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to justice. The whole continuum of dispute management starts from the structuring and drafting process where great care is taken to ensure potential legal risks associated with the rights, duties and obligations of parties are well clarified in the transaction documents. This is considered part of the dispute avoidance mechanisms. Subsequently, the dispute resolution processes should be well considered to include sustainable processes such as mediation and arbitration before exploring litigation. In practice, particularly in cross-border Ṣukūk and corporate commodity murabahah transactions, there is a general tendency to defer court adjudication of disputes emanating from such Islamic finance transactions based on the Scott v. Avery case.(61) Nevertheless, as demonstrated above, whether court intervention is contractually deferred or not, the court is the ultimate forum for dispute resolution in Islamic finance. The jurisdiction of the court, whether civil or Sharī'ah, to hear and determine an Islamic finance dispute cannot be ousted but it may be delayed through a two or three-tiered dispute resolution clause in the Islamic finance contracts.

Finally, the judicial function in the Islamic finance spectrum should also be understood from its numerous roles in supporting developments in the Islamic financial services industry. The courts have demonstrated that the judiciary can and had supported Islamic finance in different ways. Some of the ways demonstrated in this study include the purposive interpretation of contracts, recognition and enforcement of foreign arbitral awards and judgments, consistency and predictability of outcomes, legal risk mitigation, and facilitation of mediation and arbitral proceedings, thereby positively reshaping the future of Islamic finance industry. In addition, the availability of binding judicial precedents, which is hitherto not common for Islamic law matters, is a welcome development in the Islamic finance industry. Since the industry is still evolving, more judicially inspired reforms will be felt in the coming years and decades.

(61) A Scott v. Avery Clause is a clause within an agreement where the parties agree to submit any dispute between them to arbitration as a preliminary step before exploring the option of a court action. It does not exclude but only differs the option of litigation as a last resort since parties cannot by a contract oust the jurisdiction of the courts. This principle was established in the case of Scott v. Avery (1865) 5 HL Cas 11.

have been very consistent in ensuring justice and fairness between the customer and the Islamic bank. The "Sharī'ah defence" which is often regarded by the courts as "a lawyer's construct" in Islamic finance has its historical antecedents in one of the earliest English case involving an Islamic facility, Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd and others[57]. This was later remphasised in the Court of Appeal decision in Beximco Pharmaceuticals Ltd & Ors v Shamil Bank of Bahrain EC,[58] where the earlier decision of the lower court was upheld and such Sharī'ah defence was considered as a mere "lawyer's construct". A similar issue was also raised in The Investment Dar Company KSCC v Blom Developments Bank SAL (Rev 1).[59] Many similar cases of recovery of funds advanced by Islamic banks to bank customers have also appeared in courts of leading jurisdictions such as Malaysia and United Arab Emirates. It is interesting to note that the courts in such jurisdictions followed the decisions in the English courts. This is the beauty of judicial precedents which may either be authoritative or persussive in nature and have had so much impact on the development of modern practice of Islamic finance.

For instance, the above precedents have influcenced the current practice in legal documentation in Islamic finance with the inclusion of a fundamental clause in Islamic finance agreements which seeks to waive any form of "Sharī'ah defence" in the event of a dispute. The right to bring a "Sharī'ah defence" is now explicitly waived in drafting Islamic finance agreements where the customer undertakes not to raise any defence relating to Islamic principles underlying the transactions in the event of default in payment. This clause is important as it seeks to ensure certainty of the transaction.[60] It is common to read this proviso in standard Islamic finance agreements, that the borrower, "waives all and any defences based on Sharī'ah law". Since there are various juristic interpretations of different aspects of Islamic financial transactions, raising a defence, which may be legitimate, will jeopardise the entire transaction; hence, once a transaction has been certified by a competent Sharī'ah board and the parties to the agreement have agreed to the terms of the contract, a "Sharī'ah defence" cannot be raised later in the event of a defualt of payment.

## 5 Conclusion and Recommendations

It is impossible to discountenance the pivotal role of the judiciary in shaping the Islamic finance industry. Moving forward, one would envisage a situation where there is a formal integration of the process of dispute resolution to enhance the adjudication of Islamic finance dispute and provide a platform where parties have effective access

(57) [2003] All ER (D) 25 (Aug)

(58) [2004] EWCA Civ 19.

(59) [2009] EWHC 3545 (Ch).

(60) Kilian Bälz, Islamic Financing Transactions in European Courts. In S. N. Ali (Ed.), Islamic Finance: Current Legal and Regulatory Issues (pp. 61-75). Cambridge, MA: IFP Harvard Law School, 2005.

waive any entitlement to recover interest from each other.

The above explains how judicial intervention over the years has positively shaped developments in the Islamic financial services industry.

## 4.3 The Impact of Binding Precedents on the Development of Islamic Finance

In Islamic finance litigation, the impact of binding judicial precedents cannot be overemphasised particularly in common law jurisdictions. The decisions of the superior courts of record are binding on the lower courts. Though there is a lee way for judges who do not want to follow precedents through distinguishing of facts, a judge of the lower court must be able to successfully distinguish the facts of the case before it and those of the decision of the appellate court to side-track the rule.(54) The concept of judicial precedent is often expressed as stare decisis, which means stand by what has been decided. Solum gives the following description of the doctrine:

> The doctrine of the law of the case sets the parameters for reconsideration of the same issue within a single action, and bears strong similarities to the doctrine of issue preclusion, which applies between two different actions. The doctrine of judicial estoppel precludes a party from asserting inconsistent positions in two different adjudications.(55)

Islamic finance cases are not free from the doctrine of judicial precedent. The doctrine is necessary for the predictability of the legal system. When a judgment is handed down by a court, its binding effect has ripple effects in the overall industry because future contracts must be structured in line with such decision and future cases must be decided in light of the decision.(56)

A typical example of the reliance on binding precedents in Islamic finance is the usual defence from Islamic finance consumers who have defaulted in payments that the underlying Islamic finance facility is not Sharī‘ah compliant. There is an emerging trend in Islamic finance litigation where defaulting customers raise a defence during legal proceedings, and such defence relates to the certainty-doubt conundrum. This “Sharī‘ah defence” is mianly used in raising doubts about the Sharī‘ah compliance of the Islamic finance facility. The English courts as well as the Malaysian courts

(54) Stephen Markman, “Originalism, Precedent, and Judicial Restraint: Originalism and Stare Decisis”, Harvard Journal of Law & Public Policy 34 (2011): 111; John O. McGinnis, and Michael B. Rappaport, “Originalism, Precedent, and Judicial Restraint: Originalism and Precedent”, Harvard Journal of Law & Public Policy 34 (2011): 121.

(55) Lawrence B Solum, “Effect of Judgment & Preclusion, Stare Decisis, Law of the Case, and Judicial Estoppel”, In Moore’s Federal Practice - Civil, 2011: 18-13.

(56) Umar A.Oseni, and M. Kabir Hassan, “The Dispute Resolution Framework for the Islamic Capital Market in Malaysia: Legal Obstacles and Options”, In Islamic Capital Markets: Products and Strategies, edited by M. Kabir Hassan and Michael Mahlknecht, 91-114. John Wiley & Sons, Ltd., 2011.

arbitration during the course of the proceedings. In addition, the court is the proper forum for the recognition and enforcement of foreign arbitral awards. For any foreign award to be enforced in a particular jurisdiction, there is a need for filing of such decision in the competent court for its recognition and enforcement subject to the procedural requirements of each jurisdiction. Given the unique nature of cross-border Islamic finance transactions such as Ṣukūk and their multijurisdictional nature where the transaction documents are governed by different laws. For instance, the International Islamic Centre for Reconciliation and Arbitration (IICRA)'s "arbitral award in a case involving ijārah muntahiyah bi al-tamlīk (lease contract ending with ownership or financial lease) between an Islamic bank and an individual foundation based in Sharjah was recognized and enforced by a Sharjah Court in its judgment No. 953/2013 on 16th March 2014".[52] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) aptly provides for a framework for common legislative standards for the recognition and enforcement of foreign arbitral awards. Both the DIFC and Qatar Financial Centre (QFC) arbitration laws are based on the UNCITRAL Model Law which also provides for the recognition and enforcement of foreign arbitral awards.

One of the most significant judicial support for the development of Islamic finance is the refusal to recognize and enforce a foreign arbitral award which contains interest (riba) on the ground of public policy.[53] Since riba is prohibited in Islamic finance transactions, even in judgment debt, Qatari courts have refused to recognize an enforce foreign awards containing interest elements. However, actual financing charges incurred may be recovered after proper valuation has been made. Malaysian courts do not also award interest in judgments but have introduced Sharī'ah-compliant modes of computing financing charges and compensation through the principles of ta'widh (compensation) and gharamah (penalty) introduced in the Rules of Court 2012. Similarly, the influence of the judiciary in refusing to award interest has also been felt in the drafting of Islamic finance contracts where parties now expressly waive interest. In practice, a common boilerplate clause in most Islamic finance contracts states:

> The parties recognise that interest is repugnant to Shari'a and accordingly to the extent that Shari'a principles apply to them and any legal system would (but for the provisions of this clause) create (whether by contract, by statute or by any other means) any right to receive interest, the parties irrevocably, unconditionally and expressly

(52) Umar A. Umar, "Dispute management in Islamic financial services and products: A maqasid-based analysis." Intellectual Discourse 23 (2015): 377; IICRA. (2014). Maḥākim Imārah al-Shāriqah ta'tamid aḥkām al-markaz al- Islāmī al-duwalī lil-muṣālaḥah wa-al-taḥkīm. Retrieved July 19, 2015 from http://iicra.com/ar/news/detail/3c3e586123.

(53) Article 34(2)(b)(ii) of the UNCITRAL Model Law provides that a foreign arbitral award may be set aside by the court on the ground the award is in conflict with the public policy of this State.

much-awaited decision of the Federal Court of Malaysia on the powers of the SAC with regards Sharī'ah matters referred to them by the court was settled out of court. In Tan Sri Khalid Ibrahim v Bank Islam Malaysia Berhad [49] the appellant questioned why the decision of the SAC should be binding on the court and argued that the court in a way had abdicated from its judicial responsibility if judicial powers were to be conferred on another quasi-judicial body. The case was pending before the Federal Court but the issue was never determined, as it is believed the parties settled out of the court due to its sensitive nature and its potential impact on the entire Islamic financial services industry in Malaysia. It is generally believed the judges at the apex court encouraged the parties to settle out of court.[50] This benign role of the court in encouraging the parties or even supporting the parties who signify the intention to settle amicably was emphasized by Vincent Ng J. in KTL Sdn Bhd v Azrahi Hotels Sdn Bhd (formerly known as Virtual Amber Sdn Bhd); Advance Hotels Supplies (M) Sdn Bhd & Anor, Supporting Creditors[51], thus:

> Modern day courts, in this era of rapid development are lumbered with an ever-increasing backlog of cases…. Thus, in the interests of justice and good grace a defendant's or respondent's request for an adjournment of the hearing to another date to settle the matter amicably ought to be allowed; but allowed on terms such that the court's time is not wasted in permitting the latter party to renege on his promise to settle, especially after being given reasonable time – nay, such time as requested – to settle.

Therefore, the judicial support for Islamic finance should be understood from the perspective of quasi-judicial mechanisms available to resolve Islamic finance matters. For instance, in Malaysia, the court-annexed dispute resolution framework is called Kuala Lumpur Court Mediation Centre (KLCMC) which, among others, provides for mediation of Islamic finance cases by judicial officers in their capacity as mediators to ensure amicable settlement of disputes. The judicial support to mediation and arbitration involving Islamic finance disputes is similar to the general practice in commercial dispute resolution. This is recognised in the UNCITRAL Model Law and it is considered best practice for the courts to benignly facilitate mediation and arbitral proceedings.

## 4.2 Recognition and Enforcement of Foreign Arbitral Awards

There are several cases where the court had referred the parties to mediation or

(49) [2012] 3 CLJ 249.

(50) Kamal, S. M. (2014). Khalid confirms out-of-court settlement with Bank Islam for undisclosed sum. Malay Mail Online. February 14, 2014 at http://www.themalaymailonline.com/malaysia/article/khalid-confirms-out-of-court-settlement-with-bank-islam-for-undisclosed-sum#sthash.oxrwECgw.dpuf

(51) [2003] 5 MLJ 503 at 508.

Appeal held that the court should lean against a construction which would defeat the commercial purpose of the agreements. The appellate court dismissed the appeal and affirmed the decision of the High Court while emphasizing that the reference to "Sharī'ah law" in the governing law clause was a mere reference to the fact that Shamil Bank conducts its business in accordance to Sharī'ah principles. The court further observed that the sole interest of Beximco was to obtain advances of funds and Sharī'ah was not supposed to be an issue in the interpretation of the governing law clause and such law should not necessarily have any impact on the validity of the agreements. Therefore, the court gave effect to the commercial purpose of the agreements which was mainly to obtain advances of funds.

## 4 Major Judicial Support for the Islamic Finance Industry

Based on the above analyses on the dynamics of judicial support in Islamic finance, this part examines major aspects of judicial support for the Islamic finance industry from the prism of case law in Qatar International Court and Dispute Resolution Centre (QICDRC), Malaysia, DIFC, and England.

### 4.1 Encouraging Amicable Settlement in the interest of the Parties

There are situations where the judge encourages the parties to explore amicable settlement, which reflects the original practice in Islamic law where the judge is conferred with the inherent powers to settle a case before him or her amiably if he deems fit. In Islamic law, the judge "is endowed with multiple roles with a largely inquisitorial justice system, and the roles of mediator and conciliator are included amongst them."(46) In addition, provisions for recognition and enforcement of awards in Islamic law clearly require that for the purpose of enforcement, an award should be referred to the judge. The implication of this is that the judge is involved in the process.(47) It is either the judge earlier referred such a case for arbitration or the disputing parties independently appointed a third-party neutral as an arbitrator to resolve the matter.

In a rather unique proceeding, the court at the QICDRC was faced with a preliminary objection relating to the jurisdiction of the court in Daman Health Insurance Qatar LLC v. Al Bawakir Company Ltd(48) where it decided it had jurisdiction but encouraged the "parties to settle the dispute without further recourse to the court" since the defendant accepted that it owed the claimant and the claimant had signified interest that it will accept the settlement sum. In a similar vein, there is also some indications that the

(46) Aida Othman, "And Sulh is Best: Amicable Settlement and Dispute Resolution in Islamic Law", Ph.D. Thesis: Harvard University, 2005, at 7.

(47) See Ahmad b. 'Umar Al-Khallaf, Adab al-Qadi. Commentary by 'Umar b. 'Abdul-Aziz, edited by Abu al-Wafā' al-Afghānī and Abū Bakr Muhammad al-Hāshimī, Beirut, Lebanon: Dār al-Kutub al-'Ilmiyyah, 1414/1994, at 481-486.

(48) Case no: 04/2017. Judgement delivered on 13 July 2017.

> Act 1950 still govern Islamic contracts. The MOD facility agreements were not one that could be avoided under s 24 of the Contracts Act nor an illegal contract under s 25 and therefore remained an enforceable agreement and had to be adhered to.(41)

In most cases, the holistic approach allows for a fair consideration of the case before the court, as fairness to both parties requires that once a party has benefitted from a facility, such a party cannot later plead no-compliance as a defence. Islamic finance customers cannot enjoy the benefits of an Islamic finance facility from a bank and later claim it is not Sharī'ah compliant when they default. A party cannot approbate and reprobate at the same time; hence, the maxim qui approbat non reprobat is firmly embodied in English Common Law.

## 3.5 Application of the Commercial Purpose Test

The application of commercial purpose test by the courts in deciding cases before them is well documented in many English cases. As held recently in the Australian case of Ecosse Property Holdings Pty Ltd v Dee Gee Nominees Pty Ltd(42) in interpreting ambiguous clauses in agreements, the court places greater weight on presumed commercial purpose of the underlying agreements than the language used or adopted by the parties. In US Bank Trustees Ltd v Titan Europe 2007-1 (NHP) Ltd.(43) the court observed:

> If... the court concludes that the language used is unambiguous, then the court must apply it, even though some other result might be thought more commercially reasonable, and even if it gives a result that is commercially disadvantageous to one of the parties. The court's function is to interpret the contract, not to rewrite it.

Therefore, as held in Rainy Sky v Kookmin Bank(44) where any term of a contract is subject to more than one interpretation, it is appropriate to adopt the interpretation which is most consistent with business common sense or such interpretation that serves the commercial purpose of the original intention of the parties.

It appears the English court also gave judicial support to the above principle where the court held the parties to be bound by their agreement despite the insistence by a party that the underlying murabahah agreements were not Sharī'ah compliant. In the often-cited Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd(45) the Court of

(41) Ibid, p. 83.
(42) [2017] HCA 12.
(43) [2014] EWHC 1189 (Ch), at [25]).
(44) [2011] UKSC 50, at [30].
(45) [2004] EWCA Civ 19, [2004] 1 W.L.R. 1784, [2004] 4 All E.R. 1072, [2004] 2 All E.R. (Comm) 312, [2004] 2 Lloyd's Rep. 1, [2004] 1 C.L.C. 216, (2004) 101(8) L.S.G. 29 Times, February 3, 2004, 2004 WL 62027.

argue that in complex Islamic finance cases such as cross-border Ṣukūk transactions, the interventionist approach may be more appropriate to dissect every relevant fact of the case and address all issues raised in the interest of justice and fairness. Though the non-interventionist approach seems to be the prevailing model in the English Court, the decision of the court in Shamil case showed that the court may adopt the interventionist approach when the facts require it to do so.[35]

## 3.4 Consideration of the case as a whole

The approach of considering the case as a whole is based on the premise that it is usually a difficult challenge for the court to exercise its judicial function in applying positive law to Islamic finance transactions. In Bank Kerjasama Rakyat Malaysia Bhd, v Emcee Corporation Sdn Bhd[36] the court held:

> The facility given by the appellant to the respondent was an Islamic banking facility. But that did not mean that the law applicable in this application was different from the law applicable if the facility was given under conventional banking. The charge was a charge under the National Land Code. The remedy available and sought was a remedy provided by the National Land Code. The procedure is provided by the Code and by the Rules of the High Court 1980. The court adjudicating it was the High Court. Therefore, the same law was applicable, the same order that would be, if made, and the same principles that should be applied in deciding the application.[37]

The holistic approach to a case as established above has also been upheld in Tan Sri Khalid Ibrahim v Bank Islam Malaysia Berhad[38] and in the more recent case of Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor.[39] In the latter case, the court was faced with a question "whether a contract which did not comply with Shariah on one hand, but in compliance with the law of contracts on the other hand, would be legally enforceable"[40]. The court therefore held:

> The purported non-compliance with the murahabah principles did not render the contract illegal and unenforceable. The validity of the contract in this case should be viewed from the law that generally governs the contract between parties in this country. The provisions of the Contracts

(35) Tun Arifin Bin Zakaria. "A judicial perspective on Islamic finance litigation in Malaysia", p. 156.
(36) (2003) 1 CLJ 625.
(37) Ibid.
(38) [2012] 3 CLJ 249.
(39) [2017] 2 MLJ 69.
(40) Ibid, p. 82.

country. As a matter of fact, this encouraged the regulatory authority to come up with clear policy guidelines on rebates in Islamic finance facilities.

## 3.3 Consideration of the substance of the agreement

It is interesting to note that there are cases where the court had gone beyond the compliance of the parties to the terms of the agreement, including the procedural requirements. The court in those cases had considered the substantive principles of the Sharī'ah even though the court is a civil court with a judge not necessarily trained in Sharī'ah. This practice is not so common in the English court, as the judges had consistently avoided making decisions or given opinions on Sharī'ah issues. The Qatari and DIFC courts also avoid scrutinizing Sharī'ah issues but a Malaysian court once considered the substantive Sharī'ah principles of the case. In a collective judgment delivered by the court for 11 separate cases involving Bank Islam Malaysia Berhad and Arab Malaysian Finance Berhad, the court held that the BBA is not a bona fide sale but a financing transaction that is contrary to the relevant Islamic banking laws in the country. In the case, Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)[32] the court went into the analysis and definitions of "Islam", "Muslim", and "Madhhab", and concluded that:

> This court holds that where the bank purchased directly from its customer and sold back to the customer with deferred payment at a higher price in total, the sale is not a bona fide sale, but a financing transaction, and the profit portion of such Al-Bai' Bithaman Ajil facility rendered the facility contrary to the Islamic Banking Act 1983 or the Banking and Financial Institutions Act 1989 [now repealed and replaced with Islamic Financial Services Act 2013] as the case may be.[33]

Although the decision was reversed at the Court of Appeal, the above case is a clear example where the court goes into the substantive part of the agreement and making attempts to interpret Sharī'ah issues. Similar practice was experienced in Affin Bank Berhad v Zulkifli Abdullah[34] where the court took a step further to calculate the amount of profit the bank would have earned up to the date of the final judgment of the court. The foregoing analyses on the judicial approach to the construction of Islamic finance agreements revealed some glimpse into how a court delves into the substance of the dispute by addressing Sharī'ah issues in the case with the intention of ensuring fairness in the final decision of the court. This approach is generally referred to as the interventionist approach though is considered by some as eroding the sacrosanct principles of judicial impartiality and neutrality. One could however

(32) [2008] 5 MLJ 631.
(33) Ibid, p. 659.
(34) (2006) 4 MLJ 1.

this is allowed in commercial arbitration when the parties expressly empower the arbitral tribunal to act as such.[29] However, it is rare in judicial proceedings for a judge to apply principles of equity and fairness. But this commendable role of the judiciary has been seen in some Islamic finance cases in Malaysia. For instance, in Malayan Banking Berhad v. Ya'kup bin Oje & Anor[30] in a case involving the bank facility of Al-Bai Bithaman Ajil (BBA), the court was asked to determine whether the bank was entitled as of right to full profits in event Islamic facility was terminated prematurely. As there were no clear guidelines on rebate for Islamic finance facility from the regulatory authorities at that time even though there were resolutions of SAC, Hamid Sultan J (as he then was) decided to apply the principles of justice and equity while emphasizing that: "Equity in this case applied both to the plaintiff as well as to the defendants." The judge further emphasized:

> When parties enter into Islamic commercial transaction, it is always subject to Quranic injunction to act with justice and equity and there is a need for the parties entering into such commercial dealing to respect Islamic worldview on such transaction; more so in the fairness to ensure that the deal is completed as per the terms and the need to mitigate the breach, taking into A consideration various principles, inclusive of the concept that says that excess profit is not permissible.(31)

In order to further ensure that he is not going beyond his judicial function, the judge referred to relevant statutory provisions that allow him to apply principles of equity in the case. In the above case, the court prevented the bank from recovering the total amount of profit which it was entitled to had it been there was no premature termination but also held that the customer should pay the outstanding balance owed promptly. The basis of the decision was that apparent injustice which was reflected in the amount the defendant had to pay (RM167,797.10) compared to the original amount received from the bank (RM80,065). Such salutary judicial support helped in shaping the future development of the Islamic financial services industry in the

(29) Article 28(3) of the UNCITRAL Model Law on International Commercial Arbitration provides: "The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so." In the "Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006", it is explained that: "Article 28 (3) recognizes that the parties may authorize the arbitral tribunal to decide the dispute ex aequo et bono or as amiables compositeur. This type of arbitration (where the arbitral tribunal may decide the dispute on the basis of principles it believes to be just, without having to refer to any particular body of law) is currently not known or used in all legal systems. The Model Law does not intend to regulate this area. It simply calls the attention of the parties on the need to provide clarification in the arbitration agreement and specifically to empower the arbitral tribunal. However, paragraph (4) makes it clear that in all cases where the dispute relates to a contract (including arbitration ex aequo et bono) the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction." See UNCITRAL, UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006, Vienna: UNCITRAL, 2006, p. 34.

(30) [2007] 6 MLJ 389.

(31) Ibid, pp. 399-400.

the Malaysian courts in deciding Islamic finance matters,[25] a further probe into the approaches reveal that the English court as well as civil courts in Qatar, Dubai, and elsewhere would also adopt similar approaches. Based on the trends in the English court, this study adds to the list a fifth approach, which is the application of the commercial purpose test.

## 3.1 Parties are bound by their agreement

The approach that prefers that parties are bound by their express agreement has its origin in the Sharī'ah itself, as there is a legal maxim which provides: "Muslims are bound by their stipulations [or agreements]".[26] In one of the earliest Islamic finance cases adjudicated by the court in Malaysia, Tinta Press Sdn Bhd. v Bank Islam Malaysia Bhd.[27] the Supreme Court held that parties are bound by their agreement. At such early phase of Islamic finance litigation globally, there was no much reference to the Sharī'ah principles but the court specifically considered the lease agreement and held the parties to be bound by it. This approach is the strict non-interventionist approach where the court focuses on the agreement without necessarily examining other extraneous factors.

During the early period in the history of the Islamic financial services industry, there were no statutory Sharī'ah Committees although Islamic banks and windows had their in-house Sharī'ah advisors. Geneally, during that period, Islamic financial institutions only received ad hoc Sharī'ah advisory services from leading scholars. So, the courts were proactive in giving full support to Islamic finance contracts that have been duly verified by scholars and executed by the parties. This element of judicial support was very helpful during the early phase of the development of Islamic finance in the 1980s. This is reflected in the position of the court in Arab Malaysian Merchant Bank Berhad v Silver Concept Sdn. Bhd[28] where the court established the general principle of rebuttable presumption to the effect that Islamic banking business and Islamic finance contracts generally are presumed to be in order unless and until such presumption is rebutted. It was surmised that such rebuttal could be a formal statement or resolution of the in-house Sharī'ah advisory body of the financial institution in question.

## 3.2 Justice and equity of the case

There are situations where the court goes beyond strict legal principles while trying to apply some extraneous legal principles to the matter before it, particularly if the court feels such will serve the ultimate interest of justice and equity of the case. In practice,

(25) Ibid.

(26) This is contained in a Hadith related by Al-Bukhari, Abu Dawud and Al-Hakim and classified sahih or sound. See Al-Bukhari, Sahih al-Bukhari with Fath al-Bari, Book of conditions (Shurut), vol. 5: 354.

(27) (1987) CLJ Rep 396/2 MLJ 192.

(28) [2005] 5 MLJ 210.

incorporated into the Murabaha Agreement as they were sufficiently certain. This was because there was sufficient reference and identification of specific aspects of Sharia law." This important judicial support to Islamic finance through the recognition of codified standards is unprecedented and will further deepen further reforms in the industry. In a way, it might change the negative perceptions of some experts on Islamic finance litigation.

## 2.3 Islamic finance litigation: a niche for commercial lawyers

The judicial support of Islamic finance issues can be better accessed in examining trends in Islamic finance litigation. Therefore, Islamic finance litigation should be understood from the perspective of a whole continuum of dispute resolution processes, which may include court-annexed processes, including arbitration. In an empirical research conducted few years ago[21], it was revealed that 74.5% of Islamic finance practitioners in a survey, including the legal practitioners among them, claimed that they have never been involved in the settlement of an Islamic finance related dispute whether directly or indirectly. While a negligible 6.6% have been involved in litigation, 3.8% has been involved in arbitration. In all, the research found that the increasing importance of Islamic finance litigation has blurred the views of many practitioners, particularly the legal experts, who are not ready to seek for amicable means for the resolution of disputes in the Islamic finance industry.[22] This has created a niche for Islamic finance litigation in both international and domestic commercial litigations. With the growing interest of legal practitioners, economists, finance experts and accountants in Islamic finance, a new global pool of experts is emerging. As for the legal practitioners, an emergent legal system or a major field in legal practice has definitely been brought to limelight. Foster describes it as a "rapidly developing transnational legal system" which many commentators fail to realize.[23]

## 3. Judicial Approaches in Dealing with Islamic Finance Disputes

The adjudication of Islamic finance matters in the courts have witnessed different approaches over the years based on the available case law in leading jurisdictions. The four approaches identified are: parties are bound by their agreement; justice and equity of the case; consideration of the substance of the agreement; and consideration of the case as a whole.[24] Though in its analysis of the four approaches, a former Chief Justice of Malaysia, Tun Arifin Zakaria argued that the approaches are those of

(21) Umar A. Oseni, "Islamic Finance Litigation: An Empirical Analysis of the Practitioners' Views on Dispute Resolution", Second Prize Award Paper, 4th Kuala Lumpur Islamic Finance Forum Essay Competition, 4th October 2011 (unpublished).
(22) Ibid.
(23) Nicholas H. D. Foster, "Islamic Finance Law as an Emergent Legal System", 21 Arab Law Quarterly, (2007), 170-188, 186.
(24) Tun Arifin Bin Zakaria, "A judicial perspective on Islamic finance litigation in Malaysia" IIUM Law Journal 21, no. 2 (2013): 160.

From the above Figure 1, all 25 Muamalat appeals registered in 2015, which were brought forward to 2016 were disposed in 2016. Similarly, in 2016, 29 appeals were registered, and out of this, 12 appeals have been disposed of. The success recorded in the Malaysian courts is as a result of the necessary infrastructure put in place to ensure Islamic finance matters are not only resolved expeditiously but also effectively. These include setting up the Muamalat Bench itself and establishing a procedure for mandatory court referrals to the Sharī'ah Advisory Council (SAC) on any Sharī'ah matter during any proceedings before the court.

In English and, Doha, and Dubai courts (Dubai International Finance Centre, in particular), there have been instances where the courts were faced with applying the Sharī'ah in Islamic finance disputes. The current position of law is that the courts may apply the Sharī'ah indirectly. "While the English and DIFC courts will not directly apply Sharia principles, there are ways in which they can indirectly apply them. In particular: they can apply Sharia principles that are incorporated in an agreement; they can apply a national law that itself applies Sharia principles; they can use Islamic law as an aid to construction; and/or they can decide a justiciable issue of IF [Islamic finance] principle on which the rights of a party are conditional."[17] It is therefore important to point out that it is possible for the English court to apply Sharī'ah by incorporation of the principles into the agreement. The English Court of Appeal explained in Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd[18], that the provisions of foreign law can be incorporated into the contract in form of private legislation though this rule is subject to the requirement of certainty. The court must be able to identify with certainty the relevant rules being incorporated by the parties. In Shamil, the court suggested that relevant "provisions of foreign law or an international code or set of rules" could be incorporated but such law, code or set of rules must have specific black-letter provisions appropriately codified rather than general principles. Therefore, it is believed an English court may apply incorporated terms in a contract which are based on a codified Islamic law. In today's Islamic financial services industry, what is obtainable is the Sharī'ah Standards of the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) and perhaps the Ottoman Mejelle.[19]

In the Dubai International Finance Centre (DIFC) case of Deyaar Development P.J.S.C. v Taaleem P.J.S.C. & National Bonds Corporation P.J.S.C.[20] the Court of Appeal agreed that the Murabahah Agreement in question sufficiently incorporated the Sharī'ah Standards of AAOIFI and OIC Islamic Fiqh Academy. The court emphasised that: "on a true construction of the Murabaha Agreement, the Sharia Standards were

(17) Rupert Reed, "The application of Islamic finance principles under English and DIFC law", Butterworths Journal of International Banking and Financial Law , October 2014, p. 574.

(18) [2004] EWCA Civ 19, [2004] 1 W.L.R. 1784, [2004] 4 All E.R. 1072, [2004] 2 All E.R. (Comm) 312, [2004] 2 Lloyd's Rep. 1, [2004] 1 C.L.C. 216, (2004) 101(8) L.S.G. 29 Times, February 3, 2004, 2004 WL 62027.

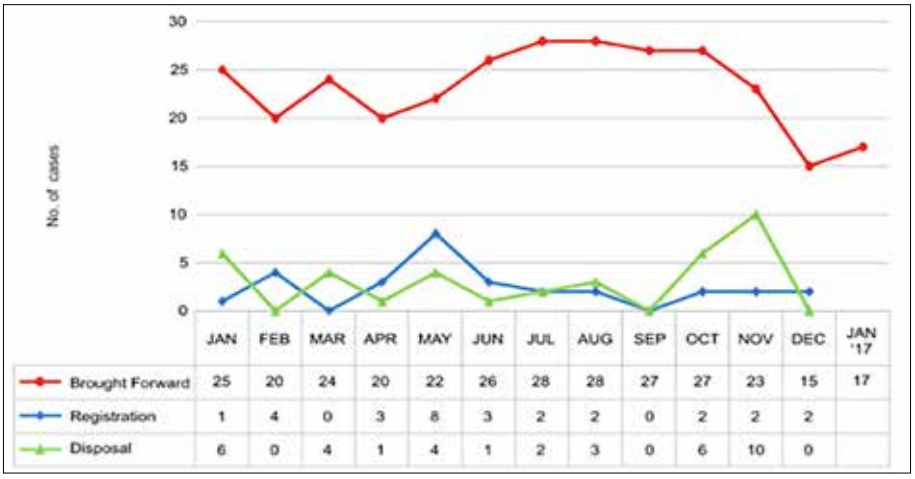
(19) Ibid, pp. 574-5.

(20) [2015] DIFC CA 010.

perspective, lacks practical implications and application to the current reality of the Islamic financial services industry in Malaysia and elsewhere. It is worth noting that Buang had earlier proposed a similar framework where the Sharī'ah Courts could be the appropriate forum for the resolution of Islamic finance disputes.(13) In both earlier studies,(14) there was no proposal for court-annexed dispute resolution. It is on record that court-annexed ADR is increasingly becoming popular in Malaysia with the introduction of Practice Direction No. 5 of 2010 which institutionalised court-annexed mediation that may either be judge-led mediation or court-referred mediation.(15) Since all the civil courts in Malaysia have been mandated to apply this as a preliminary step in all cases, the Muamalat Bench has found a better way in resolving its disputes. Through the Practice Direction, the Muamalat Bench can engage the services of expert arbitrators or mediators who are learned in Islamic banking and finance.

Furthermore, in Malaysia, the Court of Appeal had performed excellently over the years in disposing appeals relating to Islamic finance and Sharī'ah-compliant transactions emanating from the Muamalat Bench. Figure 1 below shows the number of Muamalat appeals registered, disposed of and pending at the Court of Appeal in Malaysia as at the end of 2016.

***Figure 1: Muamalat Appeals Registered, Disposed of, and Pending by the end of 2016***




| | JAN | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT | NOV | DEC | JAN '17 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Brought Forward | 25 | 20 | 24 | 20 | 22 | 26 | 28 | 28 | 27 | 27 | 23 | 15 | 17 |
| Registration | 1 | 4 | 0 | 3 | 8 | 3 | 2 | 2 | 0 | 2 | 2 | 2 | |
| Disposal | 6 | 0 | 4 | 1 | 4 | 1 | 2 | 3 | 0 | 6 | 10 | 0 | |

*Source: The Malaysian Judiciary Yearbook 2016.(16)*

(13) Ahmad Hidayat Buang, "Islamic Contracts in a Secular Court Setting? Lessons From Malaysia", Arab Law Quarterly 21 (4) (2007): 317-340.

(14) Ibid; Ruzian Markom, et l.

(15) Ali Mohamed Ashgar Ali, "Practice Direction in Mediation", In Mediation in Malaysia: The Law and Practice, by Ishan Jan Mohammad Naqib and Ali Mohamed Ashgar Ali, 493-504. Kuala Lumpur: LexisNexis, 2010.

(16) The Malaysian Judiciary, The Malaysian Judiciary Yearbook 2016, Kuala Lumpur: The Malaysian Judiciary, 2017, p. 30.

the inclusion of arbitration and the powers of the Muslim judge to mediate the dispute through amicable settlement. This unique practice in the judicial function in Islamic law is less appreciated in modern judicial practice.

Among numerous issues that fall under the jurisdiction of the courts, commercial matters and other contractual issues have been adjudicated upon by the courts since the advent of Islam. Just like other civilizations such as the Roman civilization, which gave birth to modern civil law tradition, and the English Common law, the Islamic legal tradition recognised and practiced the judicial function over the centuries while relying on fundamental sources of law in its adjudication. Furthermore, unlike the nature of adjudication in the early days and over the centuries in Muslim states, modern courts operate in pluralistic legal systems that are based on the English common law, Continental civil law, both Common law and civil law, or some other legal systems that take their origins from a successive reign of both common law and civil law with some significant element of Islamic law. This is reflected in the different permutations and variations in legal systems across the world since some of the legal systems have undergone legal acculturation or some sort of legal mutation.

## 2.2 Prominent role of the courts in dispute resolution in Islamic finance

The increasing importance of Islamic finance products has remarkably increased the number of related cases litigated in the courts. Some contractual arrangements involving Islamic finance products have generated controversies which have sometimes led to protracted litigation. The dramatic surge in Islamic finance litigation in the last decade has formidably established this form of litigation as a professional field of practice. Law firms specialising in Islamic finance, whether for consultancy and advisory purposes or litigation, have sprung up across the world from Doha to Dubai, Singapore to South Africa, London to Luxemburg and from Malaysia to Malta. More Law firms have established Islamic finance units to advice government, corporate bodies and private individuals on Sharī'ah-compliant transactions and Islamic mortgage products and takaful.

It is pertinent to note that Islamic finance litigation came to the limelight around the twilight of the 20th century starting with developments in the Malaysian courts which were as a result of the teething problems the then nascent industry faced. Markom et al, examined the observable trends in the adjudication of Islamic banking and finance cases in the civil courts in Malaysia between 1986 and 2010, a period of dramatic developments in Islamic finance litigation.[12] Though the study is a comprehensive work on the subject matter, its conclusion is that Islamic banking and finance cases should be adjudicated in the Sharī'ah Courts from the court of first instance to the appellate stage. This suggestion, although commendable from the academic

(12) Ruzian Markom, Sharina Ali Pitchay, Zinatul Ashiqin Zainol, Anita Abdu lRahim, and Rooshida Merican Abdul Rahim Merican, "Adjudication of Islamic banking and finance cases in the civil courts of Malaysia." European Journal of Law and Economics, 36(1),(2013): 1–34.

This study examines different dimensions and permutations of invaluable judicial support in Islamic financial services and products and identifies specific areas where the judiciary has helped to shape current practices in the industry. While relying on qualitative legal methods with comparative case analysis from England, Malaysia, Qatar and United Arab Emirates, this study conducts cross-jurisdiction case analyses and identifies the role of judiciary in introducing sustainable practices in the Islamic finance industry.

Against the above backdrop, this study is organised into five major parts. After this introductory part, Part 2 briefly examines the nature of the judicial function in the modern Islamic finance industry and the emergence of Islamic finance litigation as a specialised field. Part 3 identifies the different judicial approaches in dealing with Islamic finance matters coming before the courts, while Part 4 identifies areas of major judicial support for the Islamic finance industry and Part 5 provides the conclusion and recommendations.

## 2.The Judicial Function and Islamic Finance Litigation

The socio-economic importance of the judicial function in any society stems from the ability of laymen to have unhindered access to justice to enforce their rights. This overarching function has been recognised in different times and climes. In fact, in the general realm of politics of a particular society, Aristotle described someone who holds the position of a judge as being the personification of justice whose primary role is to mediate between the two disputes, thereby maintaining justice.(4)

### 2.1 Judicial Function in Islam

In Islam, the importance of the judicial function in the society is well documented in the primary sources of Sharī'ah as well as books of principles of Islamic jurisprudence since the inception of Islam in the 6th century.(5) This informed the emergence of specific books on judicial code of conduct written by leading Muslim jurists such as Al-Khassaf(6), Ibn al-Qāss(7), Al-Māwardī(8), 'Abd al-Rāfī'(9), Fadīlāt.(10) The judiciary and its function has been a major organ of the state in Islamic law, as Muslim jurists who wrote extensively on administration of the state such as Al-Mawaridi and Abu Ya'ala dedicated entire chapters of their respective treatises on the judicial function in the state.(11) One unique aspect of the judicial function in most classical fiqh books is

(4) David C. Mirhady, "Aristotle and the law courts", Polis: The Journal for Ancient Greek Political Thought 23, no. 2 (2006): 303.

(5) There are numerous Qur'anic legal texts and prophetic legal precedents during the time of the Prophet.

(6) Ahmad ibn 'Umar Al-Khassaf, Adab al-Qadi (Commentary by 'Umar b. 'Abd al-Aziz). Edited by Farhat Ziyadeh. Cairo: American University in Cairo, 1978.

(7) Ahmad Ibn Abi Ahmad Ibn al-Qāss, Adab al-Qādī, Edited by Husayn Khalaf al-Jubūrī. Tā'if: Maktabah al-Siddiq, 1989.

(8) Ali ibn Muhammad Al-Māwardī, Adab al-Qadi. Edited by Muhy Hilal al-Sarhān. Baghdad: Matba'at al-Arshad, 1971.

(9) Ibrahim ibn Hasan ibn 'Abd al-Rāfī, Mu'īn al-Hukkām 'alā al-Qadāyā wa al-Ahkām. Beirut: Dār al-Gharb al-Islāmī, 1989.

(10) Jabr Mahmūd Fadīlāt, Al-Qadā fī al-Islām wa Ādāb al-Qadi. Oman: Dar Āmmār, 1991.

(11) See generally, Al-Mawardi, Abu al-Hasan'Ali. "ibn Muhammad ibn Habib." Al-Ahkam as-Sulthaniyyah, Cairo: Maktabah al-Anjlu al-Misriyyah, 1992; and Abu Ya'la, Al-Ahkam Al-Sultaniyyah, Beirut: Dar al Fikr, 1974.

## 1. Introduction

With a total asset worth of USD1.89 trillion by the end of 2016,[1] the Islamic financial services industry,[2] remains the fastest growing sector of the global financial system. A sustained growth requires a robust legal, regulatory and financial architectures that will be able to weather the storm of future financial crises. Besides the regulatory authorities in any jurisdiction, one of the most important players, though less celebrated, is the judiciary which has the inherent powers to shape practices in the industry. Though there have been some common misconceptions on Islamic finance litigation, the broader role played by the judicial function in supporting the Islamic finance industry has not been given much focus in recent studies. The judicial role in, and support for, Islamic finance issues is as important as the role of the main regulatory authorities in the financial system of a country.

The function of the judiciary in its interaction with Islamic finance matters is mostly appreciated through Islamic finance litigation – an emerging area of commercial litigation. Litigation is the most popular method of dispute resolution. Contractual parties have often resorted to litigation in order to enforce their rights particularly in finance contracts. Undoubtedly, litigation has its advantages especially in terms of enforcement of contractual terms and settlement agreements. Since most Islamic finance transactions, particularly cross-border Ṣukūk issuances, run into millions of US dollars, investors feel protected when all associated legal risks are well catered for, including choice of law, legal enforceability of the agreement, dispute resolution, and the recourse element in the transaction documents. Such confidence is required to ensure the financial consumers are well protected against any untoward event relating to their investments. As such, more than 98% of the Islamic finance cases are adjudicated upon by civil court judges who have experience in hearing and determining related commercial disputes. Though the Sharī'ah issues that appear in Islamic finance litigation may not be suited for the civil courts, the procedure for inviting expert opinions as well as specific procedures for referrals to a Sharī'ah Advisory Council in some jurisdictions such as Malaysia has reinforced the position of civil courts as suitable forums for resolving Islamic finance disputes.[3]

While relying on a key aspect of the legal and regulatory framework for Islamic finance, this paper examines the judicial role in facilitating Islamic finance transactions within the industry through numerous interpretative approaches, fair processes and support directives which involve a combination of intrinsic and extraneous processes relating to English law and Sharī'ah to ensure parties get effective access to justice.

(1) Islamic Financial Services Board, Islamic Financial Services Industry Stability Report 2017, Kuala Lumpur: Islamic Financial Services Board, May 2017, p. 7.

(2) The Islamic financial services industry comprises the Islamic banking, Islamic capital and money markets, and Islamic insurance (takaful) sectors.

(3) Mohd Johan Lee, and Umar A. Oseni, IFSA 2013: Commentaries on Islamic banking and finance, Selangor: Malaysian Current Law Journal Sdn Bhd, 2015.

## Abstract

As the Islamic finance industry expands beyond its original frontiers with wider acceptance and confidence in new jurisdictions, the legal and regulatory framework remains the bedrock of series of reforms taking place across the world. One key aspect of the legal and regulatory framework is the judicial function, which serves as an indispensable support mechanism, in facilitating Islamic financial services and products. This paper examines different dimensions and permutations of invaluable judicial support in Islamic financial services and products and identifies specific areas where the judiciary has helped to shape the industry in line with the original value proposition of Islamic financial intermediation. While relying on qualitative legal methods with comparative case analysis from different jurisdictions, this study conducts cross-jurisdiction case analyses and identifies the role of judiciary in introducing sustainable practices in the Islamic finance industry. The paper concludes that the judicial function has played a significant role in ensuring justice and fairness through purposive interpretation of contracts, recognition and enforcement of foreign arbitral awards and judgments, consistency and predictability of outcomes, legal risk mitigation, and facilitation of mediation and arbitral proceedings, thereby positively reshaping the future of Islamic finance industry. Above all, the availability of binding judicial precedents, which is hitherto not common for Islamic law matters, is a welcome development in the Islamic finance industry.

*Keywords: judicial function, dispute resolution, adjudication, Islamic finance, litigation*

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# Judicial Support for Islamic Finance Issues

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