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Shariah Advisory Council: Judicial Body or Statutory Expert?

Background

The Shariah Advisory Council (“**SAC**”) is a body established by the Central Bank of Malaysia pursuant to the powers vested in it by the Central Bank of Malaysia Act 2009 (“**CBMA**”), to ascertain the Islamic law applicable to Islamic financial business. Sections 56 and 57 of the CBMA empowers the SAC to issue rulings that are binding upon the Islamic financial institutions and the court or arbitrator that made the reference.

The effect of Sections 56 and 57 of the CBMA came under the spotlight in September 2016, in the case of *Kuwait Finance House (Malaysia) Bhd. v JRI Resources Sdn Bhd & Ors.*, when the Court of Appeal was asked to consider, *inter alia*, whether Sections 56 and 57 of the CBMA (“**impugned sections**”) had the effect of vesting judicial power in the SAC. If such impugned sections were found to usurp judicial power, the Court of Appeal would have to consider whether the impugned sections were unconstitutional and consequently, void. The case went on appeal until it reached the Federal Court.

The Federal Court’s judgment of *JRI Resources Sdn. Bhd. v Kuwait Finance House (Malaysia) Bhd.* (the “**KFH case**”), issued on 10 April 2019, considered the constitutionality and the validity of the SAC’s powers pursuant to the impugned sections. The question for consideration before the Federal Court was whether the provisions in the impugned sections (which compelled the court or arbitrator hearing an Islamic finance business dispute, to refer such dispute to the SAC, whereupon any ruling of the SAC on the same, would be binding on that court or arbitrator) had the effect of usurping judicial power such that the judge was prevented from determining the issue at hand. The Federal Court decided by a majority that the impugned sections were constitutional and did not breach the Federal Constitution.

Facts

JRI Resources Sdn. Bhd, (“**JRI**”) was granted Islamic credit facilities (“**Facilities**”) by Kuwait Finance House (M) Bhd. (“**Kuwait**”) to finance JRI’s leasing of shipping vessels owned by Kuwait. JRI defaulted in paying the amounts due under the facilities, and summary judgment was entered by Kuwait against JRI in the High Court of Shah Alam (“**High Court**”). In JRI’s appeal to the Court of Appeal against the High Court’s summary judgement, JRI contended that Kuwait’s failure to carry out maintenance works on the shipping vessels had led to JRI’s failure to derive income. JRI contended that the *Ijarah* agreements, which stated that it was JRI’s responsibility to bear the maintenance costs of the vessels, were not *Shariah*-compliant and hence JRI’s liability under the Facilities should be rendered void. Instead, Kuwait, as the owner, should bear all such maintenance costs.

The Court of Appeal, upon granting JRI’s appeal to set aside the summary judgment, allowed JRI to seek the SAC’s ruling pursuant to Section 56 of the CBMA on the following question: whether the relevant *Ijarah* clause under the agreements was *Shariah*-compliant. On account that the *Ijarah* clause

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was consequently ruled to be *Shariah*-compliant, JRI, as the applicant to the appeal, sought the Federal Court's determination as to whether the impugned sections under which the SAC gave such ruling was constitutional, and whether the SAC's ability to independently ascertain the *Shariah* issue, suggested characteristics of "judicial power".

The Applicant relied on a parallel challenge which arose in respect of the constitutionality of a provision under the Land Acquisition Act 1960 ("**LAA**") in the case of *Semenyih Jaya Sdn. Bhd. v Pentadbir Tanah Daerah Hulu Langat and another case*¹ (the "**Semenyih Jaya case**"), where the impugned provision of the LAA encroached on the court's adjudicative function to award a reasonable amount of compensation in land reference matters, and was thus, held to be unconstitutional for vesting judicial power in the land assessors.

The Judgement

Zawawi Salleh FCJ, in delivering the majority opinion, held that the SAC, when ascertaining Islamic law for Islamic banking, did not command judicial power similar to the characteristics mentioned in the *Semenyih Jaya case*. The court would apply the ascertained Islamic law to the facts of the case, and the SAC neither determined nor pronounced any decision on the rights and/or liabilities of the parties to the proceedings. In the present case, the High Court is still required to apply the ruling to the facts of the case and to make a finding on that basis. The Federal Court agreed with the submission of counsel for the respondent that the SAC had a duty to ascertain Islamic law but it had no jurisdiction to "make any finding of facts or to apply a particular '*hukum*' (principle) to the facts of the case or to make a decision".

In defining what constitutes the exercise of judicial power, the Federal Court affirmed the proposition of law set out in the *Semenyih Jaya case*, that the exercise of judicial power carries certain characteristics - firstly, it has to be applied in accordance with the judicial process of the judiciary. The judicial process is based on the courts acting "openly, impartially and in accordance with fair and proper procedures" when ascertaining the facts and the law and when applying the law as it is to the facts. Secondly, judicial power cannot be exercised by non-judicial persons; only persons appointed to hold judicial office may exercise judicial power. Thirdly, judicial power must include the jurisdiction to enforce a decision.

The Federal Court agreed with the reasoning in several Australian cases, that the exercise of judicial power was all encompassing, and comprised the power to investigate, declare and enforce rights and obligations based on ascertained facts and under existing laws. The fact that an administrative body purportedly exercised only one of those powers, e.g. by making a ruling confined to the *Shariah* issue, was not conclusive of the fact that it had exercised judicial power, and consequently, it could not be said that the SAC had exercised judicial power or had usurped the judicial power of the court.

The majority held that the SAC, pursuant to its ruling on the *Ijarah* clause, did not determine the liability of JRI under the Facilities and did not usurp the judicial power of the High Court.

¹ [2017] 3 MLJ 56

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Conclusion

The SAC was established to unify and render certain Islamic principles of law applicable to Islamic finance. Prior to the advent of the SAC, there was no uniformity and the *Shariah* committees of financial institutions often issued differing *Shariah* opinions; there were also primary and secondary sources of *Shariah* law, and different schools of thought being applied to adjudicate Islamic banking disputes. Hence, the establishment of the SAC under the CBMA was greeted with relief as it brought clarity and certainty into the Islamic law applicable to Islamic finance business.

The *KFH case* has further clarified the role of the SAC and clearly delineated the boundaries where the SAC's powers end and the civil courts begin. There is now unambiguous legal recognition that the SAC does not hear evidence nor decide on cases. Under Sections 56 and 57 of the CBMA, *Shariah* questions arising during legal proceedings relating to Islamic banking business must be referred to the SAC for a ruling. The role of the SAC is strictly as a statutory expert to ascertain the Islamic law applicable to Islamic financial matters or business, and thus, it was established as a form of "functional efficiency" of our constitutional mechanism to assist the courts to apply the correct Islamic laws to resolve disputes.

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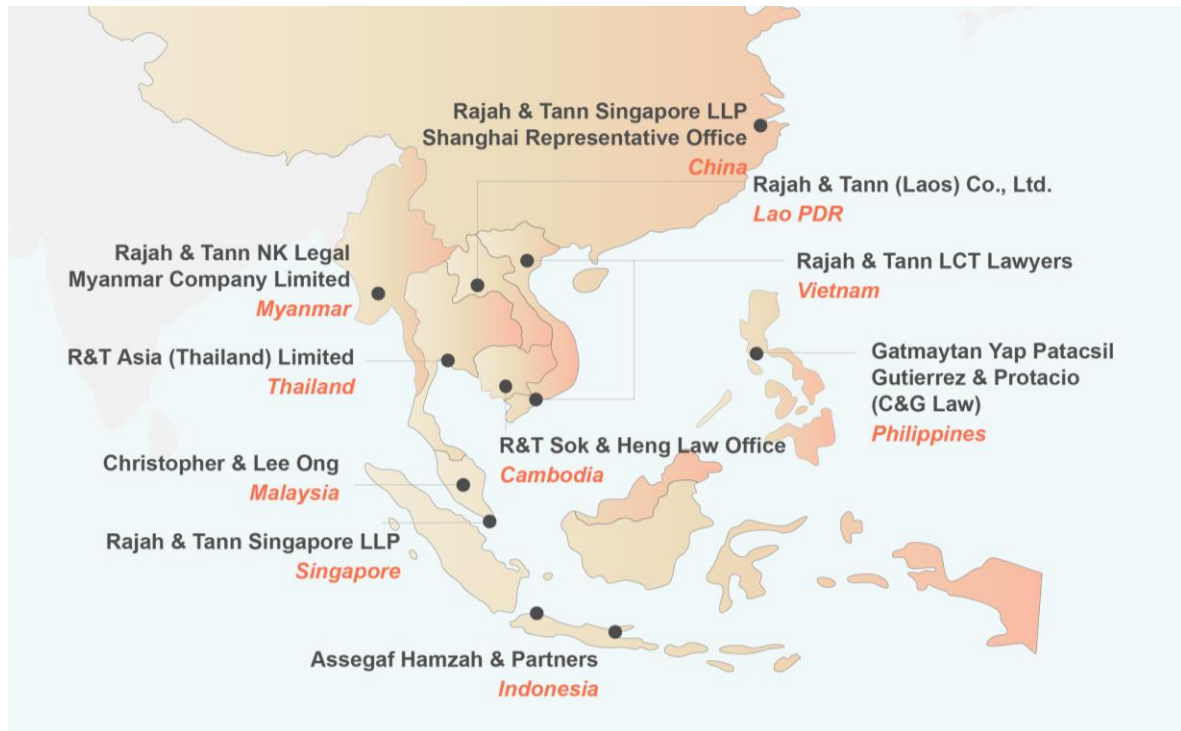
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