

The Islamic Financial Services Bill 2012 - Shariah Governance (Part 2)

(Part 4 of 4)

**By Gopal Sundaram
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Shariah committees are key governance instrumentalities in Islamic financial institutions and are tasked with ensuring the products and services offered by these institutions are in compliance with Shariah.

Islamic scholars are not in complete agreement regarding the permissibility of certain transactions such as Tawarruq. The lack of convergence in the interpretation and application of Shariah in Islamic finance raises some challenging problems on the universal acceptability of Islamic finance products. To legally address this issue and to promote greater uniformity and standardisation of Shariah finance products, the Central Bank of Malaysia Act 2009 established the Shariah Advisory Council which is the authority for the ascertainment of Islamic law for the purposes of Islamic financial business. Rulings of the Shariah Advisory Council are binding on financial institutions, the courts and arbitrators.

The Islamic Financial Services Act 2012 empowers the regulator, Bank Negara Malaysia, to specify standards to give effect to the advice or rulings of the Shariah Advisory Council. As noted earlier, standards issued by the regulator are binding on all Islamic financial institutions authorised under the Act and on their directors, chief executive officers and senior officers and in particular, on their Shariah committee members who function as vanguards for Shariah compliance in these institutions.

Being in the forefront for Shariah compliance in Islamic financial institutions, Shariah committees have to be constituted with great care and thoughtfulness. The 2012 Act prohibits the appointment of any person as member of the Shariah committee unless the person meets the requirements specified in the standards issued for this purpose by the regulator and the written approval of the regulator has been obtained. It is believed that the existing rules which limit the number of Shariah committees that such members may sit in will be subsumed under these standards. The Act also empowers the regulator to specify the duties and functions of the Shariah committee and the Shariah committee members from time to time.

Just as an appointment to the Shariah committee is subject to various considerations, cessation as a member of the Shariah committee is subject to several statutory requirements as well in the 2012 Act. Primarily these requirements ensure that a Shariah committee member resigns only of his own volition and his termination or removal is only on grounds of disqualifications under the fit and proper requirements. The law requires resignations and proposals to terminate a Shariah committee member to be notified to the regulator.

To ensure that the Shariah committee can carry out its functions, the new Act requires the financial institution, its directors, officers or controllers to provide such documents and information as are needed by the committee and states that such documents and information should be accurate, complete and not false or misleading in any material particular. On their part, Shariah committee members are subject to the usual banking secrecy rules under the Act.

Shariah committee members enjoy statutory protection for actions for breach of confidentiality provided they have acted in good faith in the course of the discharge of their duties and performance of their functions. Shariah committee members are also statutorily protected from actions for defamation in respect of any statement made by them without malice in the discharge of their duties.

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Gopal began his highly distinguished career in Bank Negara Malaysia (BNM) in 1982, pursuant to graduating from University of Malaya on a Bank Negara scholarship. He was appointed as Assistant Governor in 2006. As Assistant Governor he was responsible for the Legal Department, Finance Department and the IT Services (Computer) Department as well the Money Museum and the Art Gallery. During his tenure, he was a member of various committees chaired by the Governor, inter alia, the Management Committee, the Monetary Policy Committee, the Financial Stability Committee, the Budget Committee, the Risk Management/ Committee and in attendance at the Malaysia International Islamic Financial Centre Executive Committee (MIFC), a multi-agency committee appointed by the Prime Minister.

Upon his retirement in 2011, he was appointed as Project Advisor to BNM to advise and supervise the drafting of an omnibus legislation for banking, insurance, payments systems and exchange control as well as an omnibus Islamic legislation for Islamic banking, takaful, payment systems and exchange control proposed to be tabled in Parliament later this year.

Gopal is the only member of the International Monetary Law Committee of the International Law Association (MOCOMILA) from Malaysia. He is also in the Executive Committee of the Malaysian Chapter of ASIL (Asian Society for International Law). Gopal sits on the Board of Directors of Kuwait Finance House (Malaysia) Berhad, the Board of Management of Methodist College Kuala Lumpur, the Council of Education, Methodist Church in Malaysia and the Judicial Council, Methodist Church in Malaysia.

He is a leading adviser on the new Financial Services Act (FSA) and Islamic Financial Services Act (IFSA).

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