

INTEREST-EARNINGS IN MALAYSIAN CIVIL LITIGATION: QURANIC AND LEGAL ANALYSIS

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Abstract

This study examines civil litigation actions in the Malaysian civil courts which are prone to interest earning. The objectives of this study include the following: to identify Quranic verses which prohibits the earning of interests; to identify civil litigation actions which attract the earning of interests and lastly, to examine whether such actions are within the Syariah parameters. To achieve this, information was gathered via both primary and secondary data collection. The methodology used in this study is qualitative. Primary data were collected mainly from legislations and case laws. Secondary data were obtained from various sources which include books and information retrieved manually and electronically. This study found that Malaysian legal firms which are involved in litigation work in the civil courts may encounter various activities of earning interests which are legalised under statutory as well as case laws. However, such activities might not be in harmony with Islamic teachings due to the existence of interest earning. It is thus recommended that more efforts need to be undertaken to identify other activities throughout legal practice that are prone to interest so that Muslim lawyers are wary of their existence and try their best to avoid them.

Keywords: Interest-earning activities, civil litigation, Malaysia

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Introduction

Islam, through numerous divine injunctions, prohibits the taking or giving of interest (known as usury or *riba* in the Arabic language). Despite clear divine injunctions on the prohibition of interest earning (such as in Al-Baqarah 2: 275), the prevalence of providing and earning interest is noticeable in business activities.

According to the Official Website of the Malaysian Bar³, the existing number of legal firms is 7,058. However, out of this figure, not much is known as to whether legal firms which are managed by Muslim lawyers are complying with divine injunctions that forbid Muslims from

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³ Official Website of the Malaysian Bar, http://www.malaysianbar.org.my/statistics_no_of_lawyers_and_law_firms.html (accessed on 13 July 2015).

involving directly or indirectly with the charging or accepting interest in their daily activities, particularly in litigation work. Since lawyers are also involved in representing their clients in business dealings especially relating to sale and purchase of properties, it is essential that lawyers (especially Muslims) are aware of dealings which are prone to interest earnings. Equally important are litigation matters involving torts, personal injury, commercial and contracts, to name a few.

Earning interest is not prohibited under the Legal Profession (Practice and Etiquette) Rules 1978 (hereinafter known as 'LPPER'). However, it might be incompatible with religious belief or morality. In the light of the above ethical guidelines as laid down in the LPPER, it is unclear to what extent a Muslim lawyer should consider accepting a brief (taking up a case) which is prone to earning interest or avoiding it totally on the grounds of morality. Thus, the main concern of this study is to identify prohibited activities that are carried out throughout litigation practice which are clearly in contradiction with the intent of the Holy Quran to banish interest. In addition, there is lack of writings which have specifically emphasised on the issues of earning interest in litigation action. It is uncertain as to what types of litigation actions which are prone to the earning of interest.

Based on the underlying problems, the objectives of this study are as follows: to identify Quranic verses that prohibits the earning of interests; to identify court litigation actions which attract the earning of interests and lastly, to examine whether such actions are within the Syariah guidelines.

Divine Legislations on the prohibition of Interest-earning

The Qur'an clearly states that Allah the Almighty permits man to the carrying out of trade but forbids interest-earning (see for instance, al-Baqarah 2:275; al-Baqarah 2: 279; An-Nisa': 161; Al-Imran:130). Thus, the carrying out of any trade which is tainted with interest-earning is forbidden. Central to the concept of Islam is justice.

Islam prohibits and abhors false or misrepresentations during any trading activity. All transactions are subject to this concept of justice. Notably, this concept is clearly spelt out in numerous Quranic verses (See for instances: al-Maidah: 8; an-Nisa: 135; ad-Dukhan: 38-39; an-Nisa: 58, an-Nisa: 107; Sad: 26; and al-Hadid :25).

Methodology

The methodology used in this study is qualitative. Primary data were collected mainly from legislations and case laws. Secondary data were obtained from various sources which include books and information retrieved manually and electronically (via Google Scholar).

Result and Discussion

This study found that Malaysian legal firms which are involved in civil litigation work in the civil courts may encounter various activities of earning interests which are legalised under

statutory as well as case laws. However, they might not be in harmony with Islamic teachings due to the existence of interest earning.

This study found that there are several litigation actions which involve the earning of interest. They are as follows:

1. Interest on Debt (Money Judgment) and other Types of Claims

Civil litigation may also be commenced in other types of claims which are not limited to the recovery of debt (money judgment). These claims include the following: tort, damages for breach of duty and personal injuries, breach of promise of marriage and infringement of a patent.

In practice, it is common for a legal firm to represent its client (as the plaintiffs in civil suit) to claim for the payment of a debt (principal sum) by way of court action. In general, the court recognizes that a party is entitled to a money judgment claim together with accruing interest on the judgment sum if the judgment sum is not paid within a specified period. This principle is enunciated in the English case of *London Chatham and Dover Railway Company v South Eastern Railway Company* (1893) AC 429, where Lord Hershell observed that the court should direct (the party who is wrongfully withholding money from the other party who is entitled to its use) to pay to the latter interest upon the amount withheld. Similarly, in the Malaysian case of *Pelita Leisures Sdn Bhd v. Tsai Chee Jung* [2007] 8 MLJ 205, Hamid JC (as he then was) held that the court has discretion to award interest from the date the cause of action arose until the date of judgment.

The Rules of Court 2012 allows a defendant who has been served with a writ and statement of claim to upon entering an Appearance, pay into Court a sum of money in satisfaction of the cause of action. This principle is clearly stated in the case of *Martin French v Kingswood Hill* [1961] 1 QB 96. In this case, the court held that a payment into court is an offer to dispose of a claim. Thus, a plaintiff who accepts any such payment from the defendant is deemed to have the matter settled. The payment into court may be made at any time after the entry of appearance and before the delivery of judgment. It seems that early payment would reduce the interest and costs to be paid by the defendant.

It is also found that the commencement of bankruptcy action includes the charging of interests. This is evidenced by several court decisions. In *Perwira Affin Bank Bhd v Kim Ah Hee @ Sim Ah Hee*, whereby the court held among others that arrears of interests may be claimed for a period of 6 years from the judgment date. In *Moscow Norodny Bank Ltd v Ngan Ching Wen*, the court held that the appellant was entitled to claim interest as stipulated in the judgment and that the date on which the interest became due was the judgment date.

Similarly, the legality of interest charging is also supported by legislations, namely the Bankruptcy Act 1967 (BA) and the Limitation Act 1953 (LA) and the Civil Law Act 1956 (CLA) and is confirmed by several court decisions. In *Ipmuda Berhad v Eurodec Development and Construction Sdn Bhd*, the court held that section 43(6) of the Bankruptcy Act 1967 clearly states that the interests rate shall not exceed 6 % per annum.

In *Captain Ho Fooi v Standard Chartered Bank Malaysia Berhad*, the court among others held that in computing the 6 years limitation period under LA for the recovery of interest in

respect of a judgment sum, time begins to run from the judgment date and such limitation only applies to post-judgment interest and not to pre-judgment interest. In *Dato' Haji Yusuf @ Mohd Yusuf bin Kamari v CIMB Bank Berhad*, the court cautioned that the amount stipulated in the Bankruptcy Notice must accord with the terms of judgment/order and this can be done by quantifying the interest up to the date of the notice and that the amount must be due and owing at the time the notice is issued.

In Malaysia, Section 5 of the Civil Law Act 1956 (CLA) stipulates the court may award a party with interest on judgment. Section 11 of the CLA *inter alia* stated that "...the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt..."

Apart from the CLA1956, the Court of Judicature Act, 1964 (COJA) and the Rules of Court 2012 (RC 2012) also empower the court to award interest to a successful party.

It is also common to find many legal firms are representing banks in exercising their power of sale of a charged property by way of public auction as governed under the National Land Code (NLC). In litigation relating to a claim for debt secured by charges over real estates, the National Land Code states that the remedies available to the charge are to foreclose the charged property. This can be done by way of obtaining an order for sale from the court or by taking possession. Thus, the remedies available to the banks as chargees are sale (sections 253-269 of the NLC) and possession (sections 270-277 NLC).

For instance, section 268(2) (a) of the NLC mentions about the charging of interest:

"(2) The reference in paragraph (e) of subsection (1) to the payment off of subsequent charges is a reference -

- (a) In the case of a charge to secure the repayment of a debt, or the payment of any sum other than a debt, to the payment to the charge of the principal sum thereby secured (or so much thereof as is then outstanding) together with any interest then due, if any;"

Similarly, lawyers may also find themselves representing chargors (especially banks) in instituting civil suits for the recovery of monies due under credit facilities which are granted to firms and companies that failed to regularise payments as scheduled under agreement. In such instance, the borrower is required to register a charge in favour of the banks in order to secure the repayment of such facilities. In such claim, it is common to find lawyers representing banks to assist their clients to demand payment of any outstanding sum together with interest.

For instance, in the case of *Southern Finance Berhad v Sun City Development Sdn Bhd & Anor* [2006] 6 AMR 335, it was reported that the legal firm has assisted the plaintiff bank in its claim against the defendant as follows:

"the amount due, owing and payable to the plaintiff together with interest as at November 28, 2001 was found to be RM3,160,949.19, which amount was to bear additional interest accruing on the default instalments at the agreed rate of 2.5% per annum above the base lending rate calculated on a monthly basis from November 29,2001 till the date of full settlement."

Similarly, in the case of *Affin-ACF Finance Berhad v Green Formation Sdn Bhd* [2006] 6 AMR 269, Low Hop Bing J. has referred to clause 19 in the annexure to the charge which provides the essence for acquisition of land and mentioned as follows:

“In my judgment, the crucial clause 19 in the annexure to the charge which provides in essence for government acquisition of the land and the consequences flowing therefrom, in particular:

(1) all moneys received as or by way of compensation shall be applied in or towards the discharge or repayment of any money or liability secured by the charge; and

(2) in the event of all such moneys being less than the amount due to the chargee (plaintiff), the charger shall forthwith pay to the chargee the difference between the amount due and the amount so received and until such payment will also pay interest on such difference at the prescribed interest.”

2. Interest on Judgment Sum

When the defendant in a case fails to comply with any judgment or court order in regards to the payment of a judgment sum, the Rules of Court 2012 allows the plaintiff as the winning party to obtain his judgment sum by filing the following processes:

(a) Writ of execution, including:

- Writ of seizure and sale
- Writ of Possession
- Writ of Delivery

(b) Examination of the Judgment Debtor

(c) Garnishee Proceedings

These processes allow the plaintiff to charge interest apart from the judgment sum.

3. Interest on Overdue Legal Fees

Under s.124 of the Legal Profession Act 1976, a legal firm shall with the leave of the court commence any action for the recovery of any cost due for any business done by it until the expiration of one month from the date of delivery of its bill of costs to the party to be charged therewith. Under the Solicitors Remuneration Order 1990, interest at the rate of 8% per annum will be charge on disbursement and cost on the expiration of one month from the date of the delivery of the bill of costs.

4. Interest for Acting as Stakeholder

The legal firm is not bound by Rule 2 (i) (ii) of the Solicitors' Accounts (Deposit Interest) Rules 1990 if clients' monies are held in the capacity as stakeholder (because no specific party owns stakeholder money until the occurrence of an event or events which is or are certain). Thus, the monies cannot be recorded into the seller-clients' accounts or in the purchaser's client account. In this situation, a separate stakeholder's account in the form of fixed deposit account is maintained. According to Malayalam (2005), this action is done by the legal firm to earn interest. Monies are held by the legal firm until the transaction is completed or the outcomes of deciding events are known with certainty.

5. Interest in Personal Injury Cases

In the Federal Court case of *Murtadza bin Mohd Hassan c Chong Swee Pian* [1980] 1 MLJ 214, the relevant principle regarding the charging of interest in personal injury cases can be found in the writings of Mallal's Supreme Court Practice 2nd Edition at p. 26 as follows:

“(1) The Governing principle is that interest should be awarded to the plaintiff not as compensation for the damage done but for being kept out of money which ought to have been paid to him; *London, Chatham and Dover Rly Co v South Eastern Ry Co* (1893) AC 429, per Lord Herschell LC at p. 437, followed in *Wong Chong Chow v Pan Malaysian Cement Works Bhd* (1980) 2 MLJ 75, FC.

(2)...

(3) On special damages, the interest should be half of the rate of interest on general damages from the date of the accident to date of trial.

(4) On general damages for pain and suffering and for loss of amenities, interest should be awarded at the appropriate rate from the date of the service of the writ to the date of the service of the writ to the date of trial.

(5) On damages for loss of future earnings, this is a payment in advance and no interest should be awarded.

(6) On damages under s. 7 Civil Law Act 1956 (Act 67) (M), and s. 12 Civil Law Act (Cap.30) (S), interest should be awarded at the appropriate rate from the date of the service of the writ to the date of trial.

(7) On damages for loss of expectation of life under s.8 Civil Law Act 1956 (Act 67) (M) and s. 8 Civil Law Act (Cap.30)(S), interest should also be awarded at the appropriate rate from the date of the service of the writ to the date of trial.”

In sum, the above references show that the lawyer can be involved in assisting his client, as the plaintiff in a personal injury case to claim interest against the defendant. The tendency to

do so is supported by Order 59 of the Rules of Court 2012 which specifically stipulates on the matters pertaining to interest on costs.

In view of the above findings, it is crystal clear that legalizing interest is not tolerated in Islam even though permissible under the law. The prohibition of interest is crystal clear in Islam. For example, *illat* (the basic cause) of the prohibition of interest is *zulm* (injustice). Qur'anic verses relating to such prohibition are al-Maidah: 8; an-Nisaa: 135; ad-Dukhan: 38-39; an-Nisaa: 58 and ash-Shura: 15.

Generally, Malaysian court practices require litigation lawyers to be familiar with both substantive laws and procedural court rules as specified under the Rules of Court 2012. The professional ethics of lawyers in Malaysia are clearly spelt out under the LPPER. For instances, the said rules restrict lawyers from the following acts: to conduct cases intending to delay proceeding, harass or injure the opposite party (rule 12 LPPER); and to appear in court if pecuniarily interested (rule 27 LPPER). The LPPER also requires lawyers to conduct proceedings with candour, courtesy and fairness (rule 18 LPPER) and uphold the dignity and high standing of his profession (rule 31 LPPER). Most importantly, the LPPER prohibits a lawyer from acting in a particular case on the ground that his professional conduct is likely to be impugned (rule LPPER).

Quranic Viewpoints on Legal firm Representing Client to earn Interest from Litigation

Notably, the LPPER does not stipulate that it is unethical to charge interest in litigation practice. The LPPER does not forbid the charging of interest. However, Muslims lawyers must adhere to certain Islamic ethics which if observed attentively will show that any litigation action which is prone to interest earning is forbidden in Islam.

In Islam, man is seen to be the servant (abd) and vicegerent of Allah. He (man) has specific duties and obligations to perform in relation to Allah, to himself, to nature, to the religion, to his relatives and to the community. Islamic ethos demands that a Muslim abides by the messages of the Holy Qur'an, follows the Sunnah of the Prophet (Pbuh) and accepts the rulings of recognised religious scholars of the past.

The Quran also emphasises on morality and thus prescribes that a Muslim must involve in virtuous practices which are not limited to acts of worship alone. Some known primary traits expected of him or her are piety, humbleness and a sense of accountability to Allah. Thus, excessive cravings for worldly pleasures should not be emphasised because Islam preaches that worldly materials must be utilised in moderation in accordance with Allah's guidance. This is emphasised in the al-Baqarah: 88 as follows:

“The Day where neither wealth nor sons will avail, but only he (will prosper) that brings to God a sound heart”

Thus, the Islamic moral principles appeal to the man who exercises his intellectual capacity in a wise manner. Islam holds that man must learn to control his every action and in doing so, he has to ensure that his goal is to attain Allah's pleasure. Islam stresses on having a strong relations with Allah at all times. This is the key to enjoining good and virtuous conduct at all times [Al-Baqarah:177]. Islam abhors forbidden and sinful acts [Al-Qur'an 7:33]. The Islamic moral principles appeal to the human intellect, while elevating the pursuit of morality to the level of worship.

It is assumed that when a lawyer is approached by his client on a litigation matter, his client is actually seeking advice as to his or her rights and obligations pertaining to his or her claim. Based on the understanding of Islamic morality, the Muslim lawyer must be ready to turn down cases which involve the earning of interests. In the alternative, he may advise his client to claim for the principal sum but avoid from claiming interest upon the principal sum.

There are several Quranic verses which speak of earning management in a permissible manner according to Islam (halal). Such verses can be used to check on earning management of an establishment such as a legal firm in terms of whether its involvement to coach his client to earn interests is permissible or prohibited in Islam. For instance, the Quran states in Al-Baqarah : 267:

“And eat up not one another's property unjustly”

Based on the above explanation, it is important for the Muslim lawyer to advice his client against filing a claim in court, especially if it is based on false or misrepresentation in trade dealings especially when such claim may include the charging of interest over a claim sum.

As mentioned hereinbefore, there are numerous Quranic verses which forbids interest-earning (see for instance, al-Baqarah 2:275; al-Baqarah 2: 279; An-Nisa': 161; Al-Imran:130). The above cited Quranic verses suggest that the prohibition regarding the earning of interest can be similarly applied in determining whether Muslim lawyers must refrain from assisting their clients in earning interest out of a court action. Thus, earning interest should not be viewed as part of the fruits of litigation. The Quranic verses tend to show that Islam recognises the right of Muslims to be involved in trade. However, such involvement must reflect a moral duty on them to abstain from doing what is prohibited in Islam.

Conclusion

The study has shown that earning interest has been part and parcel of running a legal practice. The known ill-effects of interest activities include but not limited to fragmentation of the society especially in terms of financial stability. Sadly, the prevalence of providing and earning interest is legally recognized in certain transactions as mentioned in this study. Thus, Muslim legal firm owners must exercise caution to avoid earning interests or involve in assisting their clients to earn interest.

Current laws that allow the charging of interest tend to reflect the attitude of the society. However, laws, like morals are changeable throughout the passage of time. Social attitudes

towards the practice of interest charging might changed, perhaps due to the achievement of a higher level of morality or even due to religious observation in the society. Thus, it is viewed that the findings of this study are significant because they might contribute to the cumulative understanding among academicians and the legal fraternity on the importance of not incorporating the charging of interests in contracts and in the recovery of debt through court action.

The analysis of this study was based largely on information obtained from the relevant statutes and case laws. Nevertheless, this study has only reviewed a number of specific issues pertaining to the legalization of interest. Thus, future studies should venture into examining other related issues that have not been discussed in this study or have not been contemplated in this study.

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