

How Does Values-Based Banking Counter Unfair Terms in Consumer Contracts and Notices in Islamic Banks in Malaysia?

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ABSTRACT

In July 2017, Bank Negara Malaysia (BNM) in collaboration with Malaysian Islamic finance industry, released a ‘Strategy Paper on Value-based Intermediation (VBI)’. This paper articulates strategies to promote the application of VBI which aims to improve the products and services offered by Islamic banking institutions (IBIs) towards a better facilitation of entrepreneurship, community well-being, sustainable environment and economic growth, without compromising on shareholders’ returns. The VBI is based on SharĒ‘ah, which determines the underlying values, moral compass and priorities in Islamic banks. With the adoption of VBI, IBIs will need to consider the impact of their activities and actions on a wider range of stakeholders, including the financial consumers. The main purpose of this study is to highlight the voice of banking consumers on detriments due to unfair terms in consumer contracts and notices, which is rarely heard by IBIs and BNM. Finding in this study reveals that although BNM has issued a number of standards and guidelines to improve fairness, transparency and governance, but the adoption and enforcement of the standards is highly uneven across the Islamic banks in Malaysia. Using content analysis, this study analyses the impact of values-based banking and governance in solving the problem of unfair contract terms and notices in Islamic banks. Therefore, this paper recommends that IBIs to take the leadership role in advocating values-based banking and governance in ensuring fair treatment, ethical banking and a more socially responsible banking environment to the consumers/community in line with sustainable development goals of SharĒ‘ah. The outcome of this study will be helpful to IBIs in enhancing their branding image and reputation towards facilitating business success over time.

Keywords: *Values-based Banking and Governance, Unfair Terms, Consumer Contracts and Notices, Malaysia.*

INTRODUCTION

The Islamic finance industry has rapidly developed as a prominent facet of the Malaysian financial industry since its inception three decades ago, during which it has witnessed an unprecedented growth and has been mainstreamed into the global financial system. According to BNM, as at end of 2016, Malaysia's Islamic banking sector holds over RM742 billions in assets, with a projected annual growth of 12 per cent, as compared to 2 per cent of the conventional loan banking growth. In tandem with the exponential growth of Islamic banking, the Malaysia International Islamic Finance Centre (MIFC) commented that BNM as the regulatory authority in Malaysia, has been at the "forefront in supporting the industry's growth with robust regulatory frameworks, legislations and Sharĕ'ah governance to preserve the sanctity of the Sharĕ'ah-compliant transactions and boost public's confidence in the sector" (MIFC, 2014, p.1).

BNM, as the Central Bank of Malaysia, is a statutory body established under the Central Bank of Malaysia Act 1958, which commenced its operations on 26 January 1959. It continues to operate under the Central Bank of Malaysia Act 2009 (CBMA) which further empowered its role as the regulator of financial institutions in Malaysia. The CBMA "confers the necessary powers and instruments on BNM to achieve its mandates effectively and legitimises the duality of both the conventional and Islamic financial systems in Malaysia and in doing so, establishes the legal foundation for development of an Islamic financial system within the overall Malaysian financial system" (D'Cruz & Zulkifli, 2016, p.25). According to BNM, this is achieved by "developing a sound, resilient, inclusive, progressive and diversified financial sector which serves to support the sectors of the real economy". BNM has proven to be a reputable financial institution and good institution in Malaysia and internationally alike when it was named as the winner of 'The Best Regulator of the Year 2012 for Asia Pacific Region' at the prestigious Asian Banker Achievement Awards.

In June 2013, the Islamic Financial Services Act 2013 (IFSA) came into force to "pave the way for the development of an end-to-end Sharĕ'ah compliant regulatory framework for the conduct of Islamic financial operation in Malaysia" (Miskam & Nasrul, 2013, p.2). Under IFSA, BNM was conferred with further regulatory and statutory powers to issue guidelines and circulars on Sharĕ'ah requirements in promoting financial stability and ensuring Sharĕ'ah compliance. As Sharĕ'ah regulator of the Malaysian financial industry, IFSA empowered BNM to penalise financial institutions for breaches of IFSA and offences committed thereunder. The introduction of IFSA was timely to modernise legal and regulatory framework to adapt to the changing needs of the industry and consumers.

To further strengthen the roles and impact of IBIs, BNM has proposed several strategies to position IBIs to be more prominent and leading agent of positive change for Malaysian financial system. In July 2017, BNM in collaboration with Malaysian Islamic finance industry, released a 'Strategy Paper on Value-based Intermediation (VBI)'. According to BNM, the four underpinning thrusts of VBI are entrepreneurial mindset, community/ consumer empowerment, good self-governance and best conduct. The embodiment of these principles in the business strategies of IBIs is expected to result in greater appreciation on the need to create a positive impact on shareholders and wider stakeholders, as propounded by Sharĕ'ah. The VBI is based on Sharĕ'ah, which determines the underlying values, moral compass and priorities in Islamic banks. The Islamic banks are seen as development agents with important role in the economy and moral uplift due to its ethical banking for the customers/ community within the Sharĕ'ah framework (Gilani, 2015).

This study finds that Islamic banks in Malaysia use standard form contracts in their dealings with banking customers to promote smooth functioning of the economy by saving time and avoiding transaction costs negotiating contracts. These contractual agreements are key enablers for the commencement of trade between Islamic banks and banking consumers. The standard form contracts promotes the smooth functioning of the banking operations by “reducing legal costs on negotiated contracts between parties without having to negotiate every time new contract is made, minimising documentation and procedure variations, as well as minimising SharĒ‘ah scholar involvement” (Alvi, 2009 as cited in Noormahinar & Norhashimah, 2016b). However, these standardised contracts are pre-drafted by the Islamic banks with stronger bargaining power and makes the offer on a ‘take it or leave it’ basis. Standard form contracts are also known as ‘adhesion contract’ since they are non-negotiable, leaving the banking consumers with no realistic opportunity to bargain for more favourable terms but to accept these terms. They are also referred to as ‘boilerplate contract’ since consumers have no choice in ‘shopping around’ for better contract terms as standard form contracts are standardised across the IBIs. Research on reading rates for consumers suggests that a significant number of consumers failed to read and understand the contracts, and even if they do read the contracts they may undervalue the risks associated with such contracts. Standard form contracts may also be long and confusing to consumers, often written in fine prints using legal terminologies that are difficult to understand. All the above circumstances may lead to the inclusion of unfair terms in consumer contracts and notices. These unfair terms in the Islamic banking consumer contracts violates the objectives of SharĒ‘ah (*MaqĒĒid al-SharĒ‘ah*) due to social detriments that go against ethical grounds. In these circumstances, intervention is warranted to encourage adoption of ‘fair’ terms in consumer contracts and notices. As a form of intervention, the new paradigm shift by VBI indicates that Islamic banks are to include customers in its governance and operating system so as to avoid using unfair terms in contracts and notices. With VBI, IBIs will need to consider the socioeconomic impact of their activities and actions on a wider range of stakeholders, including the financial consumers.

This paper is structured as follows: Section 2 outlines the method of analysis of the research. Section 3 discusses the literature review on the importance of SharĒ‘ah corporate governance and the development of SharĒ‘ah governance in Malaysia. It also discusses banking consumer protection from unfair terms through value-based banking of good self-governance and best conduct by the IBIs, which is in line with *MaqĒĒid al-SharĒ‘ah*. With respect to *MaqĒĒid al-SharĒ‘ah*, the IBIs must strive to be fair and accountable to banking consumers. The central doctrine of justice and balance (*al-wasaĒiyah*) must be balanced in demonstrating good conduct by the IBIs towards banking consumers. This section will also review the policy implications of VBI on banking consumers in avoiding the use of unfair terms by IBIs. Section 3 concludes the study with recommendations to encourage IBIs to use fair terms in their contracts and notices. This study intends to provide policy options to the government in improving the protection of banking consumers from unfair terms in consumer contracts and consumer notices.

METHODOLOGY

This study summarises findings from: consumer contracts and notices from various Islamic banks in Malaysia, ‘Strategy Paper’ by BNM entitled ‘Value-based Intermediation: Strengthening the Roles and Impact of Islamic Finance’, ‘Dialogue on VBI’, held at Auditorium Sasana Kijang, BNM, Kuala Lumpur on 24 August 2017, informal discussions with BNM Consumer and Market Conduct Department officials, and secondary data resources derived from BNM websites, IFSB main websites, books, newspaper articles, journals, and reliable Google Scholar link information.

The type of research employed in this study is content analysis. It analyses values-based banking which includes social, ethical, green and community banking. This study examines the governance model in VBI specific to the two underpinning thrusts of VBI, good self-governance and best conduct and its impact in solving the problem of unfair terms in consumer contracts and notices, as well as to provide suggestions for effective enforcement conducts. The study also indicates briefly the broader stakeholders of Islamic banks as suggested by the VBI that are needed for effective SharĒ'ah corporate governance (SCG). This study argues that enhanced governance by IBIs through applying the *MaqĒ'id al-SharĒ'ah* principles and *wasāliyah* maxim would assist them in fulfilling the aim of VBI in promoting a more holistic SharĒ'ah observance especially in preventing negative impacts arising from IBIs practices, conducts and offerings.

LITERATURE REVIEW

Why SharĒ'ah Corporate Governance (SCG)?

In these modern materialistic era, Islamic banking is seen as a service where priority is always given to social motives and society welfare. Attainment of the *MaqĒ'id al-SharĒ'ah* in providing benefit (*maġlaġah*) and preventing harm (*mafsadah*) to the community, is an indispensable function of Islamic banks. An Islamic bank is defined by the General Secretaries of the Organisation of the Islamic Conference (OIC) as "a financial institution whose statutes, rules and procedures expressly state its commitment to the principle of SharĒ'ah and to the banning of the receipt and payment of interest on any of its operation" (Ali & Sarkar, 1995 as stated by Kamal, Lokesh & Bala, 2009). According to BNM, an Islamic bank is:

"a system of banking that uses financial services and products that conform with the SharĒ'ah law (SharĒ'ah compliant) and governed by the underlying principles to conduct business in accordance to mutual risk and profit sharing between contracting parties, the assurance of fairness to all as well as transactions must be supported by genuine business activity/asset". (Noormahinar & Norhashimah, 2016b)

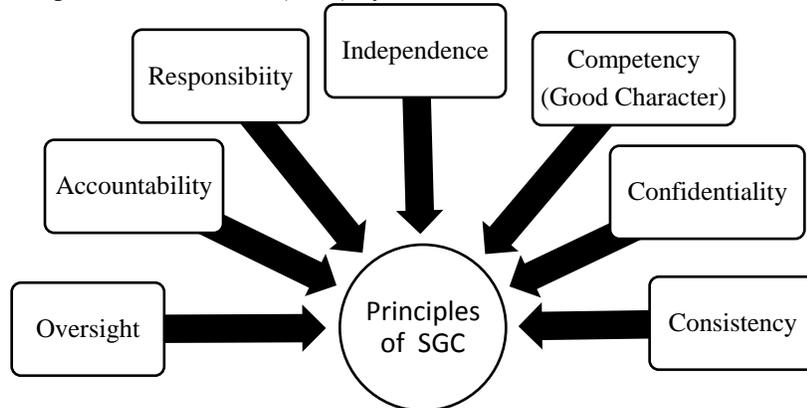
From the above definitions, it can be summarised that the foundation of Islamic banking operations are based on SharĒ'ah, which consists of Islamic ethical precepts and values, that guides the banking operations and outlook of Islamic banks, and that failure to follow SharĒ'ah will render banks not to be considered as Islamic banks (Noormahinar & Norhashimah, 2016b). Since Islamic banking is all about ethical banking and operates on profit and loss-sharing principle, therefore it is essential to have Corporate Governance (CG). CG refers to "methods by which a corporation is directed, administered or controlled, which includes the laws and customs affecting the direction and the goals which a firm moves" (Kamal, Lokesh & Bala 2009). The Organisation for Economic Co-operation and Development (OECD) in 2004, defined CG as "a system through which companies are directed and controlled" (Muneeza, 2013, p.2).

The CG principles that are applicable to Islamic banking is known as SharĒ'ah Corporate Governance (SCG). SCG for Islamic banks is rooted in SharĒ'ah which is based on the concept of economic well-being of the community, justice, accountability, moral obligation, universal solidarity, and equitable distribution of income. Islamic Financial Services Board's (IFSB) 'Guiding Principles on SharĒ'ah Governance System for Institutions Offering Islamic Financial Services' defines 'SharĒ'ah governance system' as:

"The set of institutional and organisational arrangements through which an institution offering Islamic financial services oversees SharĒ'ah compliance, that Islamic banking products and operations are in accord with SharĒ'ah principles" (Muneeza, 2013, p.3).

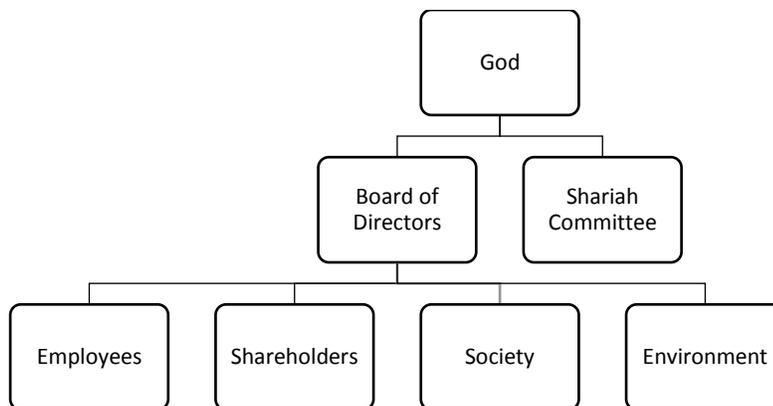
IFSB-10 on ‘SharĒ‘ah Governance’ sets out four guiding principles to SharĒ‘ah Governance System which are: competence, independence, confidentiality and consistency. The SharĒ‘ah Governance Framework (SGF) of BNM lays down the general requirement of the SharĒ‘ah governance framework which includes: oversight, accountability, responsibility, independence, competency, confidentiality and consistency. Hence, good SharĒ‘ah governance requires IBIs to practice competency and professionalism, integrity and accountability, consistent improvement, and independent judgement. The following Diagram 1 illustrates the SCG principles of the Malaysian IBIs in a nutshell.

Diagram 1: SharĒ‘ah Corporate Governance (SGC) by BNM SGF & IFSB-10



Muneeza, 2013 (p.4), however has proposed a very interesting SCG model which was based on Islamic worldview and resonates well with the Shari‘ah approach as embedded in the VBI (cross reference to p.7). The true nature of this proposed SCG can only be truly comprehend with reference to Islamic worldview and that the prefix of ‘SharĒ‘ah’ to CG implies that Islamic law is applicable to SCG. Diagram 2 depicts the proposed SCG model. This model indicates that the basic structure of SGC is the duty of IBIs owed to God, then only to board of directors (BOD) and SharĒ‘ah Committee (SC), and finally the stakeholders which include: employees, shareholders, community/ consumers and environment. “God shall be the apex, BOD and SC shall be in the same level that decisions pertaining the banks shall be made via consultation between the two bodies, and stakeholders shall be at the bottom of the hierarchy” (Muneeza, 2013, p.5).

Diagram 2: Proposed Model of SCG in IBIs



Source: Muneeza, 2013 (p.5)

The need for good SCG is imperative within the Islamic banking paradigm as the institutions expand and that their challenges become more complex. However, the responsibility of practising ethical governance in IBIs does not be the sole responsibility of the Sharĕ‘ah Committee, but also all other parties involved such as directors, shareholders, regulators, supervisors, consumers/ community, etc. From Table 1 below it is clear that the question of governance issues is well placed in all IFIs worldwide, with Malaysia attaining the highest governance score. According to this survey by Thomson Reuters, Malaysia has the strongest SCG in Islamic finance because all the institutions that play a crucial role in disciplining markets, ensuring efficiency and integrity are well-developed. Malaysia is also placed as the world leader in Islamic Economic indicator and Islamic finance markets with 20 fully-fledged Islamic banks where 10 are foreign-owned. “Without effective SCG, it may not be possible to strengthen Islamic banks and enable them to expand rapidly and perform their role effectively” (Chapra & Ahmed, 2002).

Table 1: Islamic Finance

| Islamic Finance | Sector Score | Asset Size | Governance Score | Awareness Score | Social Score | GIE Ranking |
|----------------------|--------------|------------|------------------|-----------------|--------------|-------------|
| Malaysia | 189 | 276 | 114 | 317 | 49 | 1 |
| United Arab Emirates | 92 | 59 | 72 | 167 | 69 | 2 |
| Bahrain | 90 | 54 | 106 | 143 | 58 | 3 |
| Saudi Arabia | 83 | 111 | 28 | 47 | 148 | 4 |
| Oman | 51 | 7 | 70 | 74 | 53 | 5 |
| Kuwait | 51 | 63 | 50 | 49 | 44 | 7 |
| Pakistan | 47 | 19 | 72 | 76 | 22 | 6 |
| Qatar | 47 | 38 | 42 | 55 | 53 | 8 |
| Indonesia | 38 | 24 | 74 | 30 | 23 | 10 |
| Jordan | 35 | 8 | 39 | 49 | 44 | 9 |

Source: Thomson Reuters

Development of Sharĕ‘ah Corporate Governance (SGF) Ecosystem in Malaysia

Discussion here will be divided into three phases: Phase 1 from 1980 to 1996, Phase 2 from 1997 to 2006 and Phase 3 from 2007 to 2017. In phase 1, during the period of 1980s to 1990s, in the development of the IBIs ecosystem in Malaysia, priority has been centered on Sharĕ‘ah compliance and governance. The Islamic financial players were institutionalised at this time. Legal and Sharĕ‘ah foundation were developed at this stage and the number of players were increased so as to stimulate competition. Prior to the introduction of IFSA, IBIs were governed by the Islamic Banking Act 1983 (IBA). In 1983, the first Islamic Bank was established, and subsequently the first Shari‘ah Committee was formed by Bank Islam Malaysia Berhad (BIMB) under the purview of IBA 1983. Since the establishment of BIMB, Sharĕ‘ah governance has developed gradually to strengthen Sharĕ‘ah compliance. Hence, the IBA requires every IBIs to establish Sharĕ‘ah advisory body to ensure full compliance of Sharĕ‘ah. During this time, the Guidelines of ‘Skim Perbankan Islam’ or the Sharĕ‘ah Compliance Regulation was launched by BNM in ensuring Sharĕ‘ah compliance by conventional banks that carried out Islamic banking services. Conventional banks that introduced Islamic windows were also mandated to have an internal Sharĕ‘ah

advisory body whereby “sufficient regulatory and SharĒ‘ah firewalls must be instituted to ensure funds between the conventional operations and Islamic banking windows were not co-mingled and the Islamic banking operations remained in compliance with SharĒ‘ah principles” (MIFC, 2014).

In Phase 2 (from 1997 to 2006), a significant landmark was the establishment of the SharĒ‘ah Advisory Council (SAC) of BNM in 1997 as a centralised SharĒ‘ah advisory and sole authority for Islamic finance to enhance certainty of SharĒ‘ah. The SAC was established as an apex authority in Islamic finance to harmonise views and oversee uniform implementation of SharĒ‘ah rules in Islamic Finance Institutions (IFIs). In 2003, a dedicated Muamalat Court was set up by BNM in cooperation with judicial body, placed at the High Court Kuala Lumpur Commercial Division 4, and presided by the High Court Judge to hear Islamic banking cases (Zulkifli, 2012 as stated by Noormahinar & Norhashimah, 2017c, p.7). This led towards greater efficiency in managing Islamic finance cases since all cases involving Islamic finance matters are registered and adjudicated at the Muamalat Court. The Muamalat Court consists of 1 High Court judge, 1 deputy registrar and 1 senior assistant (Hakimah, 2011 as stated by Noormahinar & Norhashimah, 2017c, p.7). In 2004, BNM issued Guidelines on the Governance of the SharĒ‘ah Committee for IFIs (this was later superseded by the SharĒ‘ah Governance Framework (SGF) for IFIs). In addition, talent and knowledge institutions that were established during this phase includes Islamic Banking and Finance Institute Malaysia (IBFIM), International Centre for Education in Islamic Finance (INCEIF) and International SharĒ‘ah Research Academy for Islamic Finance (ISRA) towards nurturing talents and generate knowledge especially in SharĒ‘ah.

In Phase 3 (from 2007 to 2017), based on backdrop of the previous foundations in phase 1 and 2, and in line with market developments, the financial ecosystem has evolved in response to the need for clear guidelines and policy development on SharĒ‘ah aspects which encompasses all areas of Islamic finance including legal, operational and prudential frameworks. During this time, legal and regulatory frameworks were developed in ensuring end-to-end SharĒ‘ah compliance of diversified Islamic financial business. For example, the CBMA 2009 does not only reinforces the authority of SharĒ‘ah Advisory Committee (SAC) of BNM on SharĒ‘ah matters relating to Islamic finance, but also made the decisions of the SAC compulsory to be observed by courts and arbitrators once they have referred to such decisions. In 2010, the SGF for IFIs was introduced by BNM to strengthen the roles and accountability of key functionaries in IFIs. It sets out BNM’s expectations on SharĒ‘ah governance structures, processes, BOD’s duties and responsibilities, management and SharĒ‘ah Committee as well as adherence to SharĒ‘ah. In 2013, IFSA which repeals IBA, was enacted as a SharĒ‘ah contract-based regulatory framework which enforced legal and regulatory framework for diversified SharĒ‘ah contracts. Sections 27 and 38 respectively, covers SharĒ‘ah compliance and SharĒ‘ah governance.

Value-based Intermediation (VBI): Good self-governance & Best Conduct

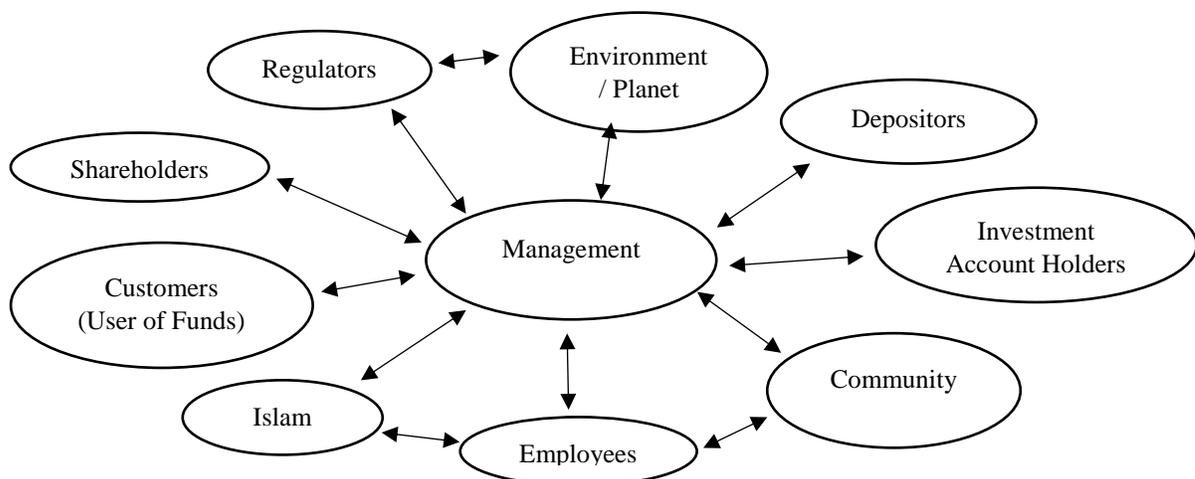
The exponential growth of IBIs should not be seen as only in headline numbers, but importantly in addressing social and environmental concerns. However, from the perspective of BNM, a ‘game changer’ as a way forward for IBIs is where focus should be given to both economic value creation and upholding ethical values. Therefore, BNM issued the ‘Value-Based Intermediation (VBI) Strategy Paper’ which will mark the next step in realising the full potential of IBIs. Even if VBI shares similarities with concepts like Ethical Banking, Environmental, Social and Corporate Governance (ESG), as well as Sustainable, Responsible, Impact Investing (SRI), however, the distinguishing element is the central position of SharĒ‘ah as the determinant in Islamic banking’s underlying values, moral compass and priorities. According to BNM, the four underpinning thrusts of VBI are:

- (1) Entrepreneurial mindset-greater involvement of IBIs in facilitating entrepreneurial activities through financing, designing products to support entrepreneurs, providing advisory, market structure and business network.
- (2) Community/ consumer empowerment-IBIs to create financial solutions that have socioeconomic impact to the communities such as *waqf* and *Îadaqah*, at the same time creating business opportunities for IBIs.
- (3) Good self-governance-IBIs to inculcate inclusive self-governance by engaging stakeholders in key decision making process (consultation) in line with the principles of righteousness (*iÎsan*) towards greater accountability and integrity.
- (4) Best conduct-IBIs to adopt practices that would improve IBIs' offerings, processes and treatment towards stakeholders.

The embodiment of these principles in the business strategies of IBIs is expected to result in greater appreciation on the need to create a positive impact on shareholders and wider stakeholders, as propounded by SharÊ'ah. IBIs are expected to take leadership role in initiating the VBI and embracing these new principles in their business strategies and operations.

VBI gives maximum priority to the realization of justice and fairness in protecting the interests of the broader stakeholders. The most important stakeholder is Islam itself. Chapra and Habib, 2002 (p.14) commented on some perception that when Islamic banks do not perform well, Islam is blamed for the poor performance of these banks and being outdated with the modern world, even if Islam have nothing to do with it. The stake of shareholders, regulators and environment are unquestionably recognised here. Customers, entrepreneurs and business ventures should use the power of their wallets to make informed choices. The public sector and advocacy groups play an important role in creating awareness. Employees also have a stake because their contribution to the efficient performance of the bank and their remuneration are determined by banks' incentive structure. In short, the "planet, economy, and society as a whole are at stake because ineffective functioning of the Islamic financial system can exert an adverse effect on all economic sectors and society through financial instability as well as lower rates of economic growth and general well-being" (Chapra & Habib, 2002, p.18). Hence, the aim of satisfying the conflicting interests of wider stakeholders bring into focus the crucial role of SCG. Diagram 2 below illustrates the broader key stakeholders as enlisted in VBI Strategy Paper.

Diagram 3: Ecosystem of Stakeholders in IBIs under VBI



The focus of this study is only on the two main thrusts of VBI, good self-governance and best conduct of the IBIs, which is used as a tool mechanism to counter unfair terms in consumer contracts and notices. VBI not only promotes holistic observation of Sharĕ‘ah beyond Sharĕ‘ah legality of products but also gives maximum priority to the realisation of justice and fairness in protecting the interests of the broader stakeholders. In line with the *MaqĕĒid al-Sharĕ‘ah*, VBI also aims to minimise and prevent the negative impact due to practices, conduct and offerings of IBIs. Under VBI, IBIs are to embrace good self-governance and best conduct proactively without relying solely on regulatory intervention. “Good self-governance focuses on an institution’s internal decision making process and governance infrastructure, while best conduct refers to an institution’s treatment towards its stakeholders such as customers, employees, public and investors” (BNM Strategy Paper, 2017, p.2).

‘Good self-governance’ is defined as “inculcating organisational discipline (self-restraint) and ensuring meaningful participation of all stakeholders in the governance framework based on two main components: inclusive governance and self-governance” (BNM Strategy Paper, 2017, p.23-24). Within this context, inclusive governance refers to proactive engagement of the stakeholders in the decision making (consultation) of the IBIs towards providing better perspective, insights and expectations on the outcome of their business plans. As for self-governance, it indicates the implementation of self-discipline culture within the operations and practices of IBIs in line with justice and benevolence/ righteousness (*al ‘adl wal iĒsan*) towards greater accountability and integrity. To promote transparency in doing business, there are several possible indicators suggested by BNM to measure the success of good self-governance by IBIs such as mandating product standards, frequency of engagements/ consultation with banking consumers, statistics of complaints by consumers to banks’ internal complaints unit, compliance to relevant global standards on redress mechanism for consumers and the development of codes of ethics for IBIs. The Code of Ethics (CoE) for Financial Services Industry in Malaysia, which includes Islamic banks, as published by the Financial Services Professional Board (FSPB) and Securities Commission (SC) could also enhance the ethical behaviour of fairness and transparency by IBIs to the broader stakeholders (Noormahinar & Norhashimah, 2016a, p.3). Hence, IBIs would better understand the impact affected by their business activities and to include customers in their decision-making process.

‘Best conduct’ refers to institutions’ treatment towards its stakeholders which include: customers, employees, public and investors (BNM, 2017). IBIs are to adopt practices that would improve their treatments to consumers in enhancing consumer satisfaction and aim to provide offerings to address consumer needs while protecting their rights. Best conduct could also be implied through fair conduct and transparent disclosure in banking transactions by the IBIs. Similarly, Sharĕ‘ah has also provided rules that protect rights of contracting parties such as prohibition of usury (*riba*) in dealings, minimisation of uncertainty (*gharar*) in contractual terms due to asymmetrical information and avoidance of disputes due to unfair and oppressive contractual terms (BNM, 2017). Some indicators forwarded by BNM to ensure best conduct by IBIs are having customer satisfaction index and statistics on the number of complaints by consumers, enhancing transparency level as well as encouraging the development of codes of conduct. A Banking Code of conduct, similar to that of United Kingdom’s Financial Conduct Authority’s Banking Conduct of Business Sourcebook (BCOBS) which contains the rights and obligations of banks and consumers, is also helpful to ensure best conduct by the IBIs in Malaysia.

Good self-governance and best conduct by the IBIs that aim towards fair and transparent business transactions to banking consumers, inadvertently would cultivate good and ethical conduct in banking transactions, while resulting in greater confidence among banking consumers. The impact-focused

assessment and disclosure of VBI would make IBIs more aware of undertaking certain contractual performances. Any contractual performances that would create detriments to consumers for example, will have to be eliminated overtime. The commitment of IBIs in embracing both good self-governance and best conduct which reinforces the emphasis on fairness and transparency, is clearly in line with *MaqĒlid al-SharĒ'ah* and the maxim of *al-wasāliyah*. IBIs need to apply these two code of ethics to avoid any financial scandals as seen in the Global financial crisis 2008. Even if VBI has laid down the best possible framework of code of ethics, Islamic banking financiers need to constantly challenge themselves to a mindset change to uphold those standards.

The Impact of VBI to Counter Unfair Contract Terms and Consumer Notices

Banking consumers are often 'asked' to agree to contractual terms and if they do not agree, they are told to 'take it or leave it'. The terms are fixed, non-negotiable and not transparent to the extent of being dictated by the Islamic banks with the stronger bargaining power. Similarly, a consumer notice such as announcement, advertisement or other communication whereby banking consumers are frequently assumed to agree on the terms. Section 24A(c) of the Consumer Protection Act 2010 (CPA) considers a term is 'unfair' if it: 'causes a significant imbalance in the rights and obligations of the parties arising under the contract to the detriment of the consumer'. This indicates that unfair terms would be detrimental to banking consumers since the terms are more favourable to the banks at the expense of the consumers. A term in Islamic banking contracts or consumer notices would be potentially unfair if (Noormahinar & Norhashimah, 2016a):

- (1) The terms give Islamic Banks rights with absolute discretion from time to time to avoid, limit their performance of the contract, terminate it, vary the terms even after banking consumers have initially agreed upon them, renew or not the contract or withhold some conditions of the financing under the banking contract.
- (2) The terms give Islamic Banks right to change the price or characteristics of the goods and services to be supplied to banking consumers.
- (3) The terms give Islamic Banks rights to determine when the contract has been breached and such extent of liability of banking consumers for breaches.
- (4) The terms that give advantage to Islamic Banks to limit or avoiding liability to banking consumers of the rights of banking consumer to sue them.
- (5) The terms are detrimental financially or otherwise to banking consumers when Islamic Banks limits the redress mechanism for banking consumers.
- (6) Terms limiting/ avoiding the liability of the Islamic banks to the banking consumer.
- (7) Terms allowing the Islamic banks to terminate or alter the contract or product/ services provided under the contract without recourse to the banking consumers.
- (8) Terms which are not expressed in plain, intelligible language and are difficult to understand by average/ typical banking consumers.

As a tool to address the problem of unfair terms in consumer contracts and consumer notices, this study suggests the modification of Islamic banks/ bankers' behaviour via the adoption of VBI strategies on good self-good governance and best conduct. Since VBI is a holistic approach and in line with *SharĒ'ah*, IBIs are expected to deliver the intended *MaqĒlid al-SharĒ'ah* in realising benefit to the customers/ community and protecting them against evil and corruption, especially regarding their affairs in this world and the hereafter (Laldin, 2006 as stated by Noormahinar & Norhashimah, 2016b). Specific to Islamic banking business, the "*MaqĒlid al-SharĒ'ah* refers to the overall goal that *SharĒ'ah* aims to

achieve which are quite specific objectives related to banking transactions and business that brings happiness, prosperity and wealth to the banking consumers which include: equitable wealth circulation, educating the consumers, promoting fair and transparent banking practices, establishing business ethics and governance as well as realizing social justice to prevent harm (*mafsadah*) to consumers/ community” (Noormahinar & Norhashimah, 2016b).

Islamic banking is viewed as a type of ethical investing or ethical borrowing/ lending. This indicates that ethical responsibilities of IBIs to conduct business morally, to do what is right, just and fair as well as avoiding harm on consumers through their decisions or practices. The adoption of VBI by IBIs would further strengthen the element of Sharĕ‘ah governance and self-discipline within Islamic banks through affirmative emphasis on ethics, compassion, tolerance, benevolence, justice, responsible and moral considerations in dealings with banking consumers. A common moral outlook for Islamic banks is to be fair and transparent in legal documentation, which would lead to justice, excellent and balanced society, as well as curbing extremism in banker-customer relationship. Within this context, the social responsibility of Islamic banks to the consumers would be an obligation rather than option, and since the banks have an upper hand in contractual negotiation, they should give room to banking consumers to negotiate terms that would be favourable to them also. This would result in strong consideration on the detriments of unfair terms on the lives of banking consumers and their families. In the Qur’Ēn (Ali Imran 3: 110), Allah describes that those who attain everlasting success are those who (inviting to all that is good (*khayr*), enjoining what is right (*ma’rĒf*), forbidding what is wrong (*munġkar*), and believing in Allah). Among others, this verse established that in the IBIs, the bankers must behave in an efficient and ethical manner in performing their jobs to the best of their ability by leveraging social interest with their personal interest and not lower and that as vicegerent on earth they are accountable to Allah in the hereafter. Some examples of ethical values in IBIs instituted by Sharĕ‘ah which would be related to good conduct and governance in VBI include: the freedom of contract, freedom from excessive uncertainty (*al-Gharar*), and the entitlement to fair contract. The adoption of VBI would indicate that the Islamic banks would also be driven to continuously improve their offerings and treatments towards customers, as well as establishment of justice and elimination of exploitation in business transactions.

In promoting best conduct of fair and transparent banking practices, in line with the maxim of just/ not extreme (*Wasāliyah*) in *MaqĒlĒd al-Sharĕ‘ah*, the IBIs must ensure that there exist an equilibrium between their rights and duties with the customers to reshape best conduct in eliminating all disputes in banking transactions as well as giving banking consumers considerable protection against serious inequality of power by the IBIs (Noormahinar & Norhashimah, 2017a, p4). “The underlying principle of *al-wasāliyah* is an important aspect in Islam that promotes moderation, excellence and justice towards the realization of just and balance society” (Noormahinar & Norhashimah, 2017a, p16). Fairness to banking consumers that are relevant to banking transactions include: right to fair and transparent contract terms, right to plain language/ easy to understand contract terms, right to equal information, right to efficient prices of goods and services, right to redress as well as right to equal bargaining power in banking transactions. This indicates that fairness in IBIs is all about balancing the rights of Islamic banks against the broader banking consumers. As such, IBIs are required to “avoid dubious clauses to become part of its legal documentation and that all clauses included in the banking transactions must be in plain language, legible to read and properly disclosed in the banking contract” (Noormahinar & Norhashimah, 2017b). Avoidance of unfair terms would provide justice for fair bargain and valuable guideline to guard against behavioral biases that protects banking consumers from irrational behaviour of IBIs (Noormahinar & Norhashimah, 2017a). The *wasāliyah* principles set a very high standard of conduct for IBIs, obligating it to act with integrity, fairness, professionalism, and righteousness (*iĒsan*).

It is pertinent that the internal SharĒ'ah governance of IBIs should be supported by their external counterparts in ensuring all involving parties perform their duties as stipulated by SharĒ'ah. For example, the Association of Banks in Malaysia (ABM) has helped to set up policies and guidelines for member banks on code of conducts/ ethics to encourage honest bankers, whereby bankers that aim for consumer satisfaction will be credited by publishing favourable report about them. Similarly, the CoE for FSPs in Malaysia has set out five broad core principles to be complied to and relied by FSPs which include: competency, integrity, fairness, confidentiality and objectivity. The CoE clearly enhances the ethical behaviour of IBIs especially on fairness and transparency on the wider stakeholders of IBIs which is clearly stated in the VBI. Islamic banking in Malaysia should have a 'Banking Code of Conduct', similar to UK's BCOBS, which lays down customer charter for best banking practice and conduct standards which includes: disclosure, key commitments and obligations of IBIs to banking customers on banking standards. This Code would enhance professionalism in banker-customer relationship in Islamic banks to achieve service standards that banking consumers can trust.

Value-based good self-governance and best conduct as enshrined in VBI, which is in line with the *MaqĒ'id al-SharĒ'ah* and the legal maxim of *wasā'iyah*, is an indicative state of bringing *barakah* (blessings) in the lives of consumers/ community while creating an impactful and sustainable economic value in the long run. In the Qur'Ēn (Ar-Rahman 55:78) we are told that (Blessed be the name of thy Lord full of Majesty Bounty and Honor), which means that in actualising the name of Allah, we are bringing a blessed *barakah* giving of beauty and honour in human life (as translated by Yusuf Ali). We can infer *barakah* to mean a state whereby God's approval and blessings are bestowed upon those who strive His commands. *Barakah* seems to be inferred from the example of the act of National Australian Bank (NAB) when they abolished overdrawn fees on personal transactions and savings account, which consequently affected around 700,000 personal transactions or savings account customers per annum as well as forgoing revenue of \$100 million every year. If anything it brings even more blessings from Allah which can be seen in the form of long-term value creation that has resulted in stronger relationships with existing customers with complaints on fees and charges has dropped by 24% (2011-2012) and new customers are created with an increase of 5.86% (2009-2010). And indeed the *barakah* continues to flow in, today NAB is one of Australia's largest financial institutions which serves more than 124 million customers globally. Hence, the circumstances of NAB should create significant and positive impact on IBIs to embrace a change of mindset voluntarily. "VBI calls for a transformation of the mind of which far-sighted leadership is central to this paradigm shift to transform culture, systems and people" (Deputy Governor BNM, 2017). A 'game changer' by VBI makes it imperative for IBIs to practise good self-governance by ensuring that consumer contracts and notices should be fair and transparent in form and substance. Best conduct of IBIs should be in line with the *wasā'iyah* maxim which involves the ability of banks to do what is right and just even if it is not to their advantage.

CONCLUSION

Islamic banks, with its natural affinity towards social-justice should promote fair and transparent treatment to banking consumers. The IBIs are responsible for advocating value-based self-governance and best conduct, which are intrinsically linked to *MaqĒ'id al-SharĒ'ah* and *wasā'iyah* maxim of moderation, excellence and justice, so as to make an impactful and socially responsible banking environment. Unfair terms in standard form banking contracts and notices would impact the confidence and trust in the Islamic banking industry, and may also be considered undesirable on ethical grounds. Hence, fostering fair and transparent banking practices enable confident participation of banking

consumers in Islamic banking industry, and over time would further enhance the position of Islamic banks as a value-based banking with ethical and a more socially banking environment. Value-based banking or VBI through good self-governance and good conduct by the IBIs would provide a level playing field for banking consumers when interacting with Islamic banks through standard form consumer contracts and notices. Apart from enhancing the welfare of banking consumers by increasing their certainty and confidence, they also would be ensured that the contract that they have entered into is fair and reasonable and that the risks associated with it are allocated efficiently. It must be made clear that VBI do not seek to change the bargaining power of contracting parties that may exist in the contract formation stage but rather to address the imbalance of information or asymmetrical information regarding contract terms or alleviate the detrimental effects of enforcing unfair terms against banking consumers. Applying VBI to counter unfair terms would also seek to improve incentives for IBIs to offer fair contract terms and notices as well as avoiding unfair terms being offered to banking consumers in standard form contracts and notices.

Adoption of VBI initiative in the end-to-end operation of IBIs would cultivate good self-governance and best conduct in banking operations. Apart from positioning IBIs as the leader for value-based banking in the new era, more business opportunities and growth could be created if the current paradigm could be shifted in delivering value propositions to the wider stakeholders within the society and the economy at large. Hence, customers will receive better quality services from the banks towards greater confidence among customers and public as a whole. It is for IBIs to put greater emphasis on value creation and value-based businesses that reflect the true essence of Islamic banking, which is rooted in creating social justice and promotion of values-based economy. True to its name, the time has now come for Islamic banks to continuously provide effective intermediation and focus on meeting human needs in the real economy in realising sustainable financing and development goals as well as the intended socio-economic impact of Islamic banking.

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