

Consent Judgment as a Method of Shariah Compliant Resolution of Litigation in Private Contracts in Malaysia¹

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Abstract: A consent judgment is a mutual agreement between two disputing parties to a settlement to end their legal suit. This settlement is recorded by the court as a consent judgment. Private contracts are contracts entered into between individuals, or companies, or individual and company. Except those financial contracts which are in accordance with Shariah, judgments in other private contracts are subject to a statutory rule that imposes a charge of interest rate over the judgment sum. Such rate of interest is *riba* which is prohibited in Islam. This paper is to examine the method of consent judgment and determine whether it can be a Shariah compliant method of resolving legal suits in private contracts. The methodology used in this paper is qualitative where statutory provisions and cases are analysed. The findings suggest that consent judgment may provide a better solution to ensure judgments in these private contracts are Shariah compliant.

Key words: Compensation • Private contracts • Shariah compliance

INTRODUCTION

Parties to a contract may have a dispute in relation to the performance or non-performance of a term under the contract. If the parties fail to resolve the dispute, it may escalate to a legal suit in which the court normally issues judgments based on merits. A judgment is defined as 'a decision made by the court in respect of the matter before it' [1]. The judgment has the effect of ending legal disputes between two opposing parties, and the legal force to secure compliance of a party against whom the judgment is issued.

This paper aims at ensuring judgments, in general, are Shariah compliant methods of resolving litigation arising from private contracts.

The objectives of this paper are to examine the method of consent judgment and private contracts; and to determine whether it can become a suitable Shariah compliant method of settling disputes, especially those which have escalated into litigations, between two opposing parties in private contracts. In discussing this paper, the position of consent judgment in private contracts shall be examined from the perspective of

Malaysian laws. Further, it is hoped that the findings of this paper would assist litigants especially Muslims who are concerned with the legality of judgments according to the Shariah.

Background of Study: In Malaysia, Generally judgments in civil cases, including private contracts, are generally subject to the main procedural law which is known as the Rules of Court 2012, which the RC 2012 has replaced the old procedural laws i.e. the High Court Rules 1980 and the Subordinate Courts Rules 1980. Order 42 rule 12 provides that every judgment shall carry a rate of interest from the date of judgment until the judgment is fully satisfied.

Such a rate of interest is clearly *riba* which is prohibited under the Shariah [2-3]. Literally, *riba* refers to 'excess' or 'addition'. Terminologically, *riba* is defined as benefit or profit which the creditor takes from the debtor [4]. Another definition of *riba* is 'the increase in lieu of delay or postponement of payment of a debt due' [5]. The above definitions of *riba* include the rate of interest which is imposed on a judgment sum. The judgment sum is equivalent to the principal debt; and the rate of interest

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represents the excess amount which is the prohibited riba or usury. (Usmani, 2007; Saleh, 1992). The legal texts that prohibit riba can be found in the primary sources of the Shariah.

The Holy Quran, for example, states provides, "... Allah hath permitted trade and forbidden usury. Those who after receiving admonition from their Lord, desist, shall be pardoned for their past; their case is for Allah (to judge); but those who repeat (the offence) are Companions of the fire: they will abide therein (for ever)" [16]. In another verse, the Holy Quran says, "O ye who believe, fear Allah and give up what remains of your demand for usury, if ye are indeed believers." [6].." (The Presidency of Islamic Researches Ifta Call and Guidance (ed) The Holy Quran: English Translation of the Meanings and Commentary, 1990). Based on the above verses, the Shariah treats those who practise riba as non-believers and companions of the Fire. This shows that riba is a very big sin which must be avoided by Muslims. Thus judgments which carry the rate of interest, as provided in the above procedural law, are clearly not Shariah compliant.

However there are exceptions to the above statutory procedural rule which imposes the rate of interest on judgments. Firstly, when the parties mutually agree not to impose the rate of interest and secondly, when the case falls under rule 12A of the same order. Rule 12A provides that judgments in cases relating to Islamic financial transactions shall carry late payment charge, instead of the rate of interest. Unlike the rate of interest, the late payment charge is permissible according to the Shariah Advisory Council of Central Bank of Malaysia [7]. (ResolusiSyariahdalamKewangan Islam Majlis Penasihat Syariah Bank Negara Malaysia, 2010 - 2011).

Based on the above discussion, it is shown that judgments in private contracts may be divided into two categories. The first is the general category where all judgments are subject to the rate of interest. The second is the exceptional category where judgments are free from the rate of interest. This is so if the parties to legal suits mutually agree not to include the rate of interest in the judgments; or if the suits are related to Islamic financial transactions. While from the above two categories, it is clear that the judgments in private contracts relating to Islamic financial transactions are statutorily required to be Shariah compliant, judgments in other private contracts may not be so. However judgments in other private contracts are not subject to a similar statutory

requirement. Thus this paper shall examine the category of 'other' private contracts so that judgments in such contracts may also be Shariah compliant.

In deliberating this paper, the discussion shall be according to the following sequence: methodology, discussion on consent judgment and private contracts and conclusion.

METHODS

This study adopts was based on qualitative based research where data were gathered from primary as well as secondary sources. The primary sources included relevant statutory provisions and relevant decided cases were analysed. While the secondary sources were legal books, journal articles, conference working papers, etc. These data were then analysed to find answers to the formulated questions of this study. Those questions to be examined are: a) whether consent judgment may become a Shariah compliant resolution of litigation in private contracts; and b) whether the category of 'other' private contracts, which are not relating to Islamic financial transactions, may also have Shariah compliant judgments.

DISCUSSION

In discussing the above questions, it is pertinent to understand consent judgment and private contracts.

Consent Judgment: Consent judgment is defined as "a judgment issued by a judge based on an agreement between parties to a lawsuit to settle the matter, aimed at ending the litigation with a judgment that is enforceable." [8]. (TheFreeDictionary.com, 2017). In other words, a consent judgment is a mutual agreement between two disputing parties to a settlement to end their legal suit. To give this agreement a force of law, it must be submitted to the court to be endorsed as a consent judgment. As such a consent judgment is also known as agreed judgment. A consent judgment duly examined, sanctioned and endorsed by the competent court has similar legal effects like ordinary other final judgments that are duly issued by the court of competent jurisdiction. A consent judgment is also known as a consent order.

It is a well settled law that a consent judgment incorporates terms of resolving disputes as mutually agreed by the plaintiffs and defendants. (*Haji Mohamed Zebidi Bin Haji Salleh & Anor V. Dato' Haji Abdullah Bin Mohd Hussin & 3 Ors and Dewan Perniagaan Perusahaan Melayu Malaysia (Intervenor)*, [9] 1994).

In this case the plaintiffs and the defendants agreed to settle their dispute via a consent order in 1993. But later the plaintiffs applied to the court to vary the said consent order. The court held that it is a settled law that a judgment once perfected or drawn up, cannot be modified or varied except under the 'slip rule' which is to correct errors in expression the intention of the court. Based on evidence, the court ruled out the application of slip rule. Accordingly the court rejected the plaintiff's application. Once agreed upon, a consent judgment should not be challenged by any party to the judgment. To allow a party to challenge the consent judgment would be unjust and grossly prejudicial to the other party. This was decided by the court in (*Mayban Allied Bhd V. Kenneth Godfrey Gomez & anor and another appeal*, 2010). [10]. Prior to this present action, the plaintiff sued the defendants to recover proceeds from an auctioned property. Later both the parties agreed to settle their dispute via a consent judgment, which required the plaintiff to strike out their claim and counterclaim respectively. The consent judgment also required the parties to issue notice of discontinuance. However the plaintiff brought the present action against the defendants to recover the same auction proceeds. The court held that consent judgments give rise to the principles of *res judicata* and *estoppel*. Based on these two legal principles, the plaintiff was estopped from bringing a new lawsuit against the other party. The court further held that to allow a party to challenge the consent judgment would be unjust and grossly prejudicial to the other party. In arriving at the decision the court had referred to *Boustead Trading (1985) Sdn. Bhd. v. Arab Malaysia Merchant Bank Bhd* [11] which expounded the doctrine of *estoppel*.

In fact the courts are reluctant to review the validity of a consent judgment. The approach of the court in this regard can be seen in *Ambank (M) Bhd & Anor V. Perdana Industri Holdings Berhad & Anor* (2009) [12]. In this case, both the parties agreed to settle their dispute via a consent judgment. Later the plaintiff applied to set aside the consent judgment. In dismissing the plaintiff's application, Hamid Sultan Bin Abu Backer J (as he then was) held: "It is trite that courts ordinarily will not set aside a consent order." Based on the facts of the case, the learned judge further held that "... it is clear that the plaintiffs knew about all the proceedings as well as the said summary judgment and consent order but did not diligently move to protect their interest."

However there are exceptions to the above rule that bars challenges to consent judgments. Like normal judgments, consent judgments may be set aside when

there is any vitiating ground factor or factors. Normally the grounds for setting aside consent judgment: are firstly, fraud and secondly, mistake. This principle was followed by the court in (*Tea Beng Heng V Thee Kim Sang @ Tee Bin Hwa & Ors*, 2012) [13]. In this case, the plaintiff and the defendants were siblings to their deceased mother. The plaintiff claimed that their late mother died leaving her last will whereby the plaintiff was appointed as the executor of the estate of the deceased. However the defendants argued that their late mother died intestate. While the case was pending, the plaintiff and defendants recorded a consent judgment in 2012 in respect of the distribution of the estate of the deceased. After one and a half years, the plaintiff commenced a legal action to set aside the consent order on the ground that the contents of the consent order were not explained by his counsel in details, and that he had no opportunity to discuss the terms of the consent judgment with the defendants. Based on evidence, the court held that the plaintiff's application had to be rejected as there was no proof that the defendants committed any fraud against the plaintiff, or that the consent judgment was entered into by mistake.

For mistake, it can be mistake of law or mistake of fact. In *Liew Siew Jin v. Liu Hoi Khoo & 2 Ors* [14], the plaintiff made an application to set aside the consent judgment. The High Court Sabah and Sarawak at Kuching, the Court, dismissed the application and held: "...the case authorities on the setting aside of consent judgment is clear that it cannot be willfully done on account of one of the parties having a change of heart. It can only be done if there are mistakes as to the facts and law. Consent judgments give rise to the principles of *res judicata* and *estoppel*. Based on the principles, the party is estopped from bringing a new lawsuit against the other party (*Mayban Allied Bhd*, 2010). In order to set aside a consent judgment, a proper application has to be made under Order 42 rule 3 within thirty days after the date of receipt of the consent judgment. Failure to do so within the prescribed period would be a ground to dismiss an application to set aside the order. This was held in *Tea Beng Heng V Thee Kim Sang @ Tee Bin Hwa & Ors* [13].

Since consent judgments are based on the agreement of both litigants, they may mutually agree that their judgment sum shall not carry any rate of interest so that the judgment is free from *riba*. Alternatively, they may also agree to adopt the late payment charge principle which is permissible according to the Shariah. Based on the above discussion, it is clear that consent judgment may be used to have judgment in the other private contracts be Shariah compliant.

However it must be noted that consent judgment may only be used if both litigants are willing to settle amicably. Without mutual inclination of both the parties to settle, consent judgment will not materialise. In such a case, the litigation shall be decided based on merit according to the existing procedural law on judgment.

Private Contracts: What is a private contract? A contract, though made between two individuals or between an individual and a private company, may not be a private contract if the contract is required to be in a statutory form or contains statutory requirements which must fully be complied with. (*KC Chan Brothers Development SdnBhd v Tan KonSeng&Ors*, 2001) [15]. A contract of sale and purchase of a housing accommodation is a good example to illustrate this point. Such contract of sale is required, by the Housing Developers (Control and Licensing) Regulations [16] 1989, to be in the form of Schedule G or H. As such, the terms of such contract, which are essentially the statutory provisions, cannot be modified by the contracting parties. (*Chua Eng Hong &Anor v Palm Springs Development SdnBhd*, 2001) [17].

In addition, the above criteria of private contracts would also exclude contracts in Islamic banking and finance because such contracts are between customers and corporate institutions. Also, such contracts are subject to numerous guidelines and circulars of Bank Negara Malaysia and the Securities Commission of Malaysia, which are the principal regulatory bodies in banking and finance industry in Malaysia. In addition, judgments, in litigation arising from Islamic banking and finance contracts, have been specifically covered under Order 42 rule 12A of the Rules of Court 2012. The effect is that the judgments are free from *riba* and thus Shariah compliant.

Therefore, from the above explanation, a private contract refers to a contract which is not required by any statute to be made in a prescribed form, nor related to Islamic financial transactions. This qualification to private contracts is the basis for the discussion in this paper.

The findings suggest that apparently, such private contracts are not subject to the above provision governing Islamic banking and finance. This is because those private contracts are not Islamic transactions. As such they are not governed by Order 42 rule 12A of the Rules of Court 2012 [18]. Instead they are governed by general application of Order 42 rule 12, which allows interest */riba* to be charged on defaults by the paying party.

As mentioned earlier, consent judgment may provide a better solution to ensure judgments in these private contracts are Shariah compliant provided of course, mutual consent of litigants is secured. In the absence of this mutual element, litigation shall be decided based on merit according to the general rule on judgment which prescribes the rate of interest. Thus this may hinder the attempt to have judgments in other private contracts to be Shariah compliant.

Clearly this issue should be further researched to find out whether judgments in litigation arising from these 'other' private contracts can be exempted from the general rule on judgment so that they can be Shariah compliant.

CONCLUSION

Judgments in cases relating to Islamic banking contracts are Shariah compliant by virtue of a statutory requirement, but such requirement does not cover judgments in other private contracts. Since there is no similar requirement governing other private contracts, there is a need for such private contracts to have their judgments to be Shariah compliant. From the above discussion, it is clear that consent judgment may provide an alternative to have a Shariah compliant judgment that resolves legal suits arising from private contracts. However consent judgment as a method of resolution has limitation. It is only applicable when both litigants are willing to settle amicably, but not for those who remain adversarial. For situations where amicable settlement is difficult, a further research should be carried out to find suitable solution that may ensure judgments would be Shariah compliant.

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