Enforcing Islamic Contracts (*Lex Islamicus*) in English Courts

"Subject to the principles of the Glorious Shariah, this Agreement shall be.."

By Khalil Jarrar, J.D.

While listening to Market Place, a popular radio-show on National Public Radio in the US, discussing the introduction of sovereign Islamic bonds in the UK, one of the guest speakers was in shock to learn that the UK was adopting two legal systems governing a financial instrument, the common law of England and Islamic law (*Lex Islamicus*).

One must wonder if the lawyer would have had the same reaction if it was any other legal system aside from Shariah law. Conflicts of laws exist in every federal system: in the United States the application of the Erie Doctrine was devised solely for that purpose, where federal courts apply the federal procedural law and states substantive law. Noteworthy to highlight that Scotland still uses both Civil and Roman law, so can harmonizing two sets of laws in Great Britain be any different? Is it such a giant leap?

Certain observers are acting as if they have never heard of Islamic law, as if Muslims never interacted with Western countries (and vice versa), living in commercial isolation... Globalization in its current form has introduced Islamic financial instruments, but the basic principles of Islamic law are not alien to the West either, especially to the common law system.

In an article by Manlio Lima, entitled *English Common Law and Islam: A Sicilian Connection*, the author asserted that "Principles of Common law are rooted in Islamic ("*shari'a*") law, introduced into Norman England through contact with the multicultural kingdoms of Sicily and Jerusalem. That is the thesis suggested over the last decade by several scholars, most notably John Makdisi in the United States and Omar Faruk in the United Kingdom. While there exists no absolute "concrete" proof of a direct connection, circumstantial historical evidence supports the possibility of an exchange of legal ideas" (See reference link).

When in doubt, judges have never been reluctant to quote more recent conventions and legal principles or even resort to customary international or natural law. Why not *Shariah*?

The Principles of usury (akin to riba) are not novus to English courts or any other legal system. There are prohibitions against usury in the American constitution; furthermore, the body of law governing Islamic contracts is a set of negative covenants, acting as a limitation to protect an adverse party if the enforcement of a contract clause shocks the conscience.

It is widely accepted that there could not be two separate systems of law governing a contract. The Rome Convention provided that a contract shall be governed by "the law chosen by the parties" and the reference to a choice of law was to the law of a country, not to a non-national system of law such as Shariah. Although it is perfectly open to the parties to a contract to incorporate some provisions of a foreign law into an English contract, but only

where the parties had sufficiently identified specific provisions of a foreign law or an international code or set of rules.

These issues were illustrated in *Shamil Bank of Bahrain v Beximco*. Here the court argued that Shariah law is neither specific nor codified to enable the judges to reach an educated decision. As for specificity of Shariah law the same point can be made about most constitutions in the West, the American constitution being one, where decisions by the Supreme Court justices can oscillate from one end of the spectrum to the other.

English courts have never solely relied on codified law in dispute resolutions, they have allowed parties to a contract to introduce *custom and usage* in a particular trade where ambiguity exists. On the other hand, for judicial economy, lawyers can make adequate reference in a contract to a prospectus explaining key financial instruments. Although a prospectus has no legal standing on its own, such documents can be introduced as Parol Evidence or can be referred to in the contract itself, acknowledged by signatories as having read and understood the meaning of specific financial instruments or structures.

Once can surmise that the use of a contractual term may carry an ambiguity as to the original intent of the contracting parties, or where one party brings forth an expert witness testifying to an inference to a specific contract that did not exist in the contract itself. Such was the case of divorce proceedings In *re Marriage of Shaban*, 2001 (88 Cal.App.4th 398), where the husband claimed that a marriage certificate was a prenuptial agreement as well - citing a generic statement in bottom of the contract: "The above legal marriage has been concluded in Accordance with his Almighty God's Holy Book and the Rules of his Prophet to whom all God's prayers and blessings". Here the court ruled out the application of Shariah law, where the statement is too ambiguous and subject to multiple interpretations.

Some might contend that applying *Murabaha* contracts require extensive knowledge of such instrument, while the name might sound alien or foreign, a reasonable search of a competent lawyer or court clerk would reveal that *Murabaha* is the Arabic word for cost plus contracts which is an ancient principle that transcends cultures and legal systems. Even if and when a specific subject matter requires special skills or knowledge beyond the competency of the court, the use of an expert witness would always work to alleviate discrepancies. The court should be able to take expert opinions about Islamic Law of contracts and the elements for a valid *Murabaha* contract from qualified *Fuquha* (Islamic Jurists), amongst which there will be little disagreement. The court should take the aforementioned steps to educate itself in an unbiased manner and subsequently apply its knowledge to determining the validity of such contracts.

English courts are not purely at fault though, responsibility must be shared across the entire industry. Lawyers are also responsible, where a competent lawyer drafting a contract adequately and specifically can render the choice of laws irrelevant. Industry-wise the courts could be aided greatly by the existence of an enforceable, codified, widely disseminated, and properly-defined set of Islamic finance rules.

In the spirit of constructive criticism this is as an attempt to create thought-provoking discussion, exploring legal, regulatory and compliance challenges facing the enforcement of Islamic contracts in English courts in particular and the legal community at large.