English Case Law on Islamic Finance: Interpretation and Application of *Shariah* Principles

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Abstract

The emergence of Islamic finance in the United Kingdom ('UK') has rendered it a remarkable alternative to conventional finance. The following paper studies how the English and Welsh courts interpret and apply *Shariah*-based Islamic finance principles under English law. The paper takes the view that Islamic finance arrangements and the *Shariah* principles that inspire them are capable of being conveyed through their conventional counterparts under English finance law, insofar as doing so does not contravene English law. The focal points enshrined under this paper are: [1] the means through which Islamic finance arrangements are interpreted and applied under English law; [2] the approaches undertaken to honour such Islamic finance principles without contravening English law; and [3] the approach taken when the courts are faced with a conflict of laws. Using legal analysis, this paper finds no one-fit-for-all method for the English and Welsh courts when dealing with Islamic finance cases. However, the unanimous principle is that Islamic finance arrangements will never be treated exceptionally to their conventional counterparts.

Keywords: *Islamic finance, English law, alternative finance arrangements, Islamic finance arrangements, ultra vires, lex mercatoria*

1. Introduction

Islamic finance has been rising as a feasible alternative form of finance to conventional finance in the UK. The Islamic Finance Services Industry currently embodies well over four hundred developed Islamic financial institutions, in addition to almost two-hundred conventional banks functioning within seventy-five countries (Zulkhibri et al., 2019). As the leading non-Muslim country for issuing *ṣukūk*, the UK was also the first to host stand-alone Islamic financial institutions in the European Union ('EU') (Abdul-Alim, 2013). Islamic finance can be described as a method to finance and commence financial activities under concepts that are grounded in and governed by *Shariah* (Alamad, 2017; 2019). The years 2003–2009 saw English finance law undergo a series of reformations to accommodate *alternative finance arrangements*—the corresponding terminology for Islamic finance arrangements under English law. Bearing that in mind, the key challenges regarding Islamic finance in the UK revolve around the extent to which *Shariah*-based principles are capable of being contractually conveyed and legally enforced without undermining well-established English law. Under English law, only can the law of a *nation* be the governing law of a contract. This poses challenges when dealing with Islamic finance arrangements because Islamic law alone—being a religious system of law—is not recognised in the UK as an applicable law of a nation.

Islamic finance arrangements are often unusual mixtures of financial devices that are tweaked and collectively activated to deliver a *Shariah*-compliant function—for example, *Islamic residential mortgage contracts* in England and Wales incorporate both a *legal charge* and *a sale and leaseback* to deliver the function of a conventional mortgage *in toto*. In an illustrious sense, Islamic finance arrangements, in their English law

form, are akin to a *mischwesen*[*]. This occasionally renders Islamic finance anomalous to those unaccustomed to it. Various English cases on Islamic finance have resulted in the contractual agreement prevailing as an ordinary English contract, irrespective of whether the commercial agreement's *Shariah* integrity was upheld or not. In doing so, the English and Welsh courts have separated the contractual element of the Islamic finance arrangement from its commercial one (Dewar, 2020). Parties to an Islamic finance arrangement are free to stipulate their preferred commercial elements—seldom will the courts interfere with those—however, *Shariah* principles cannot override English law.

In the eye of English law and by virtue of *retained EU law*[*], Islamic law (on its own) is a non-national system of law. It is deemed *incapable* of governing a contract, therefrom. Henceforward, the principal purpose of this paper is to gauge the degree to which a secular court will consider the *Shariah* principles of an Islamic finance arrangement under English law. This raises the primary research question of this paper: –

To what extent will the English and Welsh courts investigate the Islamic finance element of an alternative finance arrangement when dealing with Islamic finance cases?

To answer this question, three key research objectives must be satisfied: [1] to identify how principles of Islamic finance can be interpreted and applied under English law; [2] to identify how Islamic finance arrangements should be conveyed under an English commercial contract; and [3] to demonstrate how the English and Welsh courts resolve disputes that arise in Islamic finance cases. To achieve the first research objective, the paper must ponder the conditions that steer the English and Welsh courts to interpret and apply principles of Islamic finance. To achieve the second research objective, the paper will investigate the extent to which Islamic finance principles are capable of being upheld. To achieve the third research objective, the paper will investigate how the English and Welsh courts rule over matters requiring an interpretation and application of Islamic principles. This research is valuable for Islamic finance considering the years to come. Following Brexit, some might question whether the UK's Islamic finance sector will be affected. From a legal perspective, this paper affirms that Islamic finance will not be severely impacted due to English law's ability to adapt principles of Islamic finance within its legal framework. More importantly, this paper offers practical guidance to those who may find themselves using Islamic financial services in the UK.

2. Literature Review and Problem Statement

2.1. Islamic finance and English finance law

In England and Wales, finance law regulates and controls financial assurances, dealings, indemnities, and services (Hudson, 2013). English finance law is an area of English law subject to legal precedence and the continuous reformation of the *Finance Acts* and the UK's financial regulatory composition. The Financial Services and Markets Act 2000 and the Financial Services Act 2011 played a significant role in shaping contemporary English finance law (Tran and Roberts, 2013). More recently, the Financial Services Act 2012 defined most of the UK's current regulatory structure by amending existing legislation such as the Bank of England Act 1998. The Financial Conduct Authority ('FCA') and the Prudential Regulatory Authority ('PRA') are two prime regulatory bodies effecting the financial legal framework—both the joint-successors of the former Financial Services Authority ('FSA').[*] The FCA safeguards consumer protection laws by stimulating salubrious competition between different financial service providers, whilst the PRA regulates such financial institutions' conducts (Mallin, 2018). Thus, the FCA and PRA conjointly regulate Islamic financial activity and institutions. In addition to the FCA and PRA, the Financial Policy Committee ('FPC') is responsible for the macro-prudential monitoring of the UK's financial system's stability.

Islamic finance is affected by virtue of the Finance Act 2005, as modified by the Finance Act 2007—whereby Islamic finance arrangements are designated as *alternative finance arrangements*; these have been further developed under the Income Tax Act 2007, the Corporation Tax Act 2009, and the Finance Act 2009. Section

[*] A *mischwesen* is an unusual mixture of natural things, like the *Burāq*.

[*] Originally, between 1/4/1991 – 16/12/2009, the *Convention on the Law Applicable to Contractual Obligations* [1980] OJ C027/34 (the '*Rome Convention*') as enacted into English law by the *Contracts (Applicable Law) Act* 1990 applied. From 17/12/2009 – 31/12/2020, the *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)* [2008] OJ L177/109 ('*Rome I*') applied. From 1/1/2021, the *Rome Convention* and *Rome I* were enacted into English law as retained EU law under the *Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendments etc.) (EU Exit) Regulations* 2019 ('*EU Exit Regulations* 2019').

[*] The Financial Services Act 2016, sections 12–15, remerged the PRA into the Bank of England.

123 of the Finance Act 2009 highlighted and extended tax neutrality to *alternative finance investment bonds*—the corresponding term for *ṣukūk*. The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2010 effected equal treatment between *ṣukūk* and conventional bonds (Hudson, 2013). This can encompass credit risk assets as well (Khan et al., 2020). In April 2021, the Financial Services Act 2021 received Royal Assent, in what is seen as the first step, post-Brexit, in managing the UK's financial services' regulatory framework to maintain the UK's status as a financial hub. With that, there is the Finance Act 2021, which focuses on clamping down on tax avoidance. Section 115 and Schedule 23 of the Finance Act 2021 amended Part 4 of the Finance Act 2003[*] concerning relief from stamp duty land tax ('SDLT') for freeport tax sites, extending tax neutrality to Islamic-financed acquisitions of property within freeport tax sites. Thus, English finance law mandates impartial treatment between Islamic and conventional financing mediums.

All the aforesaid—concerning how English law treats Islamic finance—can be summarised through the FSA's famed sentence: *no obstacles, but no special favours* (Ainley et al., 2007; FSA, 2006). The general sentiment concerning how to process Islamic finance transactions in England and Wales is hinged upon conveying Islamic finance arrangements through standardised processes and documentation. Such preference has been implied under English law and expressed by legal practitioners. An example of such standardisation of documents is the *User's Guide to Islamic Finance Documents*, which is standard guidance over drafting *Shariah*-compliant documents (Ercanbrack, 2019). Thus, Islamic finance holds no special legal status under English law—but is rather treated equally to its conventional counterpart (Dewar and Hussain, 2018). The attempts to harmonise the execution of Islamic finance arrangements under English law—in addition to the standardisation aforenoted—reflect the *UK financial system*'s positive attributes, such as its flexibility, impartiality, and inclusivity.

2.2. Comparing English law to Islamic law

English law stems from a tradition expressed in action (Slapper, 2011). This means that English law, being a common law system, finds its principal legal sources from previous case rulings (or 'legal precedence'), statutory law, and until Brexit, EU law. International treaties do not effectuate under English law until or unless they are incorporated under English statutory law (*Blackburn v Attorney-General* [1971] 2 All ER 1380 [1382]). The application of English law is carried out through procedural and substantive law. Procedural law establishes the procedure through which lawsuits will proceed, whilst substantive law draws the lines through which the law will be construed, constructed, and ruled upon. The key feature of such a dynamic is that it eases the handling of cases in the event a foreign element is brought into the English and Welsh courts. An example of this ability is reflected by the Private International Law (Miscellaneous Provisions) Act 1995, section 14(3)(b) and by *Boys v Chaplin* [1971] AC 356.

The view towards procedural and substantive law under Islamic law is different, whereby both elements bear tantamount effect. The applicability of procedural law is similar amongst the *madhāheb*[*], yet there sometimes may be variations when adopting methodologies to deduct and rule Islamic laws—these are best described as 'a diversity within unity' (Kamali, 2017, p. 54). In theory, 350 to 550 *Qur'ānic* verses are considered legally relevant for formulating rules (Lange et al., 2021). Around 80 are legal verses in a narrow sense (Lowry et al., 2007; Hallaq, 1997). Research by Lange et al. (2021) highlights 2,954 *Qur'ānic* verses from which substantive Islamic law is traceable. This is interesting because it shows how procedural and substantive Islamic laws have a common *Qur'ānic* denominator. When carrying out Islamic jurisprudence, *fiqh* (jurisprudential interpretation) can aid the procedural and substantive constructions under Islamic law. For example, *ijtihād* (independent reasoning) is an interpretive means of *fiqh*, which is relied upon in harmonising Islamic law's primary sources with contemporary society (Shabbar, 2017).

The aforesaid is not exhaustive of Islamic law, let alone Islamic jurisprudence. The prime point here is that, unlike English law, where substantive and procedural laws are divisible, Islamic procedural law and substantive law are jointly entwined with the *Qur'ān* and *Sunnah*, whence they originate. Thus, Islamic law, whilst adaptable, is grounded in many firm and non-alterable *Qur'ānic* principles, unlike English law, which reflects parliamentarian legislation, the common law, and retained law. The overarching challenge when applying

[*] The 2003 Act was the first to waver double SDLT on some Islamic products.

[*] Plural of a *madhhab* (a 'school of thought'). Throughout Islamic history, *madhāheb* emerged, discontinued, and adapted different levels of progressiveness/conservativeness—for example see *Jarīrism*.

Islamic law in an English law setting comes from the various lights Islamic laws can be construed—especially where the *Qur'ān* and *Sunnah* are silent over the question at hand.

2.3. When can a conflict of law transpire; how is this solved?

Islamic law is a religious legal system primarily shaped by the *Qur'ān* and the *Sunnah*. It forms the foundation of legal systems in countries such as Saudi Arabia and Brunei. English law, on the other end, does not recognise religious law as an applicable legal system (Reed, 2014)—this does not mean that the English and Welsh courts are incapable of interpreting and applying Islamic law; it means that Islamic law is not seen as the national law of a country—meaning that it is incapable of being the governing law of an English contract. When it comes to the national law of a country based on *Shariah*, such as Saudi Arabia, English law would regard that as Saudi-influenced *Shariah* law. This distinction can be seen in *Al Midani v Al Midani* [1999] CLC 904, even though that case dealt with Islamic inheritance and not Islamic finance. The English and Welsh courts are not bound to apply Islamic finance principles, even if the parties to a contract designate Islamic law as the governing legal system under an English contract. The only exception, in which the courts can directly apply Islamic finance principles, is when they are dealing with an arbitration agreement, in an English-seated arbitration[*], insofar as the *Shariah* substance of such arbitration agreement does not contravene English law (Tucker, 2008).

Saba and Fathnezhad (2013) state that an aggravated problem that arises when interpreting and applying Islamic law in line with English law is when the *madhāheb* have diverging views over the same issue. If English law were to accommodate these *madhāheb* directly—when ruling over Islamic finance disputes—the accommodation of these schools of legal thought would distort the harmony of the courts' rulings. In theory, accounting for each *madhhab* to rule over one matter can result in multiple answers and exceptions to the original judgment. All of this means that there would be an exception at law every time English law, or a *madhhab*, is found to conflict with another *madhhab*'s perspective over an Islamic finance matter.[*] Therefore, there is a need to treat Islamic law in its common denominator form under English law.

Considering that, the English and Welsh courts have been apathetic about interpreting between different *madhāheb.* Instead, emphasis has been placed on the strictness with which *Shariah* principles will be interpreted and applied. Thus, their focus primarily hinges on matters that raise questions of English law not *Shariah*. Where the Islamic element is integral to the question of English law, there could be a potential consideration to both the Islamic finance arrangement's commercial and contractual agreements conjointly. However, this is yet to be expressly affirmed because it is uncertain whether the High Court intended to imply this in *The Investment Dar Company KSCC v Blom Development Bank SAL* [2009] EWHC 3545 (Ch) (Reed, 2014). Al-Ali (2019) deems this conflict as a *Shariah* integrity problem, whereby an Islamic finance arrangement must be carried out under English law even if it loses its *Shariah* integrity. There is veracity to this notion—albeit not always (as the following case law will show). This takes the paper to the next segment covering situations where parties to a contract challenge the court's justiciability to rule over matters involving Islamic finance.

2.4. Ultra vires

Ultra vires is the situation where the *question of law* is beyond the *jurisdiction* and *legal authority* of a court. Over the past twenty years, when faced with litigation, parties to Islamic finance contracts have attempted to invalidate their contractual obligations on two grounds. The first ground regards parties relieving themselves from their contractual obligations where a contract is deemed *Shariah*-non-compliant. The second ground regards Islamic law being beyond the jurisdiction of the English and Welsh courts. In legal terms, the latter is called '*ultra-vires*'—which, if accepted, would enable a party to omit from their contractual obligations in part or in whole. In practice, the *ultra vires* argument has been invalidated and disregarded by the English and Welsh courts. This comes as no surprise because doing otherwise would allow the *ultra vires* argument to be procured as a vehicle for fraud and for evading contractual liability—both of which go against English- and Islamic commercial principles.

It is somewhat logical that contracts of Islamic finance are deemed *intra vires* by the English and Welsh courts, where they will treat such agreements as ordinary English contracts. Yet, to do so, there need be a line drawn between the legal agreement and the commercial agreement of the Islamic finance arrangement.

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* Wherein the *lex loci arbitri* is English law.

* There are nine primary *madhāheb* amongst *Sunni*, *Shia*, and *Ibādi* Muslims.

Otherwise, there would be an open door for the *ultra vires* contention. Islamic finance contracts usually contain a *Shariah*-compliancy clause, which, if breached, could render the entire agreement unenforceable. By separating the contractual- and commercial agreements, the courts can treat an Islamic finance agreement as an ordinary English contract regardless of that agreement's commercial *Shariah* integrity. Thus, the divisibility of the contractual and commercial agreements of the Islamic finance arrangement enables the English and Welsh courts to separate the contractual governing law of that agreement from its Islamic financing mechanisms. The overall effect of this is to enable the English and Welsh courts to enforce rulings on contracts that are deemed *Shariah* non-compliant, even where such judgments would not be binding upon the Islamic courts in other jurisdictions (Nethercott and Eisenberg, 2012).

3. Research Methodology

The methodology used throughout this paper is legal analysis. The method involves analysing primary English finance law—i.e., case- and statutory law—and highlighting their Islamic finance equivalents. This approach is viable because it allows the researcher to clearly draw conclusions from analysing the relevant existing documents, cases, and laws related to Islamic finance treatment by the English and Welsh courts under English law. By doing so, the author can demonstrate how the courts interpret and apply principles of Islamic finance and how such courts reach their final judgments. Moreover, the author has legally analysed each case separately to identify the problems that arise when the courts deal with Islamic finance cases. This allows demonstrating how different legal contentions are put forth before the courts and how such contentions are handled. After achieving the points aforementioned, the author can discuss the results of the comparative documentary legal analysis to draw conclusive remarks. Those remarks can then be compared to the literature review to determine whether the findings align with what the academic literature had shown or whether there are further points to add on top of what has previously been said. In brief, this methodology will help draw out a clear conclusion with practical recommendations by satisfying the research objectives and questions.

4. Analysis of and Results from English Case Law on Islamic Finance

4.1. Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems NV & Ors

Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems NV & Ors [2002] All ER (D) 171 is the first reported Islamic finance case in England and Wales. Islamic Investment Company of the Gulf ('IICG'), and the Symphony Gems NV ('SGNV') entered a master *murābahah* agreement, to facilitate a *Shariah*-compliant cost-plus sale. IICG agreed to two requests from the defendant to purchase diamonds from Hong Kong-based supplier, Precious Limited ('PL'). IICG and PL signed two *murābahah* contracts to purchase those diamonds—in accordance with the master *murābahah* agreement signed with SGNV and proceeded with the purchase. Under the agreement, IICG would be repaid in three separate instalments: [1] $1.98 million (15/07/2000); [2] $1.98 million (15/09/2000); and [3] $3,957,450.00 (15/11/2000). SGNV defaulted on the preliminary instalment, and upon failed settlement attempts, IICG decided to enforce its two bank guarantees to recover the gross sum initially paid and concurrently triggered proceedings against SGNV.

The payment default resulted from disputes between the defendants and from the PL's supplier failing to deliver the diamonds. The Court's construction was that one of the defendants did not receive the diamonds, as a result of PL not receiving its diamonds from its own suppliers. The *murābahah* assured IICG that it would receive its instalments irrespective of the status and timely means by which the diamonds would be delivered. IICG was relieved from the risk of payment under the *murābahah* by virtue of a clause that retrospectively allowed it to turn the *murābahah* into a conventional finance arrangement.

Additionally, the case facts did not make the interpretation of the *murābahah* under Islamic law necessary because the contract was governed under English law. Nonetheless, the High Court first resorted to advice from two experts to better understand the commercial nature of a *murābahah*. One of the experts, Dr Yahya Al-Samaan, deemed this *murābahah Shariah* non-compliant, explicating to the High Court the formalities and constituents of a valid *murābahah.*

Subsequently, Tomlinson J clarified that the *murābahah*'s *Shariah*-compliancy status was irrelevant for the purposes of the legal proceedings, emphasising that the agreement was an ordinary English contract governed by English law. Based on the inferences above, judgment was sought, and three arguments were raised: –

[1] The first argument motioned that the *murābahah* bore elements of interest, which deemed it

illegal under *Shariah*. SGNV also argued that Saudi Arabia was the base from which IICG initiated its activities. Tomlinson J disregarded the contention of the agreement conflicting with Saudi law, or any relevance of Saudi Arabia in the case because IICG was registered in the Bahamas as a Bahamian company. Also, under the principle of *lex situs*[*], the *murābahah* would have most likely fully applied in the UK and not in Saudi Arabia. Moreover, a company's legal personality differs from that of its employees and directors, which were Saudi Arabian. As for the illegality argument, the treatment of the *murābahah* as an ordinary conventional financial arrangement under English law rendered the *Shariah*-compliancy factor extraneous.

[2] The second contention deemed that SGNV bore no responsibility to pay IICG because the delivery of the diamonds acted as a condition precedent. However, a clause under the *murābahah* proved fatal because it stipulated that payment was not subject to any event's occurrence which amounted to no condition precedent therefor. Consequently, payment was required to be done timeously regardless of whether the diamonds were delivered by the date of due payment. Thus, the High Court rejected the second contention.

[3] The last contention was that IICG's articles of association barred it from carrying out undertakings that contravene *Shariah*. This compelled the High Court to apply Bahamian company law, which offered no support to the defendants' case. The defendants were ordered by the Court to pay a sum of $10,060,354.28 (13/02/2002); however, they rejected the order based on such practice being prohibited. Nonetheless, the Court refuted such a challenge because paying interest is completely permissible under English law.

It can be seen in this case that the High Court treated the agreements as ordinary English contracts. The Islamic finance substance of the agreements gave the High Court a reason to study and familiarise itself with the *murābahah* arrangement, which it did via expert advice. Such familiarisation also aided the Court in invalidating the *Shariah*-compliancy arguments put forth to it by the defendants—instead, focusing on applying contract law. This is one context under which the English and Welsh courts resorted to expert advice to better understand the nature of the commercial agreement at hand and the grounds from which the defendants were arguing. In *Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems NV & Ors* [2014] EWHC 3777 (Commercial Court), the High Court considered the scope of the English and Welsh courts' power, under the Civil Practice Rules to vary or revoke an order—no specific comments were made regarding Islamic finance.

4.2. Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd & Others

In *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd & Others* [2003] EWHC 2118 (Comm), the High Court undertook an indirect application of Islamic finance principles. During the period between 1995 and 1996, Shamil funded the working capital of two companies. The first was Beximco, and the second was Bangladesh Export Import Co Ltd ('BEIC')—conjointly, the two defendants.

The funding was undertaken by way of two separate *murābahah* agreements, of which each valued at $15 million. Following a few instalment payments by the defendants to the claimant, a payment default occurred. This compelled the parties to enter two 'Exchange in Satisfaction and User Agreements' under which each defendant would transfer titleship of certain assets to Shamil, whilst Shamil would relieve the defendants from outstanding sums. Also, the assets could be leased from Shamil to the defendants in return for a user fee and accumulated compensatory payments. However, another payment default occurred, instigating Shamil to raise the matter to the Court.

The gross sum contested by Shamil was $49,711,710.52, which was significantly higher than the original $30 million. Shamil backed up its argument by showing that it had a qualified *Shariah* supervisory board, which affirmed that Shamil's actions were *Shariah*-compliant throughout the course of the agreement. On the other hand, Beximco and BEIC argued that the earnings that Shamil was making from the *murābahah,* and the leases constituted interest. In addition, it was argued that the alleged interest would deem their contractual obligations unenforceable because the agreement stipulated that it would be subject to *Shariah* and governed by English law.

[*] The 'law of the jurisdiction' in which the Islamic finance arrangement was situated.

In the first instance, the Court considered the notion of examining the position of Islamic law over the matter; however, this was disregarded given the conflicting interpretations of the case facts under Islamic law. The grounds over which the Court defended its decision was that the parties had agreed for a secular jurisdiction to govern the agreement. To the Court, this would have implied that it was implausible for the parties to assume that a secular court would interpret Islamic law on their behalf, primarily were *madhāheb* differed on the matter. Morrison J also alluded that Beximco and BEIC's actions prior to the lawsuit implied no rejection of, but rather an affirmance to, the contract they had entered.

It was stated that the Court could have ruled over certain matters of Islamic law had it possessed a well-rounded understanding of *Shariah*. Additionally, under the Rome Convention, the choice of law ought to be articulated with reasonable certainty. This could have been done by expressly stating the parties' true intentions under the agreement's terms or where the case facts could only lead to such a conclusion. Dicey J then stated that the reference to the parties' choice of a contract's governing law could only be a reference to the law of a country, and that there cannot be a contract that is governed concurrently by both Islamic- and English law. The judgment was held in favour of Shamil. The defendants appealed this decision.

In *Beximco Pharmaceuticals Ltd & Others v Shamil Bank of Bahrain* [2004] EWCA Civ 19, Beximco and BEIC argued that the rules of *Shariah* under the agreement were applicable within the framework of the governing English law. Yet, Potter J dismissed the appeal and held that *Shariah* principles could only be enforceable contractual terms if they are inferred into the agreement from an overall law of an actual nation. This means using the laws of a country that is influenced by Islamic law, such as Saudi Arabia. Potter J also classified Islamic law as a non-national system of law, characterising it as a *lex mercatoria*[*]; thus, emphasising its commercial importance for the financial arrangement, but also severing it from the contractual element of the financial arrangement. The Court of Appeal's ruling deemed that a *murābahah* is capable of being equated to an interest-bearing loan, especially in the case at hand, where the *murābahah* agreements were merely concealed loans that did, in fact, charge interest.

The Beximco case demonstrates the English and Welsh courts' capability of interpreting Islamic finance principles. Such interpretation was carried out to identify the agreement at hand and whether the *murābahah* was a genuine Islamic finance arrangement or a mere cover-up of a conventional one. Had there been a genuine *murābahah*, an indirect application of Islamic law could have taken place—the application was disregarded due to the case facts, in addition to the veiled nature of the *murābahah* agreement. However, even if there were a genuine *murābahah*, the Court would have still disregarded the indirect application due to the lack of an applicable 'national *Shariah*-influenced law' being contractually stipulated, and due to the judges' scepticism towards Islamic finance. After all, the High Court was confident that the defendants had accepted contracting with the claimant under terms that remained questionable. The defendants only refuted the contract's terms and questioned its true *Shariah* compliancy upon bearing onerous contractual liability. Despite this, Morrison J and Dicey J mentioned that had the parties plainly contractually expressed and verbally implied their true intentions in wanting *Shariah* values to prevail, the High Court *might* have taken a different approach.

4.3. The Investment Dar Company KSCC v Blom Development Bank SAL

The Investment Dar Company KSCC v Blom Development Bank SAL [2009] EWHC 3545 (Ch) was the first case in which the High Court reached a judgment after making a significant interpretation and an indirect application of Islamic finance principles. Blom Development Bank SAL ('Blom') appointed The Investment Dar Company KSCC ('TIDC') under a master *wakāla*, whereby Blom, the investor, deposited investible funds to TIDC, the agent. TIDC then invested Blom's $10.7 million via *Shariah*-compliant tools. The *wakāla* mandated TIDC to pay Blom capped rates of return whilst being entitled to any surplus returns. Retrospectively, TIDC would ensure Blom through indemnities for losses incurred under the *wakāla,* should TIDC default. Upon undertaking poor investments, TIDC defaulted in repaying Blom, prompting Blom to seek summary judgment from the High Court.

Blom's main argument was that its monies were held by TIDC on trust and that TIDC had acted in breach

* *Lex mercatoria* (Latin for 'merchant law') refers to a body of commercial and trading principles that were adopted by merchants throughout medieval Europe. In the context of the case at hand, the judge used this expression to equate Islamic finance to a body of commercial principles that are contemporarily adopted by Muslims to carry out financial activity in alignment with their faith.

of its duties by failing to repay Blom. Blom sought after two actions. The first action requested an order from the High Court to TIDC to repay the initial invested sum of $10,733,292.55. The second action also requested an order from the High Court to make TIDC pay the surplus sums that would have originally accrued from the *wakāla'*s rate of return on the investments.

The High Court held in favour of Blom over the first contention but did not grant the repayment of the surplus sums. Based on the High Court's decision, TIDC appealed on the grounds that the *wakāla* contravened *Shariah*, meaning that it was never allowed to enter the agreement due to its articles of association. TIDC's articles of association banned it from entering agreements that were *Shariah* non-compliant. The High Court allowed TIDC's appeal upon satisfying one condition. The Court believed that it was adequately debatable that no trust existed between Blom and TIDC. Accordingly, the High Court ordered TIDC to pay the principal sum to Blom directly without doing so through the Court. This was based on the Court's confidence in Blom, being a highly respectable Lebanese company that owed no allegiance to the English court. The Court's reasoning rendered TIDC liable to repay Blom in any case—if the master *wakāla* was *intra vires*, Blom's claim would succeed via a claim in contract; if the master *wakāla* was *ultra vires*, a restitutionary claim by Blom would succeed.

The key taking from the High Court in Blom is the extent to which it was willing to interpret and understand the *wakāla* agreement and the additional Islamic principles laid out by the parties' *Shariah* advisory boards. This was affirmed by Purle QC's remarks in the judgment where TIDC's evidence and the *Shariah* compliancy contentions were deemed 'rather exiguous evidence of Sharia law' (*TIDC v Blom*, 2009, para. 16). However, the experts that gave advice to the High Court had different views on the *wakāla's Shariah* compliance. The Court stated that it was in no position to resolve which expert was correct and focused on the Islamic principles in their common denominator form.

Henceforth, it can be deduced that the English and Welsh courts may interpret and indirectly apply the Islamic commercial element of an alternative finance arrangement, insofar as such interpretation and application are necessary to reach a final judgment about the overall contract at hand. Another noteworthy taking from this judgment is the different lights through which the High Court viewed TIDC's breach, and the different approaches the Court laid out to return Blom back to the position they would have been in prior to the breach. This reaffirms English law's impartial approach in treating Islamic finance arrangements in equation to their conventional parallels. On a final note, Blom's compliance with the Accounting and Auditing Organization for Islamic Financial Institutions' standards guaranteed enforcing TIDC's obligation to pay Blom. This concurs with the view in the academic literature regarding standardising documentation and practices—in the sense that the standardisation of procedural practices in Islamic finance has shown to make it more obliging on a defaulting party to meet its payment obligations and easier to litigate through the courts.

4.4. Dana Gas PJSC v Dana Gas Sukuk Ltd and Ors

The challenges raised in *Dana Gas PJSC v Dana Gas Sukuk Ltd and Ors* [2017] EWHC 2928 (Comm) shed light on the enforceability of security documents under an Islamic finance transaction that was concurrently subject to English law by virtue of a purchase undertaking agreement (the 'Agreement'), and Emirati law by virtue of a *mudārabah*. It also dealt with the extent to which conducts that are *Shariah*-non-compliant are likely to deem such security documents unenforceable. In 2007, Dana Gas PJSC ('DGP'), an Emirati public joint-stock company, levied $1 billion through an issue of *Shariah*-compliant certificates, or *ṣukūk ('mudārabah-ṣukūk*' in this case), which could be traded on the Irish Stock Exchange. In 2013, the Islamic finance transaction was restructured, and the Parties were assured by a *Shariah* legal and financial consultancy that the transaction was *Shariah*-compliant and concurrently lawful under Emirati and English law. The *mudārabah-ṣukūk* were redeemable on 31/10/2017; however, in the same year, DGP informed Dana Gas Sukuk Ltd ('DGS') and the other Parties that the *ṣukūk* were deemed by their advisors as *Shariah*-non-compliant. As a result, DGP sought an order recognising the *ṣukūk* as *Shariah*-non-compliant by the courts in the UAE and the UK.

The first contention put forward by DGP was that its obligation to pay was subject to the condition of having a valid agreement. The choice of English law as the governing law of the Agreement applied certain legal principles which deemed the Agreement valid *prima facie*. The High Court stated that the Agreement was enforceable under English law, even where presumed that such document was unlawful under Emirati law. The High Court illustrated that the condition precedent alleged by DGP was invalid, *in toto*, as it conflicted with the order in which the parties entered into the agreement. This was backed up by the fact that the agreement expressly stated that the *mudārabah-ṣukūk* certificate holders' rights to the *mudārabah-ṣukūk* did not affect DGP's obligation to pay, rendering the condition precedent invalid—meaning that DGP was still bound to pay

the certificate holders.

The next contention put forward by DGP claimed that the Agreement was void for mistake, by the common assumption of the parties that the *mudārabah* and the Agreement were valid. The High Court held that the doctrine of mistake could not be framed based on DGP's subjective beliefs, which led the Court to adopt an objective approach to ascertain what the parties had actually agreed upon—resorting to *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255. Thus, the agreement would only have been void for mistake where it was evident beyond reasonable doubt that the agreement was never intended to be used in the manner for which it had been used. Moreover, the agreement had expressly foreseen the probability of the *mudārabah* being unlawful under Emirati law.

Lastly, DGP argued that it would be opposing to English public policy for the High Court to enforce an agreement that is unlawful under the national law of a foreign state, in which part of that agreement's work is being carried out. The High Court found no evidence of the parties intending under the agreement to carry out work in the UAE. That also did not conflict with the fact that payment was designated to happen in London. DGP also claimed that such matter, if overlooked by the Court, induced a penalty. This argument was refuted on the ground of legal precedent from *Cavendish v Makdessi* [2016] AC 1172. The parties had agreed to separate the *mudārabah* from the agreement to assure the trustees that DGP would pay any outstanding monies.

In this case, the High Court implied that the lack of *Shariah* compliance carries no weight over the enforceability and validity of an English contract. Thus, the reputational damage caused by one being *Shariah* non-compliant carries no weight over any moral standard by which a secular court should rule. This does not seem to conflict with Islamic law either, because a Muslim cannot force a secular court to apply *Shariah* in a manner affecting that court's just decision—especially where the contending party knows that the secular court would lack understanding of *Shariah*. The conclusive remarks of Leggat J reflected a rather incredulous view of the commercial integrity and certainty of Islamic finance arrangements. Yet, at the same time, one can also argue that Leggat J's view illustrated the reality of the Islamic finance industry as epitomised in the lack of standardised documentary instruments and practices to optimise the legal enforceability and transparency of Islamic financial undertakings.

4.5. Project Blue Limited v Commissioners for Her Majesty's Revenue and Customs

The UK Supreme Court's decision in *Project Blue Limited v Commissioners for Her Majesty's Revenue and Customs* [2018] UKSC 30 is significant for the purpose of affirming the *no obstacles, but no special favours* principle. In 2007, Project Blue Limited ('PBL') purchased a former London military property from the UK Ministry of Defence ('UKMD') for £959 million. As a means of obtaining capital to purchase the property, PBL secured funds from an Islamic bank—Al Rayan Bank UK ('Al Rayan'). PBL secured its funds from Al Rayan through an *ijāra*.

Subsequently, PBL and the UKMD contracted to execute the property's purchase. In 2008, PBL sub-sold the freehold of the property to Al Rayan, which then leased the property back to PBL, as *per* the *ijāra.* Thus, the UKMD ceded the property's freehold to PBL, which was then ceded to Al Rayan, with the property finally being leased to PBL by Al Rayan. The implication of having the sub-sale arranged as such was to relieve PBL and Al Rayan from SDLT. This was based on the grounds that PBL owed no liability to pay SDLT because it was entitled to 'sub-sale relief' under the Finance Act 2003, section 45(3). Al Rayan retrospectively lodged that the sale agreement and lease between it and PBL fell under the 'alternative property finance relief', as *per* the Finance Act 2003, section 71A.

In other words, the 'Islamic' finance arrangement was structured in such a way that affixed the transaction to two SDLT-relief provisions. The function of this would result in none of the parties being subject to paying SDLT, specifically PBL. Upon the matter reaching Her Majesty's Revenue and Customs ('HMRC'), it was decided that £50 million in SDLT were due, which drove PBL to take the matter to the Upper Tribunal. PBL argued that Al Rayan was not relieved under the Finance Act 2003, section 71A because the original seller of the property was the UKMD, as *per* section 71A(2). PBL also argued that certain sections of the Finance Act 2003 discriminated against those of the Islamic faith by not considering that adherents of Islam would be expected to use Islamic finance techniques.

The Upper Tribunal ruled against PBL, holding it accountable as the seller, but it did notably acknowledge the notion that section 75B could possibly be unfair. More importantly, the Upper Tribunal emphasised the

objective of section 71A, which aims to place *ijāra* arrangements on par with conventional lending by taxing the purchaser of a property once, not multiple times, as the case would have been prior to 2003. The ruling was appealed to the Court of Appeal, which held that the UKMD was the seller and not PBL, on the grounds that the Finance Act 2003, section 45(3), negated the initial agreement between PBL and the UKMD. By doing so, PBL had escaped from paying its taxes, which pushed HMRC to appeal the matter to the UK Supreme Court.

The question at hand was whether PBL was due to pay the outstanding SDLT sum of £50 million. The Supreme Court accepted and ruled that PBL was due to pay that sum. The Supreme Court based that decision on key facts of English law but also considered PBL's arguments relating to sections 75A(5) and 75B, concerning their unfairness towards those of the Islamic faith. The Supreme Court made significant remarks, affirming the natural position of Islamic finance under English law as an alternative yet *equal* form of finance to conventional finance. Lord Briggs, who was the only dissenting judge, interpreted the principle of *riba*, stating that *Shariah* does not prohibit the taking of security but rather forbids the payment of interest, *particularly* in dealings concerning the lending of money (*PBL v HMRC*, 2018, para. 97). He then interpreted the standard *ijāra* form of a lease and applied it to the *ijāra* at hand, which was an *ad-hoc* form.

The Supreme Court ruled in favour of HMRC, restoring the Upper Tribunal's finding—ordering PBL to pay the SDLT due. The Supreme Court held that section 75A of the Finance Act 2003 was enacted by Parliament to fill the grey area that the finance arrangement procured as a vehicle for avoiding SDLT. Lord Hodge, giving the majority's judgment, stated that the finance arrangement appeared to be drafted in deliberately broad terms to catch a wide range of arrangements that would ultimately result in tax loss. The Supreme Court also held that there was no need to consider the merits of PBL's 'discrimination' challenge because PBL had not impliedly or expressly established that it had entered the *ijāra* for religious reasons. Even in that case, Islamic finance principles would have been corresponded to *lex mercatoria*, not a binding system of law governing the *ijāra* at hand.

5. Direct Application of Islamic Finance Principles under English Law

Under the Arbitration Act 1996, section 46(1)(b), parties have the freedom to choose the rules their arbitral tribunal will apply. Such freedom extends to the choice of law, which can be Islamic law *per se*. The outcomes in *Halpern v Halpern* [2007] EWCA Civ 291 and *Hashwani v Jivraj* [2011] UKSC 40 have shown that arbitral tribunals can apply religious law principles, where the parties have laid sufficient ground and scope for such application to take place. Thus, the English and Welsh courts may directly apply Islamic finance principles where the arbitration agreement clearly reflects the parties' true intentions in having such *Shariah* principles being applied and honoured; unless an exceptional context holds otherwise.*

The Muslim Arbitration Tribunal ('MAT') issues legally binding arbitration services concerning Islamic commercial issues. Established in the early 2000s, the MAT operates under the Arbitration Act 1996. The MAT issues arbitral awards and decisions that are *Shariah*-compliant, which can then be enforced in the English and Welsh courts like any ordinary arbitral award. The only conditions that must be met in ensuring that such awards will be enforced in the courts are that: –

[1] the Islamic finance arrangement is a legal contract under English law; and that

[2] it does not procure elements and activities deemed illegal or contrary to English law.

The two scenarios in which an arbitral award will not be enforced are when it undermines public policy, as *per* section 33 of the Arbitration Act 1996; and, where the matter of the arbitration is not a civil matter, as *per* section 82 of the Arbitration Act 1996. The Arbitration Act 1996, section 46, also allows the parties to have their dispute decided in accordance with considerations other than English law. This can provide leeway for the extent to which the parties want a court to honour Islamic principles.

6. Further Analysis: Findings and Discussion

6.1. Synopsis: qualifying conditions and overarching challenges found in Islamic finance arrangements

There are general circumstances under which a court will interpret *Shariah*-based principles and indirectly apply them. A qualifying condition enabling such consideration is where the matter at hand is subject to a *Shariah*-based and/or *Shariah*-influenced national law. Another qualifying condition is where the case facts raise reasonable grounds for the interpretation and application of *Shariah* principles to reach a well-rounded

*For example, the arbitrator's duty to issue an enforceable award is jeopardised by the direct application of *Shariah*.

judgment. A third qualifying condition is where the commercial- and contractual elements are not clearly divisible without carrying out an interpretation of the Islamic element of the finance arrangement—in other words, where the essence of an English contract is vested in, and intertwined with, its *Shariah*-compliant structuring. When it comes to arbitration, Islamic finance principles can be directly applied by incorporating Islamic law into the arbitration agreement. This is by virtue of the *parties in arbitration* retaining their autonomy in choosing a forum of their convenience to resolve disputes that may arise thereof, and the courts being bound to follow the *lex loci*. However, this can only work insofar as the *Shariah* substance of the arbitration agreement does not contravene English law, and where there is a genuine and express intention for *Shariah* to take effect.

The overarching challenge associated with Islamic finance arrangements, as *per* the academic literature, revolves around *Shariah* integrity. The author believes the problem is more profound because disputing parties privy to an Islamic agreement may be bound to carry out such an agreement as if *Shariah* never existed in the first place. The other challenge conveyed concerns the *ultra vires/intra vires* contention in which the English and Welsh courts will have jurisdiction over an English contract of Islamic finance. The author does not believe that to be a 'challenge' in the meaning of the word because the English and Welsh courts' jurisdiction is, *de facto*, vested in the divisibility of the financial arrangement's contractual and commercial agreements. Even if such divisibility is rendered obsolete, the courts are *ipso facto* secular rulers that are not expected to profess Islamic law. This does not contradict both English- and Islamic law.

Thus, in the eyes of the author, the overarching problem when dealing with *Shariah* principles at large under English law is satisfying what they like to call the *goldilocks principle*—that being an optimal habitable *nexus* for Islamic- and English legal principles to coexist without contravening one another. In an Islamic finance context, the *goldilocks* zone of an Islamic alternative finance arrangement is where *Shariah* principles can be honoured without breaching well-established English law. Thus, a good Islamic finance arrangement is one that satisfies the *goldilocks principle*. An excellent Islamic finance arrangement is one that protects the *Shariah* integrity of the parties even where disputes arise. This is a contract that enables the courts to resolve disputes between the parties without rendering the commercial and contractual agreements discordant with one another. The illustration of such an ideal arrangement is not a creation of fiction, but rather so, an undertaking that is achievable if precautions are considered at the outset of the Islamic finance arrangement. The question that begs to be asked is *how can this be achieved… realistically?*

The notion in the academic literature, favouring the standardisation of Islamic financial documentation and procedures, is undoubtedly a step in the right direction. The current level of standardisation is not enough on its own to achieve: [1] good enforceability of Islamic principles; and [2] the transparency of practices, which, in turn, tend to be veiled under Islamic finance. The problem lies in the fact that such standardisation processes might be outpaced by the developments in the UK Islamic finance sector. Therefore, further standardisation is needed to create an environment that is more accommodating to the use of Islamic finance products under English law in a way that minimises legal complexities. Importantly, these standardisation processes should not be one-off endeavours—instead, they should be responsively adaptable and continuously updated to keep up with the developments taking place in the UK's financial sector.

6.2. Implications for practice and further research

When parties intend on entering an Islamic finance arrangement that is governed by English law, they should consider the following points to avoid unnecessary complications. First, it is essential for such parties to clearly state and outline their intentions in entering the Islamic finance arrangement. Doing so clarifies at the outset what the parties genuinely intend to contract. It helps any potential court identify whether the paramount intentions of the parties were inspired by a common commercial view for making a profit or whether they were inspired in doing so whilst committing to their faith—if both, the court could then designate which of the two would take primacy considering the case facts at hand. Where the prime intention lies in commerce, then the approach would be tantamount to the approaches seen in the case law presented by this paper. Where the prime intention is one of religion, then the court would look to provide further consideration to the religious element of the agreement.

Second, the parties should acknowledge at the outset that the Islamic element they chose in commissioning their financial arrangement raises no ground for exceptional treatment had such element been of a conventional

nature. Doing so places emphasis on the fact that alternative finance arrangements exist under English law only to accommodate specific commercial needs that would otherwise be unavailable through conventional finance—not for the enablement of parties to secede from their contractual obligations when they choose to believe that there is an 'issue' of *Shariah* non-compliance. This acknowledgement can be satisfied by introducing 'pain gain' sharing clauses under Islamic finance agreements, whereby the *Shariah* integrity of the contract bases a moral *gain* for the parties involved, *not* a contractual one—and *Shariah* non-compliance would base a moral and ethical *loss* for the parties, again, *not* a contractual one. The parties would thereby, clearly imply an acknowledgement of the separation of *Shariah* and its commercial integrity from the contractual nature of the contract. By that, the burden of being *Shariah* compliant would fall on the remit of both parties and their joint effort, not on the contractual conduct of the parties.

Lastly, parties to an Islamic finance arrangement should understand the divisibility of the contractual element of their arrangement from that arrangement's commercial element—in other words, their arrangement's contractual agreement is justiciable by the English and Welsh courts irrespective of the *Shariah* nature of their *entire* agreement; let alone the commercial agreement. Parties should also understand that Islamic law is not recognised under English law and that 'there is no legal duty on a citizen to comply with any religious law' (Secretary of State, 2018). The Rome Convention and Rome I, as retained by the EU Exit Regulations 2019, still effect the 'law of a nation' principle. Such a stance is not targeted at Islamic law *per se*. Rather so, all religions are equally treated with no preference of one religion taking primacy over another, which is why religious law can be affected using a country's national laws. An interesting area for future research pertains to cases where the contractual and commercial agreements of an Islamic finance arrangement are indivisible. What if a future case compels dealing with both elements concurrently and thoroughly? What if a contract is formed in a way rendering the two elements inseparable?

7. Conclusion

In conclusion, Islamic finance arrangements can be interpreted through many lights. As a result, it is rational for a secular court to interpret Islamic finance and its underlying principles from the perspective of Islamic law in its common denominator form, if need be. Looking back at the case law analysed, it is conclusive that there is no one-fit-for-all approach for the English and Welsh courts when dealing with Islamic finance arrangements. However, the unanimous principle is that Islamic finance arrangements will never be treated in an exceptional manner to their conventional counterparts. Thus, when the context makes it right to do so, the English and Welsh courts will accommodate the interpretation and application of Islamic finance principles.

Principles of Islamic finance are interpretable and applicable—both directly and indirectly—under different circumstances. These mainly relate to cases where: [1] the agreement at hand is subject to the law of a nation that is influenced by *Shariah*; [2] where Islamic law is stipulated under an arbitration agreement; [3] where an interpretation aids in understanding the case facts; and [4] where an interpretation is constructive for the courts to reach a well-rounded judgment. Islamic principles are capable of being honoured insofar as: [1] they are not contravening English law; [2] they are expressly stipulated under the agreement; and [3] they are integral to the commercial purpose of the arrangement.

Finally, if the contractual agreement is governed by a *Shariah*-influenced law of a nation, Islamic principles conveyed through that law are more prone to be honoured. Where the English and Welsh courts are ruling over matters that require them to interpret and apply Islamic principles in line with well-established English law, they will separate the contractual- and commercial elements of the alternative finance arrangement. Then, the courts will rule over the contractual matter if that is what the dispute is hinged on. If the issue is of a commercial nature, the court may also interfere, subject to the nature of the dispute at hand or the breach of commerciality. The courts will also rule on areas that could, if left unresolved, conflict with English law—otherwise, the courts will not necessarily interfere with the commercial element of an Islamic finance arrangement.

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