Al Bai Bithaman Ajil- The grant of ibra in customer default situations

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**Al Bai Bithaman Ajil: The grant of *ibra* in customer default situations**

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The *Al Bai Bithaman Ajil* ("BBA") facility is an Islamic financing facility based on underlying purchase and sales agreements. When bank customers default on their instalment obligations under the facility, the grant of *ibra* (rebate) in *Al Bai Bithaman Ajil* ("BBA") facilities is a contentious issue. This article provides an analysis of the Malaysian judgments with respect to *ibra* and BBA facilities. It seeks to identify the best way for courts to approach *ibra* in the absence of legislation or executive direction. It is suggested that while implied terms, unconscionability and even recharacterisation of the BBA facilities have been used to justify granting *ibra*, the jurisprudential justifications are weak and risks the law developing in an unprincipled manner.

I. Introduction

1. Islamic banking has consistently achieved growth rates of 15% to 20% annually worldwide.2 In Malaysia, it is said that up to 70% or 80% of Islamic banking activities are done through the *Al Bai-Bithaman Ajil* ("BBA") facility,3 based on the underlying concept of a *murabahah* (mark-up sale).4 Typically, a bank customer would request the bank to purchase the goods on his behalf and sell it to him. He would then repay the bank through an instalment plan with a price markup.

2. The BBA facility is usually an effective financing tool. However existing practice requires the whole purchase sum to be paid in the event of default under such a facility. As such, debtors often desire the grant of *ibra* (rebate) so that they only pay part of the purchase price and not the full sum, even where the documents indicate no such entitlement.

3. The Malaysian courts, however, do not seem to understand the nature of the obligations between parties under a BBA facility. Over the years, they have sought to impute or imply terms granting *ibra* when customers default so that the BBA facility is economically competitive vis-à-vis its non-Islamic counterpart facilities. However the manner in which this has been done results in an unprincipled development of the law.

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4. This article will seek to critically examine the judgments issued thus far to see what are the justifications proffered for granting *riba*. An analysis of the different justifications will be conducted and finally, it is submitted that a strict adherence to the terms of the BBA documents should still be the preferred approach in determining the grant of *iba*.

II. The meaning of *riba* (interest)

5. While the common law governs Islamic banking, the definitions and underlying principles of Islamic banking are mostly derived from extra-legal sources. A brief description of these sources is important to establish the point of reference for readers.

6. The basic structures of Islamic banking products are guided by the *Quran* and the *Sunnah* (the sayings of the Prophet), which are the two primary texts in Islam. They are supported by *fiqh* (the opinions of Muslim legal scholars). All Islamic banking products must conform to five attributes. For our purposes, what is relevant is the ban on *riba*, since we are concerned with the BBA, an Islamic financing facility based upon an underlying purchase and sale concept.

7. *Riba* is banned in Islam. In verse 2:275 of the *Quran*, it is mentioned that:

   “Allah has permitted trade and forbidden *riba*.”

While there has been no explicit reason for the *riba* ban, jurists have generally concluded that this was due to the existing practice in the Middle East during the time of the Prophet Mohamed, where the amount owing by a debtor would be doubled in the event he cannot repay his loan. It was designed to alleviate the oppression of the poor when they had to borrow in order to finance their consumption and business needs.

8. Imam Shafii, the founder of the Shafii school of Islam practiced in Malaysia, comments that:

   “If a person shows a commodity to a person and says, ‘Purchase it for me, and I will give you such and such profit,’ and the person purchases it, the transaction is lawful.”

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5 Constitution of the Federation of Malaysia (2010 Reprint) at 9 Schedule List 1 – Federal List; see also Arab Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party) [2008] 5 MLJ 631 which held that Islamic banking is within the jurisdiction of the civil courts.
8 It is noted that although the English translation of the *Quran* refers to *riba* as interest, this is not reflective of the literal meaning of *riba*.
Being a country where the Shafii school of Islam is predominant and state-sanctioned, the development of Islamic banking in Malaysia has since adopted a literal approach to what constitutes *riba*, which refers to interest charged by non-Islamic banks when loans are taken. This is despite the presence of modern interpretations, which seek to interpret the text based on its historical context through extracting the principles and adopting a modern interpretation based on the principles undergirding it.

9. To overcome the ban on *riba*, different mechanisms were created in order to facilitate trade and continue meeting the needs of Islamic merchants. In the past, Islamic banks provided short-term finance to clients for the purchase of goods even when he might not have the cash to pay. This was through the *murabahah* concept founded on two basic elements, a purchase price and its related costs with an agreed mark-up. As there was no specific mention of such a concept in the *Quran* and *Sunnah*, *murabahah* was justified mainly on *urf* (custom), which is a source of Islamic law.

### III. A brief description of BBA facilities

10. Building on the earlier literal interpretation of *riba*, the BBA seeks to overcome the charging of interest via an underlying purchase and sale agreement. Briefly, there are three parties in a *murabahah* facility. First, A will request B to purchase certain goods either from the open market or from a particular third party. B does not have these goods and promises to buy them from a third party. B acts as the middleman and the *murabahah* contract is defined as a “sale of a commodity at a price which the seller (B) promises to buy from a third party at a future date.”

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12. Abdullah Saeed, *Islamic banking and interest: a study of the prohibition of riba and its contemporary interpretation* (Leiden, 1996) at chapter 8. It was commented that the approach taken by Religious Supervisory Boards is characterised by a high degree of legalism of early jurists’ opinions. Such is not justified especially since the *Shariah* did not restrict the development of commercial institutions but left it to Muslims to develop such institutions as dictated by the circumstances. Shariah principles provide bankers with sufficient flexibility to develop various practices in finance without having to look constantly at what is prescribed in *fiqh*. This would be based on principles of equity, justice, fairness rather than on a legal opinion expressed by a scholar.


14. Norhashimah Mohd Yasin, “Islamic Banking: Case Commentaries involving Al-Bay’ Bithaman Ajil” [1997] 3 MLJ cxcii has explained the distinction between a *murabahah* and a BBA facility in that the former relates to a short-term lump sum payment while the latter relates to a long and medium term deferred payment sale.


paid for it originally, plus a profit margin known to the seller (B) and the buyer (A).”

A then repays B by instalment. This avoids the problem of riba, since the transaction is now one based on purchase and sale rather than a loan from the bank to the customer.

11. BBA facilities are generally executed in two primary ways. The first method involves two contracts. The bank first buys the asset from the third party at an initial price. This agreement is known as the Asset Purchase Agreement and the bank is now the owner of the asset. It then sells the same asset back to the customer at a mark up, which will depend on various factors such as the bank’s cost of funds, the tenure of payment and the amount of the instalment payments. This agreement is called the Asset Sale Agreement (“ASA”). The mark-up is also determined upfront between the bank and the customer. For security, the bank then takes a charge over the property.

12. The second method involves a novation agreement between the original vendor of the property, the bank’s customer and the bank itself. Here, the customer first enters into a sale and purchase agreement to buy the asset from the third party. The bank would then execute a novation agreement with the consent of the original vendor and at the request of the customer so that it becomes the purchaser of the property. It would then sell the property to the customer at a markup with the usual instalments.

13. While the above is highly similar to a non-Islamic conventional loan, there are fundamental conceptual and legal differences between a conventional loan and a BBA. A comparison will be done to show the differences. First, the BBA facility is made up of two agreements, one purchase and one sale, while a loan facility is made up of just a single loan agreement. Second, the sale price is determined and fixed at the time the ASA is signed. It cannot be varied. Under a loan facility, the bank lends money to the customer on an interest rate, which the customer has to repay with the principal over a period of time. The rate can vary, although it can be fixed, and the customer will not know at the beginning his total liability over the loan period. Lastly, the income from

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19 Abdullah Saeed, Islamic banking and interest: a study of the prohibition of riba and its contemporary interpretation (Leiden, 1996) at p 76.
20 Nik Norzul Thani, Law and practice of Islamic banking and finance (Sweet & Maxwell, 2nd Ed, 2010) at p 54.
22 Mohamed Ismail bin Mohamed Shariff, “The Affin Bank Case: Is Islamic Banking Just Conventional Banking in a Green Garb?” [2006] 3 MLJ cli at p clii; see also Abdullah Saeed, Islamic banking and interest: a study of the prohibition of riba and its contemporary interpretation (Leiden, 1996) at p 83 for factors that would influence the mark up rate. The listed ones are: the bank’s need to earn a real return, inflation, prevailing interest rates, monetary policy, interest rates abroad, marketability of the murabahah goods involved and the expected profit rates from those goods.
23 Of Islamic Loan and Other Matters of Interest [2000] INSAF XXVIX No. 3, 91; see also Malayan Banking Bhd v Marilyn Ho Siok Lin [2006] MLJU 283 at [3].
the BBA facility is characterized as profit, which is not an entitlement, while the income from the loan facility is characterized as interest, which is an entitlement.

14. From the above, it can be seen that the key difference between a conventional loan and a BBA facility is one of characterization. The former is, as its name suggests, a loan while the latter is a sale and purchase agreement between the bank and the customer. The former accrues interest based on time, while the latter charges a mark-up to the customer based on the bank’s profit rate on the principal, although it must be noted that profit not in the nature of interest is typically not dependent on time. This will be illustrated with the example of a house buyer who wishes to purchase his house through a bank.

15. Under a conventional loan facility for the purchase of a house, assuming the house costs RM 300,000, together with an interest rate of 6% per annum and tenure of ten years, the total amount paid to the bank after ten years under a conventional loan would be approximately RM 399,673, assuming constant interest rates. The total amount paid to the bank after ten years would be similar for a BBA facility. However in the conventional loan facility, the interest rate fluctuates and the total interest payable is determined by the interest rate fluctuation as well as the tenure of the loan facility utilized by the customer. This is inapplicable to a BBA facility and also where the disadvantages of the BBA facility manifests.

16. Buyers financing their purchases using BBA facilities have faced problems when they default on their monthly payments to the bank. In an event of default under a non-Islamic loan agreement, the commodity is usually sold to satisfy the debt owed to the bank with interest accrued since the commodity is usually charged to the bank. The interest for future payments would not accrue to the bank. From the above example, a customer who defaults under a conventional loan in the second year would thus be liable for the unpaid principal plus the accrued interest.

17. However the BBA facility is built on purchase and sale. Using the example above, the purchaser is disadvantaged since even though he defaults after just two years, he would still be liable for the full sum of RM 399,673 to the bank, minus what was already paid, since the sum of RM 99,673 is not characterized as interest but rather profit from sale.

18. To overcome this, banks have granted *ibra* to customers so that the full sale price need not be paid in the event of default. In the early 1990s to early 2000s, such grant of *ibra* was held to be discretionary and there was no legal obligation for the bank to grant *ibra*. Later, it was disputed whether the bank customer was legally entitled to *ibra* when he defaults as opposed to when he makes early payment to the bank. This was in the absence

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of a contractual clause mandating the grant of *ibra*. We now examine the judicial decisions that have pronounced on the issue.

IV. **Four main categories of cases**

19. The Malaysian cases can be broadly categorized into four categories:

   (1) Cases that seek to strictly apply general contractual rules and principles, denying the defaulter of any right to the grant *ibra*;

   (2) Cases that seek to grant the customer a right to *ibra* based on the tenure of the BBA facility, treating the facility akin to a loan agreement;

   (3) Cases that seek to grant the customer a right to *ibra* based on the principle of unjust enrichment; and

   (4) Cases that seek to grant the customer a right to *ibra* based on an implied term by custom.

It is submitted that even though harsh consequences are sometimes the result, an approach that adopts a strict interpretation of the terms in the BBA documents is warranted in order to ensure the consistent application of contractual principles.

**A. Cases interpreting the BBA documents strictly**

(1) *Bank Islam Malaysia Bhd v Adnan bin Omar*[^30] (**“Adnan bin Omar”**)

20. In *Adnan bin Omar*, the plaintiff bank sold the defendant land under a BBA facility for RM 583,000 commencing on 2 March 1984 and secured via a charge of the purchased land[^31] to be paid for over 180 monthly instalments. It was a term which stated that in the event of a payment default, the plaintiff bank would be entitled to sell the land to fulfill the remaining amount owed[^32]. The defendant defaulted in his payments on April 1985 and did not make any payment since. The plaintiff bank then sought an order to sell the land and use the proceeds to satisfy what was due to it[^33].

21. The defendant submitted that since the maturity date of the loan was 2 March 1999, immediate payment entitled him to a rebate in the total sum owed once the land was sold and the bank’s original outlay satisfied. However, Ranita Hussein JC did not agree. She held that first, the parties were *ad idem* in agreeing that RM 583,000 was the facility amount given to the defendant by the plaintiff[^34]. Next, the agreement did not give the defendant any right to a rebate[^35]. Given that the plaintiff granted *ibra* on a discretionary

[^31]: *Bank Islam Malaysia Bhd v Adnan bin Omar* [1994] 3 CLJ 735 at p 736.
[^33]: *Bank Islam Malaysia Bhd v Adnan bin Omar* [1994] 3 CLJ 735 at [2].
[^34]: *Bank Islam Malaysia Bhd v Adnan bin Omar* [1994] 3 CLJ 735 at 736.
[^35]: *Bank Islam Malaysia Bhd v Adnan bin Omar* [1994] 3 CLJ 735 at 737.
basis and the defendant had breached the agreement by defaulting on payment, there was no legal obligation to grant *ibra* to the customer in default. It was held that the bank had a clear legal right to claim the full purchase price since the customer knew that the loan was provided via a series of sale and purchase agreements and the parties were *ad idem* in respect of the BBA facility.\(^{36}\)

(2) *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd*\(^ {37}\) ("Silver Concept")

22. In *Silver Concept*, the defendant had part financed his acquisition of land by obtaining a BBA facility. The sale price from the bank was RM 216,687,000, being an aggregate of the original purchase price with a profit element.\(^ {38}\) The defendant agreed to make regular instalments of RM 3,281,250.\(^ {39}\) On failure to pay, it was a term of the contract that the plaintiff bank could declare the unpaid sale price to be due and payable, and declare the total purchase price commitment to cease.\(^ {40}\) The defendant defaulted and the plaintiff bank sought an order from the High Court for the sale of the charged land to satisfy the sum owed to it.\(^ {41}\)

23. Several grounds were raised by the defendant in objecting to the sale of the impugned land.\(^ {42}\) Most relevant was the defendant’s contention that the bank should grant *ibra* to a customer in default just as it would to a customer who made early payment of his instalments.\(^ {43}\)

24. However, it was held that since the defendant had defaulted on payment, and furthermore time had been exhausted such that the contractual completion time had arrived,\(^ {44}\) no rebate was available. The court acknowledged that *ibra* was not given in a default, holding that *ibra* would be given only based on “pure sympathy and indulgence” by the bank.\(^ {45}\)

(3) *Analysis of the strict contractual rule approach*

25. The common law of contract developed out of the action of *assumpsit* to rectify breach of informal agreements reached by word of mouth.\(^ {46}\) Through the years of development, 19th century case law eventually emphasized the ‘will’ theory, which asserts the self-

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\(^ {36}\) *Bank Islam Malaysia Bhd v Adnan bin Omar* [1994] 3 CLJ 735 at 737.


\(^ {38}\) *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210 at [2].

\(^ {39}\) *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210 at [4].

\(^ {40}\) *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210 at [4].

\(^ {41}\) *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210 at [10].

\(^ {42}\) *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210 at [33]. Objections were mostly based on s 256(1)(3) of the National Land Code.

\(^ {43}\) *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210 at [51]. See the other grounds in raising ‘cause to the contrary’ at [28] – [35]. See in particular [32], where it was noted that the defendant contended that he was deprived of the rebate with the cancellation of the facility.

\(^ {44}\) *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210 at [51].

\(^ {45}\) *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210 at [51].

imposition of contractual obligations. Thus the court’s role is to discover the parties’ agreement and effectuate such agreements unless the agreement involved elements of mistake, duress or illegality. According to Evans, “the intention of the parties, whether express or inferred, must be the ground of every decision respecting its operation and extent and the grand object of consideration in every question with regard to its construction.”

26. Adnan bin Omar reflects a strict adherence to the parties’ contractual bargain. No rebate was granted since there was no agreement between the parties providing for any such rebate. Such a holding upholds the common law principle of preserving the ‘sanctity of contract’, where the court seeks always to uphold contractual bargains between the parties. Since there was no clause providing for the grant of ibra, ibra was not granted.

27. The bank’s legal right to the full purchase price is also consistent with the BBA facility being a purchase and sale agreement, not a loan agreement. This approach respects the sanctity of contract between both parties and reflects the application of the will theory as the basis of contract law applied. There is much to commend where this approach is concerned.

B. Cases granting ibra based on time period, akin to loan agreement

28. The next category of cases sought to justify granting ibra based on the time period accrued since the date on which the BBA facility was effective. Here, the general position was that since the bank had not granted the defaulting customer the full tenure of the BBA facility, it should not be entitled to the full mark up of the agreed sum.

(1) Affin Bank Bhd v Zulkifli bin Abdullah (“Affin Bank”)

29. In Affin Bank, two loans were involved with the dispute involving mainly the second loan. The defendant had purchased a house from the vendor. Following the restructuring of the original facility, the new total sum payable to the bank was RM 992,363.40, to be repaid over 25 years by monthly instalments. Given the original purchase price of RM 394,172.06, the profit earned by the bank was RM 598,191.34 over 25 years. The defendant defaulted and the plaintiff bank sought an order for sale under s 256 of the

50 Mohamed Ismail Bin Mohamed Shariff, “The Affin Bank Case: Is Islamic banking just conventional in a green garb?” [2006] 3 MLJ cli at p clixiii. The BBA transaction is a sales transaction, thus at the time of contracting the profit had been fixed and the sale price agreed between the parties. The profit is not earned monthly or periodically. Where a contract between the parties is that if the customer defaults and is then under an obligation to pay the full sale price, it is a legally valid provision and there is no reason why the courts should not enforce this bargain.
claiming the outstanding payments remaining. This was pursuant to a contractual term, which allowed the bank to call forth all sums payable upon a default, which was not remedied within seven days.\textsuperscript{53}

30. The issue before the court was whether the defendant was liable for the remainder of the total sale price of RM 992,363.40. This was crucial since case law had held that the bank was entitled to the full sale price upon default as opposed to the scenario under a non-Islamic loan agreement where the bank was merely entitled to accrued interest till the date of default.\textsuperscript{54} It is also pertinent to note that at this point in time, the court could at its own discretion refer the question to the National Shariah Advisory Council (“SAC”) under the Banking and Financial Institutions Act 1989.\textsuperscript{55} The advice by the SAC did not bind the courts then.

31. Abdul Wahab Patail J in coming to his decision first commented on the inadequacy of the existing common law framework in the enforcement of Islamic banking in Malaysia.\textsuperscript{56} Instead of opting to refer the question to the SAC, he held that the interpretation and application of the terms of the contractual documents between the parties and decisions of the courts was not a Shariah law question.\textsuperscript{57} Since the profit margin is based on the agreed amount and tenure of the facility and profit rate of the provider,\textsuperscript{58} the customer must have the benefit of the full tenure to make payment if he was obliged to pay the full sum contracted for between himself and the bank.\textsuperscript{59}

32. Patail J then held that the “profit margin” in a BBA facility was calculated from (a) the agreed profit rate; (b) the tenure of the facility required and (c) the amount of the facility.\textsuperscript{60} The order for sale was granted, but the plaintiff bank was only entitled to RM 582,626.80 of the sale proceeds plus profit of RM 98.54 per day until the debt had been settled. This was based on the principal sum of RM 394,172.06 with an agreed profit rate of 9% per annum. This formula was followed in subsequent cases,\textsuperscript{61} indicating the court’s willingness to treat the bank’s markup in a manner similar to interest.

\textsuperscript{52} National Land Code 1965 (No 56 of 1965) (M’sia) s 256.
\textsuperscript{53} Affin Bank Bhd v Zulkifli bin Abdullah [2006] 3 MLJ 67 at [24].
\textsuperscript{56} Affin Bank Bhd v Zulkifli bin Abdullah [2006] 3 MLJ 67 at [19].
\textsuperscript{57} Affin Bank Bhd v Zulkifli bin Abdullah [2006] 3 MLJ 67 at [27].
\textsuperscript{58} Affin Bank Bhd v Zulkifli bin Abdullah [2006] 3 MLJ 67 at [27].
\textsuperscript{59} Affin Bank Bhd v Zulkifli bin Abdullah [2006] 3 MLJ 67 at [28].
\textsuperscript{60} Affin Bank Bhd v Zulkifli bin Abdullah [2006] 3 MLJ 67 at [34].
\textsuperscript{61} Malayan Banking Bhd v Marilyn Ho Siok Lin [2006] 7 MLJ 249.
33. In *Marilyn Ho*, the defendant had obtained a BBA facility on 17 April 2002 from the plaintiff to finance her purchase of a property which she charged to the bank. Around 2003, the defendant defaulted after paying five instalments and the plaintiff bank sought an order of sale of the property to enforce the purchase price.63

34. David Wong J opined that the issue was whether the sum outstanding was the full sale price less the instalments paid by the defendant.64 He found himself bound by the Court of Appeal decision of *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd*65 (“*Emcee Corp*”) and held that he was bound by the rules of *stare decisis* in applying the law applicable to conventional loans to the present case.66 Therefore although the agreement stated that the defendant is required to pay the balance of the sale price of RM 928,589 on 21 February 2005, he held that the court had the option to ignore it since the court may make such order ‘as seems just’, provided the court had good reasons to ignore or rewrite the terms of the contract.67 This required the court to take into account all the circumstances of the case.68

35. In coming to his decision, Wong J commented that the circumstances in which the defendant found herself was similar to a vendor seeking to forfeit a large amount of money paid under an agreement for the sale and purchase of a parcel of land. It was normal for the sale price to be paid via instalments with a provision for forfeiture of all payments made in the event of default of any instalment.69 He cited *Stockloser v Johnson*,70 holding that for such intervention, the forfeiture clause must be of a penal nature, out of proportion to the damage and it must be unconscionable for the seller to retain the money.71 He then held that the principle of equity was consistent with Islamic teachings and applied the formula used in *Affin Bank* to arrive at the final order of sale to recover RM 598,689.10 and RM 106.16 per day till the debt was settled.

(4) Analysis of the time value of money approach

(a) The approach is inconsistent with the legal characteristics of a sale and purchase agreement

36. *Affin Bank* and *Marilyn Ho* reflect a poor understanding of the BBA facility. Under a BBA facility, the sale price is determined and fixed at the time the asset is sold to the

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63 *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249 at [1].
64 *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249 at [24].
65 *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408.
66 *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249 at [26].
67 *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249 at [35].
68 *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249 at [35].
69 *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249 at [37].
71 *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249 at [37].
customer. This is distinct from a loan agreement, where the interest rate can vary. By basing the bank’s profit margin on the agreed profit rate, the tenure of the facility required and the amount of the facility, it is submitted that Patail J has redefined the nature of a BBA facility such that it has become one highly similar to a conventional fixed interest loan facility. Indeed, it has been commented that the line of reasoning here is difficult to follow since the profit is not earned monthly or periodically. Neither did Patail J cite any Shariah authority for the formula he laid down.

37. It is submitted that since the sale price is fixed in a BBA facility, there is no question of unearned profit arising, since the profit arises from the single sale of the asset to the customer. In a BBA facility, the contract provides that the customer should pay the sale price by instalments as agreed and should pay the entire balance of the sale price if he defaults. This is a perfectly legitimate bargain and does not turn the transaction into a loan. It is also a legally valid provision that can and should be enforced. Therefore, it is submitted that granting ibra based on time accrued is inconsistent with the very nature of a sale and purchase agreement.

(b) The interpretation goes against the Islamic ban on riba

38. The time value of money approach is also inconsistent with the ban on riba. Besides the above two cases, the later case of Bank Islam Malaysia Bhd v Azhar bin Osman held that the bank will deduct as ibra what is ‘unearned profit’ when the tenure of the contract has not been completed, further reinforcing the grant of ibra based on how much time there was left to the maturity date of the BBA facility.

39. It is observed that such a treatment of the bank’s entitlement to profit is highly similar to the underlying concept of riba, which has been literally interpreted to mean interest given by non-Islamic banks. If BBA facilities are truly Islamic, it is suggested that the agreement should be based on a ‘real transaction’ with the mark-up rate not being a

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78 Affin Bank Bhd v Zulkifli bin Abdullah [2006] 3 MLJ 67 at [27].
80 Noor Inayah Yaakub, “The misconception of bai bithamin ajil in Malaysia (Malayan Banking Bhd v Marilyn Ho Siok Lin)” (2006) 22 JIBLR 442 at p 443, where the author commented even though the loan facility granted is an Islamic loan, a calculation of sale price employed by the bank is akin to a conventional loan formula. This formula was adopted from the cases of Silver Concept and Affin Bank.
function of the time taken to repay the bank. Hence it is suggested that the time value of money approach goes against the very reason for the existence of the BBA facility.

C. Cases granting ibra based on unconscionability

40. The third category of cases where ibra was granted was based on the doctrine of unconscionability. Case law had sought to incorporate Islamic notions of equity into the English concept of equity to justify the grant of ibra. This can be seen in Marilyn Ho, which has been elaborated upon above, and Malayan Banking Bhd v Ya’kup bin Oje & anor.

(1) Malayan Banking Bhd v Ya’kup bin Oje & anor (“Malayan Banking”)

41. The question in Malayan Banking was whether the plaintiff bank was entitled as of right to the full profits in the event the BBA facility was terminated much earlier. The facts show that the defendants had entered into a BBA facility on 15 July 2003 with the plaintiff bank. The amount payable to the bank under the facility was RM 184,094. The defendants defaulted after paying the sum of RM 16,947.62, thus giving rise to an outstanding balance of RM 167,797.10.

42. Hamid Sultan JC (as he then was) noted that there were two cases (Affin Bank and Marilyn Ho) restricting banks from claiming the full sale price from defaulting customers. He thus framed the question as whether he should allow the order for sale for the repayment of the sum in the original form, restrict the order for sale or make suitable orders as the justice of the case demands.

43. In its submissions, the plaintiff bank contended that the cases of Affin Bank and Marilyn Ho should not be followed. It submitted that since the property was charged to the plaintiff bank in order to secure payment of the sale price and since it was exercising its statutory right to sell the said property, it had a legal right to claiming the full sale price, relying on Silver Concept as authority for its position.

44. In arriving at his decision, Hamid Sultan JC first implicitly acknowledged the bank’s legal right to claim the full sum, citing Quranic injunctions requiring parties to be bound by their agreements yet acting with justice and equity to ensure the deal is completed according to the terms. He also stressed the need to mitigate breaches of contracts and

81 Saad Marwi v Chan Hwan Hua & anor [2001] 3 CLJ 98.
82 Malayan Banking Bhd v Marilyn Ho Siok Lin [2006] 7 MLJ 249 at [39].
84 Malayan Banking Bhd v Ya’kup bin Oje & anor [2007] 6 MLJ 389 at [2].
86 Malayan Banking Bhd v Ya’kup bin Oje & anor [2007] 6 MLJ 389 at [3].
87 Malayan Banking Bhd v Ya’kup bin Oje & anor [2007] 6 MLJ 389 at [3].
88 Malayan Banking Bhd v Ya’kup bin Oje & anor [2007] 6 MLJ 389 at [9].
insisted that some risk must be involved in any gain. He then expressed his view that it was unfortunate that Islamic banks insisted on their legal rights and sought to bankrupt a person. After a lengthy survey of the Quranic scriptures and writers, he ordered the plaintiff bank to demonstrate equitable conduct by filing an affidavit and giving *ibra*, which had to be a substantial one. No formula was given to determine how much *ibra* was substantial.

(2) *Analysis of the unconscionability approach*

45. *Marilyn Ho* and *Malayan Banking* are common in that the judges sought to invoke the language of unconscionability or equity to justify the grant of *ibra*. In the former, the grant of *ibra* was based on the unconscionability of the plaintiff bank in obtaining the full sale price under an Islamic financing facility since the purchaser did not have the benefit of full tenure. In the latter, it was based on the judge’s wish to see the court demonstrate ‘equitable conduct’ since common law equity included *istihsan* (Islamic notions of equity).

46. On closer examination, it is suggested that there are deeper underlying concerns in the judgments. In *Marilyn Ho*, a big concern is the analogising of the defendant’s situation to the situation where a seller forfeits money paid to it. In *Malayan Banking*, concerns lie in (1) the likening of equity to *istihsan* (Islamic equity) also observed in *Marilyn Ho* and (2) Hamid Sultan J’s order to the plaintiff bank in *Malayan Banking* to ‘demonstrate equitable conduct’ by granting substantial *ibra*.

(a) *Analysis of the Marilyn Ho judgment*

47. It is submitted that the analogy between the defendant and a bank’s forfeiture is a superficial one. Forfeiture depends on the characterization of money paid to the plaintiff bank. The question is whether the sum is a deposit or part payment of the contractual price. It is trite law that under s 75 of the Contracts Act 1950, where reasonable sums are paid under a contract as a deposit or to guarantee performance, the payee would typically be entitled to forfeit the sum.  

48. The amount advanced to the plaintiff bank is unlikely to be a deposit or a guarantee for performance. This is because the BBA facility in *Marilyn Ho* is based on the concept of a purchase and sale. Rather, it is submitted such payments should be regarded as part

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89 Malayan Banking Bhd v Ya’kup bin Oje & anor [2007] 6 MLJ 389 at [12].
90 Malayan Banking Bhd v Ya’kup bin Oje & anor [2007] 6 MLJ 389 at [12].
92 Malayan Banking Bhd v Ya’kup bin Oje & anor [2007] 6 MLJ 389 at [39(d)(i)].
93 Malayan Banking Bhd v Marilyn Ho Siok Lin [2006] 7 MLJ 249 at [40].
payments of the sale price. That being the case, the debt owed by the defendant should not be one which can be forfeited.

49. Next, it is worrying that the court considered itself in a position to ‘make any order even if it means ignoring the terms contained in the BBA documents provided it is just in the circumstances’. It is submitted that Wong J’s reading of s 148(2)(c) of the Sarawak Land Code, empowering him to ‘make such order as in the circumstances seems just’ seems to be overly wide. His interpretation would mean that the courts would now have the ability to ignore terms contained in the BBA documents and dictate to the parties what should be just in the circumstances. Such an interpretation risks offending the principle of contractual sanctity and also runs into the issue of judges being arbitrary in their conception of justice. This would run against the consideration of contractual certainty and result in Malaysian law discouraging the enterprise of Islamic banking instead of encouraging it.

(b) Analysis of the Malayan Banking judgment

50. First, it is suggested that Sultan JC made an assumption in his judgment that common law equity necessarily included istihsan (Islamic equity). In arriving at his order to the bank to show equity to the debtors, Sultan JC referred to the Quranic verse which states that:

We created not the heavens, the earth, and all between them, but for just ends. And the hour is surely coming (when this will be manifest). So overlook (any human faults) with gracious forgiveness.\(^{95}\)

51. He then referred to Ahmad Qadri’s (an Muslim jurist) opinion that “justice in Islam is much higher than the so called distributive and remedial justice of Aristotle, the natural justice of the Anglo-American Common Law, the formal justice of the Roman Law, or any other man-made law.”\(^{96}\) He then held that Affin Bank and Marilyn Ho were judgments which attempted to act within the parameters of justice and equity to ensure a just result and that excess profit was not made under Islamic principles.\(^{97}\)

52. It is submitted that while the subject matter at hand is a BBA facility, Sultan JC should have paid more attention to the fact that the choice of law used to adjudicate the dispute was Malaysian contract law, which is English in origin. While there are certainly overlaps in the meaning of equity across legal traditions, it is uncertain how Hamid JC considered that s 148(2)(c) of the SLC encompassed Islamic notions of equity, commented that equity was mandated under the provision or finally concluded with his finding that Islamic banks could voluntarily relinquish part of their claim on a default by the customer and had to therefore grant ibra voluntarily.

\(^{95}\)Malayan Banking Bhd v Ya’kup bin Oje & anor [2007] 6 MLJ 389 at [13].

\(^{96}\)Malayan Banking Bhd v Ya’kup bin Oje & anor [2007] 6 MLJ 389 at [14].

\(^{97}\)Malayan Banking Bhd v Ya’kup bin Oje & anor [2007] 6 MLJ 389 at [26].
53. The notion of voluntariness is premised on the willingness of a party to do a certain act. This is as opposed to the situation where a party is mandated to do an act under a court order: the obligation to obey is not premised on the willingness of a party to perform the act. It is also submitted that the reasoning in Sultan JC’s judgment suffers from a logical difficulty – if as he said Islamic notions of equity were higher than any idea of natural justice under the Anglo-American Common Law, it is questionable whether the English concept of equity on which Malaysian law is largely based can encompass such a lofty ideal.

54. It is therefore submitted that for an equitable remedy to be dispensed by the court, the remedy must emanate from the invocation of the court’s equitable jurisdiction, i.e., only when damages are an inadequate remedy in the case of legal causes of actions or where the cause of action is purely an equitable one. The availability of equitable remedies are, in short, due to the inadequacy of the common law remedy of damages and can be used either to enforce rights which are exclusively equitable or those which are legal but where the equitable qualifications admitting defences based on fraud, undue influence and mistake all seek to address the underlying notion of unequal bargaining power. Without any evidence that the parties had bargained on an unequal basis, it is hard to see why the equitable jurisdiction should be invoked.

55. In summary, while equity and unconscionability are useful and needful concepts, they remain vague and unhelpful, without more. In fact, other jurisdictions have been careful not to grant remedies based on the overarching notion of unconscionability. It is suggested that that should be sufficient warning to the Malaysian court not to proceed hastily in this area and before the court grants an equitable remedy or extends the range of equitable remedies available, an analysis of the juridical basis of equitable remedies developed thus far should first be undertaken. Here, it is suggested that while the court has achieved what it deems to be a ‘fair’ result, it has been done at the expense of doctrinal consistency.

D. Cases granting ibra based on implied terms by custom

56. Lastly, the implication of a term by custom is a well-established rule in the common law and has been used by the courts in justifying the grant of ibra in the case below.

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98 Jill E Martin, Modern Equity, (Sweet & Maxwell, 18th Ed, 2009) at 1-037 to 1-038.
99 Jill E Martin, Modern Equity, (Sweet & Maxwell, 18th Ed, 2009) at 1-037.
101 See E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and another (Orion Oil Ltd and another, interveners) [2011] 2 SLR 232 at [66] to [67] where Singapore has rejected the notion that unconscionability can ground a cause of action.
102 Hutton v Warren (1836) 1 M & W 466.
The proceedings before the court involved four BBA contracts. The issue before the court was how much the bank was owed under the property sale agreements (“PSA”) entered into between the customers and the bank. The plaintiff bank relied on Lim Kok Hoe and contended that it had a legal right to claim for the full sale price. The court should therefore honour and enforce the clear written terms of the contract and not impute any other term into it. On the bank’s interpretation, the defendant would be under an obligation to pay the full sale price, irrespective of whether there was a breach.

Rohana Yusuf J held that it was an implied term by custom that *ibra* was granted when customers defaulted. She commented that the practice in BBA transactions was such that the bank might enforce the charge over the property by applying for an order of sale and judgment sum simultaneously. The problem lay in the fact that the PSA was often silent on the amount due if the tenure of the BBA facility was incomplete either due to prepayment or termination due to breach.

Yusuf J noted that in the event a customer wished to make prepayment under the BBA facility, the bank would issue a redemption statement, stipulating the amounts payable for prepayment at each monthly interval for three months later, with the unearned profit deducted as *ibra*. She then noted a witness’s testimony that the practice was in line with other Islamic banks and held that the approach facilitated prepayment while being consistent with s 266(1) of the NLC. Yusof J eventually held that the bank always grants *ibra* based on ‘unearned profit’ and she decided to intervene via enforcing an implied term of Islamic banking practice.

Analysis of the implied terms approach

Yusuf J’s approach is creative. However it is submitted that it does not seem in accordance with the law on implied terms by custom. First, it is unclear whether the defendant had successfully shown that the grant of *ibra* is a usual practice. Second, it is submitted that even if there was such a term, it should not go against the express terms of the contract.

(a) The grant of *ibra* is not a custom

First, *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* (“Sababumi”) held that the legal test in establishing an implied term by custom is one implied by custom or usage
of any market or trade that is reasonable.\textsuperscript{110} The development of the law exhibits a fairly constant process, with a particular practice shown to exist and the parties to a contract proven to rely on it. Such a term may become so prevalent that it would form the foundation of all contracts made within that trade or locality unless excluded expressly.\textsuperscript{111}

62. The term ‘usage’ was defined by Thomas J in \textit{Cunliffe-Owen v Teather & Goodwood}\textsuperscript{112} ("\textit{Cunliffe-Owen}"), where he held that:

“Usage” is apt to be used confusingly in the authorities, in two senses, (1) a practice, and (2) a practice which the court will recognise. “Usage” as a practice which the court will recognise is a mixed question of fact and law. For the practice to amount to such a recognised usage, it must be certain, in the sense that the practice is clearly established; it must be notorious, in the sense that it is so well known, in the market in which it is alleged to exist, that those who conduct business in that market contract with the usage as an implied term; and it must be reasonable… A party to a contract is bound by usages applicable to it as certain, notorious and reasonable, although not known to him. If the practice, though certain and notorious, is unreasonable, it of course follows that it cannot constitute a usage which the court will enforce as a usage.\textsuperscript{113}

63. ‘Trade usage’ was later defined in \textit{Preston Corporation Sdn Bhd v Edward Leong}\textsuperscript{114} by the Federal Court as:

A particular course of dealing or line of conduct generally adopted by persons engaged in the particular department of business life, or… as a particular course of dealing or line of conduct which has acquired such notoriety, that, where persons enter into contractual relationships in matters respecting the particular branch of business life where the usage is alleged to exist, those persons must be taken to have intended to follow that course of dealing or line of conduct, unless they have expressly or impliedly stipulated to the contrary; that is to say that a rule of conduct amounts to a usage if so generally known in the particular department of business life in which the case occurs that, unless, expressly or impliedly excluded, it must be considered as forming part of the contract.\textsuperscript{115}

64. To prove the presence of custom and usage, \textit{Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd} then held that one had to show any of the following:

\textsuperscript{112} \textit{Cunliffe-Owen v Teather & Goodwood} [1967] 1 WLR 1421.
\textsuperscript{113} \textit{Cunliffe-Owen v Teather & Goodwood} [1967] 1 WLR 1421 at p 1438.
\textsuperscript{114} \textit{Preston Corporation Sdn Bhd v Edward Leong} [1982] 2 MLJ 22.
1. A series of particular instances in which it has been acted upon;

2. Proof of similar customs in the same or analogous trades in other localities; or

3. When ancient declarations of deceased persons of competent knowledge or other forms of reputation.\(^{116}\)

65. In the context of *ibra*, it is unlikely that there is any settled custom pertaining to its grant in the event of default on any of the three above grounds. Counsel had adduced no evidence showing that a custom existed on any of the three above grounds and most of the evidence was based on what Yusuf J had understood from adjudicating other similar disputes.\(^{117}\) How her knowledge was admissible as evidence is unclear – the judgment made no mention about her taking judicial notice of any trade custom and furthermore, the threshold for judicial notice is a high one. Also, while *Adnan bin Omar* and *Silver Concept* were clear on the position that *ibra* was only to be granted for prepayment cases and not cases of default, the status of this practice is unclear given the witness testimony in *Azhar bin Osman* which stated that it was “in line with other Islamic banks” that *ibra* was granted even in cases of breach.\(^{118}\) The unsettled practice is thus hardly indicative of an implied term by custom.

(b) Implied terms cannot overwrite express terms agreed upon

66. Even if the grant of *ibra* was an implied term by custom, implied terms cannot overwrite expressly stated terms. As Lord Birkenhead held in *Les Affretures Reunis Societe Anonyme v Walford*,\(^ {119}\) the trial judge had erred in declaring that a custom may be given effect to in commercial matters which was entirely inconsistent with the plain words of a commercial agreement.\(^ {120}\) Custom does not destroy but fulfills the law and cannot contradict the express terms of a contract.\(^ {121}\) Lord Jenkins has also commented on the operation of implied terms and stated that:\(^ {122}\)

> An alleged custom can be incorporated in to a contract only if there is nothing in the express or necessarily implied terms of the contract to prevent such inclusion and, further, that a custom will only be imported into a

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\(^{117}\) *Bank Islam Malaysia Bhd v Azhar bin Osman and other cases* [2010] 9 MLJ 192 at [8] to [10].

\(^{118}\) *Bank Islam Malaysia Bhd v Azhar bin Osman and other cases* [2010] 9 MLJ 192 at [9].

\(^{119}\) *Les Affretures Reunis Societe Anonyme v Walford* [1919] AC 801.


\(^{122}\) It is noted that the Evidence Act 1950 (Act 56) (M’sia) s 92(e) states that “any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of any such incident would not be repugnant to or inconsistent with the express terms of the contract”, thus allowing for the admission of extrinsic evidence to prove the existence of a custom.
contract where it can be so imported consistently with the tenor of the
document as a whole.123

67. The contractual clauses in Azhar bin Osman however show that there was an express
intention by the parties to pay the full purchase price to the bank in the event of a default.
Such clauses were also present in two other cases. In Adnan bin Omar, the bank could
enforce its strict legal rights since there was no mention of a rebate. In Silver Concept, it
was agreed that upon default in payment, the vendors were entitled by written notice to
the defendant declare the unpaid sale price and all drawings to be immediately due and
repayable, with the Al-Wujuh agreement ceasing to exist.124

68. Thus it is submitted that the use of implied terms by custom in justifying the grant of ibra
in the absence of ibra clauses does not consider the above statement by Lord Jenkins. Even
if there is a custom of granting ibra, such implied terms cannot be used to contradict
the clear words of the BBA, which states expressly that the bank is entitled to claim for
the full purchase price in the event of default.

V. Analysis of the preceding case law

69. It is submitted that the grant of ibra based on unreasonableness, unconscionability or
implied terms by custom all have their weaknesses and it is thus unwise to attempt to rely
on the grounds of consideration, unconscionability or implied terms to “read in”
contractual obligations of which Islamic banks have to perform.

70. Being English in nature and built largely on the will theory,125 Malaysian contract law is
dissimilar to Islamic contract law. The former is premised on the freedom of contract with
rules on offer, acceptance and intention to create legal relations deciding on when is a
contract valid while in the latter, the validity of a contract is premised on it fulfilling
certain conditions under one of the following categories, namely bay (contract of sale for
consideration), ijara (hire), ariyya (loan) and hibah (gift).126

71. Since Malaysian contract law is built on the will theory, the courts should endeavor to
resolve Islamic banking disputes in a principled manner in accordance to established
common law principles. The English case of Shamil Bank of Bahrain v Beximco
Pharmaceuticals Ltd (“Shamil Bank”) is a useful precedent to follow.127

72. In Shamil Bank, Shamil Bank of Bahrain EC (“Shamil Bahrain”) had entered into
murabahah facilities with two Bangladeshi pharmaceutical companies. The

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124 Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd [2005] 5 MLJ 210 at [7].
125 Michael Furmston, Cheshire, Fifoot and Furmston’s Law of Contract, (Oxford University Press, 15th Ed,
2007) at p 15, where it is stated that 19th century case law emphasised the will theory of contract – that
contractual obligations are self-imposed and any factor showing lack of consent is fatal to the existence of a
contract.
126 Abdul Karim Aldohni, The legal and regulatory aspects of Islamic Banking: A comparative look at the
United Kingdom and Malaysia, (Routledge, 2013) at p 86.
pharmaceutical companies later defaulted on their payment obligations and Shamil Bahrain sued for payment.

73. At the heart of the dispute was a governing law clause which stated that “Subject to the principles of the Glorious Sharia’a, this agreement shall be governed by and construed in accordance with the laws of England.” The defendants contended that the agreements were only enforceable to the extent that they complied with the Shariah and in accordance with English law – since the agreements did not comply with the Shariah and were in fact disguised loans at interest, they were unenforceable.\(^{128}\) The English Court of Appeal however held that even though there might be a general consensus on the prohibition on riba, this was insufficient to incorporate the principles of the Shariah into the parties agreements, hence the dispute was to be decided by English law.\(^ {129}\)

74. While Shamil Bank concerned a choice of law clause, this relates to the adjudication of Islamic banking disputes in that without the presence of a clause incorporating specific steps to ensure compliance with Shariah law, or statutory provisions mandating the presence of certain terms, one should not misapply common law principles to achieve desired outcomes in the cases before it. As seen from the analysis of the above cases, the principle of contractual sanctity has been undermined by an unprincipled use of implied terms, unconscionability and characterization of BBA facilities.

75. Finally, the court is not a court of sympathy. It is a court of law. While one might have sympathy for bank customers who might be in financial difficulties, contractual sanctity is an important principle. It is suggested that their protection must therefore come from the legislature.

VI. Developments in Malaysia

76. Since those decisions were handed down, legislative developments have taken place in Malaysia. First, the Central Bank of Malaysia Act 2009 (“CBMA”) was passed to widen and strengthen the powers of the Shariah Advisory Council (“SAC”) on Islamic finance.\(^ {130}\) Where a question concerning a Shariah matter in Islamic financial business arises, s 56 of the CBMA now requires the court or arbitrator to consider any published rulings of the SAC or refer any such question to the SAC.\(^ {131}\) Section 57 of the CBMA then states that such rulings shall be binding on the court or arbitrator referring the matter to the SAC, in effect removing from the courts the power to decide on Shariah law questions in Islamic finance.\(^ {132}\) According to Tun Abdul Hamid Mohamad (the former Chief Justice of Malaysia), these amendments were made to allow 1) speedy rulings on

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\(^{128}\) Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd [2004] 1 WLR 1784 at para 27.
\(^{129}\) Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd [2004] 1 WLR 1784 at para 55.
\(^{130}\) Central Bank of Malaysia Act 2009 (Act 701 of 2009) (M’sia) s 51.
issues and 2) consistency of rulings on Shariah issues and non-compliance with issued guidelines could result in administrative penalties found in s 94 to 98 of the CBMA.

77. Second, guidelines have been issued pertaining to the grant of *ibra*. In 2010, the SAC made the grant of *ibra* obligatory to ensure justice to financiers and customers. Those resolutions arose as a result of the issues that have arisen before Malaysian courts and the inconsistency of practices among Islamic banks in imposing *ibra*. In addition, to eliminate *gharar* (uncertainty), the 2010 resolution provided that *ibra* must be included as a clause in the legal documentation.

78. While legislative and executive regulation has been undertaken in Malaysia, most other financial centres across the world do not have the benefit of such a centralized authority to make such pronouncements. There has also been no pronouncement dealing with the consequences of non-compliance with the issued guidelines and the prospect of judicially reviewing the SAC’s decisions remains alive. The civil remedies available to a bank customer in the event of a BBA facility non-compliant with the SAC guidelines also remain uncovered by legislature. Guidance from past judicial decisions are thus still of relevance to Malaysia. It is important that the courts decide the cases in a principled manner.

VII. Conclusion

79. Through the analysis of the above cases, it is suggested that in the absence of terms mandating the grant of *ibra*, it is unwise to resort to the contract law to “rewrite the terms of the contract” in order to seek an outcome which the judge deems just and fair. As expounded by Tun Abdul Hamid Mohamad (the former Chief Justice of Malaysia), the Islamic banking industry is estimated to grow to USD 16 trillion. Today, Malaysia has

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136 CIMB Islamic Bank Bhd v LCL Corporation Bhd & anor [2011] 7 CLJ 594 at [38].

137 Datin Jeyanthini Kannaperan & Izahairani Izani, “Guidelines on *ibra* for sale based financing and on late payment charges” [2013] 1 LNS(A) xxxvii at p 1; see also Bank Negara Malaysia website [accessed 9 July 2013].


emerged as a leader in the industry. If she intends to maintain her position as the world leader in Islamic banking and continue growing as an Islamic banking hub, the fair, just and principled adjudication of Islamic banking disputes under the common law framework is imperative since participation is sought not just from Muslims, but non-Muslims as well. Fidelity to established common law principles is needed for such to materialise.

[alaysia at the 12th emeritus prof. ahmad ibrahim memorial lecture 7 dec 2011.html](accessed 28 June 2012).