



Approach Application of Statutes of Limitations to Islamic Banking: The Case of Malaysia

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ABSTRACT - Limitations of action designate extent of time after an event, as set by statutes of limitations, within which legal action can be initiated by a party to a transaction. No event is actionable outside the designated time as same is rendered statute-barred. This study aims to provide an insight into application and significance of Limitations Act 1950 and Limitation Ordinance 1952 to Islamic banking matters in Malaysia as well as Shariah viewpoint on the issue of limitation of action. In conducting the study, a qualitative research methodology is employed where reported Islamic banking cases from 1983 to 2018 in Malaysia were reviewed and analysed to ascertain the application of those statutes of limitations to Islamic banking. Likewise, relevant provisions of the statutes as invoked in the cases were examined to determine possible legislative conflicts between the provisions and the rule of Islamic law in governing the right and limitation of action in Islamic banking cases under the law. The reviewed cases show the extent to which statutes of limitations were invoked in Malaysian courts in determining validity of Islamic banking matters. The limitation provisions so referred to are largely sections 6(1)(a) and 21(1) Limitations Act 1953 and section 19 Limitation Ordinance 1953, which do not conflict with Shariah viewpoint on the matter. This study will prove invaluable to financial institutions and their customers alike in promoting knowledge and creating awareness over actionable event in the course of their transactions.

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INTRODUCTION

Statute of limitations are laws that impose a limit as to time for a person who desires to begin a legal action against another to take steps to initiate such an action in the appropriate court. If the action is not instituted within the time limit specified by the law, the right to institute the action is perpetually gone. Any matter or right of action that is lost to statute of limitation cannot be entertained by court of law. Such a matter or right by law is said to be statute-barred, meaning that the matter or right and the party supposedly entitled to it are no longer competent to be heard by any court of law. By nature, statutes of limitation represent a judicial policy whereby aggrieved parties who generally have a right to institute legal action are barred of any relief due to commencing their action after the passage of an unreasonable extent of time (Marzen, 2019). This calls for diligence on the part of parties to Islamic banking transaction in instituting action before court of law with respect to any perceived default or breach of rights or responsibilities

arising out of such transaction. In view of this, the topic of statutes of limitation is a very important one to every context of commercial transaction.

In order to appreciate parties' right to institute an action in pursuit of any perceived breach of their respective entitlements, rights and duties from a particular transaction, it is imperative to understand the limitation imposed by law therein. This is true of Islamic banking transactions as it is for all regulated businesses. In this regard, it is notable that Islamic banking business and/or operations are preceded by the laws imposing limitation to action in Malaysia, i.e. the English statutes of limitations which have been localised and rendered Malaysian laws for all intent and purpose. However, Islamic banking is, in addition to Malaysian legislations, governed by Shariah which to a certain extent, has provided for its version of limitation to action in the principle of *taqadum* or *murur al-zaman* (lapse of time),ⁱ against actions arising out of transaction under some circumstances. Therefore, to the largest extent possible, such Shariah provisions need be incorporated in the laws applicable to Islamic banking actions as well (Yaacob et al., 2019). Therefore, given such limitations to action by the law, it is befitting from the onset for Islamic finance jurisdictions to consider rules of Shariah on limitations to actions as well while enacting laws and regulations for Islamic banking industry. This is imperative in order to create the suitable environment required for all Islamic banking transactions and their development in all ramifications. Moreover, extant researches have established that an enabling legal and regulatory infrastructure is indispensable for a vibrant Islamic banking industry (DeLorenzo & McMillen, 2013).

Malaysian statutes of limitations are the Limitation Act 1953 and Limitation Ordinance 1952. The Limitation Act 1953 provides for limitation of actions and arbitrations as applicable in West or Peninsular Malaysia only. The Limitation Ordinance 1952 is the statute of limitation that applies in East Malaysia or the states of Sarawak and Sabah. There are some minor differences in the statutes of limitation of west or Peninsular Malaysia and that of Sabah and Sarawak even though both legislations share the same spirit.ⁱⁱ Accordingly, this study aims to observe, as part of the requisite legal infrastructure, the workability and application of the limitation laws to actions emanating from Islamic banking before Malaysian courts and the significance of such laws thereto.

LITERATURE REVIEW

Nature, Scope and Purpose of Statutes of Limitations

In real litigation, the frequency of the topic of statutes of limitation is more than one can imagine. But on a closer critical look, the topic seems not to have received corresponding publicity in that regard. Thus, many write-ups could not deal with the topic generally, instead they are about some particular types of claim therein (Crump, 2016), and so coverage in available literature of the limitations of statutes issue has not been proportionate to its significance.ⁱⁱⁱ Therefore, the importance of statute of limitation in litigation is greater than it appears as it remains an intensely interesting topic to parties whose actions and their prospects depend on it (Marzen, 2019). Statutes of limitations, whose origin scholars traced to early Roman law, have been in existence for centuries and by the year 1236 one was enacted in England to govern property transfer (Heise, 2010). Statutes of limitation are obtainable in both common law and non-common law jurisdictions. Derived from judicial and legislative sources, statutes of limitations are procedural and substantive rules that restrict one from suing another due to lapse of time and on that basis alone. A statute of limitations by nature is an instrument that bars action on the part of a party at fault of laches and acquiescence. Laches and acquiescence are equitable doctrine and principles that influence limitation of action in law generally. Laches designates a failure on the part a person who is being prejudiced to do what is required to be done by the law i.e. failure to take steps to initiate an action. In essence, the doctrine of laches is about telling potential litigants that they are by law out of time to institute an action. Likewise,

the principle of acquiescence signifies tacit approval of an event, by omission or commission of one party, that might have otherwise provided a cause of action for the other party (Pettit, 2012). In other word, laches would necessarily give rise to acquiescence. Laches is the basis of limitation of action as enshrined in statute of limitation as a whole. By nature, therefore, statute of limitation in Malaysia as in every other common law jurisdiction seeks to bar action on the part of a person that is not diligent to institute such an action on the right time. This principle is aptly encapsulated in the equitable maxim “equity aids the vigilant and not those who slumber on their rights” (Marzen, 2012). The person so barred is from the onset entitled to such an action, however, due to indolence and effluxion of timeframe specified by the statute for the institution of the said action, the right to the action fizzles out as well (Crump, 2016).

The purpose of limitation statute includes the need to establish an orderly legal system to promptly and equitably resolve claims in order to promote legal stability. As a justification for its enactment, jurists and legislators alike often cite efficiency, fairness (equity) and stability in litigation to the credit of limitation statutes. At the same time, if plaintiffs are allowed to wait for unnecessarily long time before initiating legal action that in itself vitiates a component critical to a thorough, fair and just trial (Heise, 2010). Moreover, “in a world where everyone has an equal probability of being a plaintiff or defendant, the application of statutes of limitations and the resulting reduction in legal error, administrative and transaction costs bring about a net gain for the benefit of all” (Heise, 2010, p. 15,099). The application of statutes of limitation; however, takes exception in cases of fraud or where parties on their own acknowledge liability to resume the otherwise stale contractual relation/dealing between themselves (Crump, 2016). Jurisprudentially, legal scholars and jurists have articulated an opposing voice which the law ought to reckon with under the appropriate circumstances, to the effect that where compelling circumstances, and not necessarily indolence, would lead to injustice on the part of an aggrieved party, the rule should be spared (Corrias, 2018).^{iv}

Malaysian Legislations Applicable to Islamic Banking

Islamic Banking is based on Shariah or Islamic law and its foundation is entrenched in divine revelations of al Quran and the tradition of Prophet Muhammad (S.A.W.). There are certain rules set out in Islamic law to govern commercial dealings including matters of Islamic banking (Mohammad & Shahwan, 2013). Thus, in the case of *Malayan Banking Bhd v. Ya'kup Oje & Anor*^v, Hamid Sultan Abu Backer JC stated that “Islamic law of commercial transaction fundamentally is rooted on the premise of total eradication of *riba* (interest) and *gharar* (uncertainty).”^{vi} This statement encapsulates a basic rule in Islamic commercial transaction. Other rules include pursuit and establishment of fair, just and equitable society while dealings with one another in order to attain the overarching goals of Shariah, the *maqasid al-Shariah* (Mohammed, & Taib, 2015). Hence, every bank offering Islamic financial services is required and compelled to follow this and other laid down Islamic law principles.

Apart from the divine rules derived from Islamic law, relevant legislations and regulations of the jurisdiction in which Islamic banks operate are also applicable thereto (DeLorenzo & McMillen, 2013). In some Islamic finance jurisdictions, this is irrespective of whether these laws are compatible or incompatible with Shariah which ought to be the primary law to govern Islamic banking transactions (Audu, & Mikailu, 2014). Given this situation, therefore, Islamic banks are faced with the complex task of introducing, developing and implementation of Islamic banking products which should be not only Shariah-compliant but also compliant with legislations in force in the jurisdiction they operate (Aliyu et al., 2017). This sometime creates conflicts between applicable Islamic law derived from Shariah and the rest of the laws of the jurisdiction which may be inconsistent with the Islamic law (Mustapha, 2015; Oseni, 2015).

Malaysia is a multi-ethnic and a multi-cultural federation with a plural legal system (Shuaib, 2003).^{vii} The legal system operated by the country is derived from the Federal Constitution of the country, which is the highest law of the land.^{viii} There are two types of court system operating in the country; one is based on civil law while the other is based on the Shariah law.^{ix} Hence, statutes of the country are made in two sets; for Shariah courts, the statutes applicable would be based on Islamic law whilst for the civil courts it is based on common law or Malaysian local legislations. In both cases, for the validity of any statutes that would be applied to Islamic banking matters by courts, such statute would be enacted based on common law style and principles of law-making, i.e. by parliament using its constitutional powers thereon (Poon et al., 2018).

In Malaysia, the business of banking, whether Islamic or conventional, is a federal matter that would be dealt using common law. Accordingly, litigation of Islamic banking matters falls within the purview of the civil courts^x. In the civil courts, the applicable substantive and the procedural laws are based in common law and other conventional legislations. This is evident from the case of *Bank Kerjasama Rakyat Malaysia Berhad v. Emcee Corporation Sdn Bhd*^{xi} where a judge, Abdul Hamid Mohammad JCA (as he then was), sitting in the Court of Appeal stated that "though the facility given by the appellant to the respondent was an Islamic banking facility, that did not mean that the law applicable in this application was different from the law applicable if the facility was given under conventional banking."^{xii} In the case of *Bank Islam Malaysia Bhd v. Azhar Osman & Other*^{xiii}, the court interpreted this statement as to mean "Islamic banking contract is subject to the same law and legal system as any banking contract."^{xiv}

The main regulatory law specifically applicable to Islamic banking in Malaysia is the Islamic Financial Services Act (IFSA) 2013. However, in addition to the IFSA 2013, there are other substantive laws which need to be applied in determining Islamic banking matters as well. These include the Companies Act 2016 and Contracts Act 1950. The reason for the application of Companies Act 2016 is because according to Islamic Financial Services Act 2013,^{xv} every Islamic bank must be a company and the regulatory matters of companies are dealt with by the said law. Likewise, for the contractual affairs, it is a must for Islamic banks to apply the general law of contract applied in the country which is the Contracts Act 1950.^{xvi} In addition, there are policy documents on Shariah contracts and products as well as direction given by Bank Negara Malaysia (the Malaysian Central bank) by virtue of Islamic Financial Services Act 2013. The provisions of all these instruments shall be complied with and followed by all Islamic banks in Malaysia. Similarly, Central Bank of Malaysia Act 2009 makes it mandatory for Islamic banks to follow the decisions made by the apex Shariah governance body, the Shariah Advisory Council of Bank Negara Malaysia.^{xvii} These are regulatory instruments that incorporate and provide for rules of Shariah to govern Islamic banking business and to be complied with by Islamic banks in their operations. This is how Malaysia employs common law style and principles of law-making to provide regulations for Islamic banking that cater for Shariah compliance and governance thereof.

In furtherance of the objective of Shariah governance and compliance in Islamic banking, Malaysia has established a Law Harmonisation Committee in 2010 and tasked with the responsibility of ensuring the incorporation Shariah in all regulations that are relevant and applicable to Islamic banking. This Committee is part of on-going efforts by Malaysia to promote and strengthen its legal system and regulatory infrastructure as well as ensuring certitude and enforceability of the Malaysian legislations when it comes to Islamic banking contracts. These are foremost objectives to cater for the development of the Islamic banking industry. The Committee, located at the Malaysia's Central bank, undertakes review of extant laws with view to harmonise them to be Shariah compatible when they are applied to Islamic banking. The Committee shall equally undertake review of new legislations that affect Islamic banking as they are made, to be made Shariah compatible.^{xviii} The work of this Committee has

resulted in the enactment of principal and masterpiece Islamic finance legislation, the IFSA 2013 as well as amendments to several others.

Application of Malaysian Statutes of Limitations to Islamic Banking Transactions

With respect statutes of limitations, the two Malaysian legislations on the topic i.e. the Limitations Act 1950 and Limitation Ordinance 1952, both are considered procedural or adjective law for the purpose determining Islamic banking matters by Malaysian courts. Adjective or procedural law is any law that provides for how actions shall be instituted and pursued in court of law. In other word, it is a law that sets out the procedure through which matters would be entertained by courts as competently instituted. Procedural laws are necessarily required in order for litigants to institute Islamic banking cases in courts and justify their rights therein (Muneeza, 2017). The importance of adjective laws is emphasised by Lord Salmond in *Bain v. Whitehaven Railway Junction*^{xxix} when the erudite judge observed as follows:

“Adjective law is to gain access to the court of law to vindicate your rights. Need to know procedure to defend your clients and to study evidence to prove the case to the courts. Adjective law is lex fori or law of the forum. Foreigners are tried to our procedure and law of evidence.”^{xxx}

It is evident from the above, that without fulfilling requirements enshrined in Malaysian procedural legislations, it cannot be impossible to bring Islamic banking transactions before the courts. For instance, there is a requirement to prove Islamic banking disputes before the Malaysian courts. To do this, rules of evidence enacted in the Evidence Act 1950^{xxxi} as a procedural law would necessarily be resorted. Meanwhile, the courts to which the disputes could be referred, and its jurisdiction could only be ascertained via the Subordinate Courts Act 1948^{xxxii} and Courts of Judicature Act 1964,^{xxxiii} both of which for this purpose function as procedural instruments. Moreover, the procedures of application to courts could only be known through the rules of courts made pursuant to the Courts of Judicature Act 1964^{xxxiv} and Subordinate Courts Act 1948.^{xxxv} For instance, where an Islamic banking matter is brought before a High Court, the process of going about the matter including, the documents submitted and the mode of origination of the matter shall be subject to the Rules of High Court 2012.^{xxxvi} Beside these, Islamic banking disputes will likewise be subject to the statutes of limitations which impose statutory limitation as to time within which litigation could be commenced in the courts. If the statutorily imposed time lapses, it means no action could be brought to the court regardless of the existence of a valid cause of action.^{xxxvii}

It follows from the preceding discussions that statutes of limitations, as procedural laws, are significant for Islamic banking cases; hence the quest to ascertain if Islamic banking faces any legislative conflict in relation to the statutes of limitations as applicable in the determination of such cases.

METHODOLOGY

This study employs a qualitative research methodology with doctrinal approach and aims to observe and understand the significance and application of Limitations Act 1953 and the Limitation Ordinance 1952 to Islamic banking matters in Malaysia. By this methodology, reported Malaysian Islamic banking cases were examined and reviewed to determine the application of statute of limitations therein. Provisions of the statute of limitations invoked in those cases were subjected to content-analysis with view to ascertaining whether any legislative conflict exist between them and the *lex loci* applicable to Islamic banking which is Shariah or Islamic law. As the Malaysian Islamic industry grows and develops, so also the frequency of litigation in related matters. Accordingly, the reported cases considered for analysis and review in this study were as of 2018 downwards to 1983. The selection of the period of 1983 to 2018 is

informed by the fact that it marks a phenomenal time when the Islamic banking industry in Malaysia generally had tremendous growth in terms of infrastructures, capacity building and expertise which to be consolidated in subsequent years (BNM, 2017). Most importantly, this period is significant in the interplay of law and Shariah in the Islamic banking industry of Malaysia as it witnessed remarkable developmental reforms in terms of its legal and regulatory framework for the adjudication of Islamic banking disputes, Shariah governance and landmark judicial decisions that shape and strengthened the Islamic banking industry among other matters (BNM, 2017; Laldin, & Furqani, 2018; Shaharuddin, 2015).

LIMITATION PROVISIONS REFERRED TO IN DECIDING ISLAMIC BANKING CASES 1983-2018

Reported Islamic banking cases handed down by Malaysia courts from 1983 to 2018 were searched for with view to finding out the application of statute of limitations in determining them. The following four cases were reported to have the statutes of limitations cited in deciding them. In particular, the Limitations Act 1953 was cited in the case of *Bank Islam Malaysia Berhad v. UMW Zipper Manufacturing Sdn Bhd & Ors*,^{xxxviii} *Maybank Islamic Bhd v. Kamarulzaman bin Mohamed Nordin*^{xxxix} and *Maybank Islamic Berhad v. M-10 Builders Sdn Bhd & Anor*.^{xxx} Meanwhile, the Limitation Ordinance 1952 was referred to in *Profound Heritage Sdn Bhd v. Bank Islam Malaysia Berhad - Labuan Offshore Branch*.^{xxxxi} These cases will be discussed with view to examine the nature of the application of the limitations statutes in them. Before then, the relevant provisions referred and/or cited in almost all the cases, i.e. sections 6(1)(a) and 21(1) Limitations Act 1953, are hereby pointed out.

Section 6(1)(a) of the Limitations Act 1953 is to the effect that no action can be brought to any court of law in matters of tort and contract after six years from the date on which cause of action accrued. Meanwhile, section 21(1) of the Limitations Act 1953 is to the effect that, after twelve years from the date when right to receive money accrued, no action to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property shall be brought to any court of law.

In the case of *Maybank Islamic Bhd v. M-IO Builders Sdn Bhd & Anor*,^{xxxii} one of the contentions made was that the plaintiff's claim was statute-barred under section 6 of the Limitation Act 1953. The court upheld the contention and was of the view that the plaintiff's action against the defendants was statute-barred. It was stated that the plaintiff contended that the default had occurred when the defendant refused to execute a new Asset Sale Agreement (ASA) and Asset Purchase Agreement (APA) after the second ASA and APA had lapsed. The court held that, by its own admission, the plaintiff had asserted that the Murabahah Overdraft (MOD) Facility had matured on 5th May 2006 and as such the plaintiff's cause of action against the defendants would have arisen and or accrued on or by 5th May 2006. Since the matter has been filed on 23rd April 2013, it was beyond the six (6) years provided under section 6 Limitation Act 1953. On appeal,^{xxxiii} it was pleaded that the High Court judge had erred on points of law and facts to decide that the Appellant was caught by limitation period. The Court should have decided the issue of limitation in the negative since the Respondent had not ceased using the facility provided after 5th June 2006. Additionally, some part payments were effected by the 1st Respondent and terminating the Facility was only made through a Demand and Termination Letter dated 11th March 2013. Therefore, the decision of the Court should have been that the cause of action arises only after the Respondents' failure to do as required by the Demand Notice.

On the issue of limitation, the Court of Appeal held that to be without merit. The Appeal Court upheld the Appellant's contention that the facts were misconstrued by the trial High Court Judge to conclude that there was limitation while noting that the second APA and

ASA were following and in accordance with the Second Letter of Offer (LO). In his admission, the Appellant stated that the second APA and ASA, which secured him the MOD Facility, had matured on 5th May 2006. The Court of Appeal, in its observation, stated that the Judge at the High Court Judge had erroneously taken this date to be the date when initially the cause of action arose and averted his mind from the fact that the MOD Facility, through the Third LO of 28th May 2009, was restructured wherein the Appellant asked the First Respondent to effect new APA and ASA to enable compliance with the concept of *Murabahab*. The neglect and failure by the First Respondent to effect new APA and ASA amounted to a breach of obligations in the contract and that triggered an event of default. As evident in the Appellant's letters of 12th June 2009, 30th June 2009 and 21st July 2009, there were repeated request to the First Respondent to effect APA and ASA. The demand letter for the outstanding amount due under the facility was only issued on 11th March 2013. Accordingly, the cause of action could have arisen on 21st July 2009. The action was instituted on 25th April 2013 and accordingly within the permitted timeframe provided by the law. As such, it was concluded that the trial High Court Judge was erroneous in her conclusion about the Appellant being delayed in making the claim and being caught by limitation.

In the case of *Maybank Islamic Bhd v. Kamarulzaman bin Mohamed Nordin*,^{xxxiv} one of the issues raised was whether the plaintiff's action was barred by the provision of section 6(1)(a) of the Limitation Act 1953 as the plaintiff had commenced the action against the defendant after six (6) years as provided in section 6(1)(a) of the Act. The period of six (6) years must be calculated from 11.3.2003 and not 31.3.2010 as was done in this case. The court observed that the plaintiff's cause of action was to claim the shortfall which was still due and payable by the defendant and the plaintiff's claim was under a Deed of Assignment and the Sale Agreement Cum Assignment the time within which the plaintiff was entitled to claim from the defendant was twelve (12) years and not six years as provided under section 21 of the Act. As such, the court considered the issue whether a Deed of Assignment is a recognized charge under section 21(1) of the Act and whether Deed of Assignment were equitable charge or equitable mortgage as envisaged by section 21(1) of the Act as the words equitable mortgage had not been defined by any written law. The court referred to the decision of some of cases like the case of *Chuah Eng Khong v. Malayan Banking Berhad*^{xxxv} where it was held that the borrower has assigned absolutely to the lender all his rights and title in a parcel or piece of immovable property to which no individual title has been issued as security, is an absolute assignment. Thus, it was observed that an assignment to a lender as security for a loan, which absolutely surrenders all of borrower's rights over immovable property without document of title is an equitable mortgage. As such, it was held that where a landed property in respect that has no issue of document of title, or no registered charge, or no deposit of issue of document of title, the lender, as equitable mortgagee (and not equitable chargee) may upon default of a borrower, dispose of the assigned property without any court order under Order 83 or Order 31 of the Rules of the High Court 1980. Therefore, the court was of the view that section 21(1) of the Act would apply to the case and as such, in this case, the time within which limitation would come into play was twelve (12) years. The court recognised the Deed of Assignment as a mortgage under section 21(1) of the Act and held that the plaintiff's claim against the defendant was not barred by the issue of limitation as claimed by the defendant.

In the case of *Bank Islam Malaysia Berhad v. UMW Zipper Manufacturing Sdn Bhd & Ors*,^{xxxvi} the issue with regard to the Limitations Act 1950 was to determine whether the suit against defendant two and defendant three was time-barred under section 6(1) (a) of the Limitation Act, 1953 or whether the suit was valid under section 21(1) of the Act. The court found that section 21(1) had no application in this case as the claim made here is completely founded on contract and did not involve any charge or mortgage on land or personal property in so far as defendant two and the defendant three were concerned personally. The court then held thus:

“...the suit against the second and third defendants was time barred under s. 6(1) of the Limitation Act, 1953 for having been instituted after 6 years from the date on which the cause of action accrued. I accordingly dismissed this suit...”^{xxxvii}

Section 19 of the Limitation Ordinance 1952 is the equivalent of section of 6(1)(a) of the Limitations Act 1953. In the case of *Profound Heritage Sdn Bhd v. Bank Islam Malaysia Berhad - Labuan Offshore Branch*,^{xxxviii} section 19 of the Limitation Ordinance 1952 was used to determine a particular counterclaim made in the case was within the timeframe that the law permitted. The foregoing discussion establishes that Malaysian statutes of limitations, the Limitations Act 1953 and Limitation Ordinance 1952, were significant to the determination of the Islamic banking cases in the period of 1983 to 2018. As a matter of substantive and procedural requirements, these cases and the decisions handed down by the courts in them have so far set enough precedent for the application of statutes of limitation in Islamic banking matters by Malaysian courts. The table below illustrates at a glance the cases and the relevant provisions of the particular statutes of limitation invoked in them within the period covered by the study. Refer Table 1 below.

Table 1: Statutes of Limitation Legislations Invoked in Reported Islamic Banking Cases 1983 to 2018

Name of the Case	Provision & Statute Invoked
<i>Maybank Islamic Berhad v M-10 Builders Sdn Bhd & Anor.</i> [2017] 2 MLJ 69, [2016] MLJU 1353, [2015] MLJU 2035	Section 6(1)(a) of the Limitation Act 1953
<i>Maybank Islamic Bhd v Kamarulzaman bin Mohamed Nordin</i> [2014] 7 MLJ 685 & [2013] MLJU 834	Section 6(1)(a) of the Limitation Act 1953 & Section 21(1) Limitation Act 1953
<i>Bank Islam Malaysia Bhd v UMW Zipper Manufacturing Sdn Bhd & Ors</i> [2010] MLJU 1726	Section 6(1)(a) of the Limitation Act 1953 & Section 21(1) Limitation Act 1953
<i>Profound Heritage Sdn Bhd v Bank Islam Malaysia Berhad - Labuan Offshore Branch</i> [2010] 1 LNS 1249	Section 19 of the Limitation Ordinance 1952

ANALYSIS: IS THERE A LEGISLATIVE CONFLICT?

The issue examined here is whether the limits imposed by the limitation legislations are in conflict with Islamic law in the governance of Islamic banking in Malaysia. To determine this, it is imperative to understand whether there is a conflict between the principles of statute of limitation as found under Malaysian law and under Islamic law. How far has Islamic law recognized the concept of limitation to action? Answer to this poser determines if there would be a conflict between the two. Islamic law recognizes the rule of lapse of time to bring an action in court under the principle of *taqadum* or *murur al-zaman*. By this rule, it is assured that a person should be protected against claims being made against him after the lapse of a long period during which no claim has been made with regard to that right.^{xxxix} This rule imposes time limits to initiate action for any right or against its infringement in court of law. Hassan & Yusoff (2012) defined *al-Taqadum* to be lapse of time as a general principle to regulate claim over the right of an individual. The rule in particular, provides a debtor with an all-round protection against claims by a creditor who has shown no interest to pursue the debt advanced to the debtor. This is in line with the principle stated in Article 1669 of Majelle which states that:

“If any person as mentioned above fails to bring an action without any excuse, such action is barred by effluxion of time and will not be heard during his lifetime, nor, on his death, will an action by his heirs be heard.”^{x1}

Shariah recognizes lapse of time in taking cause of actions to the court (Hassan & Yusoff, 2012). Hassan & Yusoff (2012) stated that this needs be differentiated from the general rights of people as some scholars assert that the usage of *al-Taqadum* in regulating time to institute action is not in tandem with the general principle of Islamic law. This is because Islamic law recognizes the entire eternal and absolute rights of an individual. Thus, it is maintained that the right of an individual to lay claim to what is due to him/her is further substantiated by hadith of the Prophet Mohammad (SAW) that “the right of a Muslim is not terminated even though after a long period of time” (Al-Hattab in Mawahib al-Jalil, cited in Hassan & Yusoff, 2012) and the legal maxim that “a right is not destroyed by the lapse of time” (Hassan & Yusoff, 2012).

The authors have stressed that the above hadith and the maxim are not proofs that Shariah does not recognize *al-Taqadum*, but rather “evidence to prove that the Shariah recognises owner’s right over a property which cannot be forfeited even after a long period of time and that the Shariah protects against claims being made on people after a long period during which they may have lost evidence available to them to rebut those claims” (Hassan & Yusoff, 2012). Therefore, upon expiration of the designated period, no claim can be made over a right or property and a judge is impeded from entertaining such claim.

As for the time period specified in the discussion above, the ruler or the hakim will have the autonomy to decide it under *Siyasah al Shar’iyyah* or Shariah-oriented policy.^{xii} This is because as maintained by Hassan and Yusoff (2012), no standard ruling has been provided by the Shariah for the duration of litigation period and so it is left for the *ijtihad* (interpretation) of the rulers of the states. The rulers enjoy full discretion in determining the limitation period and as such, the period could be fifteen years, ten years or even shorter, subject to the *maslahah* (public interest) of the society. This view was expressed in relation to Article 58 of the Majelle which stated that “the exercise of control over *raiyah* or subjects depends on what is right to be done.” Thus, limitation periods adopted by the state authority or the judge may be changed, repealed or amended in accordance with policy relating to it to suit the need and interest of the Muslim society in general as derived from Article 39 of Majelle, where it is stated that:

“It cannot be denied that with a change of times, the ahkam (requirements) of the law change.”

As a matter of general guideline, the Hanafi scholars stipulated a period of 15 years for any commercial matters. The limitation period is extended to 36 years when the dealings involve waqaf property; and in cases of public property such as roads, rivers etc. there should be no limitation period prescribed. The Malikis, on the other hand, have adopted the hadith of the holy Prophet which prescribes the period of 10 years as a basis to determine the duration for *al-Taqadum*. The limitation period of 10 years is applicable in commercial dealings involving the immovable property. In cases where the possessor and the claimant (who claims to be the true owner) are family relatives, the limitation period is 60 years. When the dealings involve movable property, the limitation period is different depending on the nature of the property. In cases of house furniture and the like, the limitation period is for 3 years and for clothes and animals the period is 2 years. In cases where the owner of the property is unknown, the uninterrupted usurpation for 10 months is sufficient to eliminate any claim against that property regardless of whether the property is movable or immovable. The limitation period for transactions involving debt is within 20 to 30 years depending on the nature and circumstances of the case (Hassan & Yusoff, 2012; 92).

In view of the foregoing provisions of Shariah as expounded by the jurists, limitation to action is well entrenched in Islamic law. Hence, it can be concluded that the statutes of limitations applied in Malaysia as discussed in this paper in relation to Islamic banking cases are in line with Islamic law, and thus create no legislative conflict exist between the two.

CONCLUSION

This study established that statutes of limitations are important statutes applicable where relevant in the determination of Islamic banking cases in Malaysia. However, the statutes have not been frequently resorted due to the few number of cases that border on limitation of action. In confirmation of this, only four Islamic banking cases that involved limitation of action have been reported from 1983 up to 2018. The courts in these cases have referred to the Malaysian statutes of limitations, the Limitations Act 1950 and Limitation Ordinance 1952 in reaching their decisions. The notable provision invoked were sections 6(1)(a) and 21(1) of the Limitations Act 1950 and section 19 of the Limitation Ordinance 1952, all bordering on time limitation to civil matters. Moreover, this study has established that as Islamic law recognizes the concept of limitation to action, which is in tandem with what obtains in the Malaysian statutes of limitation, then no conflict exists between the two. This study demonstrates the significance of aligning procedural laws applicable to Islamic banking cases with the principles of Islamic law in order to establish a vibrant Shariah-compliant Islamic banking industry in any jurisdiction. Furthermore, it is not necessary for every law that has been enacted prior to the adoption of Islamic banking to be in conflicts with Islamic law. By this fact, laws that have been enacted before the adoption of Islamic banking in any country can still be made consistent with the principles of Islamic law by harmonisation and pruning provisions that conflicts or contradicts with the principles of Islamic law to cater for Islamic banking. The findings of this research support this. It is anticipated that this study will stimulate further research on other legislations applicable to Islamic banking to other aspects of Islamic banking in order to find out relevant provisions that need be aligned with the principles of Islamic law.

ENDNOTES

- i. Generally, and in view the doctrine of accountability to the almighty Allah all human actions and inactions on the ultimate judgment day, Shariah is not inclined to forfeiture of a person's right by mere passage of time. However, the topic of limitation of actions, referred to as *at-taqadum* or *murur al-zaman* in Arabic, literally meaning the effluxion of time, is a doctrine that is not entirely unknown to Shariah although with restricted application, in contrast to the common law. The doctrine is known to be often utilized in the Islamic Ottoman empire as evidenced in judges' books and related collections of fatwas – Gumus, E. (2017). 'Statute of Limitations (Murur al-Zaman) in Ottoman State Law in 17th and 18th Centuries and Some Examples from Amid Court.' *OTAM*, 42, p. 100.
- ii. For instance, in the case of libel and slander, the limitation period for libel and slander in Sabah and Sarawak is only one year whereas in Peninsular Malaysia; the aggrieved person has a six-year period to file an action.
- iii. See for instance Malveaux, S. M., (2005). Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation, *George Washington Law Review*, 68, 74; The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits. (1983). *Harvard Law Review*, 96(7), 1683-1702; Marzen, C. G. (2019). Statutes of limitation and crop Insurance. *Syracuse Law Review*, 69(1), 1-26; Jou, J.B. & Lee, C.T. (2019). Optimal Statute of Limitations under Land Development Timing Decisions, *Annals of Regional Science*, 62(1), 1-20.

- iv. In the word of Justice Oliver Wendell Holmes (1897), when he rhetorically asked, ‘What is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?’ This question points to the ambivalence that is generally associated with statutes of limitations and their applications (Ochoa, & Wistrich, 1997).
- v. *Malayan Banking Bhd v. Ya'kup Oje & Anor* [2007] 5 CLJ 311 at p. 325.
- vi. *Ibid.*
- vii. Shuaib, F. S. (2003), *Powers and Jurisdiction of Syariah Courts in Malaysia*, International Islamic University Malaysia, 2003, at 19; Also see: Shuaib, F. S., Bustami, A., Aris, T. and Mohd Kamal, Mohd Hisham, *Administration of Islamic Law in Malaysia, Text and Materials*; Malayan Law Journal, 2001.
- viii. Article 4 of the Federal Constitutions; Also see: Farid Sufian Shuaib, (2003), *Powers and Jurisdiction of Syariah Courts in Malaysia*, International Islamic University Malaysia, 2003, at,1
- ix. A brief history of this court system has been concisely highlighted in the case of *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253 as follows: “Let me begin from the beginning. By the time Malaya, then, obtained her independence in 1957, the "civil court" (as the term has become to be commonly used now) had established itself as "the court" in the country. Hence, the Federal Constitution, in the Chapter on the judiciary talks about the "civil courts". However, the Constitution recognized the necessity to establish syariah courts as State courts with jurisdiction over Muslims only in, substantially, personal law matters. Thus, in the Ninth Schedule, List II (State List) a provision is made, inter alia, for the creation of syariah courts”; also see: Article 121(1A) of the Federal Constitution
- x. See Article 74 of the Federal Constitution of Malaysia xi. *Bank Kerjasama Rakyat Malaysia Berhad v. Emcee Corporation Sdn Bhd* [2003] 1 CLJ 625 xii. *Bank Kerjasama Rakyat Malaysia Berhad v. Emcee Corporation Sdn Bhd* [2003] 1 CLJ 625 xiii. *Bank Islam Malaysia Bhd v. Azhar Osman & Other* [2010] 5 CLJ 54 [2010] 1 LNS 251 xiv. *Ibid.* xv. See for instance sections 8-11, 223, 279 Islamic Financial services Act (IFSA) 2013.
- xvi. See for instance section 1 (2) Contracts Act 1950. By this section, all kind of contracts including Islamic contracts used for Islamic banking transactions, are held valid and can be governed by the Contracts Act 1050.
- xvii. See for instance sections 51-58, 73 Central Bank of Malaysia Act (CBMA) 2009 on Shariah governance by Shariah Advisory Council (SAC) and the Central Bank’s function of ensuring Shariah compliance of Islamic banking.
- xviii. Bank Negara Malaysia, (2010). *About the Law Harmonisation Committee*, Available [Online] at http://www.bnm.gov.my/index.php?ch=en_lhc&pg=lhc_about&ac=230. (Accessed 9 December 2019).
- xix. *Bain v. Whitehaven Railway Junction* [1850] 3 H CL. 1-19
- xx. *Ibid.*
- xxi. Section 2 of the Evidence Act, 1950 (Act No. 56 of 1950) states that the Act shall apply to “all judicial proceedings in or before any court, but not to affidavits presented to any court or officer or to proceedings before an arbitrator”.
- xxii. Section 3 (2) of the Act provides for the establishment of subordinate courts in Malaysia which is the Penghulu’s Courts, Magistrate Courts and Sessions Courts. Hence, Subordinate Courts Act 1948 is applicable to these three courts only.
- xxiii. “Court” under section 3 of the Courts of Judicature Act 1964 is defined as to mean “the Federal Court, the Court of Appeal or the High Court, as the case may require.” Hence, the jurisdictions of these courts are stated in the Courts of Judicature Act 1964.

- xxiv. For example, Rules of High Court 2012 [P.U.(A) 205/2012]/amended [P.U.(A) 286/2012], is made pursuant to section 17 of the Courts of Judicature Act 1964; see p. 1 of the Rules of High Court 2012.
- xxv. Subordinate Courts Rules 2012: [P.U. (A) 205/2012] is made pursuant to the Subordinate Courts Act 1948
- xxvi. Order 5 rules 1-4; Order 6 rules 1-2 of Malaysia Rules of High Court 2012.
- xxvii. See Limitations Act 1950.
- xxviii. *Bank Islam Malaysia Berhad v UMW Zipper Manufacturing Sdn Bhd & Ors* [2010] 1 LNS 1560
- xxix. *Maybank Islamic Bhd v Kamarulzaman bin Mohamed Nordin* [2014] 7 MLJ 685 [2013] MLJU 834
- xxx. *Maybank Islamic Berhad v M-10 Builders Sdn Bhd & Anor* [2017] 2 MLJ 69, [2016] MLJU 1353, [2015] MLJU 2035
- xxxi. *Profound Heritage Sdn Bhd v Bank Islam Malaysia Berhad - Labuan Offshore Branch* [2010] 1 LNS 1249
- xxxii. *Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor* [2015] MLJU 2035
- xxxiii. *Maybank Islamic Bhd v. M-IO Builders Sdn Bhd & Anor.* [2016] MLJU 1353
- xxxiv. *Maybank Islamic Bhd v Kamarulzaman bin Mohamed Nordin* [2013] MLJU 834
- xxxv. [1999] 2 CLJ 917
- xxxvi. *Bank Islam Malaysia Berhad v UMW Zipper Manufacturing Sdn Bhd & Ors* [2010] 1 LNS 1560
- xxxvii. *Ibid.*
- xxxviii. *Profound Heritage Sdn Bhd v Bank Islam Malaysia Berhad - Labuan Offshore Branch* [2010] 1 LNS 1249 xxxix. See Articles 1660-1675 of Mejlle, the Islamic Code of Transactions of the Muslim Ottoman, which deals with limitation of bringing action.
- xl. Article 1669 of Majelle.
- xli. Article 58 of Mejlle provides that: The exercise of control over raiyyah, that is to say, over subjects, depends on what is right to be done; also see Kamali, H. M. (1989). *Siyasah Shar'iyah or the policies of Islamic Government, The American Journal of Islamic Social Sciences, 6*, 59-81.

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