11 June 2014

Confidential

Central Bank of Mauritania

Interim Report in respect of a Study on the Legal and Regulatory Framework for Islamic Banking in Mauritania

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Part I

Introduction

1 Project Background

1.1 In order to improve the rate of banking, CBM has decided to promote Islamic finance. In this context, an agreement of technical assistance between CBM and IDB was signed. The objective of this partnership is to strengthen the capacity within CBM, creating an institutional and regulatory environment favourable for Islamic finance, and to equip CBM with the technical means for the control of Islamic operations. In order to achieve this objective, CBM aims to:

1. create an enabling environment for the Islamic financial operations by the revision of texts of law and creation of supporting institutions;
2. review the criteria for issuance of authorization, taking into account the specificities of Islamic finance;
3. supervise the compliance of the operations of these establishments with Shariah requirements.

1.2 In relation to this, CBM appointed Messrs. Zaid Ibrahim & Co. (“ZICO”) as the Consultant to study the establishment of a legal framework for Islamic banking in Mauritania (“the Project”) the Project vide a letter dated 1 Jul 2013. CBM and ZICO executed a Consultancy Agreement in relation to the Project on 1February 2014.

1.3 The key objectives and scope of work of the Project are:

1. to study the banking legislation in force in Mauritania;
2. propose necessary actions and steps to support existence of Islamic banking in Mauritania;
3. propose the necessary mechanism for supervision of the Islamic banks (“IBs”);
4. propose the appropriate accounting standards to be imposed on IBs;
5. establish the terms of reference for the functioning of an organ in CBM to control Shariah compliance; and
6. conduct a training on the operations of IBs to the officers of CBM and commercial banks.

1.4 To carry out the study and training requested, ZICO organized a visit to Nouakchott, Mauritania from 28 February to 7 March 2014. The ZICO team members comprised Dr. Aida Othman (Partner), Dr. Said Bouheroua (Comsultant) and Muhammad Abid Abdul Latiff (Associate). The team met with CBM officers and personnel from Islamic financial institutions to obtain information and documentation about the Mauritanian legal framework in general and the legal framework on banking there in particular, as well as their views on the subject matter of the Project.

1.5 The training was conducted from 4 to 5 March 2014, and was attended by about 30 officers of CBM and Islamic banks as well as conventional banks which offer Islamic banking products. The training discussed the development of Islamic banking and finance, Shariah governance in Islamic financial institutions, Shariah principles applicable to and structuring of Islamic banking products, contemporary issues in Islamic banking and accounting standards for Islamic banking institutions.

1.6 We would like to record our thanks and appreciation to CBM and the Islamic banking fraternity who had welcomed us and facilitated our work in Noukchott during our trip there. Their hospitality and commitment to Islamic banking and finance humbled and deeply inspired us.

2 Scope of Report

This Study is conducted by utilizing the following materials to formulate our findings and recommendations:

1. Documentation provided to us, as listed below:

| **No** | **List of Documents** | **Details** |
| --- | --- | --- |
| 1 | Ordonnace Portant Réglementation des établissements de crédit | Ordonnance no 2007-020 |
| 2 | Definissant les Conditions et Criteres D’Agrement, les Modalites de Prise ou D’Extension de Participatioin dans le Capital d’un Banque et les Regles Relatives aux Dirigeants de Banque | Instruction No 2/GR/2008  |
| 3 | Ordonnance Portant réglementation des établissements de Micro finance | Ordonnance No 2007/005 |
| 4 | Finance Islamique en Muritanie, Mise en Place d’un Marché de Titres conformes à la Shariah | Rapport provisoire, July 2012, Islamic Finance Advisory & Assurance Services (IFAAS). |
| 4 | Plan Comptable Bancaire | Issued in 1988 |

(ii) Information and views provided by the following nominated individuals during the interview sessions held in Nouakchott, Mauritania from 2 to 6 March 2014:

|  |
| --- |
| Central Bank of Mauritania  |
| Dieng Adama Boubou | Director General, Supervision |
| Mohamed Lemine Ould Babiye | Director, Control of Banks and Financial Institutions |
| Lemina Mint Sidi Baba | Director, Internal Audit |
| Zein Ould Sidi Boubacar | Director, Control of Microfinance Institutions |
| [Full name] | Director, Legal Department |
| Société Générale Mauritanie |
| Christian Metaux | General Manager |
| Thomas Pouvreau  | Secretary General |
| Ahmed Salem Meidah | Jurista |
| Mauritanienne Islamique Banque (MAURISBANK) |
| Mohamed Mahmoud Baye El Moctar Mbaba | Directeur Commercial et Développement Réseau Chargé du Contrôle Interne Charia |
| Banque Mauritanienne Pour le Commerce International |
| Mohamed Ould Sidi | Directeur Général Adjoint |
| Banque Populaire De Mauritanie |
| Skander Zouch | Secrétaire Général |
| Banque Muamalat As Sahiha |
| Abdellahi Ahmed El Moctar | Directeur Général |
| Dah Ahmed Lemrabott | Directeur Exécutif des Operations |
| Hamahoullah Sidi Mohamed | Directeur Financier |
| Banque Islamique de Mauritanie |
| Mohamed Mahmoud Lehbib | Directeur Général Adjoint |
| Banque Nationale de Mauritanie |
| Mohamed Cheikh Ahmed | Directeur de Reséau ALWATANI |
| Banque Al Wava Mauritanienne Islamique |
| Mohamed Taya | Executive Director |
| Mohamed Ould Sidi Ali | Deputy Executive Director |
| Attijari Bank Mauritanie |
| Meyey Abdou | Head of Internal Control |
| Professional Association of Banks in Mauritania |
| Mohamed Ould Sidi Ali | President |
| Mohamed Taya | Deputy President |

3 Confidentiality

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Part II

The Legal Framework for Banking in Mauritania

1 Introduction: Developments in Islamic Banking in Mauritania

1.1 Islamic finance is gradually making inroads in North African countries including Mauritania.

Mauritania, a vast country covering 1.03 million square kilometers, is located on the northwest coast of Africa. It is delimited by over 700 kilometers of Atlantic coast and shares its borders with Morocco and Algeria to the north, Mali to the east, and Senegal to the south where the Senegal River is on the border.

1.2 The financial sector in Mauritania comprises the CBM, ten commercial banks, eight insurance firms, two financial institutions specialized in agriculture and fisheries, 67 microfinance institutions and 5 Islamic banks authorized at the present time as well as a leasing company. Mauritania's banking sector dominates the financial system, with 88% of the sector's assets held by commercial banks. At the same time, bank loans and deposits represent less than 20% of GDP.[[1]](#footnote-1)

1.3 CBM announced it will develop Islamic [finance](http://www.reuters.com/finance?lc=int_mb_1001) as part of efforts to modernise the banking system and make long-term loans available to companies. Governor of CBM Sid’ Ahmed Ould Raiss states that CBM is preparing a strategy for the development of Islamic [finance](http://www.reuters.com/finance?lc=int_mb_1001) that will identify the key levers to promote and revitalise the sector to its full potential.[[2]](#footnote-2) The planned creation of a securities exchange in Mauritania would allow the issuance and trading of both conventional and Islamic financial instruments, including Islamic [bonds](http://www.reuters.com/finance/bonds?lc=int_mb_1001).

1.4The CBM governor has also announced the introduction of reforms to provide "a new legal and regulatory frame that is specific to Islamic finance products".[[3]](#footnote-3) He also stated that “all Mauritanian banks have special counters dedicated to Islamic finance but they operate on a legal base originating from the classic banking system”. He believes this situation "hampers the widening of access to banking services in Mauritania, as the Muslim mentality is resistant to speculation".

1.5 Mauritania first experimented with Islamic banking with Al Baraka Bank which was established an Islamic bank in 1985, with half of the initial capital subscribed by Al Baraka’s Saudi Arabian shareholders, 10 percent of the capital subscribed by the Central Bank and the remaining 40 percent by businessmen from Mauritania. However the bank floundered in \*.

 The country currently has 18 banks, 5 of which are full-fledged Islamic banks operating in accordance with Shariah principles. Several conventional banks provide Islamic banking services via their Islamic banking windows.

* Bank Al Muamalat Assahiha was established in 2013 with a US$20 billion capital by young and successful Mauritanian business people, according to a statement from the bank. The bank will target both individuals and corporate organizations, and base its operations on the highest ethics and standards of the country's financial industry.
* The Islamic Bank of Mauritania (BIM) started operations in 2011. BIM was established with a capital of US$22 million with 60 per cent of the shares held by the Islamic Corporation for Private Sector Development (SIDSP), a subsidiary of the IDB, against 40 per cent for Turkey’s ASYA Bank. The creation of the bank is part of the decision of IDB and ASYA Bank to develop and promote Islamic finance in the Maghreb and West Africa. BIM aims to assist the private sector through targeted interventions oriented toward growth sectors of the economy.
* The National Bank of Mauritania (BNM) announced will expand the Islamic financial system to all its branches across the country. BNM chief executive Mohamed Ould Noueiguedh has justified this approach by pointing out that Islamic banks have largely been unaffected by  the financial crisis, due to the “nature of their operations, away from all the bidding and sale of credit with interest”. “Now, we have 14 branches that operate according to this system, which we intend to generalise across all of our branches,” he said.[[4]](#footnote-4)
* Other Islamic banks include Maurisbank, BMCI Mauritanie, Banque Al Wava Mauritanienne Islamique and Albaraka Islamic Bank.

1.6 The level of bank coverage of the public is quite low, and 80 percent of commercial transactions are conducted in cash. Islamic banking system is seen to be the viable solution to improve access to banking services in Mauritania, where only approximately 150,000 people own bank accounts in a population of 3 million.

1.7 The financial landscape further includes 69 savings and loan cooperatives

operating in two main networks: PROCAPEC and CREDIT OASIS, which offer a limited range of services. This sector has undergone significant changes in recent years. To consolidate the emergence of microfinance as a tool particularly well suited to combating poverty, the Mauritanian Government has established a regulatory framework that is expected to make it possible to increase microfinance activities, and introduced mechanisms for the monitoring of such institutions by their supervisory body, i.e. the CBM. Microfinance institutions in Mauritania have begun introducing Islamic financing products.

In relation to microfinance, the legal provisions specific to the savings and loan cooperatives were issued (Law No. 98-008 of January 21, 1998 and Instruction No. 001/GR/99 of January 21, 1999). Moreover, APROMI, the Association of Microfinance Professionals and Operators, was established to represent the sector vis-à-vis the public authorities and donors. This association issued an ethics code enforced by APROMI through its Ethics Council. In particular, this code mandates that microfinance institutions observe the regulations in force. Nevertheless, the microfinance sector continues to be underdeveloped and dependent on subsidies.

2 An Overview of the Legal System of the Republic of Mauritania

2.1 General

2.1.1 The legal system of Mauritania is a mix of the colonially inherited French civil law legal system and Shariah Law. The Shariah, the Constitution, legislations (i.e. organic laws, ordinary law, ordinances and decrees) and treatises are the sources of Mauritanian law.[[5]](#footnote-5)

2.1.2 Islam is constitutionally recognised as ‘the religion of the people and of the State’, and the preamble of the Constitution names the Shariah as ‘the sole source of law.’ References in other pieces of legislation further buttress this primacy of Shariah. For example, the swearing-in oath of the President of the Supreme Court, the top official of the Judicial Power, enjoins him, in the exercise of his functions, to respect the ‘Shariah, Constitution and laws’.

2.1.3 Shariah norms also have been included in their law where the Penal Code contains Shariah crimes such heresy, apostasy, atheism, refusal to pray, adultery and alcoholism as well as punishments such as lapidation, amputation and flagellation. Equally, the 2001 Personal Status Code reflects Shariah norms and its Article 311 states that for difficulties of interpretation as well as in cases where the Code is silent, reference should be made to the Shariah. The Criminal Procedure Code (article 363) and the Penal Code provide for the application of the Shariah rules of evidence.

The Code of Contracts and Obligations exclude business transactions prohibited by Shariah such as usury.

2.1.4 The first constitution of Mauritania, adopted in March 1959, was modelled on the constitution of the French Fifth Republic which recognised principles of separation of the three powers while leaning towards a strong Executive. Subsequent constitutional amendments have maintained such initial framework. The current Constitution is the 1991 Constitution drafted by a Committee of experts established by the then ruling military junta of Colonel Taya which was adopted via a referendum on 12 July 1991. This Constitution establishes an Executive (a President and a Prime Minister with all power remaining however in the hands of the former); a bicameral parliament (The National Assembly and the Senate); and consultative institutions such as the High Islamic Council and the Economic and Social Council.

2.1.5 As per article 45 of the Constitution, legislative power belongs to the Parliament which has two representative assemblies: the National Assembly and the Senate. However, like in other civil law countries, a residual legislative power is left in the hands of the Executive. Articles 57 & 58 of the Constitution exhaustively list the subject areas that constitute the exclusively legislative domain of Parliament.

2.1.7 As another common feature of civil law systems, the Government may in certain circumstances ‘legislate’ on subject areas within the exclusive legislative competence of Parliament by way of ordinances. As per article 59 of the Constitution, all matters not listed in articles 57 and 58 fall under the regulatory power of the Executive which exercises it through decrees. This regulatory power belongs to the President of the Republic who may delegate part or whole of it to the Prime Minister. This is regulated by article 60 of the Constitution which states that:

“*with the agreement of the President of the Republic, the government, in order to execute its program, may ask the Parliament for the authorization for a limited period of time to pass ordinances for measures which are normally in the domain of the law*.”

These ordinances must be accepted by Council of Ministers and signed by the President of the Republic. They enter into force immediately after their publication and must subsequently be tabled before the Parliament, within the timeframe stated in the enabling law, for purposes of ratification.

All laws that have been adopted and promulgated are published in the national Journal officiel (bimonthly). Practical rules regarding implementation are generally determined by regulatory provisions (decrees, orders).

2.1.8 As a monist state, treaties duly ratified form part and parcel of the Mauritanian domestic legal system. The Constitution states that duly ratified treaties are hierarchically superior to domestic legislations provided the other party to the treaty implement their own obligation. The power to negotiate and sign treaties belongs to the President of the Republic.

2.1.9 The main avenue for training of lawyers in Mauritania is the Faculty of Law and Economics of the University of Nouakchott which offers a 4-year degree in in law (Maîtrise). There is also the Advanced Institute of Islamic Stduies and Research (ISERI) which offers training in the Shariah. A Maîtrise in Shariah or Law or an equivalent degree is the basic academic qualification to be admitted as a Magistrate (judge and state counsel), barrister, bailiff sheriff and public notary.

2.2 Shariah scholars in Mauritania

2.2.1 Mauritania is well-known for its unique and rich centuries-old tradition of Islamic scholarship, which is based on memorization of texts and direct learning from authoritative scholars. Its scholarly strength has always been at the grassroots - in the itinerant schools and rural lectures known as mahadhras, organized by teachers always on the move.

2.2.2 Mauritania is also known throughout the Arab world for its enormously rich heritage of Arabic manuscripts, many brought from the Arab East by pilgrims returning from Makkah, some recopied from those imported sources by students in the Qur’an schools that once flourished throughout the country, and others composed by Mauritania’s own jurists, poets and historians.

2.2.3 As such, the Islamic finance industry do not lack for Shariah scholars to whom they could refer for advice on products and other Shariah issues pertaining to operations. Indeed, due to the closeness of the Mauritanian people in general to the Islamic scholarly tradition, a number of senior management personnel with background in banking, finance, audit etc. in the industry appear to be well-versed in the Shariah and its sources.

The ulama of Mauritania are known for their expertise in the fiqh of the Maliki madhhab.

2.2.4 The High Islamic Council is an advisory council to the Presidential institution created by Article 95 of the Constitution. It meets at the President’s request and gives advice to the president regarding to issues referred to it. The Council comprises 5 members who are pointed by the President; one of them is appointed as a head of the council.

2.3 The Court System

2.2.1 The organization of the judiciary is governed by Law No. 99-039 of July 24,

1999 which identifies the various courts and their respective jurisdictions. The principle of dual jurisdiction is affirmed by this law, as are rights to a defense and equality before the courts.

The Supreme Court is the highest of all judiciary institutions, and its decisions are binding on all other jurisdictions in the country. It adjudicates appeals against judgments and decisions handed down in final instance by the national courts. On an exceptional basis, in administrative matters, it may hear cases in the first and last instance that are assigned to it by law, in particular cases relating to expropriations in the public interest.

All judgments and decisions handed down by court jurisdictions are explained and pronounced publicly, failing which they are null and void. They are enforceable throughout the entire national territory. Foreign court decisions and documents must be the subject of application for enforcement of judgment before the courts of instance for the location where they are to be enforced.

Other institutions also contribute to the proper functioning of the Republic,

including the Audit Court, the Constitutional Council, the High Islamic Council and the High Court of Justice.

2.2.1 The Constitutional Council

Regulated by articles 81-88 of the Constitution and its organic law (Ordinance no 92.04 of 18 February 1992), the Constitutional Council is the highest court of the land on issues of constitutionality of laws and electoral litigations. The Council is composed of 6 members; its President and two of whom are appointed by the President of the Republic, 2 by the President of the National Assembly and 1 by the President of Senate. Once seized, the Constitutional Council must rule within a maximum period of 30 days which is reduced to 8 days in case of urgency. Decisions are taken by simple majority and there are no dissenting judgements. Decisions of the Constitutional Council are final and binding on all public, administrative and judicial authorities. All decisions of the Constitutional Council are published in the Official Gazette.

 2.2.2 Cour Des Comptes

The Cour des Comptes is provided for by article 68 of the Constitution and regulated by Law no 93-19 of 26 January 1993 as amended by Ordinance no 2007- 006 of 12 January 2007. The Cour is the superior institution of the land in charge of:

* The safeguard of public finances;
* The improvement of financial management techniques and methods; and
* The rationalisation of administrative action.

 2.2.3 High Court of Justice

Articles 92 and 93 of the Constitution provide for the establishment of a High Court of Justice constituted by the Ministers of Parliament in equal number from both chambers of Parliament. This Court has jurisdiction to hear matters in relation to the President of the Republic in case of high treason and the Prime Ministers and members of government for criminal acts committed in the exercise of their functions. The Court applies sentences stated in the Penal Code.

 2.2.4 The Ordinary Courts of Law

The judicial organisation of Mauritania is currently regulated by Ordinance no 2007/012 of 8 February 2007. The Ordinance creates a conventional three instance court system comprising:

* At the first level: Wilaya (Regional) Courts, Criminal Courts, Commercial Courts, Labour Courts, and Moughataa (district) Courts**.**
* At the second level: Courts of Appeal.
* At the third level: The Supreme Court.

 2.2.5 The Supreme Court

The Supreme Court is the highest court of the land in all matters except those falling under the jurisdiction of the constitutionally established courts as mentioned above. It hears appeals from decisions of the Courts of Appeal or of courts from first level, and exercises advisory powers. As a court of law, the Supreme Court limits its scrutiny of decisions of lower courts to whether a law, procedural or substantive, has been violated.

 2.2.6 The Courts of Appeal

Article 29 of Ordinance 2007/006 makes it clear that the goal of the Mauritanian legislator is to progressively have one court of appeal in each of the 12 Wilayas. At present, there are only three Courts of Appeal namely in Kiffa, Nouadhibou and Nouakchott. As such the territorial jurisdiction of these three courts extends beyond the Wilaya where the courts are located.

As per article 30 of the Ordinance, a court of appeal comprises of one or more civil and labour chambers; one or more commercial chambers; one administrative chamber and several criminal chambers one of which is earmarked for juveniles. These chambers hear appeals of decisions of courts from the first level falling under their specialisation. They sit in panel of three judges except in cases of appeals from the Criminal Court, where a panel of 5 judges is required.

3 The Legal Framework for the Banking Sector in Mauritania

3.1 The Central Bank of Mauritania

3.1.1 CBM is governed by Ordinance 004/2007 which was issued on 12 January 2007. Similarly to most other countries, CBM plays a supervisory role over the operations and practices of financial institutions in Mauritania.

3.1.2 CBM exercises jurisdiction over the banking, securities and money market sectors. With regard to supervision for financial institutions, the BCM has full authority to stand as an autonomous institution as it is simultaneously the licensing, regulatory, supervisory, and sanctioning authority.

3.1.3 The banks and financial establishments are governed by the Ordinance of 13 March 2007 (“Ordinance 2007-020”) regulating credit institutions,[[6]](#footnote-6) as well as by guidelines and instructions issued by CBM.

3.1.4 Insurance activities are not regulated by CBM but come under the supervision of the Ministry of Interior and the Ministry of Trade.

3.1.5 In terms of microfinance institutions, although the institutions are established under a law which is under the care of Ministry of Workforce and Innovation, their regulation and supervision are undertaken by CBM.

3.1.6 The organizational structure of CBM is as depicted in the chart in Appendix 1.

3.2 Ordinance No.2007-020 regulating Financial Institutions (Ordonnance No. 2007-020 portant Réglementation des Établissements de Crédit)

3.2.1 The main law governing banking and financial institutions in Mauritania is Ordinance 2007-020. Like most banking legislations, it contains provisions on licensing and authorization of banking activities, capital requirements, legal structure of banks, prudential requirements, and powers of BM to make regulations thereunder.

3.2.2 All credit institutions and their activity on the territory of the Islamic Republic of Mauritania are subject to the provisions of the Ordinance. A credit institution is defined as a legal person who, has as a regular occupation, at least one of the following:

1. The receipt of funds from the public regardless of the length and shape;
2. The distribution of credits in all their forms;
3. Making available to customers of all means of payment or their management.

3.2.3 It gives wide powers to CMB to authorize any banking activities to be operated by financial institutions, as clearly expressed in Article 3:

*“Credit institutions may also perform, subject to compliance with applicable laws and regulations in this area, the operations related to their activity, such as:*

1. *Foreign exchange transactions;*
2. *The placing, subscription, purchase, management, custody and sale of securities or any financial product;*
3. *advice and assistance in the management of heritage;*
4. *advice and assistance in financial management, financial engineering and in general, all services to facilitate the creation and business development, subject to the laws relating to the illegal practice of certain professions;*
5. *operating leases of real or personal property;*
6. *The intermediate operations such as commission agent or broker;*
7. ***Any other transactions that may be authorized in advance by the Central Bank.***

*Credit institutions may make equity investments in existing companies or establishment, subject to compliance with the rules in this regard issued by the Central Bank.”*

3.2.4 Further to the above provision, the CBM has full authority to determine the types of services which may be offered by the banks. Article 9 of Ordinance 2007-020 provides:

*“The Central Bank will determine, depending on the category to which the financial institution belongs, the list of operations listed in Article 3 that it can perform, as operations related to its activity.”*

3.2.5 According to Article 26, CBM may issue regulations and instructions to financial institutions in its exercise of the powers conferred upon it by this Ordinance or other legislation, to protect the interests of depositors and other creditors. Financial institutions are to comply with these regulations and instructions, and CBM will determine the implementing the rules for implementation.

Article 26 also states that the instructions and other regulations issued by CBM “may differ according to the different categories of financial institutions”.

3.2.6 Currently, all banks in Mauritania whether conventional or Islamic are licensed and authorized by CBM Ordinance 2007-020.

According to Article 13, in the act of approval, the Central Bank states, inter alia, the name, category, legal form, the composition of the shareholding of the credit institution concerned and special conditions for the exercise of its activities.

 The Conditions and Criteria for Approval of Banks (GR/2008)

3.2.7The Conditions and Criteria for Approval of Banks(GR/2008) is one of the guidelines issued by CBM under, among others, Ordinance 2007-020. GR/2008 states that it “defines the conditions and criteria for approval, the way made or extension or participation in the capital of a bank and the rules for bank officers”.

3.2.8 According to Article 9 of GR 2008, the Central Bank of Mauritania can define the specific conditions to the granting of agreement if compared to the business plan it is present. These conditions may relate in particular to:

* The conditions for development of the bank;
* The geographical location and agencies;
* The conditions of profitability of activities;
* The recruitment policy;
* Financial products and services proposed;
* The share of capital reserve holders Mauritanian;
* The minimum number of Mauritanian sitting in council of Directors of the bank.

3.2.9 All Islamic banks have been authorized by CBM without the imposition of any additional requirements on Shariah governance etc., even though we view that CBM could have imposed such requirements, in line with the recommendations of international prudential standards, with the powers conferred to CBM under Article 13 of Ordinance 2007-020 and the Conditions and Criteria GR/2008.

In order to establish a proper legal framework for Islamic finance, a new set of laws may need to be enacted or the current existing legislations may need to be amended to enable and properly supervise Islamic banking. It is preferable that the proposed legal framework will not only enhance the legal requirements for Islamic banking but across sectors. The law ought to be reflective of the nature and features of Shariah contracts which thereafter will escalate the confidence level of Mauritanians in the compliance of Islamic finance products and services offered by financial institutions with the Shariah.

4 Views of CBM on the Legal Framework for Islamic banking

4.1 Department of Supervision of Banking and Financial Institutions

4.1.1 In carrying out its licensing and approval, the department does not differentiate between a conventional bank and an Islamic one. Both types of financial institutions are authorized and supervised in the same way.

 CBM only supervises the technical aspects of banks’ operations and it does not take into account those aspects of Islamic banking operations that are Shariah specific.

 Supervision is conducted by way of receiving reports signed by the directors of the banks and spot inspections by CBM inspectors, and the department is guided by an internal guideline in carrying out their functions.

4.1.2 CBM had granted licenses to several banks to operate Islamic banking especially in last three years and these banks are operating under the purview of the same laws as with conventional banks. Thus far, CBM has not issued any regulation specifically relating to Islamic banking, even on the requirement for the establishment of Shariah board.

4.1.3 The department acknowledges that one of the issues raised by the IBs is their need for a clear legal framework for Islamic banking as they do not wish to be treated or supervised in manner similar to conventional banks.

As to the appropriate reforms for the legal framework to enable Islamic banking, the department viewed that it would be easier to only amend the existing law i.e. Ordinance 2007-020 to incorporate pertinent provisions on Islamic banking, rather than issue a separate law just for Islamic banks. CBM noted that Bill 103-12 which was in the process of being tabled to the Mororcan Parliament contained provisions for both conventional and Islamic financial institutions. However the department was open to considering proposals from the consultants as to the best option for Islamic banking in the country.

4.1.4 The department explained the role and competencies of the High Islamic Council with regard to religious matters in Mauritania and view that it is not suitable for the council to be appointed as the central Shariah board for Islamic finance.

 4.2 Legal Department

4.1.1 The Director of the Legal Department informed that the current law on banking Ordinance 2007-020 is flexible enough to allow establishment and approval of IBs under the existing legal framework.

 Due to this factor, she prefers the option of amending Ordinance 2007-020 only to incorporate required provisions, rather than issuing a separate new law for Islamic banking. This option will also minimize confusion and involve less complexity, as after all, the level of penetration into banking is low. She does not view that a less positive public perception will be an issue with using the same ordinance for both conventional and Islamic banking, as voiced by some bankers.

4.1.2 The Director informed that the procedural process for introduction of a new legislation or amending the existing legislation will take approximately 4 months. The process of preparing the draft law will take approximately 3 months and its approval by relevant authorities including the Parliament will take approximately 1 month.

 The process involves the setting up of a working committee comprising of CBM officers and foreign consultants to draft the proposed amendments or a new legislation altogether. Then, the draft law will be tabled to a parliamentary division for proofreading before it is brought to the Board of Ministers. Lastly, the law will be tabled to Parliament for its approval. A law will be easily approved and passed by Parliament if it receives support from the government.

4.1.3 There may be more complexity involved in introducing a new ordinance compared to only amending an existing ordinance.

 The director also explained that the procedure for amending CBM guideline or instruction is similar to the procedure for issuing a new one. An ordinance sets out its scope and the general rules applicable, while guidelines are issued to interpret the ordinance and to guide the implementation of the ordinance.

4.1.4 The Director also explained that a judge will decide based on Islamic law on any Islamic financial disputes as Islamic law constitutes the foundation for the legal system of Mauritania. CBM face no major issues in enforcing the existing banking ordinance. The law related to finance is found in the laws on banking, commerce, investments, the common law, administrative law and legal precedents. The courts which have jurisdiction over banking and finance are the civil and commercial courts.

 4.3 Internal Audit Department

4.3.1 The department was established in 2007 at the request of the IMF in order to ensure good governance within CBM. This department is given autonomy and is attached directly to the governor’s office. There are 15 auditors in CBM: 6 of them senior auditors, 3 executives and the rest are from the Department of Internal Controls. The main job scope of the Internal Audit Department is the audit of internal affairs of CBM. Their work is guided by the annual audit plans drafted based on the risk profiles of the operations in CBM and as endorsed by the governor.

4.3.2 The difference between the Internal Audit and Internal Control Departments is that the former will check the policies and manuals prepared and established by internal control in terms of their adequacy to mitigate risks. Subsequently, Internal Audit will propose measures to enhance the policies if needed.

4.3.3 The Director prefers that an independent, separate law be introduced for Islamic banking as it will facilitate supervision of IBs by CBM. She suggests that a special department within CBM be established to specifically supervise IBs and Islamic banking activities.

 4.4 Department of Microfinance

4.4.1 The development of microfinance institutions in Mauritania is under the purview of the Ministry of Integration and Microfinance but CBM is given the task to supervise those institutions.

 The Government of Mauritania gives considerable attention to the development of microfinance institutions as these institutions contribute to the development of small and medium enterprises in and towards the country’s effort to eliminate poverty.

 In 1997 a trust fund was set up to boost microfinance institutions, with 500 investors contributing MRO 200, 000 each. CBM has asked banks to contribute to this fund.

4.4.2 In 2007 the law governing microfinance was revised and Mauritania currently recognizes three types of its institutions, i.e.:

1. Cooperatives institutions

 These institutions must have at least 500 members who shall provide MRO 2000 each as capital of the cooperative. These institutions only provide financial services to its members.

1. Microfinance institutions established as shareholding companies

 This type of institutions would need a minimum capital of 25 million MRO if it intends to provide lending services. If it aims to provide deposit services as well, it must be established with a minimum capital of 50 million MRO.

1. Microfinance institutions which are registered as charitable bodies and projects which provide financing services.

4.4.3 As of 2007, CBM had approved 69 microfinance institutions. As a measure to strengthen and refine the microfinance sector, the 2007 law imposed a requirement upon microfinance institutions which were established under the previous law to provide justification as to why their licenses should be renewed. Due to this requirement, licenses of a number of such institutions have been withdrawn.

4.4.4 Under the said law also, CBM is given power to license a group or network of microfinance institutions. Hence, currently there is a network of deposit and lending microfinance institutions involving agriculture and fishing. They are also exploring microfinance for livestock to boost the economy.

4.4.5 The CBM organ which is responsible for supervision of the microfinance institutions is the Inspection Department. The supervision is undertaken through examining reports and financial statistics submitted by the microfinance institutions as well as by ground inspection whereby CBM inspectors will conduct to the inspections on the premises of operations.

4.4.6 Some of the microfinance institutions have already been offering Islamic products based on Murabahah. The Director of the Microfinance Department suggested that it is important to regulate Islamic products which can be offered by the microfinance institutions by clarifying the products which can be offered, the structures of the products and the appropriate accounting standards to be used.

One of the obstacles to the offering of Islamic financial products by the microfinance institutions is the absence of a clear legal framework and guidelines for their supervision from CBM.

5 Views of Islamic Banks on the Implementation of Islamic banking

The following is information provided by Islamic banks in Mauritania as to their products and operations and the challenges they face as well as their views on the subject matter of this Project.

 **Views of Full-Fledged Islamic Banks**

 5.1 Banque Populaire De Mauritanie (BPM)

5.1.1 BPM was established as a financial leasing company in the year 1998 and converted into a full-fledged IB in 2012. Its target market is the small and medium enterprises.

5.1.2 BPM currently offers products based on Murabahah lil Aamir bi al Syira’ (Murabahah to the purchase orderer), Tawarruq, Ijarah and Mudharabah. Ijarah based financing accounts for 50% of the current total financing asset of the bank.

5.1.3 BPM has appointed an external Shariah board consisting of 3 scholars which is chaired by Sheikh Hasan Al-Dedew. BPM also has an internal Shariah reviewer who helps oversee the day-to-day operations of their Islamic banking activities.

5.1.4 BPM states that the main challenge faced by the bank is with regard to the taxation incurred for Murabahah. A Murabahah transaction involves two sale and purchase agreements and each agreement will be subjected to tax. However, BPM does not face taxation issues for Islamic products based on leasing since leasing is subjected to the TVA (ZICO: to confirm if this is “value-added tax”). Upon a change of name, when the asset is eventually transferred to the customer, the tax for the transfer will be paid by the customer.

5.1.5 BPM entered into a technical partnership with Zaytuna Bank in Tunisia through which BPM obtains sample documentation, manuals and procedures with which to guide their own internal operations.

5.1.6 BPM views that the absence of clear legal provisions and guidelines for Islamic banking poses a challenge to the industry. Fortunately, the technical assistance BPM receives from Zaituna Bank enables it to establish its own internal framework and procedures.

5.1.7 BPM highlights that one of the problems they face is with regard to liquidity management as there is no mechanism to which they could channel their surplus and from which they could access funds in a deficit situation.

5.2 Banque Al Muamelat As Sahiha (BMS)

5.2.1 BMS offers a wide range of products based on Mudarabah, Bay’ Salam, Murabahah, Musharakah as well as Murabahah ‘Asiyyah. BMS also cooperates with a telecommunications service provider to offer a personal financing product. It is estimated that 5 billion MRO has been financed based on Murabahah, 1.5 billion MRO based on Mudharabah and Musharakah, and 2 billion MRO based on Bay’ Salam.

5.2.2 The BMS Shariah board is appointed by the general assembly of shareholders. The Shariah board meets at least twice a year and whenever there is a need to hold a meeting.

 Day-to-day Shariah compliance is monitored and ensured by a risk evaluation department which reports to the Risk Committee headed by the Risk Director. The operations will also be audited by the Shariah advisor who is in charge of Shariah compliance. Guidelines and manuals for Islamic products are internally developed based on the AAOIFI standards. However, BMS does not follow accounting standards of AAOIFI; instead, BMS follows the IFRS standards as required by CBM.

5.2.3 In terms of the legal framework, BMS pointed out that the licensing letter from CBM did not make any mention of the fact that it is an Islamic bank and any condition or requirement that it ought to implement in connection with an Islamic operation; in fact it requested CBM to state so in its licensing letter.

 BMS prefers to have a separate legislation specific for IBs rather than apply the same ordinance to them. They view that such a measure will lead to a law contains provisions that fits IBs, minimizes conflicts in the law and gives the right perception to the public.

5.2.4 BMS raised the problems that could arise due to the difference of opinion on Shariah issues and the local fuqaha’s lack of exposure to Islamic banking operations. For example, their Shariah board’s stand on wa’d is more strict than that of the Shariah boards of the other banks. As a result, they face difficulties in structuring some products compared to their rival banks.

 As such, BMS prefers that there be a Shariah board at the national level with qualified experts to resolve differences in Shariah opinion that could be found among the Shariah boards of banks in Mauritania, and provide greater Shariah certainty in the industry.

5.2.5 BMS also raises the issue with regard to the higher taxation faced by IBs compared to conventional banks especially with products based on leasing and tax to be paid on real estate and land taken as collateral.

5.2.6 They have initiated discussions with other banks as to mutual efforts that could be undertaken to alleviate their problem in the lack of liquidity management instruments in the industry, but their proposals have yet to be implemented.

 5.3 Mauritanienne Islamique Banque (MAURISBANK)

5.3.1 MAURISBANK was licensed in 2012 at the same time with BMS and BPM. MAURISBANK has internal and external Shariah supervision: while the internal Shariah committee is in charge of Shariah review, the external Shariah committee is, among others, in charge of product approval. The external Shariah committee meets twice a year.

5.3.2 In terms of Shariah supervision of IBs, MAURISBANK proposes that there be established at CBM level a Shariah advisory body, in addition to the Shariah board at banks level.

5.3.3 MAURISBANK also raised similar issues to those highlighted above by the other IBs. In addition, MAURISBANK views that financing based on Mudarabah and Musyarakah should be treated differently in terms of statutory reserve requirements. This is because Mudarabah and Musyarakah are equity-based products for which the bank is not obliged to guarantee the return of capital. While accepting that Murabahah products shall be subjected to the statutory reserve rule, MAURISBANK views that Mudarabah and Musharakah should not be so subjected. MAURISBANK also highlighted the lack of Islamic capital market instruments in Mauritania.

 5.4 Banque Islamique de Mauritanie (BIM)

5.4.1 BIM was licensed as a bank in 2007 but only began actual operations in 2011, with ICD as its major shareholder.

5.4.2 To ensure Shariah compliance, BIM is advised by a centralized Shariah board at the ICD level. BIM has established an internal unit which undertakes Shariah review of its operations. Product documentation is also vetted and endorsed by the ICD Shariah board.

5.4.3 BIM is licensed under Ordinance 2007-20 which generally allow banks to operate both conventional and Islamic banking and does not differentiate between them. In BIM’s view, this state of the legal framework has a negative impact on IBs and the Islamic banking industry as it results in the public perception that there is no difference between IBs and conventional banks.

5.4.4 BIM views that IBs in Mauritania need a law which differentiates IBs from conventional banks, provides clarity and direction on the legal framework for Islamic banking and which regulates Islamic banks appropriately.

 A specific legal framework for Islamic banking will give:

(i) players the necessary information, enabling them to make an informed decision on whether they would like to offer Islamic products and ready to comply with its requirements;

(ii) the public confidence in Islamic banking and enable them to make their decisions whether to subscribe to Islamic or conventional banking products;

(iii) CBM the power to take action on banks which contravene the regulations and breach Shariah principles for example by applying conventional practices in their Islamic banking operations.

5.4.5 BIM prefers a separate law for Islamic banking as it involves principles, references, responsibilities and accountability which are different from (and in fact directly contradict) conventional banking and need to be specifically set out instead of being commingled in the same law. A separate law will also prevent negative public perception within their small Muslim community as to the adequacy of the legal framework for Islamic banking and be more practical in particular if there is any need to cater for a matter which is specific to Islamic banking only.

5.4.6 BIM considers liquidity management as a major problem for the industry.

BIM currently regulates their Islamic operations based on practices of the Islamic Development Bank. However, due to the lack of clarity in the legal framework it is uncertain if these practices are acceptable to CBM as the regulator. .

5.4.7 95% - 98% of BIM’s financings are based on Murabahah due to its profitability and minimum risk profile. BIM views that the existence of appropriate regulation and framework from CBM on other Shariah principles such as Salam, Istisna’ and Ijarah will encourage IBs to diversify their products.

 **Views of Banks which Operate Islamic Windows**

 5.5 Banque Al Wava Mauritanienne Islamique (BAMIS)

5.5.1 BAMIS offers a wide range of products based on Murabahah, Mudharabah, Musharakah Mutanaqisah for the acquisition of assets and equipments, and a product based on a combination of Murabahah, Ijarah and Musharakah for importing rice. However, most of the products offered were based on Murabahah as this structure is closest to what is practiced by conventional banks.

5.5.2 BAMIS has successfully arranged Mudarabah venturess with fishermen whereby the customers use the Mudarabah capital provided by the bank to purchase fishand arrange for its cleaning, processing and refrigeration of the fish before selling the end products. The profits from the Mudharabah ventures would be divided between the customer and BAMIS in accordance with the ratio agreed upfront. Nonetheless, BAMIS emphasizes that Mudarabah transactions would require a trustworthy customers in order to be successful.

5.5.3 To ensure Shariah compliance, BAMIS established a Shariah board comprising of two Mauritanian scholars, appointed a Shariah officer and sets out the process flows and manuals to be followed by personnel who execute the Islamic transactions. They have an auditor general but have yet to implement Shariah audit.

5.5.4 BAMIS prefers the option of amending the existing law only to embed the necessary provisions for authorizing Islamic banking in Mauritania and grant CBM the authority to regulate the Islamic banking operations. Most banks are already offering Islamic products even though they do not refer to themselves as Islamic banks.

 BAMIS views that there is no issue of public perception arising if the same Ordinance is used to govern Islamic banks as in general customers are not concerned with the legal framework; they are only concerned to know if the products are Shariah compliant or otherwise.

 The existing Ordinance should be amended to incorporate the required details to supervise Islamic banking. The law now is too general and there is no supervision of Islamic banks by CBM.

5.5.5 BAMIS said it previously faced problems with regard to the taxation that arose from Murabahah transactions. However, the problem has already been resolved by the amendments made in the Finance Law \* which provided that tax will only be charged on the profits realized by the bank.

5.5.6 BAMIS states that the major problem affecting Islamic banking is the lack of any guideline from CBM on Islamic banking products and permitted structures for products. For example, CBM regarded Mudharabah and Musharakah as ordinary types of partnership and therefore it does not allow banks to provide more than 20% of their total financing through Mudharabah and Musharakah transactions. In CBM’s view, a partnership is mainly participation in the capital of a company, not in a project.

5.5.7 BAMIS also proposed that CBM issues appropriate guidelines on late payment by defaulting customers that are in accordance with Shariah principles. BAMIS viewed that one of the reasons for the failure of IBs in 1980s was their failure to resolve the late payment issue.

 CBM also needs to introduce a database system for monitoring the credit worthiness of citizens and blacklisting errant customers, which will serve as guidance to banks during the credit evaluation process.

5.5.8 BAMIS was also concerned with the problem of liquidity management in IBs and proposed that CBM establishes a liquidity management system for the industry. In addition, BAMIS also raised their concern about accounting standards to be used by IBs.

5.6 Banque Mauritanienne pour le Commerce International (BMCI)

5.6.1 BMCI has been offering Islamic products side by side with conventional products. In 2013, BMCI introduced 2 branches which are dedicated for offering Islamic products only, while other branches continue to offer both Islamic and conventional products.

5.6.2 BMCI had established a Shariah committee which consisted of 3 Shariah scholars. The Shariah committee has been referred to on several Shariah issues including whether BMCI is allowed to market Islamic and conventional products at the same time. The Shariah Committee has allowed the practice on a temporary basis only, i.e. for a transitory period of 1-2 years.

5.6.3 BMCI has engaged consultants Ernst & Young to conduct a study on converting their conventional operations and internally regulating their Islamic banking operations. The study will be completed in May 2014. BMCI aims to ensure that the transactions are well structured and clear in terms of procedures, processes and conditions.

5.6.4 BMCI acknowledged that it was operating within the general legal framework which does not differentiate between conventional banks and IBs.

Currently BMCI do not face any problems in enforcing Islamic financial contracts in court. The court does not differentiate between a conventional or Islamic contract; if the court finds that there is a valid debt obligation on the customer, the contract will be enforced by the court.

In terms of the proposed legal reform, BMCI prefers that there be only one set of law governing both conventional banks and IBs in order to avoid confusion among banks which are currently offering both Islamic and conventional products.

5.6.5 BMCI proposes that a central Shariah board be established at the CBM level as reference for the industry and minimize the discrepancies in the Shariah positions taken by the various Shariah boards of IBs.

 5.7 Société Générale Mauritanie (SGM)

5.7.1 SGM explains that it has been in operation for 4 years. It has been offering Murabahah financing products to retail customers based on the acceptance and approval of their operations by CBM under the existing legal framework.

 SGM is currently considering expanding its Islamic business due to the increasing demand for Islamic banking products among its customers but has yet to decide on whether to establish a department for Islamic products only or to have a subsidiary Islamic bank.

5.7.2 SGM is also still studying the manner in which its Islamic operations ought to be carried out and the requisite measures to ensure Shariah compliance. They note that the measures include segregation between the deposit and financing activities of its Islamic and conventional operations and setting up a separate IT system for its Islamic operations.

5.7.3 Currently, SGM has yet to establish any specific Shariah governance procedure for its Islamic operations. However, SGM stated that it consulted prominent scholars on the Islamic products which it currently offers for their approval. Consultations with Shariah scholars were being done verbally only and were not formally documented.

5.7.4 SGM also raised the issue of the high taxation incurred by Islamic banking operations.

 5.8 Banque Nationale de Mauritanie (BNM)

5.8.1 BNM currently has 26 agencies and 14 of them have been converted to Islamic agencies. In addition, any new BNM agencies of BNM in the future will only open as an Islamic agency.

5.8.2 BNM used to have an internal Shariah board consisting of 3 scholars but its functioning is currently on hold. For the time being, to ensure Shariah compliance of the products, BNM consults with an external Shariah Board for IBs (هيئة شرعية لمصارف إسلامية) chaired by Sheikh Hasan Al-Dedew.

5.8.3 BNM proposes a clear legal framework for Islamic banking with explicit provisions (instead of ambiguity or generality). The absence of a clear legal framework for Islamic banking results in uncertainty in the operations of IBs. For example, in Murabahah financing, there is a possibility that the court will not recognize the obligation of the customer to pay the debt. This is because in Murabahah the bank will purchase the asset and then sell it to the customer. However, this flow of transactions will not appear in the account statement of the customer. Hence, the court may find that the customer bought the asset using his own money and nothing was financed by the bank. Unlike conventional lending, the flow of money or indebtedness of the customer will be reflected in the customer’s account as the money will be credited to his account.

5.8.4 BNM also raised the problem with regard to enforcement of securities/collateral which procedurally takes 2-3 years to be liquidated. While a protracted period for realization of security will pose no major problem for conventional banking as the interest is accruing during the period, this delay is prejudicial to IBs as they cannot charge interest in a similar manner. Consequently, the fund will be locked-in during the said period and cannot be utilized for other purposes. BNM proposes therefore that CBM introduces a mechanism to speed up the liquidation process to address this problem for IBs

5.8.5 As with the other IBs, BNM also highlights the problem they face due to double taxation from Islamic transactions.

 **5.9** Professional Association of Banks in Mauritania (Association des Professionnels des Banques de Mauritanie (APBM))

5.9.1 According to APBM, the key problems faced by IBs within the existing legal framework in Mauritania are as follows:

1. Absence of a legal and institutional framework for Islamic banking;
2. Absence of a tax system suitable for Islamic banking products;
3. Accounting and prudential standards imposed by CBM are not suitable for Islamic banking operations;
4. Lack of refinancing facilities for IBs;
5. Lack of supervision by CBM on Shariah aspects of IB operations;
6. Absence of suitable placement instruments for IBs;
7. Absence of regulations to ensure compliance with Shariah principles such as requirements for the establishment of a Shariah committee and specification of the Shariah committee’s powers and roles; and
8. Lack of regulations on bancassurance/ bancatakaful products.

 The paper prepared by APBM on these issues is as appended.

5.9.2 Since Mauritania is only a small country and legal framework, there is no need for a separate law on Islamic banking; it is adequate to amend the existing law accordingly.

5.9.3 APBM has set up a unit to receive and address complaints of IBs as well as provide training to IB personnel.

 APBM’s president viewed that bankers in Mauritania need to be given adequate training on Islamic banking. APBM has suitable facilities at which the training could be conducted.

The proposed legal reforms should take into account the fact that the banks’ role is as financial intermediaries and not traders.

APBM raises their concern over a lack of supervision from CBM over individuals with credit problems.

APBM views that ii is important to strengthen the operations of Islamic windows.

Part III

Recommendations for the Creation of an Enabling Environment for Islamic Banking in Mauritania

1 The Criteria of an Effective Legal Framework for Islamic Banking

1.1 A primary function of law and legal systems is the provision of transparency, certainty and predictability to market participants and the society at large.

1.2 Players in Islamic finance similarly require certainty and transparency in the industry. Considering that legal framework of most countries do not readily accommodate or even contradict Shariah principles, specific amendments and customization are usually needed to the existing laws applicable to banking, insurance and the capital market instruments to enable Islamic finance.

1.3 On a broad level, experts have concluded that an enabling environment that accommodates and facilitates the development of Islamic finance:

* + - Clear policy decisions and directions;
* Legislation that provides for the licensing & supervision of Islamic financial institutions;
* Mechanisms to ensure the Shariah-compliance system is comprehensive and rigorous;
* Neutral & facilitative taxation system that makes Shariah-compliant products at par & competitive with conventional ones;
* Supporting infrastructures such as accounting standards and human resource development & any other non-fiscal initiatives;
* Participation in global initiatives, such as the Islamic Financial Services Board (IFSB), which promotes international prudential standards and best practices for Islamic finance.

It is the above factors which have spurred Bahrain and Malaysia, jurisdictions regarded as leaders in the field by observers in terms of general industry growth, diversity of key players and range of services, product innovation and institutional performance.

1.4 An effective legal framework for Islamic finance has:

* an enabling environment that accommodates and facilitates the development of the industry. This includes legislation that provides for the licensing & supervision of Islamic financial institutions;
* a clear and efficient system that preserves enforceability of Islamic finance contracts; and
* a credible and reliable forum for settlement of legal disputes arising from Islamic finance transactions.

1.5 As can be seen above, countries which intend to introduce Islamic banking and finance in their jurisdictions have two main options:

 (a) to amend the existing law on banking and have provisions for IBF side by side with those for conventional banking; or

 (b) to issue a separate legislation for Islamic banking.

 There are advantages and disadvantages to each of these options that regulatory ought to consider in deciding the legal reform measure to be adopted for their legal framework. In addition, the features of the local legal framework and other socio-economic factors unique to the country concerned will need to be considered by the regulators in determining the nature of the legal measures to be proceeded with.

1.6 There is a need for CBM to establish a regulatory framework that is consistent with Islamic precepts, is able to meet internationally acceptable prudential requirements and provides a level playing field for both IBs and conventional banks.

2 Islamic Banking Legislation in Other Jurisdictions

 2.1 Malaysia

2.1.1 Malaysia has two separate banking laws, one is specific for conventional banking and one is for Islamic banks and Islamic banking windows established within conventional banks.

2.1.2 The Islamic Financial Services Act 2013 (IFSA) came into force on 30 June 2013 and sets out the regulatory framework for Malaysia’s Islamic financial sector with the principal regulatory objectives of promoting financial stability and compliance with Shariah.

The IFSA is an omnibus, comprehensive legislation, providing for the regulation and supervision of Islamic financial institutions, payment systems and other relevant entities and the oversight of the Islamic money market and Islamic foreign exchange market to promote financial stability and compliance with the Shariah and for related, consequential or incidental matters. Similar to the Financial Services Act 2013 for conventional financial services, IFSA equips the Bank with enhanced regulatory and supervisory powers.

2.1.3 The IFSA is a milestone in the Central Bank of Malaysia (“BNM”)‘s long term efforts to develop an effective legal framework for Islamic finance in Malaysia. It caters to the specificities of the Shariah contracts that form the foundation of Islamic finance products and instruments.

2.14 To promote Shariah compliance which is a fundamental requirement for the Islamic finance industry, IFSA imposes a duty on Islamic financial institutions to ensure compliance with Shariah at all times and empowers the Bank to issue standards on Shariah requirements. The BNM Shariah standards, issued with the BNM Syariah Advisory Council’s resolutions and advice, are the minimum requirements for institutions to adhere to ensure Shariah compliance. Part IV of the IFSA is dedicated to Shariah requirements and other specific provisions on Shariah compliance throughout the Act provide a comprehensive regulatory framework to ensure an end-to-end Shariah compliance by Islamic financial institutions.

Regulated persons comprise of Islamic banks, takaful operators, operators of payment systems, issuers of designated Islamic payment instruments, takaful brokers and Islamic financial advisors, as well as conventional institutions approved to carry on operations according to Shariah.[[7]](#footnote-7) The main acts repealed by this new law are the Islamic Banking Act 1983 and the Takaful Act 1984.

 2.2 Labuan

2.2.1 Labuan IBFC has successfully developed and incorporated Islamic finance into its conventional financial services industry. It is a pioneering jurisdiction in Islamic finance due to its issuance of the world’s first omnibus legislation, the Labuan Islamic Financial Services and Securities Act 2010. This law encompasses all aspects of Islamic financial services including banking, takaful, retakaful, sukuk issuance, wealth and fund management.

2.2.2 The omnibus law also has clarified, streamlined and consolidated all aspects of Islamic finance in Labuan, including requirements for Sharia-compliant financial services and streamlines procedures for all Sharia-related activities.

2.2.3 The Act has also introduced changes to the Sharia governance framework in Labuan IBFC by establishing a Sharia Supervisory Council to guide and as a reference for the Labuan Financial Services Authority and Labuan entities. All rulings made by the Shariah Supervisory Council are to be considered by the court in hearing Islamic financial disputes.

2.2.4 With an all-encompassing Act dedicated to Islamic finance, Labuan IBFC aims to provide a greater degree of comfort and certainty in Islamic financial services to its stakeholders, and and build a position as a leading Islamic financial centre.[[8]](#footnote-8)

 2.3 Morocco

2.3.1 In June 2014 the first house of Morocco's parliament approved unanimously a bill to allow the establishment of Islamic banks and enable private companies to issue sukuk on Wednesday after months of delays.

2.3.2 The bill 103-12 includes a whole section dedicated to Islamic banks, known as participative banks. The bill will allow foreign banks as well as local lenders to set up Islamic banks in Morocco.

 In his speech the minister clarified some ambiguities concerning the advantages that would be given to Islamic banks, their governance and their control framework. The participative banks would be treated on an equal footing with the existing banks by the Central Bank of Morrocco. The new banks must submit an annual report to the High Council of Ulamas and a financial report to the Central Bank.

 Conventional banks may provide the same instruments namely Murabahah, Musharakah and Mudarabah. Thereby, Islamic windows would be authorized for conventional banks that are not creating fully-fledged subsidiaries.

2.2.3 Proposals on a law for takaful have also submitted to the general-secretary-general of the government for approval, as a part of an effort to enable in Morocco a comprehensive Islamic financial system.

2.3.4 The Central Bank of Morocco has started to set up a central Shariah board with the country's body of Islamic scholars to oversee the Islamic finance sector. Seven scholars and financial experts have started training to become members of the board.[[9]](#footnote-9)

2.3.5 In 2010, Morocco began allowing conventional banks to offer a limited set of Islamic financial services but they failed to take off because of the high prices of Islamic products. Last year, Morocco approved legislation allowing the government to issue sovereign sukuk, although it has yet to do so.

 2.4 Kazakhstan

2.4.1 Kazakhstan has a population of more than 16.8 million people with at least 65% regarded as being nominally Muslim. However, it is a secular state with a generally good record on freedom of religion.

In 2011 Kazakhstan amended its Law of Kazakhstan on Banks and Banking Activities of 1995 to incorporate various provisions to enable and facilitate Islamic banking and finance. The amendments to this law and also other legislation relevant to Islamic banking and finance were drafted and passed in 2009.

2.4.2 To provide a level playing field, Kazakhstan has amended its Tax Code to provide for equal treatment of economically equivalent Islamic and conventional banking transactions. Adjustments have also been made to bankruptcy legislation, reflecting the unavailability of deposit insurance for Islamic banks and the special nature of investment deposits in Islamic banks. Amendments to accommodate Islamic finance were also made to the Civil Code, Laws on Investment Funds, Law on Licensing and the Law on State Registration of the Rights on Real Estate and Transactions concerning it.

 2.5 Tajikistan

2.5.1 Legislators and regulators in Tajikistan are currently working to pass a draft law to introduce Islamic banking there. It is anticipated that Islamic banking will attract and be more accessible to the Muslims who constitute 98% of the population.

2.5.2 The Central Bank of Tajikistan are proposing a separate law for Islamic banking, with the template being the Law on banking Activities with the additional provisions required for Islamic banking operations, in particular Shariah governance requirements. Detailed requirements could be imposed upon Islamic financial institutions via the guidelines and regulations from the Central Bank of Tajikistan.

2.5.3 They are also studying the exact tax implications of potential Islamic products and transactions in order to propose the requisite amendments to their tax laws that will prevent double taxation for Islamic banking there.

3 Recommendations for Islamic Banking Legislation in Mauritania

3.1 CBM has two options with respect to the legal reform to facilitate Islamic banking:

 (a) to amend the existing law on banking Ordinance 2007-020 and incorporate the appropriate provisions for regulating Islamic banking; or

 (b) to issue a new, separate law to regulate Islamic banking applicable solely to Islamic financial institutions.

3.2 According to CBM and some bankers, the advantage in CBM only amending the existing law on banking are as follows:

(a) there will be only one law on banking as reference for the industry, thereby minimizing confusion to industry players; and

(b) It is more expedient to amend the existing law rather than work on issuing a new separate one;

(c) CBM as the regulator will find it more efficacious to supervise the compliance to one set of law only.

3.3 We find that the opinion among the stakeholders in Mauritania is divided almost evenly between the two option outlined above.

 However, based on the input from these stakeholders and our observations on the legal experience and developments in other jurisdictions, we propose that CBM undertakes to issue a new, separate law specifically for Islamic banking.

 The advantages in proceeding with this measure are as follows. A separate law will:

(a) provide clarity to banks as the reference point containing only the specific requirements for establishing Islamic banking operations and products;

(b) be more methodical, simpler and easier to understand and use. It will, utilize terminologies with Shariah definitions in a consistent manner and avoid convolution;

(c) accommodate the evolution of Shariah views and industry practice through issuance of regulations and instructions under it from time to time;

(d) give confidence to the players and public as to the soundness of the legal framework and its supervision by CBM;

(e) indicates to the stakeholders and the public the seriousness of the regulatory authorities in developing and sustaining the Islamic banking industry.

3.4 As we have noted above, the issuance of a separate law will most probably not result in a protracted legal approval process compared to amending the existing law.

3.5 A separate law for Islamic banking may contain provisions for both full-fledged Islamic banks and Islamic banking windows operated by conventional banks.

CBM may issue detailed supervisory guidelines, regulations or instructions under the separate law from time to time to provide for specificities of Islamic banking operations.

3.6 We view there is also no socio-political concerns or impediments to proceeding with this legal option, as Mauritania is a Muslim-majority country and it is anticipated that there will be no objection from the industry players or other segments of society on a specific law just on Islamic banking.

3.7 Further, due to the fact that all the sectors of Islamic finance, namely Islamic banking, takaful and the Islamic capital market of Islamic financial services, require similar Shariah requirements, it is advisable that CBM considers one separate, omnibus law that caters to all sectors together rather than separate, piecemeal ones. Here the Islamic finance laws of Malaysia and the Labuan International Financial Centre will be relevant for study.

3.8 It is also imperative that CBM examines the tax implications of various Islamic banking transactions and propose the requisite legal measures to avoid double taxation so as to put Islamic banking at a level playing field with conventional banking.

Together with a review of the tax laws, it is advisable that CBM review other laws of Mauritania to assess if amendments would be needed in them to make them congruent with the content with the proposed new laws for Islamic banking.

3.9 CBM and ICD may be interested in laws on Islamic banking that as much as possible adheres to internationally accepted prudential standards. It is for the working group which will be working on the proposed new law to consider the extent to which the IFSB and AAOIFI standards could be incorporated and implemented in Mauritania. For example, the adoption of the AAOIFI Accounting standards is most probably best undertaken incrementally through capacity building before it is imposed through the legal framework.

3.10 As we have noted earlier in this report, we view that CBM may impose certain conditions and specific requirements upon granting the approval and licence to an Islamic banking operation under the existing framework of Ordinance 2007-020 (Article 13) and the guideline under it GR/2008.

 Since it may take time for the new legal measures to be passed, be it amending the existing law or issuing a separate law for Islamic banking, as a temporary measure, we propose that CBM stipulates the appropriate requirements in particular on Shariah governance, on Islamic banking operations to which it grants approval or licensing, in line with the recommendations of the international standards.

4 Mechanism for Establishment of a Unit to Supervise Islamic Banking Activities

4.1 It is advisable for CBM to establish a dedicated department to supervise Islamic banking institutions and activities, located appropriately within the organizational of CBM.

In relation to Islamic banks and their operations, the main principles governing banking supervision remain relevant but with some modifications required to cater for specificities in supervision of Islamic banking.

4.2 The most significant differentiating factor is in the level of funding from Investment Account Holders (IAH) who are the the investors-entrepreneurs of the bank. This relationship between IBs and IAHs, resulting from the Shariah contracts underlying it, means that the way Islamic banks operate differ from conventional banks:

* + Investors (IAH) bear fully the investment risk (while the bank is only exposed to negligence risk). IAH could therefore determine the investments/assets profile of the banks;
	+ Islamic banks have greater fiduciary duty to protect IAH’s investment.

Greater transparency is required from IBs especially in investments which involve profit-sharing with IBs’ depositors. This is to ensure adequate support for risk management, control system and market discipline. It is the role of supervisory authority to reinforce market discipline by requiring timely and relevant information disclosures.

|  |  |  |
| --- | --- | --- |
|  | **Islamic banks** | **Conventional banks** |
| **Source of Funds** | Investment from Investment Account Holders (IAH)*Relationship: Investor – Entrepreneur* | Deposits from customers*Relationship: Creditor - Debtor* |
| **Use of Funds** | Deposits from customers*Relationship: Creditor – Debtor* | Loan to Borrower*Relationship: Creditor - Debtor* |
| Financing and Trading of assets*Relationship: seller – purchaser* |

4.3 The uniqueness of the activities and risks of Islamic banks warrants special treatments in the following aspects:

1. **Risk management**: In addition to the traditional banking risk, supervisors must acknowledge the unique risks in Islamic banking e.g. asset price risk, rate of return risk, displaced commercial risk (DCR) and equity investment risk.

Supervisors must appreciate the risk transformation element and the additional aspects of operational risk in Islamic banking.

1. **Capital requirement**s: Capital must be adequate to cushion for all risk including risks unique to Islamic banking as identified through proper risk management process.
2. **Corporate governance**: This aspect involves establishing the role of Shariah Board in governance, Shariah compliance functions within management, the process and control to protect Investment Account Holder (IAH)’s rights and transparency of financial reporting in respect to investment accounts.
3. **Market discipline**: The need to spur market discipline among Islamic banks with regard to the appropriate and timely disclosure of information on risks and returns.
4. **Supervision**: Supervision of Islamic banks is very similar to conventional banks i.e. any supervisory approach/framework may be relevant and applicable to Islamic banking supervision.

However, Islamic banking supervisors must acknowledge the unique nature of Islamic banking and efforts must be put in place to improve the skill set of banking supervisors in understanding the uniqueness. Islamic banking does not require a different set of supervisors; central banks may utilize the same resources who possess enhanced competencies in understanding Islamic banking products and operations.

4.4 The new CBM department dedicated to the supervision of Islamic banks would need to cooperate with the department supervising conventional banking in relation to those conventional banks which operate Islamic banking windows.

4.5 Supervisory authorities also need to provide greater clarity on their roles as providers of Shariah compliant liquidity support in both normal and stressed times because IBs cannot resort to conventional lenders of last resort or discount windows.

4.6 CBM would need to formulate supervisory and regulatory guidelines on the above aspects to ensure the soundness of Islamic banking operations in Mauritania, based on the IFSB and AAOIFI standards.

5 Establishing the Terms of Reference for the Functioning of the Organ in CBM which Controls Shariah Compliance

5.1 The appropriate organ for CBM which controls or supervises matters related to Shariah compliance in relation to Islamic banking would be a Shariah Supervisory Board (“SSB”) comprising of Islamic finance experts to guide CBM and other stakeholders in Mauritania.

5.2 A Shariah governance framework refers to the laws of a jurisdiction which provides for Shariah governance requirements. In general, there are two main Shariah governance structures practiced by various Islamic finance jurisdictions:

(a) a centralized Shariah governance structure which establishes a Shariah board at the regulators’ level, resulting in a two-tier Shariah supervision, at CBM as well as Bank’s level; or

 (b) a decentralized Shariah governance structure which does not have Shariah board at the regulators’ level. This structure relies solely on the Shariah governance system established at the IBs level.

5.3 A centralized Shariah governance model is established in Malaysia, Bahrain, Pakistan, the United Arab Emirates, Kazakhstan, Indonesia and Bangladesh, with variations in each country in its implementation. Some of the jurisdictions recognize the regulator Shariah board as the final authority in determining Shariah issues in Islamic finance and all Shariah boards of the regulatee IBs are bound by the regulator Shariah board’s rulings, such as Malaysia. In contrast, some central Shariah boards do not act as the final Shariah authority but only advises the regulator or Islamic financial institutions which refer queries to them for guidance.

5.4 There are advantages in establishing an SSB at the CBM level.

 Countries which established regulator Shariah Boards as the final authority for Islamic finance in their jurisdictions have a standardized Shariah rulings and policies which minimizes discrepancies in practice between IBs.

 Even if the central Shariah board does not have final Shariah authority, the advice they dispense with will be of guidance to the regulatory authorities and the IBs and play a role in harmonising the Shariah opinions applied in the industry.

 Jurisdictions which do not have a strong tradition of Shariah scholarship and a pool of Shariah qualified graduates will benefit from a central Shariah board comprising of international Islamic finance experts who could guide the stakeholders and also train local scholars.

 At the same time, countries with decentralized Shariah boards allow more flexibility and innovation for IBs with minimal control from the regulator.

5.5 The procedure for appointment and termination of service of central Shariah Board members also differs among the jurisdictions. Their appointment and its termination could be by the sovereign, regulatory authorities such as the central bank, or a non-governmental organization such as the national Shariah council which comprises of the country’s ulamas.

5.6 Considering the recommendations in the AAOIFI and IFSB standards, contemporary practice in the set up and functioning of SSBs globally and the views of industry players in Mauritania, we recommend to CBM as follows:

5.6.1 **Authority**: An SSB which is of the same standing as the High Islamic Council and designated as the highest authority in Islamic finance in Mauritania, whose rulings constitute the minimum Shariah standards and are binding on the Shariah boards of IBs or at least a major source of reference for the industry.

5.6.2 **Independence**: In order to be effective, the SSB should independent. It is proposed that its members be appointed and removed by the President, upon the advice of and consultation with CBM.

5.6.3 **Composition**: at least 3 members with a Shariah and other relevant qualifications and backgrounds.

5.6.4 **Qualifications**: Islamic jurisprudence (Usul al-Fiqh), Islamic commercial law (Fiqh al-Muamalat) and/or doctorate degree in Islamic banking and finance from a reputable university.

5.6.5 **Experience**: At least 5 years’ experience in and exposure to the Islamic finance industry.

5.6.6 **Fit and proper criteria**:

A member of the SSB must possess financial and moral integrity. It should be required that he:

* has not been associated with any illegal activity especially relating to banking business;
* has not been in default of payment of dues owed to any financial institution and/or default in payment of any taxes in individual capacity or as proprietary concern;
* has not been convicted in any criminal offence or involved in financial impropriety and immoral activities;
* has not contravened any of the requirements and standards of regulatory system or the equivalent standards of requirements of any regulatory authorities;
* has not been barred for giving religious rulings by any religious institution/body.

5.6.7 **Duties and responsibilities**:

(a) to ascertain the Islamic law on any financial matter and issue a ruling upon reference made to it by CBM, a financial institution or any other party;

(b) to advise CBM on any Shariah issue relating to Islamic financial business, the activities or transactions of CBM;

(c) to provide advice to any Islamic financial institution or any other person; and

(d) such other functions as may be determined by the President.

5.6.8 **Procedure and conduct of meetings:**

The SSB shall determine its own procedures for conduct of meeting and Shariah decisionmaking.

5.7 There ought to be established also a Shariah secretariat within CBM that liaises with the SSB members and supports the SSB functioning.

Part IV

Conclusion

Despite the lack of a clear legal framework for Islamic finance in Mauritania, the industry has continued to gradually expand there in the last few years with the support from CBM. Bankers and customers alike have shown increasing interest in Islamic banking services. CBM and the banks agree that clarity in the laws and appropriate regulatory supervision is needed to improve the uptake of Islamic banking there and address the ongoing concerns of stakeholders.

The appropriate Islamic banking regulatory model the countries of sub-Saharan Africa should adopt - or indeed whether they should develop their own instead - is a matter that is still being studied. Malaysia is one possible model, given its success in Islamic finance.

Muslim-majority countries such as Mauritania could consider the Malaysian approach, due to the fact that a separate, independent law on Islamic banking would comprehensively provide for the specificities of Islamic products and transactions, greater clarity and minimize convolution, accommodate future developments in the industry through amendments or detailed guidelines without affecting the law for conventional banking and indicate the seriousness of CBM in a sound regulatory framework for Islamic banking.

The new legislative measures on Islamic banking should require a Shariah governance framework for Islamic banking operations whether full-fledged or windows, as a fundamental requirement of Islamic finance and the international standards. They should also address any double taxation issues and the need of the Islamic banks for an Islamic money market.

(Countries where religion is a contentious matter or that have a Muslim minority may want to follow the United Kingdom model, as it does not specifically take the “Shariah-centric” approach. The United Kingdom uses different terminology and does not provide specific tax clauses for Islamic finance as Malaysia does).

For Islamic banking to succeed in sub-Saharan African countries, in addition to suitable regulations, it is also important to assess the legal framework and undertake measures to accommodate other Islamic financial products such as Islamic insurance (‘takaful’) and Islamic capital market instruments, in particular sukuk. These three sectors – banking, takaful and the capital market-form an interconnection and are needed by banks and customers like. A wholistic, rather than piecemeal, review of the legal framework to enable all three sectors will benefit the Islamic finance industry in Mauritania in the long term.#

Appendix 1

Current Organizational Chart of the Directorate General of Banking and Financial Institutions Supervision

Appendix 2

Views of the Association of Banks Mauritania

1. Cite news agency, November 28, 2012; www.bcm.mr**.** [↑](#footnote-ref-1)
2. Reuters, January 2014. [↑](#footnote-ref-2)
3. PANA news agency, 18 April 2012. [↑](#footnote-ref-3)
4. Agence Nouachkott Information, 23 March 2013. [↑](#footnote-ref-4)
5. The sources for this section are *Globalex: Researching the Legal System and Laws of the Islamic Republic of Mauritania*, August 2009, by Zelezeck Nguimatsa Serge;*The Mutual Evaluation Report Of the Islamic Republic of Mauritania On Anti-Money Laundering and Combating Financing of Terrorism,* by the World Bank,14 November, 2006. [↑](#footnote-ref-5)
6. * This law repealed and replaced the Banking Code Law No. 95011 of 17 July 1995. [↑](#footnote-ref-6)
7. http://www.bnm.gov.my/index.php?ch=en\_legislation [↑](#footnote-ref-7)
8. http://www.labuanibfc.com/site/index.php/about-labuan-ibfc/islamic-financial-services#.U8\_nnLFqO0o [↑](#footnote-ref-8)
9. Reuters, 25 June 2014. [↑](#footnote-ref-9)