken by judiciary by issuance of practice direction appears inadequate to develop a dedicated court to resolve Islamic financial disputes. Legislative amendments to the *Courts of Judicature Act 1964* and the *Subordinate Courts Act 1948* are required in order to place Islamic finance matter

under special jurisdiction. The *Rules of Court 2012* need to be revised so that a new provision is inserted to regulate Islamic finance litigation. An introduction of a comprehensive procedural law to govern Islamic finance litigation will contribute towards strengthening the Islamic financial system in Malaysia.

NOTES

- ¹ Article 121(1A) Federal Constitution provides that "(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts."
- ² Ahmad Ibrahim, *The Amendment of Art. 121 of the Federal Constitution: Its effect on the Administration of Islamic Law*, [1989] 2 MLJ xvii, Malayan Law Journal.
- ³ Kuala Lumpur High Court, Civil Suit No: S3-22-101-91 (unreported) as discussed in Mohd Illiyas, *Islamic/Interest Free Banking in Malaysia: Some Legal Considerations*, Malayan Law Journal [1995] 3 MLJ cxlix.
- ⁴ Norhashimah Mohd Yasin, *Islamic Banking: Case Commentaries involving Al-Bay' Bithaman Ajil*, Malayan Law Journal, [1997] 3 MLJ xciii.
- ⁵ [2011] 4 CLJ 654.
- ⁶ [2003] 1 CLJ 625.
- ⁷ Abdul Hamid Mohamad, *Dispute Resolution for Islamic Business and Finance Cases: The Way Forward*, 8th May 2003, Talk to Members of Association of Islamic Banking Institutions Malaysia (AIBIM) <http://www.tunabdulhamid.my/index.php/speech-papers-lectures/item/51-dispute-resolution-for-islamic-business-and-finance-cases-aibim> (7th July 2015).
- ⁸ Srimurugan Alagan, *Jurisdiction of Courts in Malaysia*, 2nd Ed, Sweet & Maxwell, 2014 at p 7.
- ⁹ *Bank Negara Malaysia v. Gerald Glesphy* [1992] 1 MLJ 151 at p 153.
- ¹⁰ Ashgar Ali Ali Mohamad, Chapter 17: Jurisdiction and Powers of the Civil Courts; in *Malaysian Legal System*, CLJ Publication, Kuala Lumpur, 2014 at p 395.
- ¹¹ [2006] 1 CLJ 577.
- ¹² [2009] 6 CLJ 22.
- ¹³ Article 122 *Federal Constitution*.
- ¹⁴ Section 74 *Courts of Judicature Act 1964*.
- ¹⁵ *Ibid*.
- ¹⁶ PU(A) 376/1995.
- ¹⁷ Article 122A *Federal Constitution*.
- ¹⁸ Article 121(1) *Federal Constitution*.
- ¹⁹ Article 122AA *Federal Constitution*.
- ²⁰ Section 24 of the *Courts of Judicature Act 1964*.
- ²¹ Sections 27, 28 and 29 of *Courts of Judicature Act 1964*.
- ²² Section 60 *Subordinate Courts Act 1948*.
- ²³ Section 65(1) *Subordinate Courts Act 1948*.
- ²⁴ Section 65(5) *Subordinate Courts Act 1948*.
- ²⁵ Sections 78 and 79 *Subordinate Courts Act 1948*.
- ²⁶ Sections 92 *Subordinate Courts Act 1948*.
- ²⁷ Sections 90 *Subordinate Courts Act 1948*.
- ²⁸ Srimurugan Alagan, *Jurisdiction of Courts in Malaysia*, 2nd Ed, Sweet & Maxwell, 2014 at p 16.
- ²⁹ Srimurugan Alagan, *Jurisdiction of Courts in Malaysia*, 2nd Ed, Sweet & Maxwell, 2014 at p 16.
- ³⁰ Article 121(1) *Federal Constitution*.
- ³¹ Section 59(2) *Subordinate Courts Act 1948*.
- ³² *Public Prosecutor v. Segaram a/l S Mathavan* [2009] 9 MLJ 597; *Taman Rimba (Mentakab) Sdn Bhd v. Sin Yew Poh Tractor Works* [2002] 2 CLJ 113.
- ³³ [1954] 3 All ER 745.
- ³⁴ See sections 31 to 37 *Courts of Judicature Act 1964*.
- ³⁵ Srimurugan Alagan, *Jurisdiction of Courts in Malaysia*, 2nd Ed, Sweet & Maxwell, 2014 at p 16.

- ³⁶ Section 24 of *Courts of Judicature Act 1964*.
- ³⁷ Para 1 Schedule *Courts of Judicature Act 1964*.
- ³⁸ Section 65(1) *Subordinate Courts Act 1948*.
- ³⁹ [2006] 8 CLJ 9.
- ⁴⁰ Note: Even though a Muamalat Division has been established at Kuala Lumpur High Court, such division was set up through administrative action and not through legislative amendments.
- ⁴¹ Abdul Hamid Mohamad, *Dispute Resolution for Islamic Business and Finance Cases: The Way Forward*, 8th May 2003, Talk to Members of Association of Islamic Banking Institutions Malaysia (AIBIM) <http://www.tunabdulhamid.my/index.php/speech-papers-lectures/item/51-dispute-resolution-for-islamic-business-and-finance-cases-aibim> (7th July 2015).
- ⁴² [2009] 2 CLJ 433.
- ⁴³ *Chief Registrar Circular No. 1 of Year 2013*.
- ⁴⁴ *Public Prosecutor v. Segaram a/l S Mathavan* [2009] 9 MLJ 597; *Taman Rimba (Mentakab) Sdn Bhd v. Sin Yew Poh Tractor Works* [2002] 2 CLJ 113.
- ⁴⁵ *Bank Utama (Malaysia) Bhd v. Perkapalan Dai Zhun Sdn Bhd* [2003] 1 CLJ 450; *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 3 CLJ 22.
- ⁴⁶ Elaine Mak, *Balancing Territoriality and Functionality; Specialization as a Tool for Reforming Jurisdiction in the Netherlands, France and Germany*, International Journal for Court Administration, October 2008, http://www.iaca.ws/files/LWB-Elaine_Mak.pdf (20 July 2015).
- ⁴⁷ Elaine Mak, *Balancing Territoriality and Functionality; Specialization as a Tool for Reforming Jurisdiction in the Netherlands, France and Germany*, International Journal for Court Administration, October 2008, http://www.iaca.ws/files/LWB-Elaine_Mak.pdf (20 July 2015).
- ⁴⁸ Aishath Muneeza, *Legislative Conflicts Facing Islamic Banking in Malaysia*, A.S. Nordeen, Kuala Lumpur, 2015 at pp 241.
- ⁴⁹ *Hamdan Ibrahim v. Lembaga Tataertib Hospital Kuala Kangsar* [2001] 1 CLJ 342.
- ⁵⁰ Srimurugan Alagan, *Jurisdiction of Court in Malaysia*. 2nd Edition. Sweet & Maxwell, 2014, at p 2.
- ⁵¹ *Jones v. National Coal Board* [1957] QB 55 per Lord Denning
- ⁵² [2003] 1 CLJ 625.
- ⁵³ Surianom Miskam et al, *Reference to the Shari'ah Advisory Council in Islamic Finance: Preliminary Analysis on Civil Court Decisions*, Proceedings of the Social Sciences Research ICSSR 2014 (e-ISBN 978-967-11768-7-0). 9-10 June 2014, Kota Kinabalu, Sabah.
- ⁵⁴ Manual Rujukan Mahkamah dan Penimbangtara kepada Majlis Penasihat Shari'ah Bank Negara Malaysia. <http://www.bnm.gov.my/?ch=7&pg=1038&ac=419&bb=file1> (14 June 2015).
- ⁵⁵ <http://klrca.org/rules/i-arbitration/#Rule11%E2%80%93Procedure%20for%20ReferencetoShariahAdvisoryCouncilorShariahExpert> (26 June 2015).
- ⁵⁶ Order 42 Rule 12A *Rules of Court 2012*.
- ⁵⁷ Bank Negara Malaysia, *Financial Masterplan 2001-2010, Chapter 5: Islamic Banking & Takaful* http://www.bnm.gov.my/files/publication/fsmp/en/fsmp_en_ch05.pdf (16th March 2015).
- ⁵⁸ Abdul Hamid Mohamad, *Cadangan Mewujudkan Bahagian Muamalat di Mahkamah Tinggi*, 9th February 2002, <http://www.tunabdulhamid.my/index.php/speech-papers-lectures/item/43-cadanga-mewujudkan-bahagian-muamalat-di-mahkamah-tinggi> (16th March 2015).
- ⁵⁹ Justice Rohana Yusuf & Justice Mohd Zawawi Salleh, *An Overview of the Adjudication of Islamic Banking Cases in Malaysia*, The Malaysian Judiciary Yearbook, 2013 at pp 84.
- ⁶⁰ Justice Rohana Yusuf & Justice Mohd Zawawi Salleh, *An Overview of the Adjudication of Islamic Banking Cases in Malaysia*, The Malaysian Judiciary Yearbook, 2013 at pp 84.
- ⁶¹ Hakimah Yaacob, *Analysis of Legal Disputes in Islamic Finance and the Way Forward: With Special Reference to a Study conducted at Muamalat Court*, Kuala Lumpur, ISRA Research Paper No 25/2011 at p 7.
- ⁶² Ahmad Hidayat Buang, *Islamic Contracts in a Secular Court Setting: Lessons from Malaysia*, *Arab Law Quarterly* 21 (2007) 317-340.
- ⁶³ *Practice Direction No. 4 of 2013* and supplemented by *Practice Direction Nos. 6 & 7 of 2013*.
- ⁶⁴ Tun Ariffin bin Zakaria, *A Judicial Perspective on Islamic Finance Litigation in Malaysia*, *IUM Law Journal*, (2013) 21 *IUMLJ* 143 at p 178.
- ⁶⁵ *Practice Direction No. 4 of 2013* and supplemented by *Practice Direction Nos. 6 & 7 of 2013*.
- ⁶⁶ *Practice Direction No. 4 of 2013* and supplemented by *Practice Direction Nos. 6 & 7 of 2013*.
- ⁶⁷ Ruzian Markom et al, *Adjudication of Islamic Banking and Finance Cases in the Civil Courts of Malaysia*, *Journal of Law and Economics*, <http://www.springerlink.com/content/qn431774608k617h/>, 2013 (Accessed on 18th October 2014) pp 19-25.

Hizri Hasshan
Senior Lecturer
Faculty of Law, Universiti Kebangsaan Malaysia
43600 UKM Bangi, Selangor Darul Ehsan.
E-mail: hizri@ukm.edu.my