

## REINFORCING HONESTY IN THE MALAYSIAN ISLAMIC BANKING CONTRACTS

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*This paper discusses about how Islam perceives honesty, as evidenced in the Qur'an, Sunnah of the Prophet (saw) and views of the Muslim scholars. The discussions begin by examining the relevant Qur'anic verses and ahadith on honesty, which provide a clear indication that being honest is obligatory upon every person, regardless of his situation or circumstance. Being honest is not a mere recommendation that is left to man's own volition because honesty is essentially part of faith (iman) and thus firmly guarded by the Shar'iah. Subsequently, the paper continues to analyse the existing Malaysian law and regulations governing Islamic banking, particularly in the requirement of honesty. However, this research is limited to honesty in contractual terms and agreements between the Islamic banks and customers. It is suggested that honesty is demonstrated by the level of transparency of each contractual term. Following this, selected samples of contractual terms from random Islamic banks are reproduced, assessed and offered simplifications. Further examples of simplified contractual terms by the UK's Competition and Markets Authority are included as reference points. Based on the existing Malaysian Islamic banking law and the current standard of Islamic banking contracts, it is concluded that abidance of the law by the Islamic banks is low. Thus, effective law enforcements by the supervisory body are required to enforce honesty in the Malaysian Islamic banking contracts.*

**Keyword:** *Honesty, transparency, Islamic banking contract, plain language.*

### 1. Introduction

Islam is not a religion by the conventional definition or understanding of the word. Islam is a complete code of life, illimitable to personal beliefs and rites. It provides an exhaustive guideline to assist a believer in his day-to-day activities. As per the nature of guidelines, some of

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its directions are binding, either in doing or abstaining, whilst others are persuasive or recommendable. In Islam, every single action, from the essential worships (*ibadah*) to other deeds beyond that are all governed for. Taking an example relevant to the research topic, a transaction in Islam must observe 5 pillars to be valid i.e. the buyer, seller, subject matter, consideration and *sighah* (buy and sell). But does this mean that conditions outside the realm of the 5 pillars are thus immaterial? For instance, is having a contract in written form superfluous in Islam? The answer is no and in fact, it is to be the preferred method. In *Surah Al-Baqarah* (2), verse 282, Allah ordains:

*“O you who have believed, when you contract a debt for a specified term, write it down. And let the scribe write (it) between you in justice.”*<sup>21</sup>

In the same verse, Allah (swt) continues to say:

*“And do not be (too) weary to write it, whether it is small or large, for its (specified) term. That is more just in the sight of Allah and stronger in evidence and more likely to prevent doubt between you.”*<sup>22</sup>

Hence, from the above verse we know that having a written contract is pleasing to Allah (swt) because; it is fairer, serves as a strong evidence and able to avoid doubt among the contracting parties. Additionally, a creditor is highly encouraged to be lenient and merciful towards the debtor, as per the hadith of the Prophet (saw), *“May Allah show mercy on easy purchase, easy sale, easy payment of price and easy payment of debt.”*<sup>23</sup> And the debtor in return, is reminded to be merciful (*ihsan*) towards the creditor by duly observing his duty to make payment. It is greatly recommended for the debtor to settle his debt the soonest possible, even before the payment is due. As said by the Prophet (saw) in a *hadith*, *“The best among you is he who pays his debt in good manner.”*<sup>24</sup> This ‘good manner’ may promote tolerance and strengthen the brotherhood bond between the debtor and creditor.

When observed closely, the recommended practices surrounding a valid transaction may not fall far from the required 5 basic pillars. However, the 5 basic pillars as we know of today have been segmented and executed at the minimum level to meet the requirements of a valid transaction. The requirements have been diluted to the point that executing deeds outside the 5 basic pillars become supplementary.

What then is the true position of honesty and transparency in transactions viewed by Islam? Imam Al-Ghazali in his celebrated book of *Ihya Ulum-Id-Din* (Revival of Religious Teachings), identified justice and kindness alongside lawful earnings and fear of religion as 4 necessary requirements of earnings.<sup>5</sup> Imam Al-Ghazali further opined that to cause hardship to public through unjust, oppressive, deceiving or fraudulent business dealings is unlawful.<sup>6</sup>

In Islam, all acts and deeds, small or big, are acts of worships (*ibadah*), which will be judged by Allah (saw), as revealed in *Surah Al-Anbiya'* (21), verse 47:

*“And We place the scales of justice for the Day of Resurrection, so no soul will be treated unjustly at all. And if there is (even) the weight of a mustard seed, We will bring it forth. And sufficient are We as accountant.”*<sup>7</sup>

Islam does not divide or separate between worldly dealings and obedience to Allah (swt). Islam as stated earlier, is a code of life. It regulates every single doing and being in this world. Thus, it is not surprising to see one ruling overlapping or connected to another, for the whole belief system is like a giant web. The system works at its optimum when taken in its entirety.

Coming back to honesty, why is it vital in Islam? Does the lack of honesty negate a valid transaction? What is the standard of 'accepted' honesty? These are among the questions that this research aims to address. Before all that, it must be noted that this research does not assert a total non-existence of honesty in Malaysian Islamic banking contracts. To reiterate, this paper simply submits that there is room to enhance honesty in the Malaysian Islamic banking contracts, as supported by the Malaysian Islamic banking law and regulations.

## **2. Honesty in Islam from the Standpoint of the Qur'an and Sunnah**

### ***2.1. Honesty in Islam from the Qur'an and Sunnah***

There are considerable verses in the Quran and the hadith of the Prophet (saw), which stress on the obligation to be honest. This obligation is imposed on every individual, regarding any matter and

against anything, including himself. Allah (swt) clearly decrees in *Surah Al-Anam* (6), verse 152:

*“And when you speak (i.e. testify), be just, even if (it concerns) a near relative. And the covenant of Allah fulfill. This has He instructed you that you may remember.”<sup>8</sup>*

And in *Surah An-Nisa* (4), verse 135<sup>9</sup>:

*“O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives. Whether one is rich or poor, Allah is more worthy of both. So follow not (personal) inclination, lest you not be just.”*

There are 2 things that we may infer from the above verse. The first point is clear, that we owe an obligation to be honest or truthful to any person in any given situation. We hold this duty when in public and in solidarity, knowing that all our deeds and acts are being watched by Allah (swt) and duly recorded by His angels. In *Surah Qaf*(50), verses 16 to 18, Allah (swt) reveals:

*“And We have already created man and know what his soul whispers to him, and We are closer to him than his jugular vein. (16) When the 2 receivers (i.e. recording angels) receive, seated on the right and on the left. (17) He (i.e. man) utters no word except that with him is an observer prepared (to record). (18)”<sup>10</sup>*

And that Allah knows all *“Whether you reveal a thing or conceal it, indeed Allah is ever, of all things, Knowing.”* (*Surah Al-Ahzab* (33), verse 54)<sup>11</sup>

The second take away point from *Surah An-Nisa* (4), verse 135 (above) (i.e. *“So follow not (personal) inclination, lest you not be just”*) is; Allah’s reminder that we are but His servants whom are created weak and in constant need of His guidance. Allah (swt) says in *Surah An-Nisa* (4), verse 28:

*“And Allah wants to lighten for you (your difficulties); and mankind was created weak.”<sup>12</sup>*

This weakness or rather weaknesses are man’s *fitrah* i.e. human nature and which are mentioned in the following verses of the Qur’an and *Sunnah*:-

**Table 1**  
**Summary of Man's Nature from the Qur'an and Hadith**

<i>No. Man's Character</i>	<i>Evidence (Quran &amp; Hadith)</i>
1. Niggardly / Selfish	- <i>Surah Al-Isra'</i> (17): 100 - <i>Surah An-Nisa'</i> (4): 128 - <i>Hadith</i> : "The worst thing that can be in a man is greedy, impatience and unrestrained cowardice"
2. Hasty	- <i>Surah Al-Isra'</i> (17): 11 - <i>Surah Al-Anbiya'</i> (21): 37 - <i>Hadith</i> : "The worst thing that can be in a man is greedy, impatience and unrestrained cowardice"
3. Probing and Contentious	- <i>Surah Al-Kahfi</i> (18): 54 - <i>Surah Al-Maidah</i> (5): 101 - <i>Hadith</i> : "People will not stop asking questions until they say, 'This is Allah, The Creator of everything, then who created Allah'"
4. Anxious and Impatient	- <i>Surah Al-Ma'arij</i> (70): 19-21 - <i>Surah An-Nisa'</i> (4): 128 - <i>Hadith</i> : "The worst thing that can be in a man is greedy, impatience and unrestrained cowardice"
5. Ungrateful	- <i>Surah Ibrahim</i> (14): 34 - <i>Surah Fussilat</i> (41): 51 - <i>Surah Az-Zumar</i> (39): 49
6. Unjust	- <i>Surah Al-Isra'</i> (17): 67 - <i>Surah Al-Hajj</i> (22): 66 - <i>Surah Al-'Adiyat</i> (100): 6

### *2.1.1. Guidance from the Almighty Creator*

The undesirable traits of man have to be suppressed or corrected by observing the prescribed rulings of the *Shari'ah*, which is an expression of the Wills of Allah (swt). Allah (swt), the Merciful Creator of the Heavens and earth, leaves not mankind without guidance for He says, "*Allah is the Light of the heavens and the earth. The example of His Light is like a niche within which is a lamp; the lamp is within glass, the glass as if it were a pearly [white] star lit from [the oil of] a blessed olive tree, neither of the east nor of the west, whose oil would almost glow even if untouched by fire. Light upon light. Allah guides to*

*His light whom He wills. And Allah presents examples for the people, and Allah is Knowing of all things.*"<sup>13</sup>

To illustrate this point, this paper will elaborate the first *fitrah* of man on the list, i.e. niggard or selfish. According to a 17<sup>th</sup> century English Philosopher, Thomas Hobbes, human beings are selfish and driven by aims of personal gains as well as fear of death.<sup>14</sup> Thomas Hobbes argued that human's greed and selfishness could only be controlled by way of submission to a strong and forceful government, without which unrestrained greed will ultimately destroy the society.<sup>15</sup> Pushing forward to 4 centuries later, the stance on human nature's greed and selfishness has not differed much. Professor Emeritus Richard Dawkins of the Oxford University, a renowned ethologist, offers his observations on the survival of human genes, which have in some cases exceeded millions of years. According to him, the "predominant quality" of those successful genes is "ruthless selfishness", that will however lead to the establishment of selfishness in individual behaviour.<sup>16</sup> In other words, our genes have survived the process of evolution by competing against one another from employing whatever means necessary. Hence it is not surprising if man develops selfishness on his way to achieve success, for it is in the genes of man to be selfish. It appears that we have to train our souls, to "teach generosity and altruism, because we are born selfish."<sup>17</sup>

The philosophical and scientific findings of man's selfishness or niggardly have been revealed via the Qur'an more than 1400 years ago. Allah (swt) proclaims in *Surah Al-Isra'* (17), verse 100:

*"Say (to them), "If you possessed the depositories of the mercy of my Lord, then you would withhold out of fear of spending." And ever man been stingy."*<sup>18</sup>

Further in *Surah An-Nisa* (4), verse 128, Allah says:

*"And present in (human) souls is stinginess."*<sup>19</sup>

And in a hadith reported by Imam Ahmad, which was narrated by Abdul Aziz bin Marwan bin al-Hakim, whom heard from the Prophet (saw):

*"The worst things that can be in a man are greediness, impatience and unrestrained cowardice"*<sup>20</sup>

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Man will always be in need of Allah's guidance that is revealed through the tongue of His blessed Prophet (saw), as per *Surah An-Nisa* (4), verse 105, "Indeed, We have revealed to you, [O Muhammad], the Book in truth so you may judge between the people by that which Allah has shown you. And not be for the deceitful an advocate."<sup>21</sup> This verse shows that the Prophet (saw), has laid down universally applicable rulings and guidance based on the Qur'an, as indicated by the use of the word "people" instead of "believers". Thus the 'forceful government' suggested by Thomas Hobbes is the Shari'ah, and the way to "teach generosity and altruism" to man's soul, is by obeying the *Shari'ah*. As proofs, the *Shari'ah* has prescribed rulings as counter-measures against niggardly as follows:

i) Imposing *zakat* (compulsory wealth contribution) and encouraging *sadaqah* (charity), based on:

a) *Surah At-Tawbah* (9), verse 103:

"Take, [O Muhammad], from their wealth a charity by which you purify them and cause them increase, and invoke [Allah's blessings] upon them. Indeed, your invocations are reassurance for them. And Allah is Hearing and Knowing"<sup>22</sup>

b) *Surah Al-Ma'arij* (70), verses 24 and 25:<sup>23</sup>

"And those within whose wealth is a known right" (24)<sup>24</sup> For the petitioner and the deprived – "(25)

ii) Prohibition against hoarding – remembrance of Allah's punishment

a) *Surah At-Tawbah* (9), verses 34 and 35,<sup>25</sup> based on:

"O you who have believed, indeed many of the scholars and the monks devour the wealth of people unjustly<sup>26</sup> and avert (them) from the way of Allah. And those who hoard gold and silver and spend it not in the way of Allah – give them tidings of a painful punishment (34) The Day when it<sup>27</sup> will be heated in the fire of Hell and seared therewith will be their foreheads, their flanks, and their backs, (it will be said), "This is what you hoarded for yourselves, so taste what you used to hoard."<sup>(35)</sup>

b) In *Surah Ali-Imran* (3), verse 180:

“And let not those who (greedily) withhold what Allah has given them of His bounty ever think that it is better for them. Rather it is worse for them. Their necks will be encircled by what they withheld on the Day of Resurrection. And to Allah belongs the heritage of the Heavens and the earth. And Allah, of what you do, is (fully) aware.”<sup>28</sup>

iii) Moderation in spending, pursuant to:

a) *Surah Al-Furqan* (25), verse 67:

“And (they are) those who, when they spend, do so not excessively or sparingly but are ever, between that, (justly) moderate”<sup>29</sup>

iv) Understanding that provisions are pre-determined by Allah (swt), based on:

a) In *Surah Hud* (11), verse 6:

“And there is no creature on earth but that upon Allah is its provision, and He knows its place of dwelling and place of storage.”<sup>30</sup> All is in a clear register.”<sup>31</sup>

b) *Surah Ash-Shura* (42), verse 27:

“And if Allah had extended (excessively) provision for His servants, they would have committed tyranny throughout the earth. But He sends (it) down in an amount, which He wills. Indeed He is, of His servants, Aware and Seeing.”<sup>32</sup>

Although obedience of the *Shari‘ah* is obligatory upon each soul, Allah (swt) the All-Knowing and Merciful still provides us comfort by declaring that “Allah does not charge a soul except [with what within] its capacity”<sup>33</sup> and “But perhaps you hate a thing and it is good for you; and perhaps you love a thing and it is bad for you. And Allah knows, while you know not.”<sup>34</sup> Every man may thus submit to the Wills of the Almighty Creator at ease knowing that none will be oppressed or mistreated by His laws.

Coming back to the position of honesty in Islam, this research has identified honesty as being an obligation, as equated with *taqwa*



and as the path to the Heavens. These are detailed out under separate headings below.

## **2.2. Obligation to be Honest**

As per the heading, being honest is incumbent on man, and especially so on Muslims. This is revealed in *Surah At-Tawbah* (9), verse 119<sup>35</sup>, in which Allah (swt) says:

*“O you who have believed, fear Allah and be with those who are true.”*

This verse was commented quite extensively by Ibn Kathir in his Tafsir. It was made in relation to the preceding verse i.e. verse 118 of *Surah At-Tawbah*<sup>36</sup>, and the reason for its revelation. It is recorded that verse 118 of *Surah At-Tawbah* was revealed concerning the reluctance of 3 Ansari companions of the Prophet (saw), from participating in the Battle of Tabuk. The 3 companions whom were Ka‘b bin Malik, Hilal bin Umayyah and Murarah bin Ar-Rabi’ deliberately stayed behind with those whom had valid excuses, e.g. sickness and old age. Upon the return of the Prophet (saw), all those who stayed behind including the 3 companions went to greet the Prophet (saw) to seek his dispensations. Accordingly, the merciful Prophet (saw) accepted all excuses given by each person including the hypocrites, and prayed for Allah’s forgiveness on their behalf. Indeed, merciful is a trait of the Prophet (saw) that is a gift by Allah (saw) to mankind.<sup>37</sup> This is described in *Surah At-Tawbah* (9), verse 61 in which Allah (saw) proclaims:

*“And among them are those who abuse the Prophet and say, “He is an ear.” Say, “(It is) an ear of goodness for you that believes in Allah and believes the believers and (is) a mercy to those who believe among you.” And those who abuse the Messenger of Allah – for them is a painful punishment.”*<sup>38</sup>

“He is an ear” is translated as “one who believes everything he ears”<sup>39</sup> i.e. sympathetic and trusting.

However, Ka‘b bin Malik and the 2 other companions could not bring about themselves to lie to the Prophet PBUH, despite being coaxed by the hypocrites whom did not take part in the Battle of Tabuk. The Prophet (saw) ordered social sanctions against all 3

companions where other companions were prohibited from talking to them and family members were disallowed from serving or assisting them. They spent their days and nights repenting and weeping in resentment of their sin of disobedience, and this continued for 50 full days before Allah (saw) accepted their repentance. On this, Ka'b bin Malik said that he since then had always told the truth for being honest had brought him success, i.e. Allah's forgiveness, "*And [He also forgave] the three who were left alone [i.e. boycotted, regretting their error] to the point that the earth closed in on them in spite of its vastness and their souls confined [i.e. anguished] them and they were certain that there is no refuge from Allah except in Him. Then He turned to them so they could repent. Indeed, Allah is the Accepting of Repentance, the Merciful.*"<sup>40</sup> And hence, "*be with those who are true*" in verse 119 of *Surah At-Tawbah* (9) is referring to the 3 companions who were steadfast in standing by the truth.

Honesty is essential in Islam, to the point that dishonesty is classified as a characteristic of the hypocrite. This is made clear in a hadith of the Prophet (saw) that was narrated by 'Abdullah bin 'Amr:

*"Whoever has the following 4 (characteristics) will be a pure hypocrite and whoever has 1 of the following 4 characteristics will have 1 character of hypocrisy unless and until he gives it up.*

1. *Whenever he is entrusted, he betrays (proves dishonest).*
2. *Whenever he speaks, he tells a lie.*
3. *Whenever he makes a covenant, he proves treacherous.*
4. *Whenever he quarrels, he behaves in a very imprudent, evil and insulting manner.*<sup>41</sup>

There are many other Qur'anic verses and hadith of the Prophet (saw) that highlight the obligation to be honest and the repercussions of disobedience. However, for the purpose of this discussion, the above evidence should suffice.

### ***2.3. Honesty is equated with Taqwa (Consciousness of Allah)***

Honesty is a part of *taqwa*, as seen earlier in *Surah At-Tawbah* (9), verse 119. If one possesses *taqwa*, then he will be with those who are

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true. Further seen in *Surah Al-Ahzab* (33), verse 70<sup>42</sup>, in which Allah ordains:

*“O you who have believed, fear Allah and speak words of appropriate justice (i.e. qawlaan sadiidaa)”*

‘Qawlaan sadiidaa’ is also interpreted to mean “(always) say a word directed to the Right”.<sup>43</sup> And in *Tafsir Ibn Kathir*, ‘qawlaan sadiidaa’ is construed as “speak (always) the truth”<sup>44</sup> which in other words, requires man to speak in a “straightforward manner, with no crookedness or distortion” and the reward that awaits the doer is guidance from Allah (swt) to do righteous deeds and His pardons. In verse 71 of *Surah Al-Ahzab* (33), Allah (swt) says:

*“He will (then) amend for you your deeds and forgive you your sins. And whoever obeys Allah and His Messenger has certainly attained a great attainment.”*<sup>45</sup>

#### **2.4. Truthfulness is Path to the Heavens**

On this point, Allah (swt) says in *Surah Al-Maidah* (5), verse 119:

*“Allah will say, “This is the Day when the truthful will benefit from their truthfulness.” For them are gardens (in Paradise) beneath which rivers flow, wherein they will abide forever, Allah being pleased with them, and they with Him. That is the great attainment.”*<sup>46</sup>

Having understood the position of honesty in Islam, we will now look into the legal standing of honesty under the Malaysian Islamic banking law vis-à-vis the actual contractual terms of Islamic banking.

### **3. Honesty in the Malaysian Islamic Banking Law Vis-a-vis the Existing Terms of Malaysian Islamic Banking Contracts**

Although the law does not spell out the word ‘honesty’ in the statutes or guidelines relating to Islamic banking, the wordings adopted by the statutes or guidelines indicate that honesty is a requirement nonetheless. For better clarity and understanding, the relevant statutory laws and guidelines are divided into separate subheadings as below:

I. Statutes

- (a) Islamic Financial Services Act 2013; and
- (b) Central Bank of Malaysia Act 2009.

II. Guidelines

- (a) The Bank Negara Malaysia's Guidelines on Product Transparency and Disclosure<sup>47</sup>
- (b) The Bank Negara Malaysia's Policy Document on Prohibited Business Conduct<sup>48</sup>

Elaborations and discussions of the contents of the Guideline on Product Transparency and Disclosure will be supplemented with samples of contractual terms gathered from several Islamic banks in Malaysia. Following this, excerpts of reports by the Bank Negara Malaysia (BNM) on the 'Effectiveness of the Product Disclosure Sheet in Influencing Sound Financial Decisions' that is contained in the BNM's Financial Stability and Payment Systems Report 2014<sup>49</sup>, will be provided.

Additionally, references to foreign law and guideline as per the following are made when necessary:

- (a) The UK's Consumer Rights Act 2015; and
- (b) The UK's Competition & Markets Authority ("CMA") Unfair Contract Terms Guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015.

**3.1. *Islamic Financial Services Act 2013 ("IFSA")***

As seen from the discussions above, *Shari'ah* seeks to uphold justice and fairness through one of many ways i.e. being honest "*even if it be against yourselves or parents and relatives*"<sup>50</sup>. Thus, if *Shari'ah* is executed in its true intent and purpose, then honesty, fairness, justice and the like will surely prevail. Having said this, section 6 of the IFSA imposes on the BNM to among others; "foster fair, responsible and professional business conduct of Islamic financial institutions" and "strive to protect the rights and interests of consumers of Islamic financial services and products." Section 6 is as per below:

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**6.** *The principal regulatory objectives of this Act are to promote financial stability and compliance with Shari'ah and in pursuing these objectives, the Bank shall—*

*(a) foster—(*

*(i) the safety and soundness of Islamic financial institutions;*

*(ii) the integrity and orderly functioning of the Islamic money market and Islamic foreign exchange market;*

*(iii) safe, efficient and reliable payment systems and Islamic payment instruments; and*

*(iv) fair, responsible and professional business conduct of Islamic financial institutions; and*

*(b) strive to protect the rights and interests of consumers of Islamic financial services and products.*

Further under section 135 of the IFSA, the BNM is accorded with the power to specify standards on business conduct “for the purposes of ensuring that a financial service provider is fair, responsible and professional when dealing with financial consumers” which includes the standards on; (i) transparency and disclosure requirements and (ii) fairness of terms in a financial consumer contract for financial services or products. Section 135 is provided below:

**135.** *(1) The Bank may specify standards on business conduct to a financial service provider for the purposes of ensuring that a financial service provider is fair, responsible and professional when dealing with financial consumers.*

*(2) Without limiting the generality of subsection (1), standards specified under that subsection may include standards relating to—*

*(a) transparency and disclosure requirements including the provision of information to financial consumers that is accurate, clear, timely and not misleading;*

*(b) fairness of terms in a financial consumer contract for financial services or products;*

*(c) promotion of financial services or products;*

*(d) provision of recommendations or advice including assessments of suitability and affordability of financial services or products offered to financial consumers; and*

*(e) complaints and dispute resolution mechanisms.*

### **3.2. Central Bank of Malaysia Act 2009 (CBMA)**

As a supervisory body for Islamic banking institutions, the BNM is also empowered to issue guidelines on matters pertaining to the *Shari'ah*, with the advice of the *Shari'ah* Advisory Council (SAC). This is stipulated in section 59 of the CBMA:

*59. (1) The Bank may issue such written circulars, guidelines or notices on any Shariah matter relating to the Islamic financial business carried on by any Islamic financial institution in accordance with the advice or ruling of the Shariah Advisory Council.*

*(2) An Islamic financial institution shall comply with any written circulars, guidelines or notices issued by the Bank under subsection (1) and within such time as may be set out in the circulars, guidelines or notices.*

And the *Shari'ah*, to briefly reiterate, obligates honesty as an effort to ensure fairness and justice.

### **3.3. BNM's Guidelines on Product Transparency and Disclosure**

Transparency is generally accepted as the core of fairness because it has the "potential to influence what the consumer expects to get from the agreement and the ability of the consumer to protect his interests in relation to the substantive terms that are on offer."<sup>51</sup> Transparency may influence the amount of information gathered by customer in forming his decision whether or not to enter into a contract, which includes the obligation and risks the contract entails. Thereon, the customer would be able to compare the terms that may be offered by other Islamic banks. In a short sentence, one may infer that transparency reflects the fairness and honesty of a legal contract.

It is thus reassuring to know that 'consumer's awareness and understanding', 'consistency in disclosure' and 'informed decision-making' are among the aims of the BNM's Guidelines on Product Transparency and Disclosure. Item 2.2 of the Guidelines stipulates:

*2.2 The objectives of the Guidelines are to:*

- promote consumer's awareness and understanding of the financial products and services;*
- facilitate consistency in disclosure of essential information on financial products and services to enable comparison;*

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- *minimise mis-selling of financial products and services and ensure that financial products and services sold are appropriate to the needs and resources of the consumer; and*
- *promote informed decision-making by the consumer.*

Not only that, the Guidelines under item 8.1.2, requires the disclosure to be “adopted at each of the three stages of the contractual process: the pre-contractual stage, at the point of entering into a contract and during the term of the contract.”

How then will transparency be demonstrated? It may be done via plain language. This too is contained in the Guidelines on Product Transparency and Disclosure. Item 8.2.4 of the Guidelines necessitates that agreements and policy documents are provided in plain language i.e. easy to understand and free of legal and technical jargons. And when unavoidable, the legal and technical jargons must be explained or printed in a glossary. Item 8.2.4 stipulates:

*8.2.4 Contracts, agreements and policy documents should be presented in plain language. The plain language requirement applies to contracts, agreements and policy documents provided to the customer on the effective date of implementation and thereafter. Plain language refers to clear presentation of information in a manner that is easy for readers to understand. It is a language that avoids inflated vocabulary and convoluted sentence structure. The use of legal and technical jargon should be avoided, whenever possible. Where the use of legal and technical terminology cannot be avoided, the meaning of these terminologies should be explained or printed in a glossary for reference.*

The BNM’s guidelines, policy documents, standards or circulars are binding on Islamic banks. As clearly inferable from the empowerment given to the BNM via section 59 of the CBMA and section 135 of the IFSA, it has also been affirmed by the court in *Affin Bank Bhd v. Datuk Ahmad Zahid Hamidi*,<sup>52</sup> which was upheld in *Diana Chee Yun Hsai v. Citibank Bhd*<sup>53</sup>

#### **3.4. BNM’s Policy Document on Prohibited Business Conduct**

This Policy Document is issued by BNM pursuant to sections 135(3) and 136(2) of the IFSA to complement and reinforce the BNM’s existing standards on business conduct and consumer protection.<sup>54</sup>

The Policy Document provides a parameter on conducts that are “misleading or deceptive”<sup>55</sup> and on assertions of “undue pressure, influence or using or threatening to use harassment, coercion, or physical force”<sup>56</sup> by the banks. In determining a bank’s ‘misleading and deceptive conduct’, BNM will among others, assess whether the bank has satisfactorily observed the required standards of product transparency and disclosure. Item 8.4(a) of the Policy Document stipulates:

*8.4 In determining whether an FSP (i.e. financial service provider) is engaging in misleading or deceptive conduct the Bank will consider, among others, the following factors:*

- (a) whether the FSP has met standards issued by the Bank on product transparency and disclosure and proper advice practices; or*
- (b) the circumstances in which the alleged misconduct occurred, for example the manner in which information was communicated to financial consumers, and whether it was appropriate to the level of financial knowledge and understanding of the person receiving the information.*

It is to be noted that what is tantamount to a ‘misleading or deceptive conduct’ is also dependent on whether information is appropriately conveyed to the customer. This means that the information must be furnished in a manner that the customer may understand. Item 8.4(b) shows a positive development of the law because it imports a subjective approach, i.e. subjective to individual customer’s understanding. It further reinforces the position of subjective principles such as honesty and fairness in the law, as well as opening the door for others like good faith.

### ***3.5. Samples of Malaysian Islamic Banking Contracts***

Although non exhaustive, the provisions from the statutes and guideline discussed earlier are adequate to prove that honesty is embedded in the Malaysian Islamic banking law. However, in practice, honesty may not transpire at the desired level due to lax legal enforcement. This can be seen in the terms of agreements or contracts between customer and Islamic banks in Malaysia. As such,



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several contractual terms gathered from random Islamic banks are provided below, followed by demonstrations of simplified terms in plain language and remarks. Cross-referencing to the UK's CMA's Unfair Contract Terms Guidance: Guidance on the unfair terms provisions in the UK's CRA is made when necessary.

#### **Sample 1: The Islamic Bank's right of setting off accounts**

- **(Actual term): Right to Set-Off-**

I/We agree that in addition to any general lien or other similar right to which the Bank as bankers may be entitled at law, the Bank may at any time, without prior notice, combine or consolidate any or all of the Banking Accounts with and the liabilities to the Bank and set-off or transfer any sum or sums standing in the credit of any or all of the Banking Accounts in or towards satisfaction of any of my/our liabilities, to the Bank whether such liabilities to the Bank be primary or collateral or several and joint. Further in, so far as my liabilities to the Bank are contingent or future, the Bank's liabilities to me/us to make payment of any sum(s), standing to the credit of any of my/our Banking Accounts shall be to the extent necessary to cover such liabilities be suspended until the happening of the contingency or future event.

- **(Simplified): Bank's Right to Set-Off-**

I/We agree that without having to inform me/us earlier, the Bank can combine all Banking Accounts that I/we keep with the Bank, to set-off or transfer any amount owed i.e. liabilities, either in the form of primary, collateral or several and joint liabilities. Additionally, in the case where the Bank has foreseen imminent liabilities on my/our part, the Bank is allowed to refrain from making disbursements to my/our Banking Accounts, as the Bank sees necessary to cover for such liabilities until their actual occurrence.

This is a cogent example where transparency via plain language may be able to aid a customer's understanding of the term. This is also an evident breach of the BNM's Guidelines on Product

Transparency and Disclosure. The term does not display “clear presentation of information in a manner that is easy for readers to understand” nor is it not drafted in “a language that avoids inflated vocabulary and convoluted sentence structure” It still imports legal and technical jargon without explaining the meanings or including a glossary, as required under Item 8.2.4. of the Guidelines. Regrettably, this drafting approach is adopted throughout the contract. In other words, the entire contract is in breach of the BNM’s Guidelines.

Coming back to the term on the Bank’s right to set-off, the example given is also in breach of subsection (d) of Item 1.3: During the Term of Contract, Schedule II of the Guidelines on Product Transparency and Disclosure, which clearly stipulates that the Islamic bank who has the right to set-off, must inform the customer of its intention to set-off “**at least 7 calendar days in advance.**” **Item 1.3 (d), Schedule II - Guidelines on Product Transparency and Disclosure**, is as per below:

*d. Intention to set-off-*

- *If the FSP has the right to set-off any credit balance in the customer’s (accounts against any outstanding balance in the financing accounts, the customer should be informed at least 7 calendar days in advance on the FSP’s intention to set-off a credit balance in the customer’s accounts against a debit balance in the financing accounts.*
- *The FSP may concurrently earmark the available funds in the customer’s accounts against the outstanding balance in the financing accounts upon the issuance of the notice to the customer.*

More sample terms will be viewed and discussed below.

### **Sample 2: Specific Terms and Conditions**

Sample 2 shows a typical case of badly structured term with poor grammar i.e. inappropriate punctuation mark, choice of words, etc. This selected sample is a single-sentenced term, with 100 words and a single comma before a full stop.

- **(Actual Term): Specific Terms and Conditions**  
I/We hereby agree that notwithstanding anything herein contained the terms and conditions governing the operation of

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any specific banking account or the use of any card linked to any of my/our Banking Accounts as contained in any other document used in connection with such Banking Accounts or card or as contained in any notices, or in the Savings Account passbook or Fixed Deposit General Investment *Mudarabah* Account receipts, brochures or advertisements of the Bank specifying such additional terms and conditions as being applicable shall apply and in the event of any inconsistency shall prevail over the terms and conditions herein.

- **(Simplified): Specific Terms and Conditions**

I/We agree that despite all the terms and conditions concluded in this agreement, other terms and conditions specified in the following are still applicable, and should prevail over the terms and conditions of this agreement, in case of any inconsistency:

- i) Any specific banking account;
- ii) Card that is linked to any of my/our Banking Accounts which terms and conditions are contained in other document or notices;
- iii) Saving Account passbook;
- iv) Fixed Deposit General Investment *Mudarabah* Account receipts; and
- v) Other brochures or advertisements issued by the Bank.

Again, when drafted in a transparent and simpler manner, the unfair element of this term is manifested, especially item (v) of the simplified version, i.e. “Other brochures or advertisements issued by the Bank”. This ‘catching clause’ functions as an avenue or means for the Bank to dictate the direction of the agreement, which continues even after the contract is executed between the bank and customer. Terms such as this is in clear inconsistency with the intent and purpose of the *Shari‘ah* as much as it is a breach of the existing Malaysian Islamic banking law.

### **Sample 3: Change of Terms and Conditions**

This term intends to allow the bank to make changes in the agreed terms unilaterally, i.e. without consulting the customer. To view it

from the bank's standpoint, this term may become necessary in several circumstances, e.g. justified increase in the bank's charges or a change in the bank's policy that affects the customer. However, this term could be drafted in a more customer-friendly way and should inform the customer of the effective cut-off time for the new term, i.e. 21 days from the date of the notice to the customer, pursuant to subsection (c), Item 1.3: During the Term of Contract, Schedule II of the Guidelines on Product Transparency and Disclosure.

- **(Actual Term): Change of Term and Conditions**

I/We hereby acknowledge that the terms and conditions herein are not exhaustive and that the Bank reserves the right to add, modify or delete any of the above terms and conditions and any such additions, modifications or deletions shall be binding on me/us and be deemed to have come to my/our attention by their being displayed at the Bank and any of its branches or posted to me/us at the last address registered with the Bank or advertised by any other mode which the Bank may deem fit as well as does not contravene the *Shari'ah* Principles.

- **(Simplified): Change of Terms and Conditions**

I/We accept that the terms and conditions contained in this agreement are not exhaustive and hence, the Bank has the right to add, modify or delete any of the terms and conditions specified above. I/We further accept that any such additions, modifications or deletions made by the Bank are binding on me/us and are regarded as being informed to me/us via:-

- i) A display at the Bank and its branches;
- ii) Posted to me/us at the most recent address registered with the Bank; and
- iii) Other types of advertisements in conformity to the *Shari'ah* Principles, which the Bank regards as suitable.

Item 1.3 (c): During the Term of Contract, Schedule II of the Guidelines on Product Transparency and Disclosure is as follows:

- c. Change to the terms and conditions

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- Any change in fees and charges applicable to the financing facility should (be communicated to the customer at least 21 calendar days prior to the (effective date of implementation.
- Communication should be done in writing or electronically to the (customer. [p. 6] - Guidelines on Product Transparency and Disclosure: Schedule II – Islamic Banking Products

**Sample 4: Bank's Right to Decline Transactions**

This clause is another clear example of a term that when drafted in a simple language, (which is not restricted to just language but also the layout of information), appears to have cloaked unfairness against the customer.

- **(Actual Term): Bank's Right to Decline Transactions**

I/We hereby agree that notwithstanding anything herein contained to the contrary, the Bank has the absolute right not to accept any deposit of any money or cheques and or not to allow or carry out any other transaction including withdrawals of money in respect of my/our Banking Accounts including but not limited to any transfers, telegraphic transfers of moneys from or to my/our Banking Accounts without assigning any reasons whatsoever to me/us.

- **(Simplified): Bank's Right to Decline Transactions**

I/We agree that despite the terms and conditions contained in this agreement, the Bank has an absolute right to do the following, without providing any reason to me/us:

- i) Decline any deposit of money or cheques into my/our Banking Accounts;
- ii) Refuse any other transactions including withdrawals of money from my/our Banking Accounts including transfers and telegraphic transfers.

### **Sample 5: No Liability as to Description**

It is not unusual for Islamic banks to transfer its liabilities to the customer with consent. However, in this sample term, the Islamic bank's absolute refusal to shoulder any responsibility even when the *Ijarah* Goods do not match the descriptions in the contract, echoes unfairness on the bank's part. It will be difficult, in this instance, to refute the assertion that the Islamic bank is exploiting its dominant position in the dealing.

- **(Actual Term): No Liability as to Description**

The Bank shall not incur any liability to the Customer nor shall the Customer be entitled to rescind the Agreement if the *Ijarah* Goods do not correspond to their description contained in this Agreement.

- **(Simplified): Bank Not Accountable for the Descriptions**

I/We agree that the Bank is not accountable to me/us if the *Ijarah* Goods do not match their descriptions in this Agreement and following this, agree that I/We am/are not entitled to rescind or cancel this Agreement.

### **3.5. Cross-Referencing to the UK's CRA and Guideline**

It is irrefutable that Malaysian Islamic banking law has a greater advantage over the UK's law of banking. This is because Malaysian Islamic banking law possesses a degree of flexibility conferred by the *Shari'ah*. This simply means that the rigidity of the conventional banking law is mitigated or softened by the *Shari'ah*. Nevertheless, we should not be refrained from making the UK's banking law as a reference point. The UK's banking law we may make reference to be:

- (i) UK's CRA (which replaces the UK's Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulations 1999 in consumer contracts and notices).
- (ii) UK's CMA Unfair Contract Terms Guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015.

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Section 62 of the UK's CRA requires consumer contract terms and notices to be fair lest they will not be binding on the consumer, as per subsections (1) and (2) of section 62. Subsection (6) of section 62 further stipulates:

*62 (6). A notice is unfair if, contrary to the **requirement of good faith** it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.*

What then is required under good faith? Good faith comprises several elements that are to be observed by parties in a contract or dealing. One element of good faith is honesty, as per the decision in *Yam Seng Pte Limited v. International Trade Corporation Limited*<sup>57</sup> Along with honesty; other elements related to good faith include fairness and transparency, as plainly deducible from the celebrated judgment of *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd*,<sup>58</sup> below:

*"In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts **parties should act in good faith** This does not simply mean that **they should not deceive each other**, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair," "coming clean" or "putting one's cards face upwards on the table." It is in essence a principle of fair and open dealing"*

The requirement of transparency is stipulated in the UK's CRA, under section 68 produced below:

*68. Requirement for transparency*

- (1) A trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent.*
- (2) A consumer notice is transparent for the purposes of subsection (1) if it is expressed in plain and intelligible language and it is legible.*

A term is considered transparent if it is expressed in plain and intelligible language as stipulated in section 64 (3) of the UK's CRA, as follows:

*64 (3). A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.*

*3.6. Samples of Terms in Plain Language Issued by the UK's Competition & Markets Authority (Previously the Office of Fair Trading)<sup>59</sup>*

The UK's CMA provides a list-length of examples on revised terms in plain language.<sup>60</sup> They also have animated descriptions of traders' obligations for consumers to better understand their rights and a step-by-step process for consumer to lodge any complain of unfairness to the CMA.

Below are samples of the most common and prevalent contractual terms, which have undergone assessments and due amendments by the UK's CMA<sup>61</sup>:

**Sample 1: Changes or Amendments to Contract**

- **Original term**

This agreement is between the company and the customer, the terms of which shall not be changed without written confirmation from both parties.

- **Amended term**

If any amendments to this contract are required it is preferable that they be confirmed in writing ...

Remarks: The amended term is more lenient on the customer and the incorporation of the word "preferable" indicates that there is room for negotiation between the customer and service provider.

**Sample 2: Attached Conditions**

- **Original term**

I/We have read the Conditions of Sale overleaf and agree to be bound by them.

- **Amended term**

Before signing this order, the customer should carefully read the terms and conditions set out on the other side of this agreement.

Remarks: It is inadequate to seek the customer's declaration of having read and agreed to be bound by the agreement. Instead,



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the customer must be directed to the page that contains the terms and conditions of the agreement. Similar examples can be seen in these 2 samples on the same subject:

**Sample 2.1:**

- **Original term**

I the buyer declare I have read and understood this contract and have had the opportunity of a thorough examination of the vehicle before purchase of my own free will without any harassment from the seller.

- **Amended term**

Term deleted.

**Sample 2.2:**

- **Original term**

This and all other documents have been fully explained to me by the sales representative.

- **Amended term**

Term deleted.

**Sample 3: Severability**

- **Original term**

The clauses of these Conditions and each sub-clause thereof are several and if any part of any clause or sub-clause shall be void, invalid or unenforceable then the remainder of such clauses or sub-clauses shall nevertheless be valid and enforceable.

- **Amended term**

-Term deleted-

**Sample 4: Title**

- **Original term**

Title to ... property in the goods shall remain vested in the Company (notwithstanding the delivery of the same ... to

the Customer) until the price of the Goods comprised in the contract and all other money due from the Customer to the Company on any other account has been paid in full.

- **Amended term**

We shall retain ownership of the goods until you have finished paying for them.

#### **4. Proposal for Enhancing Honesty in Malaysian Islamic Banking Contracts**

On paper, there are 5 solutions proposed by this research to improve honesty in Malaysian Islamic banking contracts, i.e.:

- i) Enhancing the transparency of contractual terms
- ii) Adoption of plain language
- iii) Effective enforcement of the law
- iv) Review and amendment of the existing law
- v) Increasing customer's awareness

However, in actuality, almost all of the proposed solutions are inter-related. In order to increase the customer's awareness of his rights, the contractual terms must be transparent and transparency is achievable via plain language, which in response is dependent on the effectiveness of the law enforcement. In short, effective implementation and monitoring of the law may bring us to the targeted outcome i.e. honesty and fairness in Malaysian Islamic banking contracts.

##### ***4.1. Improving transparency via plain language***

Pursuant to Item 12 of the BNM's Guidelines on Product Transparency and Disclosure, informative documents such as pamphlets that are used to supply information to the customer, must be available in Bahasa Malaysia (i.e. Malay Language). As regards to contracts or agreements, they must be provided in a plain language and the Bahasa Malaysia version should be made available to the customer upon request. If the customer requests for the Bahasa Malaysia version, all other forms related to the agreement must also

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be prepared in Bahasa Malaysia. Item 12 of the Guidelines is produced below:

### *12. Language Requirement*

*12.1 The FSP should prioritise the use of Bahasa Malaysia in disclosing information to consumers. In this regard, the **FSP should ensure that all forms and pamphlets are available in Bahasa Malaysia** Such documents could also be printed in English and other languages.*

*12.2 For comprehensive documents such as **contracts, agreements and insurance policy / takaful certificates**, the documents may be made available in a single language (at least in either Bahasa Malaysia or English). The **Bahasa Malaysia version must be made available upon the customer's request**. The FSP should ensure that all documents are written in plain language*

*12.3 It is important for the customer to understand the terms and conditions of the contract / agreement and to sign in a language that the customer can understand If the customer requests for the Bahasa Malaysia version, the FSP must allow the customer to complete the relevant forms and sign the contract / agreement in Bahasa Malaysia. In this regard, the contract / agreement signed by the customer, be it in Bahasa Malaysia or English, will be the basis for the formation of the contract.*

Apart from transparency, conciseness and accuracy of information is also governed by the BNM's Guidelines of Product Transparency and Disclosure, as stipulated under Item 8.2 below:

### **8.2 Clear and concise disclosure**

*8.2.1 Given that excessive information could be counter-productive and confusing to the customer, **disclosure must be concise and focused to serve its intended purpose** Nevertheless, necessary reference should be provided to allow the customer to obtain additional relevant information.*

*8.2.2 Information on products and services must **be presented in a clear and reasonably understandable format** This calls for the use of short and direct sentences, boldface, key words, tables, diagrams and bullet lists, where appropriate, to improve the clarity of the material.*

*8.2.3 Given that font size is a key factor in determining whether a disclosure is conspicuous, key product information that is likely to affect the customer's decisions must be presented in an easily readable font size. Font size of less than 8-point should be avoided.*

*8.2.4 Contracts, agreements and policy documents should be presented in plain language* The plain language requirement applies to contracts, agreements and policy documents provided to the customer on the effective date of implementation and thereafter. **Plain language refers to clear presentation of information in a manner that is easy for readers to understand. It is a language that avoids inflated vocabulary and convoluted sentence structure. The use of legal and technical jargon should be avoided, whenever possible. Where the use of legal and technical terminology cannot be avoided, the meaning of these terminologies should be explained or printed in a glossary for reference**

#### **4.2. Enhancing customer's awareness**

Under the Malaysian Islamic banking law, the Islamic banks are required to undertake a significant role in educating customers on “awareness and financial literacy.” Other than pamphlets, brochures or talks related to financials, Islamic banks can educate customers via Islamic banking contractual terms. This may even be more effective since interested or affected customers are particularly more attentive of the outcomes the contract entails, provided the terms are intelligible. Item 15 of the BNM's Guidelines of Product Transparency and Disclosure stipulates:

##### *15. Consumer Awareness*

*15.1 The FSP plays an important role in raising the awareness and financial literacy of consumers. In this context, the FSP should refer customer to the relevant consumer education booklet issued under the Consumer Education Programme or published in the bankinginfo and insuranceinfo websites. In addition, the FSP should inform the customer of:*

- *Hotlines and/or contact details as channels for feedback, enquiry or complaint; and*

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- *The contact details of Bank Negara Malaysia LINK and BNMTELELINK for enquiry or complaint if the complaint is not resolved by the FSP.*

#### **4.3. Effective law enforcements**

Malaysian Islamic banking law is equipped with rules and guidelines to administer contractual agreements that are anchored by honesty, fairness and transparency between parties. Honest, fair and transparent contracts will be likely to uphold justice and preserve public peace, which is a fundamental objective of Islam. However, without proper legal enforcements, even the most innovatory and comprehensive laws would prove futile.

In this present case, the BNM as the supervisory body for Malaysian Islamic banking holds the power and responsibility to ensure that the existing laws are duly observed by the Islamic banks. This responsibility of the BNM is clearly stipulated in section 5 of the CBMA, in particular section 5 (1) and (2)(c) and (2)(f), included below:

5. (1) *The principal objects of the Bank shall be to promote monetary stability and financial stability conducive to the sustainable growth of the Malaysian economy.*
- (2) *The primary functions of the Bank are as follows:*
  - (c) *to regulate and supervise financial institutions which are subject to the laws enforced by the Bank;*
  - (f) *to promote a sound, progressive and inclusive financial (system*

Section 45 of the CBMA further strengthens BNM's obligations, i.e.:

45. *The Bank shall use its best endeavours in co-operation with financial institutions in Malaysia to—*
  - (a) *promote and maintain banking and financial services for the public;*  
*and*
  - (b) *foster high standards of banking and finance in Malaysia.*

Similar responsibilities of the BNM are reinforced in the IFSA, under section 6, as discussed earlier.<sup>62</sup>

Currently, there are evident non-compliance of the BNM's guidelines, particularly on legal documents and contracts, as contained in the BNM's Guidelines on Product Transparency and Disclosure. By law, the Islamic banks were required to amend their contracts and other related documents by 1 January 2011. However, regrettably, such changes are yet to be reflected in the said contracts and documents. This progress or rather, stagnancy is recorded in the BNM report on 'Effectiveness of the Product Disclosure Sheet in Influencing Sound Financial Decisions'<sup>63</sup> Below is an excerpt of the report on the customers view on banks' Product Disclosure Sheet (PDS)<sup>64</sup>:

*“One in five consumers surveyed indicated that the Product Disclosure Sheet format could be made more user friendly by reducing its length (currently ranging between 4-8 pages)... Stronger (as opposed to neutral) language is favoured to convey the purpose of the Product Disclosure Sheet and important information. Although disclosure requirements call for the use of plain language in communicating information on financial products, 40% of consumers surveyed still found the language used in the Product Disclosure Sheet produced by FSPs difficult to understand. Among the main reasons cited by respondents include the use of technical or legal jargon, the lack of explanations on product specific terminology (e.g. lock-in period, observation date, total permanent disability) and the use of complicated sentences”*

No follow-up study was reported to be conducted subsequent to the above findings. Further, the breach of the BNM's Guidelines of the Product Transparency and Disclosure is tantamount to a breach of the BNM's Policy Document on Prohibited Business Conduct, as per Items 8.4(a) and (b) discussed above.<sup>65</sup> Breach or non-compliance of the BNM's Policy Document allows BNM to proceed with actions without requiring proof of any financial loss by the customer. Item 13.1 of the BNM's Policy Document stipulates:

*13.1 Action may be taken against an FSP that has engaged in a prohibited business conduct even if the financial consumer concerned has not suffered any financial losses*

To date, the compliance rate of the BNM's Policy Document on Prohibited Business Conduct has yet to be tested and proven.

## 5. Conclusion

Honesty plays an integral role in Islam. It forms the core foundation of every action and deed in Islam. In other words, each action in Islam must be done on the basis of honesty. Honesty thus becomes an identification of Muslims, a noble characteristic that is synonymous with decent Muslims. Any action, including contractual dealing that is not executed in complete honesty will be devoid of Allah's blessings. This will be the real loss for a Muslim because central to his life, are the blessings of his Almighty Creator. In reality, wealth and other enjoyments bestowed upon man are tools for him to reach his ultimate purpose of life; Allah SWT's blessings and pleasure. Allah (swt) proclaims in *Surah Al-Mujadilah* (58), verse 22 that, *"And We will admit them to gardens beneath which rivers flow, wherein they abide eternally. Allah is pleased with them, and they are pleased with Him – those who are the party of Allah. Unquestionably, the party of Allah – they are the successful."* The eminent position of honesty must be extended to the Islamic banking contracts; duly reflected via transparent contractual terms and agreements. Transparent and honest Islamic banking contracts must be made available to every customer regardless of his religious beliefs. Honesty in Islam, as we have seen earlier, is a protected right to all mankind, across faiths and beliefs. This is strengthened by the rationale behind having written contracts, i.e. *"That is more just in the sight of Allah and stronger in evidence and more likely to prevent doubt between you"*. Contracts may only serve as strong evidence, if they are transparent and presented in a manner that is intelligible to all contracting parties.

The other concrete reason for enforcing honesty via transparency of the Islamic banking contracts is the requirement of Malaysian law and regulations. As observed and detailed out above, there is an apparent breach of the BNM's guidelines thus the law by the banks. This is a blatant non-observance of the law by the banks in general, but more so for the Islamic banks because it is also a failure to portray the true intent of the *Shari'ah*. Law enforcements by the supervisory body must be tightened and an immediate action is recommendable. The supervisory body shoulders a big responsibility in protecting the customers' rights and interests. It also holds the obligations to

maintain the stability and promote the growth of the Malaysian Islamic banking industry. As depicted in the BNM's Report on the 'Effectiveness of the Product Disclosure Sheet in Influencing Sound Financial Decisions' pursuant to the implementation of the Guidelines on Product Transparency and Disclosure, the rate of observance by the banks is low. This situation must be promptly addressed to restore and preserve the customer's trust and confidence in Malaysian Islamic banking.

#### *Notes*

1. Surah Al-Baqarah (2), verse 282. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 43.
2. *Ibid.*
3. Imam Al-Ghazzali, (1993), Revival of religious learning: Ihya Ulum-Id-Din Vol. II, Darul Ishaat: Karachi, p. 56.
4. *Ibid.*
5. Imam Al-Ghazzali, (1993), Revival of religious learning: Ihya Ulum-Id-Din Vol. II, Darul Ishaat: Karachi, p. 48.
6. *Ibid*, p. 50.
7. Surah Al-Anbiya' (21), verse 47. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 311. 'Mustard seed' is interpreted to mean anything as small or insignificant as a mustard seed.
8. Surah Al-Anam (6), verse 152. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 134.
9. Surah An-Nisa (4), verse 135. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 89.
10. *Surah Qaf* (50), verses 16-18. Translation taken from, "The Qur'an English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 522.



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11. Other verses with similar messages can be found in the following verses; Surah Al-Baqarah (2), verses 77 and 284; Surah Al-Imran (3), verse 29; Surah Al-Maidah (5), verse 99; Surah Hud (11), verse 5; Surah Ibrahim (14), verse 38; Surah An-Nahl (16), verses 19 and 23; Surah An-Naml (27), verses 25 and 74; Surah Al-Qasas (28), verse 69; Surah Al-Ahzab (33), verse 54; Surah YaSin (36), verse 76; Surah At-Taghabun (64), verse 4.
12. Surah An-Nisa (4), verse 28. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 74.
13. Surah An-Nur (24), verse 35. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 341.
14. Warburton, Nigel, (2011), "*A little history of philosophy*", Yale University Press: New Haven and London, p. 75.
15. *Ibid.*
16. Dawkins, Richard, (2016), "*The selfish genes: 40th anniversary edition*", Oxford University Press: Great Britain, p. 23
17. As per Professor Emeritus Richard Dawkins, *Ibid*, p. 24.
18. Surah Al-Isra' (17), verse 100. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 274.
19. Surah An-Nisa (4), verse 128. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 88. 'Stinginess' is interpreted to mean 'holding on to self-interests'
20. Tafsir Ibn Kathir Abridged, Volume 10, Surah 70 (19-35), Part 29, Darussalam: KSA, 2003, p. 167.
21. Surah An-Nisa (4), verse 105. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 86.
22. Surah At-Tawbah (9), verse 103. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 184.
23. Surah Al-Ma'arij (70), verses 22-35. Translation taken from, "The Quran English Meanings and Notes by Saheeh International",

published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 590.

24. Meaning a specified share, meaning the obligatory zakah. *Ibid*, refer to footnote no. 1753.
25. Surah At-Tawbah (9), verses 34-35. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 174.
26. 'Unjustly' is interpreted to mean "through false pretense." *Ibid*.
27. Interpreted to mean the gold and silver which was hoarded i.e. whose zakat was not paid. *Supra*.
28. Surah Ali-Imran (3), verse 180. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 66
29. Surah Al-Furqan (25), verse 67. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 352.
30. The provision for each creature has been determined by Allah SWT has from its birth and after death. *Ibid*.
31. Surah Hud (11), verse 6. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 201.
32. Surah Ash-Shura (42), verse 27. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 483.
33. Surah Al-Baqarah (2), verse 286. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 44.
34. Surah Al-Baqarah (2), verse 216. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 31.
35. Surah At-Tawbah (9), verse 119. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 186.

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36. Surah At-Tawbah (9), verse 118 reads; *“And (He also forgave) the 3 who were left alone (i.e. boycotted, regretting their error) to the point that the earth closed in on them in spite of its vastness and their souls confined (i.e. anguished) them and they were certain that there is no refuge from Allah except in Him. Then He turned to them so they could repent. Indeed, Allah is the Accepting of Repentance, the Merciful.”* Translation taken from, “The Quran English Meanings and Notes by Saheeh International”, published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 186.
37. In Surah Al-Anbiya’ (21), verse 107, Allah SWT says; *“And We have not sent you (O Muhammad), except as a mercy to the worlds”.* Translation taken from, “The Quran English Meanings and Notes by Saheeh International”, published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 316. It is very important to note that Allah SWT uses the word “mercy to the worlds” (i.e. rahmatan lil ‘alamin), and not mere “mercy to mankind”. This indicates that the Prophet PBUH’s mercy extends to all creatures, the seen and unseen (i.e. mankind, animals, jins, and etc). Evidenced in another verse, i.e. verse 34 of Surah Sabaa (34), Allah ordains, *“And We have not sent you except inclusively, without exception to all mankind as a bringer of good tidings and a warner. But most of the people do not know.”* Translation taken from, “The Quran English Meanings and Notes by Saheeh International”, published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 421. Note that the word “mankind” is general and universal in nature, which cuts across nations, tribes, faiths or colours.
38. Surah At-Tawbah (9), verse 61. Translation taken from, “The Quran English Meanings and Notes by Saheeh International”, published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 178.
39. Ibid.
40. Surah At-Tawbah (9), verse 118. Translation taken from, “The Quran English Meanings and Notes by Saheeh International”, published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 186.
41. Hadith No. 32, Chapter 21, The Book of Belief, Summarised Sahih Al-Bukhari Arabic-English, Darussalam, 1996, Kingdom of Saudi Arabia, p. 69.
42. Surah Al-Ahzab (33), verse 70. Translation taken from, “The Quran English Meanings and Notes by Saheeh International”, published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 416.

43. Interpretation by Yusuf Ali, taken from the Quran Explorer accessible at <http://www.quranexplorer.com/quran/>.
44. Tafsir Ibn Kathir Abridged, Surah 33 (70-73), Part 22, Darussalam: KSA, 2003, p. 53.
45. Surah Al-Ahzab (33), verse 71. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 416.
46. Surah Al-Maidah (5), verse 119. Translation taken from, "The Quran English Meanings and Notes by Saheeh International", published by Al-Muntada Al-Islami Trust, 2012, Kingdom of Saudi Arabia, p. 113.
47. Guidelines on Product Transparency and Disclosure BNM/RH/GL 000-3
48. Policy Document on Prohibited Business Conduct issued in 2016, obtainable via <http://www.bnm.gov.my/index.php?ch=57&pg=140&ac=552&bb=file>
49. [https://www.bnm.gov.my/files/publication/fsps/en/2014/cp04\\_001\\_box.pdf](https://www.bnm.gov.my/files/publication/fsps/en/2014/cp04_001_box.pdf). The full report is obtainable at [https://www.bnm.gov.my/files/publication/fsps/en/2014/fs2014\\_book.pdf](https://www.bnm.gov.my/files/publication/fsps/en/2014/fs2014_book.pdf).
50. Surah An-Nisa (4), verse 135. See footnote 10.
51. Willet, Chris, (2007), "Fairness in Consumer Contracts, the case of Unfair Terms", Ashgate Publishing Limited: England, p. 23.
52. [2005] 1 CLJ 521. It is to be noted that this case was tried before the coming of CBMA. The provision considered by the court in this case was section 126 of Banking and Financial Institutions Act 1989 which stipulates, 'The Bank or the Minister may generally in respect of this Act, or in respect of any particular provision of this Act, or generally in respect of the conduct of all or any of the licensed or scheduled businesses, issue such guidelines, circulars, or notes as the Bank or the Minister may consider desirable.' The Banking and Financial Institutions Act 1989 is now repealed and replaced by Financial Services Act 2013, pursuant to section 271 of Financial Services Act 2013. Similar treatments shall be given Islamic banking practice by virtue of sections 53A of Islamic Banking Act 1983 and 282 of IFSA.
53. *Diana Chee Yun Hsai v. Citibank Bhd* [2009] 6 CLJ 774
54. 1.2 "The list of prohibited business conduct under the Acts **complements and reinforces existing standards on business conduct and consumer protection** issued by Bank Negara Malaysia (the Bank),

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and serves to: (a) ensure that financial **consumers are not provided with misleading or deceptive information** in connection with a financial service or product". The BNM's Policy Document on Prohibited Business Conduct is obtainable at the BNM's website: <http://www.bnm.gov.my/index.php?ch=57&cp=140&ac=552&bb=file>

55. Item 8 of the BNM's Policy Document on Prohibited Business Conduct, p. 5.
56. Item 9 of the BNM's Policy Document on Prohibited Business Conduct, p. 7.
57. *Yam Seng Pte Limited v. International Trade Corporation Limited* [2013] EWHC 111 (QB). See paragraph [135], [138] and [139].
58. *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] QB 433 on p. 439.
59. The UK's Competition & Markets Authority has taken over most functions of the Competition Commission (CC) and the Office of Fair Trading (OFT) from 1st of April, 2014. Assessed from <https://www.gov.uk/government/organisations/competition-and-markets-authority/about#who-we-are> on 21 May, 2018.
60. Visit <https://www.gov.uk/government/collections/cma-consumer-enforcement-guidance> for further details.
61. See page 2 of the report, under Introduction. The report is obtainable via [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/546521/cma58-consumer-protection-enforcement-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546521/cma58-consumer-protection-enforcement-guidance.pdf), assessed on 28 April, 2018.
62. See section 6 of the IFSA, produced and discussed under Chapter 3: Honesty in the Malaysian Islamic Banking Law Vis-à-Vis the Existing Terms of Malaysian Islamic Banking Contracts, under the first heading i.e. IFSA.
63. 'Effectiveness of the Product Disclosure Sheet in Influencing Sound Financial Decisions' is published in the BNM's Financial Stability and Payment Systems Report 2014, obtainable at [https://www.bnm.gov.my/files/publication/fpsplen/2014/fps2014\\_book.pdf](https://www.bnm.gov.my/files/publication/fpsplen/2014/fps2014_book.pdf).
64. Note that this report is pursuant to a survey conducted in the Klang Valley, an area whose people are generally more financial savvy. The survey was also focused on the Product Disclosure Sheets (PDS) alone, without a single question on contracts or agreements.
65. See subheading 3.4 above.