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5

Harmonizing Civil Litigation with Syariah Litigation in Islamic Banking: The Views of Syariah Lawyers

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Introduction

Since the 1970s, Islamic banking has emerged as a new reality in the international financial scene. Its philosophies and principles are, however, not new, having been outlined in the Al-Quran and the *Sunnah* of Prophet Muhammad (pbuh) more than 1,400 years ago (Ismail, 1985). The emergence of Islamic banking at present is closely related to the revival of Islam and the desire of Muslims to live all aspects of their life in accordance with the teachings of Islam.

The first Islamic bank established in this country was Bank Islam Malaysia Berhad (BIMB), which commenced operations on 1 July 1983. In line with its objectives, the banking activities of the bank are based on *Syariah* principles. After being in operation for more than 20 years, BIMB has proved to be a viable banking institution with its activity expanding rapidly throughout the country and with the bank being listed on the main board of Kuala Lumpur Stock Exchange on 17 January 1992.

In Malaysia, separate Islamic legislation and banking regulations exist side-by-side with those for the conventional banking system. The legal basis for the establishment of Islamic Banks is the Islamic Banking Act, which came into effect on 7 April 1983. The Islamic Banking Act provides Bank Negara Malaysia with powers to supervise and regulate Islamic Banks, the same authority it has over other licensed banks. Bank Negara has established a *Syariah* Advisory Council to monitor the practice of Islamic banking activities by all the banking institutions in Malaysia. This is to ensure that they are in line with the requirements of Islamic law.

Litigation

Litigation is a process by which an entity sues or makes a claim concerning a dispute or a disagreement. The litigation process must adhere to the principles of natural justice as well as procedural justice. Under the Islamic litigation process, it must follow the principles as outlined in the Al-Quran, *Sunnah, Ijmak, Qiyas* and other sources of *Syariah* law. In Malaysia, it is interesting to note, however, that when a dispute or disagreement arises concerning any products offered by the Islamic banking system, the court of law that resolves these disputes or disagreements is the civil court and not the *Syariah* court. This matter was established through the case of *Bank Islam Malaysia Berhad v Adnan bin Omar* (1994) 3 CLJ, 735.

Islamic banking is well entrenched in the financial system in Malaysia and more banks are licensed to operate Islamic banking. The Muslim population of the country although happy with the wide-ranging products and facilities provided by Islamic financial institutions, expects this system to function entirely on Islamic principles. In this regard, disputes and disagreements between clients and the Islamic financial institutions resolved through the process of litigation must necessarily be guided by the *Syariah*. In view of the present situation of Islamic banking litigation, it is not known to what extent the civil banking litigation processes are in accord or harmony with Islamic banking litigation based on the *Syariah*. A survey was carried out to obtain the opinion of *Syariah* lawyers, *Syariah* court judges, as well as members of

the *Syariah* Advisory panel of Islamic banks as to whether the civil banking litigation process is in harmony with Islamic banking litigation. The aspects of the civil banking litigation process examined in this research include summons, pleading, discovery, affidavit, appearance, and subpoena as provided for under the Rules of High Court 1980. Other major sources of civil procedure are the Rules of The Court of Appeal 1994, the Rules of The Federal Court 1980, The Rules of the Supreme Court 1980 and the Subordinate Courts Rules 1980. The objective of these rules is to do justice fairly and expeditiously. The rules provide well-defined and uniform procedures for dispensing justice. The research also examined matters related to the judges as well as witnesses in the civil litigation process and whether these matters are in harmony with Islamic banking litigation. This paper reports the findings of one part of the research, which examined the opinions of *Syariah* lawyers.

Concept and Implementation of Islamic Banking

There is a widespread confusion about the role and concept of Islamic banks and the Islamic banking system both in the Islamic countries as well as non-Islamic countries. This confusion is clearly manifest in the attitudes and views held by various institutions and intellectuals towards the Islamic banking system. Some Muslims believe that Islamic banks are just like any other conventional banks except that the operations are free from interest or better known in Islamic banking literature as *Riba*. For others though, Islamic banks are more than the ordinary conventional banks. They believe that Islamic banks are organized financial institutions, which operate in accordance with Islamic law (Sudin, 2003). Ahmad (1994) defines the term "Islamic banking" as the conduct of banking operation in consonance with Islamic teaching. Therefore eliminating the element of interest in its operation is only one part of the total Islamic ethos. Other principles include:

1. To engage in legitimate and lawful businesses
2. To fulfill all obligations and responsibilities
3. To undertake business based on the concept of honesty, justice and equity
4. Prohibition of overspending and wastage

5. Use of wealth in a proper and orderly manner
6. To provide help and assistance to the needy
7. Proper execution of transactions

With regard to the Islamic banking system, the *Syariah* does not provide any single decree in which it gives all the rules and guidelines to be followed by the Islamic banks. The rules and guidelines, however, are abundantly described by the various sources of *Syariah*, namely, Al-Quran, *Hadith, Ijmak* and *Qiyas*. Some scholars claim that there are five sources of laws, that is, Al-Quran, *Sunnah, Ijtihad, Maaruf* and *Maslahat* (Sudin, 2003). Manan (1986) states that, the uniqueness of Islamic law lies in its comprehensiveness of principles, valid through the ages in respect of the whole of mankind. The whole basis of Islamic law is a standing and perpetual miracle, a miracle in the sense that Islamic law may not only be compared with the law of tides but also with the simple and exact law of gravitation. This is because, while Islamic law has always been found to yield new truths and fresh guidance in every age and at every level, guidance has been furnished to mankind through a series of fundamental and eternal revelations vouchsafed by Allah to the Prophet (pbuh). Thus, a complete Islamic banking system, however, is not only a system that is free from *Riba* but include laws, practices, procedures and instruments which help in the maintenance and dispensation of justice, equity and fairness. In other words, the Islamic banking system will become a complete system only after it has its own *Syariah* law, which covers the entire spectrum of banking.

Cases in Islamic Banking Litigation

In Malaysia, as mentioned earlier, the Islamic banking system had been established in 1983 with the introduction of the Islamic Banking Act 1983 (hereinafter referred to as IBA 1983) which came into force on 10 March 1983. Consequently, Bank Islam Malaysia Berhad was established. According to IBA 1983, section 2 defines "Islamic bank" as any company, which carries on Islamic banking business and holds a valid license; and all offices and branches in Malaysia of such a bank shall deemed to be one. The same

provision further defines, "Islamic banking business" as banking business whose aims and operations do not involve any elements which is not approved by the religion of Islam. Thus, as pointed out by Norhashimah (1997) this blanket definition seems to be very ambiguous and may carry far-reaching implications. The definitions pose the question: what is Islamic banking business? The *Syariah* contracts such as *Al-Mudharabah*, *Al-Musharakah*, *Al-Ijarah*, *Al-Murahabah*, and *Al-Wakalah* are not mentioned in the IBA. Norhashimah further emphasises that the IBA, being a brief and simple piece of legislation, which was never intended to be exhaustive, will certainly have its lacuna. For instance, in the absence of a statutory definition of 'banking business' in the IBA, it is the practice and in fact the law (by virtue of ss3 and 5 of the Civil Law Act 1956) to have regard to the common law to determine its meaning. It would appear therefore that the IBA intends to define 'Islamic banking business' in a similar term carried on by conventional banks in common law jurisdiction (Mohammad Azam, 2003). The only exception is that the aims and operations of such banking business should not involve any element, which is not approved by the religion of Islam.

This is clearly evident by the decision made by the High Court of Shah Alam in the case of *Bank Islam Malaysia Bhd v Adnan bin Omar* (1994) 3 CLJ 735. In this case five issues have been raised, and one amongst them is whether civil courts have jurisdiction over Islamic banking. The defendant argued that since BIMB ('the plaintiff') is an Islamic bank, the civil court has no jurisdiction to hear the case in view of art 121 (1A) of the Federal Constitution. The judge, NH Chan J (as he then was) overruled that objection and held that the matter was rightly brought before the civil court. It was submitted that List 1 of the Ninth Schedule enumerates the various matters on which Parliament can enact laws. The scope is very comprehensive and includes banking and the constitution, organisation, jurisdiction and powers of all courts other than *Syariah* courts and native customary courts. List II in the State List provides for the constitution, organisation and procedure of *Syariah* courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters, included which exclude Islamic banking. It was further argued that since BIMB is a

corporate body, therefore it does not have a religion, and such, it is not within the jurisdiction of the *Syariah* courts. As such, civil courts have jurisdiction to hear Islamic banking and other Islamic commercial cases based on the following grounds:

1. The *Syariah* courts can only decide the cases that fall under the State List that excludes any cases relating to commercial laws such as Islamic banking.
2. The *Syariah* courts can only decide the case when all the parties are Muslims. As such, Islamic institutions such as BIMB and Syarikat Takaful are corporate institutions created by statute and do not have a religion.
3. Currently, the application of English law in Malaysia is based on the provisions of ss3 and 5 of the Civil Law Act. Section 5 of the Act provides that, in matters of mercantile law or commerce, English law is to be applied. As such, the jurisdiction is certainly vested in the civil courts. In addition, s.3 of the same Act states for the application of the English law and rules of equity when there is a lacuna in the provision of any written law. In Malaysia, although there is the IBA, but as mentioned earlier, the Act is not exhaustive. Thus, any ambiguity, clarifications and interpretation will be referred to the civil courts.

Similarly, prior to this case, in *Tinta Press Sdn. Bhd v Bank Islam Malaysia Berhad* (1987) 2 MLJ 192, the Supreme Court dealt with the issue of whether the High Court was right in issuing a mandatory injunction, a common law remedy. In this case the litigation process was referred to the civil court although it involved an Islamic banking product. The respondents had leased certain printing equipment to the appellants. The appellants having defaulted in payment of the monthly rentals, the respondents brought an action to recover possession of the equipment and to recover the arrears of rent. The respondents also made an *ex parte* application for and obtained a mandatory injunction to enable the respondents to recover possession of the equipment. The appellants then applied to dissolve and set aside the mandatory injunction. This was refused and the appellants appealed. It was held by the Supreme Court that the High Court has discretion to grant an interlocutory mandatory injunction before trial but discretion must be exercised and an

injunction to be granted only in exceptional and extremely rare cases. Where the case is one of urgency, an application can be made *ex parte*. Their Lordships further concluded that the learned High Court judge had rightly concluded from the documents and the affidavit evidence that the agreement in this case was a lease agreement and not a loan agreement.

Again in *Dato' Nik Mahmud bin Daud v Bank Islam Malaysia Berhad* (1996) 4 MLJ 295 the plaintiff ('the appellant'), through his attorney, had entered into a property sale agreement and a property purchase agreement ('the agreements') with the defendant ('the respondent') — a bank licensed under the Islamic Banking Act 1983 to carry on Islamic banking business— in respect of 25 lots of land ('the properties'). In accordance with the Islamic banking concept of *Al Bai Bithaman Ajil*, the respondent purchased the properties and thereafter resold them to the appellant for a profit. Charges ('the charges') were also executed on the properties in favour of the respondent as security for the loan granted. The appellant applied for an order that the charges be declared null and void. He also applied for the return of the titles of the properties, free of all encumbrances, to him. Learned counsel for the appellant alleged that the execution of the agreements had contravened the provisions of ss 7(i) and 12 of the Malay Reservations Enactment 1930 of Kelantan ('the Enactment') and accordingly the dealing was null and void and the creation of the charges should be set aside. It was further submitted that the word 'transfer' in s 7(i) of the Enactment is capable of a wider sense and there is no necessity for a physical transfer. The trial judge dismissed the application. The appellant appealed.

In dismissing the appeal with costs, the Court held that it is clear that s 7(i) of the Enactment prohibits any transfer or transmission or vesting of any right or interest of Malay reservation land to any person not being Malay. In this case, the trial judge had found that the appellant was all along the registered proprietor of the properties; in short, no transfer was being affected. Moreover, it was never the intention of the parties to involve any transfer of proprietorship. Accordingly, the execution of the property purchase agreement had not transgressed the provisions of ss 7 and 12 of the Enactment since

there was no dealing or attempt to deal in the lands contrary to the provisions thereof. There was therefore no reason to disagree with the findings of the trial judge.

In the case of *Bank Kerjasama Rakyat Malaysia Bhd. v Emcee Corp Sdn Bhd* (Court of Appeal, appeal no. N-02-421-1999) (unreported), the civil court was decided as the proper forum of Islamic banking litigation. As Honorable Dato' Abdul Hamid Mohamad JCA stated in his judgement::

> "As was mentioned at the beginning of this judgement the facility is an Islamic banking facility. But that does not mean that the law applicable in this application is different from the law that is applicable if the facility were given under conventional banking. The charge is a charge under the National Land Code. The remedy available and sought is a remedy provided by the National Land Code. The procedure is provided by the Rules of the High Court 1980. The court adjudicating it is the High Court. So, it is the same law that is applicable, the same order that would be made, if made, and the same principles that will be applied in deciding the application."

In a similar vein, his Lordship further emphasized that although he did not say that he was right though he believed he was, as at today that is the law.

The civil court recently proceeded on deciding the Islamic banking matters in *Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd* [2004] 6 MLJ 1. In this case the plaintiff had undertaken the development and construction of Steckel Hot Strip Mill Plant to produce Hot Rolled Coils ('the said project'). The said project was to be carried out on a piece of land measuring approximately 119 acres in Klang. The land, a leasehold property, was purchased from the Selangor State Development Council, free from legal encumbrances, at RM128m. They had secured a RM97m loan facility, from the defendant bank by using the *Syariah* principle of *Al-Istisnaa'* facility. Under this concept, the defendant purchased the said project from the plaintiff for a purchase price of RM97m, which was disbursed immediately into a financing payable account. From such an account, the monies were paid out to the plaintiff upon the latter meeting all the conditions contained in the

Al-Istisnaa' purchase agreement. Concurrently, with the execution of the *Al-Istisnaa'* purchase agreement, the defendant sold back the said project to the plaintiff by way of the *Al-Istisnaa'* sale agreement for an agreed price comprising the purchase price together with an agreed profit margin. Two tranches of the facility amounting to a sum of RM58, 215,984.84m had been released by the defendant bank to the plaintiff. The defendant has refused to release the balance of the facility amounting to RM38, 784,015.16m from the financing payable account. The plaintiff had filed a writ together with the statement of claim against the defendant alleging breach of contract on the part of the defendant. The plaintiff also sought by way of an interim injunction to prevent the defendant from exercising its lawful rights under the security documents executed by the plaintiff in favour of the defendant pending the outcome of the writ action. The defendant contended that the plaintiff had failed to meet the condition precedents of the *Al-Istisnaa'* purchase agreement, namely, to secure facilities totaling approximately USD80m or such other amount as the defendant reasonably determines from EXIM bank for the purpose of part financing of the said purchase. They also contended that the plaintiff had unilaterally decided to substitute the EXIM loan condition with a bond issue. Although not obliged to accept the above change, the defendant was very accommodative, by stating its agreement to accept the local bond issue provided that the plaintiff was willing to meet certain conditions, namely, that the local bond issue should be on a bought deal basis. But the plaintiff failed to meet the condition. Further the defendant argued that the plaintiff had defaulted in its agreed obligation to the defendant even before the defendant's purported recession of the contract. The plaintiff's default was related to the fact that the plaintiff had stopped making payment on the facility from as early as 31 January 2002 when the defendant had to liquidate a security cash deposit of RM1m to enable the plaintiff to settle the installments that were due from the plaintiff.

The Court inter alia held that in dismissing the application, the defendant is a licensed bank governed by the Islamic Banking Act 1983. It is not allowed to participate nor conduct any business that contravenes the *Syariah*. The defendant does not charge penalty interest by whatever name one wish to

call it for late payment. Even a single installment that is paid late to the defendant is a loss of use of money owed to the defendant for the period of delay. Viewed in this context, the grant of an injunction to the plaintiff would cause irreparable damage to the defendant.

The Court also held that the defendant as the lender, being an institution operating under the Islamic banking principles, would be made to suffer loss of use of its money by the delay in recovering monies from the plaintiff in the event that the High Court ultimately decides that the injunction should not have been granted. The courts cannot compensate this loss since the defendant is prevented by its strict adherence to Islamic banking principles from taking any penalty interest, which would be in the nature of usury. Abdul Malik Ishak J referred to Abdullah Yusuf Ali in his book *The Holy Qur'an, Text Translation and Commentary* at p 115 which carries Surah *Al Baqarah* verse 275, the meaning of which is as follows:

> Those who devour usury, will not stand except, As stands one whom, The Evil One by his touch, Hath driven to madness. That is because they say: Trade is like usury, But Allah hath permitted trade And forbidden usury. Those who after receiving, Direction from their Lord, Desist, shall be pardoned For the past; their case Is for Allah (to judge); But those who repeat (The offence) are Companions Of the Fire; they will Abide therein (forever).

And in Surah *Al Baqarah* verse 276 whose meaning is as follows:

> Allah will deprive Usury of all blessing, But will give increase For deeds of charity; For He Loveth not Creatures ungrateful And Wicked.

Then, in *Bank Islam Malaysia Bhd v Pasaraya Peladang Sdn Bhd* [2004] 7 MLJ 355 the plaintiff granted an Islamic banking facility known as *Al-Bai Bithaman Ajil* ('the said facility') to the defendant pursuant to a Property Purchase Agreement (PPA) and a Property Sale Agreement ('PSA'). As security for the repayment of the said facility, the defendant charged in favour of the plaintiff, ten pieces of land ('the said lands'). The charges were affected by way of two Forms 16A of the National Land Code ('NLC'). The charges

were registered on 23 July 1997. The defendant defaulted in the repayment of the installments and a notice of demand was accordingly issued to the defendant. The defendant failed to comply with the notice of demand. Consequently, the plaintiff issued and served on the defendant the statutory notice in Form 16D of the NLC. Again, the defendant failed to pay the amount demanded. In this case, it was the plaintiff's application for an order for sale of the said lands under s 256 of the NLC.

The Court allowed the plaintiff's application where in this case, the court explained *Al-Bai Bithamin Ajil* as a common Islamic banking facility involving immovable properties as collateral. It involved three separate agreements. The bank would purchase the property concerned from the chargor pursuant to the first agreement. In the second agreement, the bank would sell the property to the chargor. The third agreement was a charge given by the chargor to the bank to enable the bank to sell the property in the event of default by the chargor. The Court, following the decision in *Bank Rakyat Malaysia Bhd v EMCEE Corporation Sdn Bhd* [2003] 1 CLJ 625 held that although the said facility was granted under Islamic principles, the laws applicable were the NLC and the Rules of the High Court 1980.

Hence, from the cases mentioned above, clearly the civil courts had taken the role of interpreting and determining the nature and form of agreements signed between the parties and they had also resolved the disputes involving Islamic banking.

In relation to this, suffice here to re-emphasize the opinion given by Norhashimah (1997) on the application of Islamic law in Malaysia. She correctly points out that the law is only applicable in a limited sphere, that is, matters concerning family law and religious offences. Islamic law is provided for under the State List (Schedule 9, List II of the Federal Constitution) and therefore is under the administration of the states. There was an amendment to art 121 of the Federal Constitution in 1988, which restrains the civil courts from having jurisdiction to hear cases where Islamic law is applicable and is vested in the *Syariah* courts. Previously, the *Syariah*

courts and civil courts exercised concurrent jurisdiction on certain matters involving Islamic law. With the inclusion of cl (1A) in art 121, it was thought that the jurisdiction of the civil courts on matters involving Islamic law had been taken away. Nevertheless, as pointed earlier in the case of *Bank Islam Malaysia Berhad v Adnan Bin Omar* (1994) 3 CLJ, 735, a case involving a banking transaction based on Islamic principles, the High Court has ruled that the said clause has not taken away its jurisdiction and that it did have jurisdiction to hear the case. Thus, the law relating to commerce and business ('*Mu'amalat*') is either the statute or the English law (Norhashimah, 1997).

Methodology

The study to examine the views of *Syariah* lawyers was carried out among Muslim lawyers. The sample of study was obtained from the *Syariah* Lawyer Category in the Legal Directory published by the Bar Council. The *Syariah* Lawyer category consisted of 307 lawyers practicing throughout Malaysia. The lawyers were asked to state their opinion as to whether certain aspects of the civil banking litigation are in harmony with Islamic banking litigation. Those aspects of the civil banking litigation that was examined in the study included civil banking litigation process, judges, and witnesses. The specific aspects of the civil banking litigation process examined in the research were summons, pleading, discovery, affidavit, appearance, and subpoena.

Data was collected using a survey questionnaire. There were 28 items that measured civil banking litigation process. The 28 items were in the form of statements and the respondents were asked to state their opinion as to whether they agree or disagree that these statements were in harmony with *Syariah* litigation. The survey questionnaire was presented in Bahasa Malaysia. A 4-point Likert was used with 1 = *strongly disagree*, 2 = *disagree*, 3 = *agree*, and 4 = *strongly agree* to elicit the opinion of the lawyers. The 28 items that measured civil banking litigation process consisted of 7 items measuring summons; 6 items measuring pleading; 6 items measuring discovery; 2 items measuring affidavit; 3 items measuring appearance; and 4 items measuring subpoena. The survey questionnaires also comprised 4 items related to judges

adjudicating on civil banking litigation cases. Once again, respondents were asked to state their opinion as to whether they agree or disagree that these statements are in harmony with *Syariah* litigation. A 4- point Likert scale (1 = *strongly disagree* and 4 = *strongly agree*) was used. Finally, 4 items relating to witnesses in civil banking litigation cases were included in the questionnaire. The respondents were again asked to state their opinion as to whether they agree or disagree that these statements are in harmony with *Syariah* litigation. A 4-point Likert scale was again used. Personal information was also gathered in the questionnaire. These included gender, age, qualification, experience in legal practice, as well as whether the respondents had handled both civil and Islamic banking litigation cases. Prior to a full-scale study, the questionnaire was pre-tested among several Muslim lawyers. Minor modifications were then made to several of the statements to enhance clarity and understanding. The questionnaires were then sent out to the lawyers through mail. Several personal visits to the lawyers homes were also carried out during the process of data collection.

A total of 307 questionnaires were sent out to the Muslim lawyers. The total responses received were 136 questionnaires giving a response rate of 44.3%. Eighty-five (62.5%) of the respondents were male lawyers and 51 (37.5%) were females. One hundred and sixteen (85.3%) of the respondents are Advocate and Solicitors and *Syariah* Lawyers and 20 (14.7%) are Advocate and Solicitors with *Syariah* background. The average age of the respondents was 35.82 years (SD = 6.47 years) with the minimum age at 25 years and the maximum age at 62 years. The average experience of the respondents in the legal profession was 8.84 years (SD = 4.36 years) with minimum experience of 1 year and maximum experience of 24 years. A total of 72 (54.1%) respondents indicated they had handled Islamic banking litigation cases while 61 (45.9%) indicated they had never handled Islamic banking litigation cases. Three respondents did not provide any response to this question. Data was analyzed using descriptive statistics of mean and standard deviation. Group differences were analyzed using independent t-test.

Results

Table 1 provides the overall results of the opinion of the respondents as to whether aspects of the civil banking litigation process are in harmony with *Syariah* litigation. Based on the results, the respondents generally agree that most of the procedures involving summons in civil banking litigation are in harmony with *Syariah* litigation. Nevertheless, the respondents disagree that summons which failed to be served within a period of 6 months is void (SM7) is in harmony with *Syariah* litigation (M=2.60, SD=0.95). The results in Table 1 also indicate that two aspects (P2 and P6) involved in the process of pleading are not in harmony with *Syariah* litigation. First, the respondents strongly disagree that the courts may order an action that can be tried without pleading (P2: M=1.97, SD=0.86) is in harmony with *Syariah* litigation. Second, the respondents disagree that pleading in an action is deemed to be closed at the expiration of 14 days (P6: M=2.33, SD=0.74) is in harmony with *Syariah* litigation. In the other aspects of pleading (P1, P3, P4, and P5), the respondents generally agree that these aspects are in harmony with *Syariah* litigation.

Examining the process of discovery, the study found that several aspects of this process (D2, D3, and D6) are not in harmony with *Syariah* litigation. The respondents generally disagree that discovery may be ordered against parties to the proceedings only (D2: M=2.62, SD=0.82) is in harmony with *Syariah* litigation. They also disagree that parties to a proceeding may refuse to make discovery of documents for inspection is in harmony with *Syariah* litigation (D3: M=2.29, SD=0.84). Finally, the respondents disagree that failure to observe notice of discovery may result in pleadings being void is in harmony with *Syariah* litigation (D6: M=2.52, SD=0.74).

The results in Table 1 indicate that the processes involved in affidavit (AF1 and AF2), appearance (AP1, AP2, and AP3) as well as subpoena (SB1, SB2, SB3, and SB4) are all generally in harmony with *Syariah* litigation.

Table 1: Process of civil banking litigation in harmony with Islamic banking litigation

Litigation Process	N	Mean	SD
Summmons			
SM1: All litigation must begin with summons.	135	3.07	.94
SM2: Summon must be served personally on the defendant.	136	2.98	.87
SM3: Summon can be sent through registered possst to last known address.	135	3.05	.73
SM4: Service is effected by leaving the summmon with/near the defendant.	136	3.15	.82
SM5: Summon left with the defendant must be brought to his attention	136	3.15	.76
SM6: Affidavit of service must be made after summon served.			
SM7: Summon failed to be served within 6 months is void.	136	2.60	.95
Pleading			
P1: Pleading must be used for all actions.	135	3.36	.73
P2: Court may order that the action be tried without pleadings.	134	1.97	.86
P3: Any facts in the pleading are deemed to be admitted unless denied.	135	3.24	.72
P4: Court may strike out/amend any matter in the pleading if it discloses	136	3.05	.83
P5: Court may srike out/amend any matter in the pleading if it discloses no reasonable cause of defence.	136	2.98	.80
P6: Pleading is deemed to be closed at the expiration of 14 days.	135	2.33	.74
Discovery			
D1: Court may order any parties to make discovery of documents/facts.	134	3.27	.51
D2: Discovery may be ordered as against parties to the proceedings only.	136	2.62	.82
D3: Parties may refuse to make discovery of documents for inspections.	136	2.29	.83
D4: Discovery is subjected to other laws related to protective documents.	135	3.13	.61
D5: Discovery may be ordered against third party.	133	3.06	.61
D6: Failure to observe notice of discovery may result in pleadings being void.	135	2.52	.74

Table 1: Continued...

	Litigation Process	N	Mean	SD
	Affidavit			
AF1:	Affidavits may be used as evidence of the matters deposed.	136	3.13	.62
AF2:	Court may allow evidence in affidavits to be used in full hearing.	135	3.01	.69
	Appearance			
AP1:	Appearance can be in person or represented by a solicitor.	135	3.23	.61
AP2:	Default of appearance of one party, judge may commence hearing	136	2.95	.72
AP3:	A party who defaulted in appearance when judgement made or order given may apply to court to set aside judgement or order.	136	3.08	.58
	Subpoena			
SB1:	Witness must be present for hearing when subpoena by court.	136	3.45	.57
SB2:	Subpoena must be served personally on witness.	136	3.38	.56
SB3:	Failure to be present is deemed as contempt of court	136	3.30	.65
SB4:	Warrant of arrest can be issued for failure to attend hearing	136	3.21	.68

Table 2 above shows the results of the opinion of the respondents regarding judges and witnesses in civil banking litigation is in harmony with *Syariah* litigation. The results indicate that the respondents generally disagree that a non-Muslim can be a judge in *Syariah* litigation (J1: M=2.16, SD=0, 89). They also disagree that a female may adjudicate a *Syariah* litigation case (J2: M=2.70, SD=0.72). Finally, the respondents strongly disagree that a judge who is a *Fasiq* sitting and hearing a banking litigation case is in harmony with *Syariah* litigation (J3: M=1.93, SD=0.75).

Table 2: Characteristics of Judges and Witnesses in Civil Banking Litigation in Harmony with Islamic Banking Litigation

	Litigation Process	N	Mean	SD
	Judges			
J1:	Judge may be a non-Muslim.134	2.16	.89	
J2:	Judge may be a female.	135	2.70	.72
J3:	Judge who is a *fasiq* may sit for hearing in banking litigation.	132	1.93	.75
J4:	judge hearing litigation must satisfy requirements of relevant act.	135	3.25	.62
	Witness			
W1:	Witness may be a person who is a *fasiq*	134	2.17	.75
W2:	Number of witness is not an important element in proving any matters.	135	2.60	.86
W3:	Evidence of male and female witness has equal weight.	135	2.52	.85
W4:	Religion of a witness is not important in determining admissibility of evidence.	133	2.66	.70

Examining the issue of witnesses, the study found that the respondents are generally of the opinion that in civil banking litigation, a witness may be a *Fasiq* but this is not in harmony with *Syariah* litigation (W1: M=2.17, SD=0.75). The respondents also disagree that in civil banking litigation the number of witnesses is not an important element in proving any matters is in harmony with *Syariah* litigation (W2: M=2.60, SD=0.86). Further, the study revealed that giving equal weightage to males and females in civil banking litigation is not in harmony with *Syariah* litigation (W3: M=2.52, SD=0.85). Finally, in civil banking litigation, the religion of a witness is not important in determining the admissibility of evidence. However the respondents are of the opinion that this is not in harmony with *Syariah* litigation (W4: M=2.66, SD=0.70).

Table 3 presents the results of the comparison of opinion between respondents who have handled Islamic banking litigation and those who have not. The results indicate that only in six aspects (D4, D5, D6, AP2, AP3, and SB2) there were significant differences in opinion found between the two groups of respondents. Respondents who handled Islamic banking litigation agree that AP2 (in the event of default of appearance of one party, the judge may commence hearing) is in harmony with *Syariah* litigation (AP2: M=3.08, SD=0.62). However, those who have not handled Islamic banking litigation disagree that AP2 is in harmony with *Syariah* litigation (AP2: M=2.79, SD=0.82). These differences were statistically significant ($t = 2.32$, $p = 0.02$). Respondents who have handled Islamic banking litigation (M= 3.25, SD=0.55) as well as those who have not (M=3.00, SD=0.63) both agree that D4 (discovery is subject to other laws related to protective documents) is in harmony with *Syariah* litigation. The opinion of those who handled Islamic banking litigation, however, was stronger and the differences in opinion were significant ($t = 2.46$, $p = 0.02$). Respondents who handled Islamic banking litigation were of the opinion that D5 (discovery may be ordered against third party) is in harmony with *Syariah* litigation (D5: M=3.16, SD=0.56). Those who have not handled Islamic banking litigation were inclined to agree (D5: M=2.93, SD=0.66) that D5 is in harmony with *Syariah* litigation. The differences in opinion between both the groups were statistically significant ($t = 2.10$, $p = 0.04$). Similarly for AP3 (a party who defaulted in appearance when a judgment is made or an order is given may apply to the court to set aside the judgment or order) the groups that have handled Islamic banking litigation agree that AP3 is in harmony with *Syariah* litigation (AP3: M=3.18, SD=0.59). Those who have not handled Islamic banking litigation were inclined to agree (AP3: M=2.97, SD=0.58) that it is in harmony with *Syariah* litigation. The difference in opinion is significant ($t = 2.10$, $p = 0.04$). Finally, for SB2 (subpoena must be served personally on witness), respondents who have handled Islamic banking litigation (SB2: M=3.49, SD=0.53) and those who have not handled (SB2: M=3.26, SD=0.57) both agree that SB2 is in harmony with *Syariah* litigation. The difference in opinion is significant ($t = 2.33$, $p = 0.02$). Those who had handled Islamic banking litigation had a stronger opinion.

Table 3: Perception of lawyers handling Islamic banking litigation

Process	Handled Islamic Latigation			Not Handled Islamic Litigation			Sig
	N	Mean	SD	N	Mean	Sig	
SM1	71	2.99	0.92	61	3.18	0.96	NS
SM2	72	2.92	0.90	61	3.07	0.85	NS
SM3	72	3.07	0.76	61	3.03	0.71	NS
SM4	72	3.14	0.81	61	3.05	0.83	NS
SM5	72	3.11	0.76	61	3.18	0.76	NS
SM6	70	3.59	0.55	59	3.56	0.62	NS
SM7	72	2.56	0.98	61	2.69	0.92	NS
P1	72	3.38	0.72	60	3.38	0.74	NS
P2	71	1.95	0.84	60	1.97	0.90	NS
P3	72	3.26	0.67	61	3.23	0.78	NS
P4	72	3.13	0.79	61	2.97	0.89	NS
P5	72	3.03	0.84	61	2.93	0.77	NS
P6	72	2.35	0.75	60	2.33	0.75	NS
D1	72	3,21	0.53	59	3.32	0.47	NS
D2	72	2.58	0.83	61	2.69	0.79	NS
D3	72	2.33	0.86	61	2.26	0.81	NS
D4	71	3.25	0.55	61	3.00	0.63	0.02*
D5	70	3.16	0.56	60	2.93	0.66	0.04*
D6	71	2.65	0.74	61	2.34	0.73	0.02*
AF1	72	3.14	0.63	61	3.11	0.61	NS
AF2	71	2.93	0.78	61	3.10	0.57	NS
AP1	72	3.21	0.65	60	3.25	0.57	NS
AP2	72	3.08	0.62	61	2.79	0.82	0.02*
AP3	72	3.18	0.59	61	2.97	0.58	0.04*
SB1	72	3.50	0.53	61	3.29	0.61	NS
SB2	72	3.49	0.53	61	3.26	0.57	0.02*
SB3	72	3.36	0.63	61	3.26	0.68	NS
SB4	72	3.31	0.60	61	3.10	0.77	NS
J1	72	2.15	0.88	61	2.16	0.92	NS
J2	72	2.69	0.74	60	2.68	0.70	NS
J3	72	1.86	0.72	59	2.02	0.80	NS
J4	72	3.28	0.63	61	3.21	0.61	NS
W1	72	2.10	0.75	60	2.27	0.76	NS
W2	72	2.58	0.88	61	2.62	0.86	NS
W3	72	2.43	0.87	61	2.62	0.84	NS
W4	71	2.68	0.79	61	2.64	0.58	NS

* $p < 0.05$

Conclusion

The findings of the study generally indicate that several aspects of the processes involved in civil banking litigation are generally in harmony with *Syariah* litigation. This is based on the Islamic general principle of "*al-Asl Fi al-Ashyaa' al-Ibahat*" (al Sayuti, 1996) which means that as long as the acts are not against Islamic tenets, it is permissible. However, it was the view of Muslim lawyers that several aspects related to summons, pleading, and discovery were not in harmony with *Syariah* litigation. Specifically, summons which failed to be served within a period of 6 months, is void. This is probably because under *Syariah* law, limitation periods are not expressly provided. As such an aggrieved party may seek justice without constraint of time. Nevertheless, *Syariah* requires that justice should be sought within a reasonable time period. This principle was also evident in the situation whereby a limitation of 14 days is prescribed for pleadings in civil litigation. Otherwise the pleading was deemed to be closed. This is not in harmony with *Syariah* litigation. Once again this is not consistent with *Syariah* law, which does not prescribe limitation periods. Muslim lawyers were also of the view that courts may not order actions to be tried without pleading. Under *Syariah* law, the principles of public interest (*Maslahah*) require that justice is fairly and expeditiously dispensed in a court of justice. As such in *Syariah* litigation, pleading is necessary for both the litigants to document facts of claim and counter claims so that the process of litigation can be disposed off fairly and expeditiously.

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