

Outsourcing The Islamic Way: A Look Into The Challenges Faced By Financial Institutions

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Abstract

Fuelled by the growth of Islamic finance, banks and other financial institutions are increasingly seeking to outsource their non-core business functions. The benefits of outsourcing have already been well documented in literature and while it is good business sense to indulge in outsourcing when required, it becomes a matter of concern when it comes to outsourcing Shariah compliancy. Although there is a great avenue for growth in outsourcing, the industry must be conscious of the risks involved. This article addresses the issues and challenges in outsourcing Shariah approval for banks that do not have their own Shariah advisory board. This unique perspective into outsourcing by Islamic banks divulges into the Shariah risks, governance issues and Shariah arbitraging. For instance, when dealing with consultancy firms that contract Shariah scholars, the issue of rubber stamping is created. This becomes a problem because in many cases these scholars are not held accountable for their actions as the board of directors would be, hence leading to a conflict of interest between Shariah scholars and banks. Furthermore, it is established that subsiding this risk can be done through a convergence of Shariah opinions and a greater need for collaboration between the private sector, the government and regulatory bodies is required.

Keywords: Outsourcing, Banks, Shariah, Risk, Governance

1.0 Introduction

Outsourcing non-core business activities has been a long-standing tradition of many firms in an attempt to cut cost. More importantly, outsourcing allows firms to focus on activities that are vital to the company's growth. Following in these footsteps are

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Islamic finance institutions, which are increasingly seeking to outsource technology and non-core business functions to specialist consultancy firms.

There have been many diverse opinions on the benefit or lack thereof of outsourcing in Islamic finance. From a beneficial point of view, the outsourcing of Shariah advice allows Islamic Financial Institutions (IFI) to handle its Shariah workload, particularly when there is a lack of Shariah personnel in the IFI or to enable it to focus on core activities.

However, more importantly, a bank should always have an internal Shariah board as well as a strong Shariah division considering the pivotal role of Shariah governance in a fully-fledged IFI. When it comes to matters of Shariah approval or governance, it is important that scholars do not have ulterior motives or self-interest in their services to the bank and *Ummah* at large.

Correspondingly, an IFI's technological need is more complex than a conventional bank due to several dimensions that are unique to an Islamic bank. It is important to ensure that the outsourcing contract complies with Shariah principles. The element of good governance also comes in play as an important element in the case of outsourcing for an IFI. The governance model should take into account the recommendations from the Shariah Supervisory Board.

With the growth of outsourcing of regulated and non-regulated activities of the financial sector we face a new form of operational risk. Outsourcing activities to third parties also means that the risk, management and compliance are transferred as well. In this situation, how can banks be sure that their business risk is under control or the activities outsourced comply with the regulators? Similarly, in the Islamic finance industry where compliance is of utmost importance, as it defines what is Islamic and what is not, how can banks be assured that their outsourced activities are truly Islamic in nature?

Hence, as outsourcing is a new development in the Islamic finance sector, it becomes important to understand the potential risks and challenges involved in order to have better insight on how to overcome the issues. This paper attempts to understand the issues and challenges that come with outsourcing in Islamic finance and provides a theoretical platform for overcoming these challenges.

This article divides into five sections; in Section 1, we introduce the concept of this paper. Following this, in Section 2, we highlight the potential of outsourcing in Malaysia particularly. Section 3 highlights the issues and challenges that overwhelm the outsourcing industry. An illustration of these challenges is presented in Section 4. Recommendations by the authors are highlighted in Section 5 and in Section 6; the

central banks' guidelines on outsourcing are re-examined. Lastly, we have the conclusion in Section 7.

2.0 Potential Of Outsourcing In Islamic Finance

As a business concept, outsourcing has proved to be an effective model for many firms globally. Islamic finance institutions who are increasingly seeking to outsource their non-core business activities are also adopting this trend. Furthermore, the rising significance of the global Shared Service and Outsourcing (SSO) market suggests that outsourcing is a business opportunity worth exploring. Countries such as Malaysia, Iran and Saudi Arabia are fast becoming key players in Islamic finance showing great potential to become a hub catering to all Islamic finance outsourcing needs.

Malaysia in particular has been identified as global centre for Islamic finance outsourcing services. According to a Bank Negara Malaysia report, Islamic banking assets of Malaysia are estimated to be RM350.8 billion for 2011 while the Islamic finance in Malaysia has opened up several opportunities in the outsourcing industry.

A research conducted by ValueNotes (Outsourcing in Islamic Finance, 2009) validated that the Malaysian outsourcing industry would grow to \$1.9 billion by 2013. Furthermore, the Global Services Location Index has ranked Malaysia as one of the most preferred locations for global outsourcing services eight years in a row. The report further states that Malaysia in view of its low costs, modern infrastructure, business environment and high levels of global integration, was an ideal location for outsourcing (A.T. Kearney's Global Services Location Index, 2011).

More interestingly, the risk management norms adhered to by Malaysian Islamic banks are local and are not consistent with the BASEL II norms established by Basel Committee on Banking Supervision (BCBS). According to a recent survey conducted by Advanced Information Management, there is an added need for banks around the world to streamline and upgrade their technology and IT infrastructure in order to comply with the risk management norms of BASEL (Permatasari, 2011).

IT companies with strong capabilities in the banking domain have an opportunity to tap into the Islamic finance domain. This provides growth prospects to already established players in Malaysia as well as players with capabilities in Islamic finance to invest in Malaysia with the support of the Malaysian government (Permatasari, 2011). This proves the potential of the Malaysian outsourcing industry in the years to come, in particular in satisfying the Islamic finance industry where there is a great arena for growth.

3.0 Issues And Challenges

In this section, we highlight a few issues and challenges that Islamic financial institutions face when dealing with outsourcing. However, in lieu with our objectives we will restrict the issues to those related with Shariah governance, compliance and so on.

3.1 Shariah Governance Issues

Outsourcing agreements, similar to any agreements undertaken by the bank, should be able to take into account all the requirements and recommendations of the Shariah supervisory board. An outsourcing contract faces several legal and documentation risk that need to careful consideration. Firstly, there is the issue of the governing law of the documents; will it be under the Shariah law or English law? Outsourcing is not directly an Islamic finance activity and hence does not fall under the shariah law, however when it comes to any dealings by Islamic financial institutions it should always be governed by Shariah law to ensure there is no conflict of interest.

Secondly, when it comes to outsourcing Shariah scholars and fatwas, it becomes important to keep in mind the law of jurisprudence. For instance, Malaysia follows the Shafie School of thoughts, hence any banks operating within Malaysia should be respectful towards this and when outsourcing Shariah scholars must ensure that it does not contradict the Malaysian law of jurisprudence.

Lastly, a governance issue that can be raised by outsourcing contracts is that the contracts should take into account the unique operational characteristics and risk of Islamic financial institutions. As Islamic institutions are increasingly seeking to engage with top-of-the-line global suppliers, they will need to be careful to ensure that the vendor has an appropriate understanding of the fundamental principles behind an Islamic organization.

Furthermore, to deal with some of the governance issues comprehensive governance procedures should be put in place to help identify and resolve problems. Similarly, training of relevant staff is important both for technical matters, such as compliance, and soft skills including relationship management.

3.2 Outsourcing of Shariah Scholars

Shariah scholars play a critical role in the effective management of the Islamic finance industry. They are there to ensure that all transactions, products are indeed in compliance with Islamic norms. In the ideal situations, Islamic banks or conventional banks intending to deal with Islamic finance products must have their own Shariah

advisory board. However, it is often that banks are outsourcing Shariah scholars via a consultancy offering Shariah advisory services.

Banks prefer to deal with consultancy firms as they are not only cheaper, but also because they have very few top scholars who are well known in the Islamic finance arena. This leads to the crux of the problem as there are only a few scholars who sit on several Shariah boards of different banks. A report by Funds at Work (April 2010) revealed that a few top scholars hold a place on up to 80 boards at the same time. The top six of 221 scholars including Sheikh Nizam Yaquby, Sheikh Abdul Sattar Abu Ghuddah and Mohamed Ali Elgari sit on almost a third of almost 1,054 board positions.

This practice of Shariah consultancy is feared to not bring about any real Shariah supervisory but rather it would lead to the practice of rubber stamping. This means that bankers will be able to get Shariah approval on their products more easily. Aly Khorshid (Richter, 2010) says, 'They will have one or two people in their organization to structure the product and then will just rubberstamp it from three or four scholars and pay them a fee and get it done for you.'

Hence, when outsourcing Shariah supervisory, it can lead to rubber stamping approval on products developed by banks and this can be a problem when the approval received is not true to Islam. Some Shariah scholars may have a conflict of interest when approving this new product or business transaction. Hence, this can pose to be a big problem for the growth and further development of Islamic finance.

3.3 Shariah Arbitrage

It is commonly known that arbitrage opportunities arise when there is a discrepancy between the prices of the same product in different markets. Hence, the arbitrageur has the prospect of buying the product cheaply in one market and selling it at a higher price in another. The term Shariah arbitrage is borrowed from the concept of regulatory arbitrage, which refers to the advantage taken between the economic substance and the regulatory position of a deal. (Fleischer, 2010)

Hence, Shariah arbitrage is defined as the practice of extracting premium rents from participants in a captive-market for products labelled and perceived to be Shariah compliant (El-Gamal, 2004). When it comes to arbitraging Shariah advisory, banks may attempt to generate profit based on certain financial practices disallowed in one country and allowed in others. In Islamic finance, when banks and other institutions engage in such practices, it leads to fatwa shopping.

With different opinions in the interpretation of Fiqh, scholars tend to disagree on certain practice, which means that sometimes a product can be deemed Shariah compliant in one market and not in another. Therefore, banks have the opportunity to shop for fatwas that fit their need. Fatwa shopping is a procedure that enables the financial institutions to seek a fatwa on financial products or contracts from the scholars who, they assume, will consider such products or contracts as Shariah-compliant and later grant a fatwa (Wilson, 1999). It has become an impediment to the Islamic finance industry and works against the harmonization efforts of fatwas by regulatory bodies.

An interesting predicament for fatwa shopping arises from several situations. One such avenue is, for instance, Malaysian scholars may be considered too liberal for the Gulf Cooperation Council (GCC) investors whereas Pakistani or Indian Scholars follow different Shariah guidelines to those defined by GCC Shariah scholars. There is additionally the issue of differing interpretation of existing Shariah rulings.

Hence, the existence of various sects, each with their own interpretation on Shariah issues, in Islam makes the process more complicated. This allows differences to arise and exist between the countries and regions, providing for fatwa shopping opportunities. Furthermore, fatwa shopping increases the inconsistency between Islamic financial products, leading consumers and investors to be uncertain regarding the Shariah compliance of the offered products and gradually leading them to lose faith in Islamic finance as a whole.

4.0 Sukuk And Tawarruq – An Illustration

It has been said that Tawarruq and Sukuk are the two most controversial Islamic financing tools currently prevailing in the market. With a difference of opinion on these tools from the Malaysian Shariah scholars and those from the Gulf, it is interesting to understand how this difference can lead to opportunities for fatwa shopping and rubber stamping.

Tawarruq is a financing method that involves the customer buying a commodity from a bank on deferred payments and then selling it to a third party for cash at a discount. Banks resort to tawarruq for mainly two economic reasons: (a) to gain greater access to borrows in need of cash that do not easily lend themselves to Murabahah and (b) to provide more efficient credit facilities through Tawarruq. According to El-Ghamal (2004) this is already Shariah arbitrage. Firstly, the existence of a ready market already makes it possible to implement inefficient replications of conventional products through separation of contracts. Hence, through these varying degrees of separation, banks are able to ensure a steady stream of profits. According to El-

Ghamal, by adding degrees of separation, it would eventually become impossible for any jurist to prohibit the practice as legal trick to undermine the substance of Islamic law.

Similarly, the sale/lease-back bond structure (sukuk-al-ijara) uses an SPV to sell and buy-back an asset. This practice was challenged twice in the British courts where shariah provisions were disregarded in favour of English law. In the two cases of *Islamic Investment Company of the Gulf v. Symphony Gems NV* (2002), and *Beximco Pharmaceuticals v. Shamil Bank of Bahrain EC* (2004), courts ruled against Islamic-bank debtors, who had argued that the transactions amounted to unsecured interest-bearing loans and therefore violated Islamic provisions, and allowed the Islamic banks to collect their accrued interest.

In lieu with these cases, El-Ghamal (2007) identified three sets of beneficiaries of Islamic finance; firstly the international law firms, who promote the use of sale/lease back structures to disguise interest-bearing debt; secondly multinational banks who have driven innovations into both investment and retail banking; and lastly, scholars who are retained as consultants to certify the conformity of these re-engineered products to Islamic principles.

Hence, sukuk and tawarruq are just two structures that are considered controversial in some regions and acceptable in others. Contracts such as these, can lead to issues such as fatwa shopping, arbitrating of shariah principles and rubberstamping contracts. These become an even greater issue when these activities are outsourced. For instance, a bank may structure their product based on sukuk or tawarruq in and seek approval from a consultancy based in Malaysia who approves of such practices.

5.0 Recommendations

The service of outsourcing in Islamic finance is faced with several challenges that need to be looked into in order to be able to provide a more Shariah compliant service to banks and other financial institutions dealing with Islamic finance. Below, we duly identify and examine some steps that can be undertaken to ensure a more risk mitigating outsource industry in Islamic finance.

The main component of Islamic finance is the compliance to Shariah practices, hence it is important to ensure that all outsourcing contract fulfils the needs of the Shariah. Principles such as prohibition of gharah, riba, misyar have to be carefully exempt from all outsourcing contracts. One such way would be to ensure that all late payment charges (primarily based on interest) are eluded and no hidden cost and profits are present (Wilkinson, 2011). Wilkinson further encourages that outsourcing contracts

are not appointed through *Wakalah* as there is a risk this might increase the fiduciary owed to the customer. Therefore, in order for all outsourcing contracts to be more Shariah compliant, it may be advisable to obtain the approval from a Shariah advisory in order to ensure that there is full conformity.

Furthermore, as outlined previously due to the limited number of Shariah scholars available in the industry has led to several concerns on the viability of outsourcing Shariah scholars. The downfall of not regarding this concern is the loss of legitimacy of Islamic finance in the eyes of the public. Shariah scholars should be able to provide an opinion that does not coincide with any personal agenda and is purely for the benefit of upholding Shariah norms.

Regulatory bodies such as Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) are looking into ways to address this issue. For instance, AAOIFI is looking into drafting rules to regulate the number of boards a Shariah scholar can sit on, at any one time. AAOIFI follows in the footsteps of Bank Negara, which has limited Shariah scholars from sitting in more than one Shariah committee at the same time.

Another suggestion in addressing this issue is to allow other well-educated scholars to enter the field, providing proof of his level of knowledge and expertise that would allow him to shadow existing scholars and learn from them. This would allow for a conducive learning environment where the top scholars are able to ensure the legitimacy of the practices/ fatwas issued and yet it will increase the number of scholars in the industry.

Another challenge to the practicality of the outsourcing service industry is the lack of a universal framework that all Shariah scholars must conform to. As we have highlighted in the previous section, this lack of framework can lead to fatwa shopping or Shariah arbitrage by banks globally. The adherence to different school of thoughts shuns out the possibility of regulatory bodies such as AAOIFI to establish a supranational Shariah supervisory board. This, while theoretically possible, would be met with disagreements by differently opinionated scholars. This difference in opinion is rooted deeply into the school of thought a scholar prescribes to personally. For instance, the practice of Bay al Inah is allowed by the Malaysian scholars but is frowned upon by the Gulf scholars.

Hence, it becomes more essential to set forth standards and guidelines that would apply across all jurisdictions. This would create a more transparent environment for not only Islamic finance, but also the outsourcing of Shariah scholars. When there is a

transparent work environment internationally, there is little room for practices such as fatwa shopping and Shariah arbitrages.

This inter-jurisdiction set of regulations can be made possible when all members concerned convene together to draw up standards that are acceptable to all. Bank practitioners, Shariah scholars, regulatory bodies need to work together to avoid further conflict of interest.

6.0 Revisiting Bnm's Guideline

The Central Bank of Malaysia has provided several guidelines for financial institutions to follow for outsourcing. Two such guidelines are the Guidelines on International Islamic Banks and Guidelines on Business Continuity Management (see 6.1 and 6.2 below). These guidelines are there to allow banks the opportunity to outsource and yet ensure that they are conducting themselves correctly.

6.1 Guidelines on Business Continuity Management: IT and DFI Supervision Department BNM/RH/GH/013-3

E. Outsourcing

Principle: In the event that some parts of the business functions are outsourced, the institution should ensure that risk arising from outsourcing does not compromise its business continuity preparedness.

108. The institution is expected to address all issues relevant to managing the risks associated with each outsourcing arrangement to the extent reasonable given the unique circumstances and having regard to the interests of the institution.

109. The institution should ensure that the outsourcing vendor is subjected to the BCM Guidelines, where appropriate.

110. The outsourcing contract should specify the requirements for ensuring the continuity of the outsourced business function in the event of a major disruption affecting the outsourcing vendor's services. Recovery time objectives (RTO) should be built into the outsourcing contract, with provisions for legal liability should the RTO not be achieved.

111. The institution should ensure that the outsourcing vendor has in place fully documented and adequately resourced BCP and DRP. The institution should ensure that periodic testing is conducted by the outsourcing vendor on

its BCP and DRP at least annually and twice a year, respectively. The vendor should notify the institution of the test results and action to be undertaken to address any gap. The institution may also require its outsourcing vendor to declare their state of business continuity readiness to the institution, annually.

112. The institution should include a clause in the outsourcing agreement, which allows the institution's internal auditor or other independent party appointed to review the BCM of the outsourcing vendor.

113. The institution should be notified in the event that the outsourcing vendor makes significant changes to its BCP and DRP, or encounters other circumstances that might have a serious impact on its services.

114. The institution's own BCP should address reasonably foreseeable situations where the outsourcing vendor fails to provide the required services, causing disruptions to the institution's operations. In particular, the plan should ensure that the institution has in its possession, or can readily access, all records necessary for it to sustain business operations and meet obligations in the event the outsourcing vendor is unable to provide the contracted services.

6.2 Guidelines on International Islamic Bank: Islamic Banking and Takaful Department

BNM/RH/GL/002-9

Outsourcing

10.5 Bank Negara Malaysia recognises that the outsourcing of functions is a common practice in the financial sector and such practice has provided several benefits to the financial institutions particularly in terms of cost reduction and enhanced efficiency. In this regard, the IIB may outsource its relevant banking functions in its course of doing business. However, for the outsourced functions, IIB's management must ensure that it retains ultimate responsibility and control of the outsourced activities.

10.6 IIB that engages third party providers should include the following:

- (i) Due diligence review on the capabilities and expertise of the outsourcing vendor prior to the selection decision;

- (ii) Approval from the board of directors to outsource the function has been obtained and documented;
- (iii) Written undertaking by the outsourcing vendor to comply with the secrecy provision pursuant to Section 34 of the IBA;
- (iv) Service agreement between the IIB and the outsourcing vendor should include a clause on ethics and professional conduct in performing their duties. The service shall clearly define the roles and responsibilities of the outsourcing vendor; and
- (v) Proper reporting and monitoring mechanisms must be in place to ensure that the integrity and quality of work conducted by the outsourcing vendor is maintained. The IIB shall have a contingent plan in the event that the arrangement with the outsourcing vendor is suddenly terminated.

According to the BNM's guidelines on outsourcing for international Islamic banks (IIB), the banks are mainly responsible for the actions of the vendors. Furthermore, all of the requirements of the bank are confined only to authenticity of the services provided by the vendors; there are no guidelines on the Shariah requirements or Shariah approval of outsourcing from third-party vendors. There are several requirements that can be put in place by central banks to ensure the compliancy of Shariah principles.

Firstly, to ensure that no contracts are assigned without the approval of the Shariah board, it should be included that the approval from the Shariah board must be first obtained. This will ensure that the contracts outsourced are not against any Shariah norms. Banks should ensure that there is always a provision for supervisory access to avoid any undue negligence.

Secondly, we recommend that central banks must hold Shariah boards accountable for their actions as board of directors are. This will ensure that the decisions made by Shariah boards are indeed compliant with Shariah norms. This will further warrant that any outsourcing activities banks announce are in line with Shariah principles.

Next, it should be ensured that the outsourcing vendors are also bound to the same regulatory and supervisory concerns, in conjunction with the specific service provided to a bank. This will ensure that the services provided by the outsourcing vendor are automatically in accordance with the regulatory and supervisory needs of that jurisdiction. This would limit the vendor's ability to cut corners on task such as issuing fatwas and stamping approval on products.

Hence, some revision must be done to incorporate the shariah compliancy of outsourcing contracts, especially when it comes to outsourcing Shariah advice or conformity. It must be ensured that there are no loopholes for financial institutions to bypass Islamic laws in favour of their own interest.

7.0 Conclusion

The concept of outsourcing is a lucrative one, even in the Islamic finance industry, where many banks are beginning to see the benefits of outsourcing. Similarly, the outsourcing industry, itself is on track to tapping into the niche industry of Islamic finance. Many countries are vying to be a hub for outsourcing activities, with Malaysia displaying great potential. Malaysia is prepared to grow its outsourcing industry to \$1.9 billion by 2013.

However, when outsourcing Shariah compliance, there is greater risk involved. Firstly, the outsourcing contract itself should be Shariah compliant and must not exhibit any form of prohibitions. Secondly, the outsourcing services and feedback received must be in line with Shariah norms. Thirdly, there is a risk of outsourcing leading to fatwa shopping or Shariah arbitrage. These practices are due to limited number of scholars in the industry and the lack of standardization of regulatory practices.

In relation to these above-mentioned issues, the authors attempt to provide some recommendations that can be followed to ensure that outsourcing does not lead to frowned upon practices. Banks can ensure that their outsourcing contracts are Shariah compliant by ensuring that all contracts receive the approval of the Shariah committee. Moreover, there is a dire need to enforce the regulation of limiting the number of boards a scholar can sit on at any given time. There is also a need to increase the number of scholars in the industry, which can be done by introducing a mentoring based training where prominent scholars ensure the authenticity of the rulings by mentor new scholars. Lastly, there is a need to create a platform to ensure standardization between the practitioner, regulators and scholars.

Furthermore, central banks can begin to integrate more stringent guidelines for outsourcing in order to ensure not only legal compliance but also shariah regulatory compliance. Existing guidelines can include the need for approval from Shariah boards of any contracts outsourced. Similarly, shariah boards should be held responsible for their actions, similar to board of directors of an institution. Guidelines can be extended to the third-party vendors as well, to ensure that both are governed by the same set of rules.

Hence, Islamic financial institutions must be conscious of the specific and unique risks within this industry but it is possible to make these arrangements more Shariah compliant. The various efforts at harmonizing the Islamic finance industry will help drive up the quality of services that outsourcing can offer to banks and to the industry at large.

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