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Some Reflections on "Sharī ʿah Clauses" of Islamic Finance Contracts

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Abstract: *This study delves into resolving financial disputes on Sharī ʿah contract clauses involving parties from different jurisdictions. There is a lack of explicit references to Sharī ʿah law in the choice of law clauses in financial contracts. The study emphasizes the complexity of applying Sharī ʿah principles due to different interpretations. The jurisdictions lacking Sharī ʿah law expertise on Islamic finance disputes may set unfavorable precedents. The recommendations include strengthening local jurisdictions in Sharī ʿah-based legal systems by training judges and arbitrators. Encouraging Islamic Financial Institutions (IFIs) to adopt Sharī ʿah compliance procedures, collaboratively developing unified IB&F Law, offering mechanisms of comprehensive training of legal practitioners, promoting confidence in local courts, creating a collaboration platform, and developing a comprehensive handbook for adjudicators, etc. are recommended measures to enhance Sharī ʿah-based dispute resolution and maintain credibility, stability & growth of Islamic finance sector.*

Key Words: Contract, Sharī ʿah, Interest, Riba, Sharī ʿah Risk, Islamic finance, Choice of Law

Introduction

During the early stages of Islamic Finance, disputes regarding *Sharī ʿah* compliance were rare. The practice was limited to the particular states within a specific group of people, and there was limited need for legal enforcement of contractual arrangements in courts. As the Islamic finance sector expanded within a jurisdiction and gained a global presence, it transformed from a community-centric endeavor into an international business sphere. As this sector evolved, defaults led to litigations by banks to enforce and defend Islamic finance contracts. This phenomenon has now become an integral aspect of the global industry. This article aims to explore various facets, primarily focusing on the categories of contracts that Islamic banking uses. Then it will delve into the complexities of conflicting laws and regulations and provide a succinct overview of noteworthy litigations focusing on English Courts. This overview will shed light on the interpretation of these agreements in light of cases held in various courts throughout these jurisdictions. Following the analysis of these cases, this article will conclude by examining various factors and offering recommendations for solutions to these legal issues engulfing Islamic finance.

Types of Contracts in Islamic Finance

Various *Sharī ʿah* law contracts are employed in modern Islamic finance. Following a Supreme Court ruling on *Ribā* in Dec 1999, the State Bank of Pakistan (SBP) approved some specific Islamic financing modes, including *Mushārakah*, *Muḍārabah*, *Murābaḥah*, *Musāwamah*, Leasing, Salam, and *Istiṣnā ʿ*. In practice, however, contracts based on mainly six modes (*Murābaḥah*, *Ijārah*, *Mushārakah*, Diminishing *Mushārakah*, Salam, and Istiṣnā ʿ) are being used in the Islamic Banking Sector (SBP IB Bulletin. (2021).

In other jurisdictions, however, some other types of contracts e.g. *Ṣukūk* (Islamic bonds) and *Wakāla* (Al Alawi & Co., Advocates & Legal Consultants, 2023) are also practiced.

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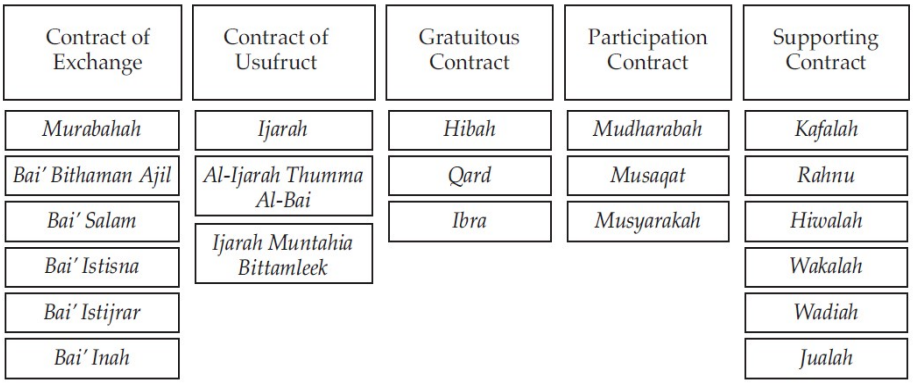
A list of the contract types used in Islamic Finance under *Sharīʿah*. (Figure: 1).

Figure 1

Major Contracts in Islamic Finance



Source: Rabia E Adawiah (2007)

In the following section, we are presenting case laws for examination, in which courts mainly from UK jurisdictions have tackled *Sharīʿah* contracts of Islamic finance.

Sharīʿah as a Legal Code in some Islamic Countries

While many Muslim countries consider *Sharīʿah* as a primary legislation source, it's often applicable mainly in family matters rather than commercial affairs (Sacarcelik, 2015). In several countries, *Sharīʿah* holds a prominent position within legal frameworks. It serves as either the primary legal code or the predominant source of law within their Constitutions e.g. Egypt, Syria, Kuwait, Bahrain, Yemen, UAE, Qatar, Iran, Sudan, Iraq, Kuwait, and Pakistan (Colón, Julio. C., 2011). Oman and KSA, despite not having formal written Constitutions, exclusively apply *Sharīʿah* as their Islamic legal system (Gemmell, A. J., 2006).

In certain jurisdictions, their civil codes, (for example Article 1 sub-article (2) of the Civil Code of Qatar, 2004) categorize *Sharīʿah* as an interpretative guideline (Al-Muhairi, B., 1996 & Ballantyne, W. (1985). Islamic finance and banking align with tenets of Islamic commerce voluntarily, encompassing principles like the prescription of *Ribā*, avoidance of *Maysir* (gambling), and *Gharar* (speculation), alongside the profit-and-loss sharing principle (Sacarcelik, 2015).

Litigations in the UK

In the United Kingdom, the Chancery Division is responsible for handling legal disputes involving various aspects such as business law, banking law, trusts law, tax appeals, copyright, trademarks, probate, and occasionally land law. This division also plays a significant role in financial regulatory matters and is central in competition law cases. According to Yaacob, H. (2011), cases concerning Islamic finance are also within the jurisdiction of the Chancery Division. The cases being examined in this context have mostly originated from the Chancery Division.

English Courts Courts in England have addressed numerous cases involving financing transactions, including *Murābaḥah*, the cost-plus model. Philip T. N. Koh (2007) compiled cases involving IF dealt with by English and Malaysian courts. The historical record of Cases indicates that certain Western and USA courts have partially interpreted specific provisions of the Sharīʿah Contracts that were brought up in court. During the judicial review of the Shariah contracts, judges have occasionally transcended their limitations imposed by the constitution, reading legislation that has its roots in religion. In numerous instances, these specialized Sharīʿah courts function outside the bounds of other nations' existing legal systems. On occasion, a judge in a Sharīʿah court has forgiven or categorized an 'interest' amount as Ribā (usury). It's worth noting that comprehensive information about such legal cases and their outcomes may not always be readily accessible, as highlighted by Abdul Rahman, Y. (2010).

According to Abdul Rahman, Y. (2010), several instances of court cases related to Islamic banking emerged in the United Kingdom, often presided over by judges who might not specialize in *Sharīʿah* law. Some of these cases were resolved outside of the formal legal system, with their specifics potentially remaining undisclosed.

Symphony Gems Case

In 2002, the first instance occurred when a Western court issued a ruling about a *Sharīʿah* contract. This case, titled Symphony Gems N.V., involved Symphony's pursuit of adding precious stones/gems to its inventory. To achieve this, Symphony engaged in a *Murābaḥah* agreement with the Islamic Invest. Co. of the Gulf Ltd (Registered in Bahamas).

Under this agreement, the supplier was to be located by Symphony, while Islamic Invest Co of the Gulf Ltd would purchase the stones/ gems from the supplier to be later sold to Symphony at a certain markup amount, payable in installments. The supplies were to be delivered directly to Symphony. According to *Sharīʿah* law concerning *Murābaḥah* [AAOIFI Standard No. 8(3)], actual or constructive possession of the deliveries was to be taken by the Islamic Investment before passing on to Symphony.

In this instance, given that Symphony received the package straight, it is inferred, in this case, that Islamic Invest did not assume any risk linked to the transaction. The Symphony was obligated to clear costs, supported by two guaranteeing parties, irrespective of the delivery of the stones or diamonds, regardless of any possible flaws, losses, or breaches (Moghul & Ahmed, 2003). The agreement included a provision indicating the choice of English law to govern the contract.

On the demand of Symphony, Islamic Investment ordered for purchase of diamonds, but delivery could not be made by the supplier. Symphony withheld the required payments for the transaction, prompting Islamic Investment to file a lawsuit against Symphony using a 'summary judgment' (a judgment requested because the accused lacked a plausible defense). Symphony argued that the agreement was a sale-purchase contract, and its non-delivery constituted a breach, thus relieving it of the obligation to pay. Symphony further contended that since a portion of the deal was made in Saudi Arabia, this type of contract was prohibited by law. Symphony claimed that the agreement was beyond Islamic Investment's authorized scope, rendering it unenforceable, as the transaction violated *Sharīʿah* principles. Islamic Investment's plea for liquidated damages was rejected because it would essentially be claiming 'interest'. The court dismissed Symphony's arguments, ruling that as per the agreement, payments were not contingent on delivery. The agreement couldn't be rendered unenforceable due to the principle of illegality, as the connection to Saudi Arabia wasn't substantial enough. Furthermore, the court determined that the Bahamas, the country where Islamic Investment was founded, did not have any regulations that prohibited the agreement. Even if the agreement fell beyond the outlined objectives of Islamic Investment, it wasn't void from the outset. According to the judge, a business that was functioning under Bahamian law had filed the claim in an English court. Therefore, granting remedies wouldn't be governed by *Sharīʿah* laws. As a result, the court didn't delve into examining the validity of the agreement as a *Murābaḥah* contract.

Shamil (Islamic) Bank Case

In Shamil's (Islamic) Bank of Bahrain v. Beximco Pharmaceuticals of Bangladesh, the defendant failed to repay a loan acquired through a *Murābaḥah* agreement. Shamil Bank, seeking the jurisdiction of an English court, got a decree in his favor. However, the defendant (Beximco), contested the ruling in the appellate court. The contract provided that subject to Sharīʿah canons, English law shall govern this Agreement. Beximco contended the contract had to abide by Sharīʿah and English law. and its provisions should apply only if they are valid under both legal systems. Moreover, Beximco claimed that in essence, the cost-plus (Murābaḥah) agreement was an interest-based financing scheme under a cover. Given that the agreements about Ijārah and Murābaḥah were in contradiction to the principles of Sharīʿah, Beximco contended that they were unenforceable.

Writing judgment for the full bench, the LJ Potter referred to the Rome Convention, 1980, for deciding which, English or *Sharīʿah* law is to prevail. Article 3 sub-article (1) states that the law governing a contract shall be at the will of the parties. LJ Potter ruled that the law meant national law, not generic law that applied to all states or countries, like the Sharīʿah, or the common canons of law on commerce, lex mercatoria. Mentioning *Sharīʿah,* the court observed, was intended to signify that the bank conducted its business by Islamic principles, rather than overriding the application of English law.

While concluding, the judge drew comparisons with expressions like the choice of laws of different countries [Art. 1 sub-article (1)] and choice of foreign law [Article 3(3)]. The court interpreted that such words imply support for the Convention's encouragement for identifying a nation's law alone, as opposed to a

non-national law like Sharī ʿah. As a result, the court maintained that English law would apply to this transaction.

Rome I Regulation 2009 in the UK

Abdul Rahman, in April 2019, contends that the English Court's stance in the Beximco decision lost its impact following the replacement of the Rome Convention due to the Rome I Regulation in the United Kingdom (UK). He claims that Sharī ʿah can regulate a transaction under the 'Rome I Regulation'. He uses the Preamble to the Regulation and Article 3(1) to bolster his claim: The statement a contract is subject to the law that the parties select, is retained in the updated Article 3(1) of the Rome I Regulation, reflecting the language found in the Rome Convention. But in other areas, the Regulation makes substantial changes, enabling the application of non-national law as a contract's controlling law. The choice between the laws of different countries, which appeared in Rome Convention Article 1(1) stands omitted. The Rome I Regulation's Article 1(1) now states that it shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.

The goal to permit the use of non-state laws in agreements is reflected in the rewording of Art. 3(1). Preamble 13 of the Regulation clarifies any confusion regarding whether conflicts involving non-national law are included in the definition of conflict of laws in Art. 1(1) of the Rome I Regulations which does not preclude parties from incorporating concerning their contract a non-state body of law or an international convention. This confirms that Rome I Regulations allow the parties to select non-national law for their agreements, making Sharī ʿah the applicable law. for contracts enforceable by English courts.

Abdul Rahman A (Apr 2019) also contends that the Beximco Case's viewpoint is exclusive to judicial proceedings and does not extend to arbitration. The English Arbitration Act of 1996, Section 46(1)(b), allows Sharī ʿah to be used as the applicable law in arbitration-related matters.

The ruling in Musawi v. R E Int'l Ltd case in which litigants consented to choose a judge conversant with Islam as an arbitrator, supports this claim. through an arbitration agreement. However the arbitrator's decision was not respected by the defendant. It was decided to grant the claimant's main request to have the arbitration award implemented. The claim was rejected by the court that contracts made before the enforcement of the law of the Contracts were dealt with under *Sharī ʿah*, ultimately concluding that English law applied to all of the agreements in the case.

Avoiding Litigations: "Liberation from Sharī ʿah Defence" Clauses

In light of the judgments rendered by English courts, the IB industry has actively resorted to reducing litigation. This has led to a pressing need to address the ambiguity caused by disparate courts in different jurisdictions and reduce the hazards connected to Sharī ʿah that are particular to legal documents are necessary. Consequently, the practice of incorporating " Liberation from Sharī ʿah Defence " clauses has emerged in agreements made by Islamic Banking Establishments. As cited by Abdul-Rahman, Y. (2010), numerous Islamic banks and IFIs have revised their Islamic contracts to include specific clauses or statements aimed at avoiding potential *Sharī ʿah*-related issues. Here are some illustrative examples:

This Agreement shall be governed by .... laws of the State of Malaysia not being Islamic Law (*Sharī ʿah*) and the parties submit to .... Courts (not being the Sharī ʿah Courts or any Courts implementing Islamic law or *Sharī ʿah*) .

This is a finance contract and in case it is brought to court it will be handled as a regular interest-bearing financial transaction.

The provision on law choice hardly means Sharī ʿah canons; in Islamic agreements, English law is still a dominant option of law (Bälz, 2008).

Investment Dar Case – "Lawyer's Construct"

Kuwaiti banking entity, the Investment Dar, contracted an agreement of *Wakālah* (Agency) with Blom Development Bank SAL, a Lebanese Co. The agreement involved Investment Dar investing capital on behalf of Blom with an agreed-upon guaranteed rate of return ("anticipated profit"), irrespective of the investment's actual performance. As investments remained unsuccessful, Investment Dar was unable to fulfill its payment obligations.

Blom filed a lawsuit against Investment Dar, leading to a summary judgment in favor of Blom in Jul 09. Investment Dar appealed the judgment before the High Court of England, contesting repayment of both, capital as well as the anticipated profit. Investment Dar argued that Art 5 of its MoA prohibits indulgence in non-*Sharī ʿah*-compliant businesses:

Sharia compliance will be a prerequisite for the company's establishment." The firm must not be permitted to engage in any usurious or non-Sharia-compliant operations, either directly or indirectly, by any of the objectives.

The *Wakālah* Agreement between them was *Sharīʿah* non-compliant, allegedly exceeding Investment Dar's corporate authority. Investment Dar contended that a guaranteed rate of return equated to *Ribā* (usury), thus rendering the *Wakālah* agreement *ultra vires* and unbinding. The section on governing law in the *Wakālah* arrangement specified the application of English law and included a condition that Investment Dar would utilize the money solely in Sharīʿah-compliant ventures.

In the summary judgment stage, Investment Dar's claim of *ultra vires* was upheld, although the judge expressed reservations about this argument. The judgment ordered the payment of the Capital Sum to Blom but not the Anticipated Profit.

Investment Dar challenged this decision, leading to the choice to move on with a trial by the court. The court disallowed the stance that the contracts were "disguised loans" in violation of Sharīʿah guidelines because it only applied English law by the controlling law provision.

Typically, Contract law is affected by selecting the English law of the UK instead of English law in its totality. Moreover, English law recognizes a foreign company's ability to be regulated by its home country's laws. It's implied that this doesn't mitigate the risk of the contract being challenged under the law of its incorporation, potentially rendering the contract *ultra vires* and void.

As a result, Godden, M., & Miller, N. D. (2010) suggest the following best practices for ensuring choice of law clauses in *Sharīʿah* transactions:

- Including recitals, assurances, and guarantees on the satisfaction of parties and how well agreements are Sharīʿah compliant.
- Inserting a clause as to agreement by parties on non-challenging enforceability of agreement in the future due to a failure to adhere to the principles of Sharīʿah. The goal here is to create an "estoppel" for English law applications.
- Utilizing the applicable law, a provision that just names English law as the appropriate legal framework for interpreting this contract (without explicit reference to *Sharīʿah*).

Godden, M., & Miller, N. D. (2010) further conclude that from the court's finding the argument presented by Dar was an arguable defense, that ought not to be misconstrued to indicate that the court's belief that Dar would prevail at litigation. The court regarded the argument put forth by Dar's lawyer as a "lawyer's construct" lacking substantial basis, given that the deal had received explicit endorsement from Dar's Sharīʿah committee and was further confirmed in the Master *Wakālah* Agreement.

Awami Hajj Trust Case

The Ministry of Religious Affairs of Pakistan, besides other functions, oversees various matters concerning Pakistani *Hujjaj*. In 1994, the Pakistani Government established the Awami Hajj Trust to gather deposits from Pakistanis desiring to go for Hajj pilgrimage in the future. These funds were intended investments in *Sharīʿah*-compliant modes to assist Pakistani Hujjaj in covering their Hajj-related expenses.

An agreement, including arbitration terms, was reached with Dallah, a Saudi company, concerning accommodation arrangements for Pakistani pilgrims in Makkah. The arbitration provision of the contract provided that disputes/ differences between the parties shall be arbitrated by 3 arbitrators under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris.

Meanwhile, the Pakistani government changed, and negotiations between the parties halted. Dallah alleged that due to the government's breach of the agreement, it chose to pursue arbitration in Paris as specified in the contract. Dallah sought damages due to the Pakistani government's breach of the agreement. The arbitrators at ICC held the Pakistani government accountable for the agreement breach and deemed its liability to compensate Dallah company for the damages.

In 2006, Dallah sought enforcement of the arbitral award, which was granted by the English High Court. The French legislation that governed the jurisdiction where the ICC verdict was issued rendered the arbitration agreement between the parties invalid, according to the Pakistani government's argument. After considering the matter, the High Court changed its mind and decided not to support the implementation of the arbitral ruling. This reversal was carried out by Section 103(2)(c) of the UK Arbitration Act 1996. Due to the lack of a legally enforceable arbitration agreement between the parties, as mandated by the jurisdiction where the decision was rendered, the execution of the verdict was denied. (French law).

In its appeal, Dallah Company primarily contended that the Act's Section 103(2) imposed limited authority to challenge jurisdictional ruling issued by the tribunal. The execution of an arbitral ruling rendered by the International Chamber of Commerce (ICC) in Paris was the main matter under discussion. Based on Section 103 clause (2)(b) of the Act, the Appeals Court denied

the company's petition to enforce the verdict, mentioning the following points:

- The Appeals Court upheld the High Court's view that when issuing an enforcement order, the court could conduct a comprehensive review of an arbitral decision. This included reevaluating evidence related to factual matters and questions concerning foreign law.
- The court affirmed the application of French law by the High Court to determine that the arbitration agreement had no binding effect on the Government of Pakistan (GoP).
- The Appeals Court declined enforcing the award, while exercising discretion granted by the term "may" in Article V sub Article (1) of the New York Convention of 1958. This discretion was not exercised since a binding arbitration agreement was deemed absent. The court indicated that such discretion could be exercised under different circumstances.
- The Appeals Court addressed the fact that the group's earlier statement, made by its solicitors, did not prevent it from resisting award enforcement in the English High Court.

In 2010, The appeal was likewise denied by Supreme Court in the UK noting that the GOP wasn't a party to the impugned agreement. The Supreme Court emphasised that an arbitral tribunal can only have jurisdiction if both parties agree to it The tribunal is not permitted to establish jurisdiction without the parties' consent. The question of whether consent exists falls under the jurisdiction of ordinary courts, whether it be in the tribunal's nation or in another nation where the execution of the ruling is being pursued. The courts in these countries have the authority, and indeed the obligation, to review the issue of jurisdiction in arbitral matters.

American International Group (AIG) Case

Islamic Finance stakeholders might have concerns regarding the potential conflict with the 1st Amendment of the US Constitution, enacted in 1791. In addition to guaranteeing freedoms of speech and the press, this amendment forbids the state from endorsing any particular religion.

Trumbull, C. P. (2006 at p. 615) asserts that it implies that the freedom granted by the 1st Amendment applies universally, thus any endorsement of a particular religion could lead to objections. These objections are indeed occurring in the USA.

Colón, Julio. C. (2011) has mentioned that Before the US Treasury Department acquired a majority interest in AIG during the 2008 financial crunch, several AIG affiliates had started offering Islamic Financing modes. Thomas More Law Centre (a Christian Institute) resisted being appropriated of Federal Funds by the US Treasury Department for AIG, arguing that they are utilized to fund Sharīʿah Compliant Financing (SCF), a practice that violates the Constitution and demonstrates animosity against non-Muslims such as Christians and Jews. On the merits, the district court issued a summary judgment in the defendant's favor. The defendant's request was denied by the Michigan court.

Dana Gas PJSC v Dana Gas Sukuk Ltd and Ors

Dana Gas PJSC, a UAE-based energy Co. issued Islamic bonds, *Ṣukūk* (*Muḍārabah* based), in 2007 to raise capital for its operations. These Ṣukūk tradable in the Irish Stock Exchange were structured to comply with *Sharīʿah*, specifically avoiding the payment of Ribā. In 2017, Dana Gas announced that it believed the Ṣukūk to be *Sharīʿah* non-compliant and unlawful under UAE law. Dana Gas sought a declaration from the English High Court that the Ṣukūk was not valid or enforceable, effectively attempting to invalidate its own Ṣukūk.

The central issue was whether the Ṣukūk issued by Dana Gas was indeed *Sharīʿah* compliant and, subsequently, valid and enforceable. Another key question was whether the lawsuit may be heard in English courts and if the desired declarations could be granted. The High Court of Justice ruled on various aspects of the case in its judgment. The court found that the Ṣukūk were valid and enforceable under English law. It also declared that the attempt by Dana Gas to declare the Ṣukūk as *Sharīʿah* non-compliant under UAE law was not recognized, as the company's actions amounted to unlawfully challenging the validity of its contracts. Additionally, the court declared the matter to be within the jurisdiction of English courts. The case raised important Questions regarding the enforcement of IF instruments, the interpretation of Islamic law in a commercial context, and the role of the English courts in such matters. El Daouk, M. (2021) concludes However, another viewpoint that highlights the reality of the IF sector is that there aren't any defined documentation tools or procedures to maximize legal enforcement as well as transparency of Islamic financial commitments. This is what Leggat J.'s perspective illustrates.

Project Blue Ltd v Commissioners for HM's Rev and Customs

The case involved the sale of a high-value ex-military property known as the Chelsea Barracks site in

London in 2007. The appellant, Project Blue Ltd (PBL), acquired the site through a share purchase transaction. To acquire the necessary capital for property purchase, PBL obtained financing from Al Rayan Bank UK ('Al Rayan') under the Islamic mode of *Ijārah* arrangement. The question at the heart of the case was whether Stamp-Duty-Land Tax (SDLT) applied to this transaction. Under UK law, SDLT is typically levied on land transactions, including property acquisitions. However, the specific structure of the transaction in question raised the issue of whether the sale of shares in the company that owned the property would also attract SDLT.

PBL argued that the SDLT treatment of the transaction should be based on Islamic principles of finance, where the property was acquired through an Ijārah (lease) arrangement, rather than a traditional mortgage. The argument was that the SDLT should be calculated based on rental payments rather than the full property price. Her Majesty's Revenue and Customs (HMRC) contended that viewed payment of the SDLT on the property's full purchase price, as was the economic reality of the transaction. HMRC argued that the Ijārah was a financing mechanism and not a true lease.

The decision of the Supreme Court came in favor of the HMRC, and PBL was ordered to pay SDLT dues. The judge stated that the SDLT was payable on the full purchase price of the property. The court emphasized the economic substance of the transaction and the fact that the *Ijārah* arrangement was a financing tool rather than a genuine lease. The court's ruling had implications for the taxation of similar transactions involving Islamic finance structures.

This case highlighted the complexities that can arise when applying traditional legal frameworks to transactions involving structures like Islamic finance. It also underlined the need for legal systems to adapt and evolve to accommodate new financial instruments and their associated legal challenges.

Additionally, the Supreme Court ruled that PBL had not proven, either explicitly or implicitly, that it had entered the Ijārah for religious purposes, hence evaluation of the merits of PBL's discrimination complaint was not required. Even so, Islamic finance rules would not have governed the Ijārah at hand as a binding system of law, but rather as lex mercatoria. (Daouk, M., 2021)

Analysis of the Cases

Taking into account the information presented earlier, it is important to delve into various factors before arriving at conclusions and making recommendations. This analysis is aimed at providing a comprehensive understanding of the context and nuances involved in the subject matter. By considering these factors in-depth, a well-informed perspective can be developed, leading to more effective and relevant conclusions and suggestions. This approach ensures that the final judgments and recommendations are grounded in a thorough evaluation of the situation and its complexities, enhancing the overall quality and applicability of the proposed solutions.

The disputing parties in the cases were not from England. In the Shamil case, the parties belonged to Bangladesh & Bahrain, whereas the companies, Blom v. Dar, were established under Kuwait & Lebanese law. In the Dallah case, the parties hailed from Saudi Arabia and Pakistan. Why do these parties choose to use the English court's jurisdiction over the courts in their own countries? Were the courts in these countries incapable of adjudicating on issues, especially those related to *Sharīʿah* matters?

Sharīʿah as a choice in IF!

When it comes to resolving disputes stemming from *Sharīʿah* agreements, New York law is taken as the next common choice of law, after English law. English law has been regarded as the contract law, and it is the law of choice for controlling financial activities across international borders. Instances where contracts opt for *Sharīʿah* principles as the choice of law are rare (Bälz, K., 2008).

One possible reason could be because historically, English law has accommodated religious regulations and established a reputation of trustworthiness among Muslim-majority nations. As Yaacob, H. (2011) rightly noted the Charter of George II, which dates back to 1753, provides the foundation for Islamic law implementation in English courts. It highlights the historical acceptance of religious laws in English courts. In 1772, the expert testimony was specified for implementation of the Charter that Muslim clerics (Maulanas), as well as pandits, were able to come to court as jurist advisers and help the judge determine which specific rule applied as a result. (Fyzee, Asaf A A, 1963).

It is imperative to proactively address this issue by meticulously drafting IF contracts, which will serve a dual purpose: prevent disputes from arising and accurately specify the law that would govern.

Tackling 'Choice of Law' and 'Jurisdiction'

In transactions involving multiple jurisdictions, Islamic Financial Institutions (IFIs) often include clauses on the choice of law as well as jurisdiction in their agreements

mostly preferring courts of England or the USA. The track record of these foreign courts has shown a limited inclination to prioritize Islamic laws when resolving IFI disputes.

This situation underscores the need for the creation of a unified law for Islamic banks and finance that can be adopted and applied by countries playing significant roles in the Islamic Finance sector. Without a unified framework, there's a concern that adjudication and enforcement of disputes within the Islamic Finance sector may gradually shift to the jurisdiction of countries where judges and arbitrators possess little to no experience in Islamic laws. This scenario could set undesirable precedents for other courts to follow, posing serious challenges for the IF sector. To avoid such an outcome, establishing a unified legal framework becomes crucial to ensure consistency, fairness, and continued growth of the Islamic Finance sector.

'Mark-up' or 'Interest'

In the two cases before English courts (Islamic Investment Co v. Symphony Gems, 2002 and Beximco Ph v. Shamil Bank, 2004), arguments were presented that the "mark-up" in these contracts violated *Sharī'ah* law, essentially amounted to "interest". The courts in England also observed that no country recognizes *Sharī'ah* as State law. Moreover, Islamic scholars hold differing opinions on various contracts, which complicates the application of *Sharī'ah*. As a result, the English courts applying English law granted "interest charges" in these cases (Yaacob, 2009, p 134).

'Sharī'ah Risk'

The representations made by some parties/ lawyers in the *Sharī'ah* cases adjudicated by English Courts have exerted an adverse influence on Islamic Finance. This influence has been felt particularly in transactions involving Islamic Financial Institutions (IFIs), where parties are more cautious about the potential for *Sharī'ah*-related uncertainties. This phenomenon is referred to as "*Sharī'ah* Risk," encompassing the situation where a transaction might be deemed non-*Sharī'ah* compliant by a *Sharī'ah* advisor associated with one of the involved parties.

If the asserting party is an IFI, this risk of *Sharī'ah* non-compliance is magnified, resulting in what is commonly known as '*Sharī'ah* risk.' This risk doesn't merely impact one party; rather, it casts doubts on the overall credibility of the Islamic Finance sector. The presence of this risk undermines the confidence of potential investors in engaging in *Sharī'ah*-compliant transactions. The uncertainty surrounding the adherence to *Sharī'ah* principles has the potential to dissuade potential investors from participating in such transactions, thereby affecting the growth and stability of the entire sector.

Conclusion and Recommendation

1. Court Cases discussed herein before involved parties from non-English subjects; Bahrain, Bangladesh, Lebanon, Kuwait, Saudi Arabia & Pakistan. The choice of law clauses of their agreements seldom referred to *Sharī'ah* law. To address this and draft *Sharī'ah* contracts more carefully, the governing law must be specified accurately.
2. Certain legal counsels argued in Sharī'ah cases in such a way before English Courts which had a detrimental effect on the Islamic finance sector. This has led parties engaging with Islamic Financial Institutions (IFIs) to be concerned about Sharī'ah-related risks. In certain instances, the party's Sharī'ah advisor himself asserts Sharī'ah-non-compliance. When an IFI becomes the claiming party, it exacerbates the perceived 'Sharī'ah risk,' casting doubt on the overall reliability of the entire Islamic finance sector. Implementing transparent and standardized Sharī'ah compliance procedures could alleviate this risk.
3. There is a concern that the litigation of Islamic finance disputes might eventually be fixed before judges or arbitrators with limited to no experience in Sharī'ah law would make decisions. This could establish precedents for other courts to follow, potentially leading to outcomes that are detrimental and unwelcome in the Islamic finance sector. The extensive analysis of the cases and associated factors leads to several significant conclusions:
4. The application of *Sharī'ah* principles in financial matters is intricate, as evidenced by the English Courts' struggles. The divergent interpretations by Islamic scholars and the absence of a universal standard for *Sharī'ah* compliance contribute to the challenge.
5. The inconsistent application of *Sharī'ah* principles highlights the significance of a unified IB&F law. Such a structure may be developed collaboratively by countries with significant roles in the Islamic Finance sector, providing clarity and consistency.

Based on the conclusion the Recommendations are:

1. Countries with *Sharī'ah*-based legal systems should invest in enhancing the capabilities of their legal systems to strengthen local

jurisdictions and handle complex financial disputes. This includes specialized training for judges and arbitrators in *Sharī'ah* principles, fostering confidence in local adjudication.

2. IFIs are to be encouraged to adopt transparent and standardized *Sharī'ah* compliance procedures. Clear guidelines and certification mechanisms can alleviate concerns related to *Sharī'ah* Risk, bolstering investor trust.
3. IFI stakeholders are to collaboratively develop and adopt a "Unified Islamic Banking and Finance Law". This framework should be designed by legal experts, scholars, and industry practitioners to ensure consistency, clarity, and proper alignment with Islamic principles.
4. Training and education be provided to judges, arbitrators, and legal practitioners to promote expertise, and comprehend and apply *Sharī'ah* principles in financial transactions effectively. This can lead to more informed decisions and efficient dispute resolution. A special concise On-Job-Training may be devised for them while undergoing initial training as well as during refresher courses at respective judicial academies.
5. The confidence of parties in local courts' ability to handle complex financial disputes, including those involving *Sharī'ah* matters improved through concerted efforts. This would discourage the overreliance on foreign courts.
6. Engaging legal and financial experts, a platform for collaboration between legal experts, financial practitioners, and scholars be established to navigate the complex interplay of *Sharī'ah* and legal systems, which would result in more informed decisions and resolutions.
7. Stakeholders of IF are to work on a comprehensive "Handbook for Judges Arbitrators and Tribunal members etc. adjudicating upon matters involving interpretation of *Sharī'ah* on IF".
8. An autonomous Alternative Dispute Resolution institution be established to resolve disputes arising from Islamic finance contracts grounded in *Sharī'ah* Law.

To conclude, addressing complexities surrounding *Sharī'ah* based disputes and their resolution requires a multifaceted approach that prioritizes local jurisdiction development, standardized compliance, a unified legal framework, and expert engagement. Adopting these recommendations, the Islamic Finance sector can ensure credibility, stability, and continued growth while upholding the principles of *Sharī'ah*.

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