

OPALESQUE

# ISLAMIC FINANCE

INTELLIGENCE



## Jinn Opalesque

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John Hathaway, Managing Director and Portfolio Manager, Tocqueville Asset Management

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It has been quite impossible to escape the recent headlines emanating out of Dubai and specifically relating to Nakheel - to the point that one would have been tempted to avoid the topic altogether. We emphasize the need to take a forward-looking perspective for this the fifth edition of OIFI. We explore the broader implications of Nakheel as it relates to the future of sukuk specifically and to the Islamic financial marketplace as a whole within our editorial section.

Fortunately OIFI does not coordinate content with irrational exuberance (or market 'standstills' for that matter), we remain focused on providing coverage of a wide range of topics - all very timely and relevant in their own right. Our Featured Resource section revisits various opinion pieces on ethics and Islamic finance, with a further segway into social responsibility and responsible investing.

In our Featured Structure section, Nikan explores various Shariah compliant short-selling solutions that have been developed over the past few years (and complemented by further analysis of each one). This review is further complemented by our Fund Manager Interview as we converse with Tocqueville's John Hathaway, who oversees one of the very first Islamic hedge funds.

Khalil continues his Lex Islamicus column with a specific look at contractual complexity and this is further complemented by our Industry Snapshot, where Hdeel Abdelhady from DLA Piper provides a critical analysis of some of the most noteworthy court cases involving Islamic law in recent years. Just as legal precedent is relevant and necessary, so is the need for developing the future talent in the industry as we hear from Fuwad Beg, of Yasaar Human Capital, exploring this theme in detail in our Opinion Column.

Once again we welcome your comments & suggestions, and a reminder that you can check the free online archive of Opalesque Islamic Finance Briefing (our daily news summary) which provides a historical data bank of industry news and articles, as well as the back issues of OIFI.

Thanks & Regards,  
Bernardo  
Editor, Opalesque Islamic Finance Intelligence

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Photography by: Kelly Lemon,  
Robert Seabrook

# The Jinn of Sukuk

By Bernardo Vizcaino, CAIA

Sukuk, whether one likes it or not, has been the flag bearer of the Islamic finance industry and it has had a talismanic role in its growth and expansion. Major conferences, entire industry reports and multiple awards have been devoted to this particular sector. Governments and institutions from across the globe almost exclusively contemplate their entry into Islamic finance through the issuance of so-called 'Islamic bonds'. New Islamic finance institutions more often than not have a sukuk issuance at the very top of their business plans, whereas established IFIs have recently devoted time and effort in launching sukuk funds to broaden their appeal from an institutional to a retail audience. However, if real estate is all about location, location, location it seems that Islamic finance has been simplified into sukuk, sukuk, sukuk. The structure (albeit there's more than a dozen permutations) has been demonized as the poison pill of the industry, so we must ask is this the case of a jinn amongst us? We can certainly choose to brand it as an evil spirit but much harder it is to scrutinize Nakheel for what might be in store for the industry. We foresee the following trends:

## Structural Reform:

Sukuk has exemplified one of the key areas of discontent for industry participants. Specifically, it has exhibited many shortcomings in the way that some issuances have been structured - this has been primarily due to the predilection and popularization of structures that are essentially asset-based debt products rather than an asset-backed hybrid instruments. Yet Nakheel has arrived at a point in time when various Scholars, industry bodies and practitioners at large have repeatedly voiced their concerns over the former debt-like structures. Nevertheless, these calls have been fragmented and uncoordinated - making it unlikely that any realistic change would be enacted. This will see itself accelerated, with the latest events giving stronger support to the

calls for industry reform (at least in the area of product structuring) although even without any official reform the shift away from certain types of issuance (such as murabaha sukuk) is already underway. There might be further implications beyond sukuk, as there would be spillover consequences onto other instruments or practices. Whether change is proactive or reactive is besides the point, as there will be change nonetheless.

## Allocator Mindset:

What begs a question is whether allocation has been overly influenced by a preference for certain types of returns (i.e. correlated to interest rates). If sukuk aims to establish itself as a distinct asset class (as it has been suggested at conferences and forums) then it will require an equally distinct risk management framework and identify its proper place vis-a-vis other asset classes in a portfolio. Allocation decisions would have to be optimized in terms of sukuk, equities, commodities, alternatives, and so on. What is far from certain is whether Islamic banks are ready to overhaul their approach to allocation - this would require a monumental shift. A detachment would be required - by this we mean a financial, structural and philosophical one - since the economics of sukuk needs to move away from interest-based returns (regardless of who originates or underwrites such products). This shift is required from scholars and structuring teams but crucially it has to be driven by investors at large. The usual over-subscription to new sukuk issuance is evidence of their tacit approval of current business practice and in this respect the signs are not positive. Every single type of service provider will have something to say about sukuk, but the actual allocators are mute in this respect. They are the ones that can drive the necessary change - but are they willing to do so?



# Editor's Note

## Sector Diversification:

This is another area ripe for improvement - we have covered this aspect extensively as it pertains to Islamic investment funds (where we have identified various issues such as a distinct geographical bias as well as multiple gaps in terms of asset classes). It is not surprising this is the case for sukuk as well, where underlying assets have been focused on specific regions (say GCC) and sectors (say real estate). Then again, there is absolutely nothing wrong with GCC exposure nor real estate exposure, except that such an exposure should be part of an overall diversified portfolio - not the exclusive component of one. Another strong distinction in the industry has been between Malaysian sukuk and GCC sukuk, with many Malaysian issuances deemed unacceptable to GCC scholars. It is rather ironic that the furore is behind an issuance from the UAE, but one of the trends going forward will be a revisiting of how justified this distinction really is. Many IFIs have been actively investing in issues from their counterparts on the other side of the Indian Ocean, and while this has typically not been widely reported one will expect cross-border activity to be less of a taboo going forward.

## Asset Origination:

A further line of inquiry relates to why products haven't been developed for other regions/sectors? The un-elegant answer is sheer lack of origination expertise. This relates to the ability of Islamic banks to identify assets and opportunities away from their home markets, and the know-how to structure an issue in a timely and efficient manner in jurisdictions outside of their own. The concern here is that if Islamic banks have been immune to the global financial crisis they will be equally immune to market rallies and the anticipated recovery in the global economy (the simple fact that they are not present in a downward market does not validate their business model). Another outcome of Nakheel will be a stronger impetus to build collaborative efforts with non-IFIs that can provide this sector expertise and/or local know-how, so that IFIs move away from their comfort zones.

## Asset Quality:

In the US, the default of East Cameron Gas sukuk has been highlighted as a positive development (the legal outcome has upheld the sukukholder's claim to the underlying assets). What is less evident is that this was a highly-engineered issuance that many in the conventional world would not have touched with a stick. So we must ask whether Islamic finance is the dumping ground for suboptimal investments? While distressed or special situation strategies have their merits it seems the project pipeline of Islamic finance tends to attract rather unconventional offerings. The quality of the underlying assets has also been a highlight of Nakheel, and this has often been exemplified by the lack of rated sukuk and in that sense, sovereign sukuk has been highlighted as a pre-requisite for market development (having a rated issue that in turn provides a benchmark for pricing corporate sukuk). Issuers might have to reduce their reliance on government direction (or support) but most importantly the private sector will need to focus its attention on identifying a much broader set of quality assets.

We expect plenty more headlines relating to Nakheel, but the real story will be on how the industry responds - either it falls back in denial or it embraces this as an opportunity to reinvent itself. Oddly enough, a Jinn has the ability to appear in various forms (most references point to a snake or other animals), so a financial instrument is not entirely out of the question. Then again, these spirits are not exclusively evil and in fact are able to do as much good as they can do mischief. Most tellingly, the Jinn are said to have been created from fire (and Nakheel is certainly fanning the flames of discontent in the industry). Nevertheless, human beings are superior to Jinns, so it is not sukuk that should be demonized but instead the emphasis should be on the various stakeholders (scholars, IFIs, service providers, and - most crucially - investors) as they have the ultimate responsibility to purge these problems away.

Your feedback and comments are very important to us, please feel free to contact the author [via email](#).

# Ethics & Islamic Finance - A Compendium

 **Blogger**™ [As featured in the Islamic Finance Resources Blog](#)

*With Thanks to Joy Abdullah, Sayd Farook and Blake Gould for initiating and developing many of these topics*

## Academic Papers:

### [An Analysis of Islamic Ethics in Small and Medium Enterprises \(SMEs\)](#)

Mohd Zulkifli Muhammad, Azleen Ilias, Mohd Fahmi Ghazali, Rosita Chong Abdullah, Hanudin Amin, Universiti Malaysia Sabah

### [Case Study: Islamic Microfinance and Socially Responsible Investments](#)

Chiara Segrado, MEDA PROJECT, University of Torino, Italy

### [CSR Disclosure in Malaysian Companies](#)

Nik Nazli bt Nik Ahmada, Maliah bt Sulaimanb, and Dodik Siswantonoc, International Islamic University Malaysia and University of Indonesia

### [Islamic Marketing Ethics and Its Impact on Customer Satisfaction in the Islamic Banking Industry](#)

Abul Hassan, Abdelkader Chachi, Researcher, Islamic Economics Research Centre, King Abdulaziz University, and Salma Abdul Latiff, Director of Centre for Islamic Banking, Finance and Management, University Brunei Darussalam Indonesia

### [Sustainable Development from an Islamic Perspective: Meaning, Implications, and Policy Concerns](#)

Zubair Hasan, Professor of Islamic Economics and Finance, International Islamic University of Malaysia

### [Moral Behavior in Stock Markets: Islamic Finance and Socially Responsible Investment](#)

Aaron Z. Pitluck  
Illinois State University

## Industry Articles:

### [Islamic Finance and SRI: Any Crossover?](#)

Samer Hobeika,  
Novethic

### [Social Responsibility](#)

Sayd Farook,  
Dar Al Istithmar

### [SRI and Islamic finance: Similar but Disconnected](#)

Blake Gould,  
Sharing Risk Dot Org Blog

### [Evolution of Islamic Banking and Insurance as Systems Rooted in Ethics](#)

Dr.Nejatallah Siddiqi

### [Introduction to Islamic Microfinance](#)

Institute of Microfinance and Development



# Short Selling in Islamic Finance

By Nikan Firoozye, PhD



Islamic Finance Theoreticians and Islamic Economists often get caught up in the doctrinaire. Rather than exploring the feasibility of an arrangement, they will find arguments against it based on legitimate (but to some extent overused) sources. In the case of short-selling, many would quote the truly famous hadith, where the Prophet (pbuh) was quoted to have said ‘Do not sell what is not with you.’ This hadith is the basis for much speculation about the inner meaning of Islamic Finance and has even been cited and miscited by Western Economists as a rationale for why Islamic Economic systems must be more stable than conventional. (see Kamali, [Islamic Commercial Law: An Analysis of Futures and Options](#) chapter 10 for a deep discussion of this hadith).

We can only point to the recent announcements of Dubai World as an example of the lack of stability of any system based on huge amounts of leverage, as well as an opportune time for discussing the mechanisms for a short-sale. Certainly, shorting DP World or Nakheel a few months back might have made perfect sense, given the questionable support of the Abu Dhabi government for the speculative excesses of its super-trendy neighbour.

But, given the explicit authorization of bai as-salaam contract (forward sale, where payment is made upfront and the sales item is delivered at a later date), which certainly calls the applicability of the above-mentioned hadith into question, we leave the open

debate (see for instance our LinkedIn discussion [here](#) for a lively debate on the topic) of whether something should or should not be allowed behind in order to tackle the specifics of just how would short-selling be accomplished.

If this justification for our discussion were not sufficient, the possibility of Islamic Hedge Funds had been much in the news within the past two years. Perhaps this was just the dreams of structurers who always want to solve the next puzzle, rather than a case of genuine demand. And, recently the role of hedge funds in the Global Financial Crisis may call to question the wish to Islamize many of their activities. Nonetheless, the primary obstacle to the development of Islamic Hedge Funds was seen to be the lack of a short-selling mechanism, although some would cite at least three requisites in order to launch a hedge fund: leverage, short-sales, and compensation schemes (see, for example [this article](#) on the death of hedge funds from 1969). We hope to tackle issues of leverage (through Shariah-compliant repos for instance) in later articles. As we shall see here, the structuring teams have been very active when it comes to developing the means for short-sales.

Although we shall discuss four methods for short-sale below (with links to three already detailed in [Islamic Finance Resources](#)), further methods and nuances of each of these are likely to emerge over the coming years, given the level of activity and interest among market participants in finding solutions to the issue of Islamic Hedge Funds.

## 1. Short-sale by Salaam:

This uncovered short-sale method was originally used by Newedge in their hedge fund platform, which has some following in KSA due primarily to the Shari’ah Advisor. It came under more scrutiny after AAQIFI issued a standard on *bai as-salaam*, which explicitly limited salaam sale to commodities. Effectively rejecting this limitation, Malaysia’s SC recently elaborated on the mechanism for salaam sale, extending its applicability to short-sale of financial securities (see reference link [here](#) for a more detailed discussion in Islamic Finance Resources).

## 2. Short-sale by exchange of (conditional) promises (*wa'dan*)

This method for covered short-sales has been used by Amiri Capital in their hedge fund platform. It allows for the exchange of two promises or *wa'd* (unilateral promises, dual *wa'dan*, plural *wu'd*), one by short-seller, one by lending party where the conditions for entry are different for each promise, effectively skirting the prohibition on bilateral promises (*muwa'dah*). This method is discussed in further detail in Islamic Finance Resources (see reference link [here](#)).

## 3. Short-sale by Sale and Promise:

The Malaysian SC developed a method for a covered short-sale involving the purchase and sale of a security to a central exchange with the promise to buy back at some later date. The exchange would similarly enter into a sale and promise with a subsequent purchaser. In effect the exchange will circumvent the need for bilateral promises (and may not act like a 'rational economic agent'). This method is also detailed in Islamic Finance Resources (see reference link [here](#)).

## 4. Short-sale by Arboon (down-payment sale):

This method for a covered short-sale was developed extensively by Shariah Capital as the basis for its own hedge-fund platform (upon which its own commodities hedge fund has been successfully operating for several years now). Arboon sale or down-payment sale (buyer pays a downpayment in order to have the option to purchase a security in the future) is a call option with far less flexibility than the unilateral promise, which has been approved only for the Hanbali *maddhab* (school of jurisprudence, followed primarily in KSA) and mostly disapproved in the other *maddhabs*. Nonetheless, modern *fuqaha* (scholars) have been approving its use in a wider and wider range of applications, irrespective of the school of thought. We aim to write more on this method in Islamic Finance Resources, but the following white paper by Sh Yusuf Talal DeLorenzo (see reference link [here](#)) provides further details.

We may very well see new developments and methods for short-sales in the future as well as a quest for dominance of one prime brokerage platform (and method) over the others. As different as those methods might be, it seems the lack of a cohesive approach to alternative investments represents yet another hurdle for this sector. Nonetheless, looking at the mechanisms for the individual methods (with their respective pros and cons) can give further insight into the plausibility of both hedging and benefiting from the speculative excesses of others.

Your feedback and comments are very important to us, please feel free to contact the author [via email](#).

# Tocqueville Asset Management

## John Hathaway, Managing Director And Portfolio Manager, Tocqueville Asset Management

John Hathaway has primary responsibility for management of the DSAM Kauthar Gold Fund's portfolio. Mr. Hathaway has 38 years of experience in the investment business, including the last 10 years with Tocqueville Asset Management. Mr. Hathaway is a managing director, portfolio manager, and a member of both the investment committee and the executive committee of Tocqueville where he participates in the management and investment process. Mr. Hathaway manages discretionary "concentrated" portfolios for individual and institutional clients. As an analyst, he is responsible for researching the natural resources sector and special situations.

Prior to joining Tocqueville, Mr. Hathaway spent 8 years with the investment advisory firm of David J. Greene & Co., where he became a partner. He then founded and managed Hudson Capital Advisors, followed by 9 years as the Chief Investment Officer at Oak Hall Advisors. Mr. Hathaway has a B.A. degree from Harvard College and an MBA from the University of Virginia.

The DSAM Kauthar Gold Fund is the first Shariah compliant hedge fund of its kind and the first in a series of commodity-linked funds offered by Dubai Shariah Asset Management (DSAM), a joint venture between Dubai Commodity Asset Management (DCAM), a wholly-owned division of the Dubai Multi Commodities Centre Authority (DMCCA) and Shariah Capital, Inc. DMCCA has invested \$50 million into the Fund as the seed investor. The Fund seeks to produce positive, absolute long-term returns using both long and short strategies in gold and precious metals equities. It invests primarily in the shares of precious metals producers.

### **Q1. The landscape of Shariah compliant investment products is quite fragmented; do you believe there is sufficient investor appetite for alternative products when even vanilla solutions are hard to come by? In a sense, are we there yet (in terms of investor sophistication)?**

I just returned from a trip to the Gulf last month where I met a number of institutions (conventional and Islamic) staffed by senior professionals experienced with hedge funds. I am confident that, over time, their familiarity with hedge funds will translate to investors. We may not be there yet in terms of hedge fund sophistication, but we are moving rapidly in that direction.

A study in April of this year by Bank of New York and Casey, Quirk & Associates expects Middle Eastern investors' share of hedge fund assets to rise almost 30%, to \$194 billion (about 7 ½% of global hedge fund assets), by the end of 2013. That's a very strong indication of appetite for alternative products. No doubt Islamic investors are a healthy part of that demand.

### **Q2. What issues have you faced in gaining a wider acceptance of your Shariah compliant hedge fund product? Would you compare the perception/information problem to what traditional hedge funds have faced elsewhere?**

Interestingly, the issues are very traditional ones. No one has questioned our Shariah guidelines or solutions. Instead, investors want to know: Who you are, what you do, and how you've done. Our 65%+ return in 2009 answers the last question, so my job really is to educate investors about our strategy and my experience. The better investors understand my investment strategy, the better they appreciate the Fund's performance.



# Portfolio Interview

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**Q3. You launched the DSAM Kauthar Gold Fund (DSAM Gold) in January of this year, could you provide some background of the pre-launch of the product and what challenges did you face in setting it up (time to market from idea to launch, recalibration of investment methodology, etc)?**

Shariah Capital began work on Shariah compliant hedge funds over 7 years ago, so they've really done the heavy lifting, including re-writing prime brokerage documents for Shariah compliance at Barclays Capital. As we moved to opening the portfolio account on the Al Safi Trust platform, it was the volume of legal documents in multiple jurisdictions that caused the delays. Accommodating Shariah was easy. Working with lawyers to resolve non-material legal issues took the bulk of our time.

**Q4. DSAM Gold is in turn one of the underlying products of the DSAM Kauthar Commodity Fund of Funds. Since the single manager product shares space with other commodity funds, has it been designed to be considered as a standalone investment or is it optimized to be part of the fund of fund?**

The DSAM Kauthar Gold Fund is available as a stand alone investment or as part of the fund-of-funds, the DSAM Kauthar Commodity Fund. With strong Middle Eastern interest in gold, my impression from prospective investors is that they are leaning toward a direct investment in the Gold Fund.

**Q5. The entire investment and custody is executed exclusively under one prime broker (Barclays Capital). Has this captive relationship presented a risk management issue? In case of credit events, do you have a contingency plan in place for a secondary broker?**

Barclays Capital is the exclusive prime broker for the Al Safi Trust platform. Although other prime brokers may be working toward competing Shariah compliant platforms, Al Safi currently is the only operating platform that I'm aware of.

**Q6. Do you consider the Arbun approach (from the Al-Safi Trust) as efficient/effective as conventional short-selling? Is the proposition from the Al –Safi trust comparable to conventional prime brokerage relationships in terms of pricing/execution?**

At a meeting in Doha last month, I detailed to one client how the arboon short-sale solution developed by Shariah Capital gave me, the portfolio manager, the same economics I have from a conventional short sale. The beauty of the arboon solution is that it allows me to manage my portfolio and balance sheet the

same way I manage my conventional fund. So, yes, the arboon is as efficient and effective as conventional short-selling. And, yes, pricing and execution at Barclays Capital is competitive with other prime brokers.

**Q7. DSAM Gold was launched with seed capital of US\$50m, how vital was this in terms of getting the product off the ground? Your AuM has grown to approximately US\$80M - what is your target size and is there a critical size for the long-term viability of the product?**

The seed investment was critical. As much as it provided a reasonable level of assets to diversify the portfolio, it was a statement by the Dubai Multi Commodities Centre that a sovereign government is committed to developing and supporting Islamic investment products. It gave the product instant credibility. We've not set an upper limit on the fund at this point. Our strategy is very scalable, so we could accommodate a substantial level of assets. There is no reason why our fund could not sustain \$5 billion or more of assets.

**Q8. Would you classify the investment style of DSAM Gold as high conviction? With regards to the particular Shariah compliant screening mechanism does it aid or limit your investment process (as compared to your conventional products)? Is there a bias towards large/small caps or low-gearred stocks?**

The Shariah universe of acceptable companies I receive each month automatically screens out companies with high debt levels, so to that extent Shariah precludes my investing in companies that could be negatively affected by excessive leverage. In my case, however, I typically avoid such companies anyway. And, although I have small positions in smaller cap names, the bulk of my exposure is to large cap, highly liquid companies.

Bottom line, the companies in my Shariah portfolio are nearly identical to those in my conventional portfolio. The only real difference between the two: in my conventional portfolio I use modest leverage to enhance overall returns; in my Shariah portfolio, I don't.

**Q9. You quote the performance of DSAM Gold next to that of the Philadelphia Gold & Silver Index (XAU). Is this the best comparison available considering that yours is an actively managed and uncorrelated (absolute return) offering? Would a comparison with conventional peers be justified?**

A peer comparison would be preferable to the XAU. One problem with a peer comparison, however, is that ours is one of the only

# Portfolio Interview

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strategies focused strictly on gold mining companies. As far as I know, Tocqueville has the most AUM's of any manager focused just on gold companies. Most other managers diversify across a range of mining and metals companies.

For what it's worth, below is a ranking by Barclay Hedge ([www.barclayhedge.com](http://www.barclayhedge.com)), a hedge fund database with over 5800 hedge funds, of the Top 10 Metal and Mining managers based on Sept 2009 performance. I think it's significant that a Shariah compliant fund performed very competitively with these conventional funds.

## PERFORMANCE RANKINGS: Hedge Funds

Sector Specific - Metals and Mining – Fund Assets Greater Than \$10 Million as of Month-end Sep 2009.

Hedge Fund Program	Sep 2009 ROR	YTD
AIS Gold Fund L.P.	20.81%	130.80%
SIA Global Mining Value Fund USD	17.36%	226.15%
Front Street Canadian Energy Fund	12.60%	130.11%
<i>DSAM Kauthar Gold Fund Ltd.</i>	11.50%	51.48%
Phoenix Gold Fund	11.44%	106.65%
Hinde Gold Fund Class B USD	11.18%	20.20%
Meridian Global Gold & Resources Fund, Ltd.	4.64%	119.47%
Polar Capital Healthcare Opportunities Fund USD Class	2.64%	6.93%
Wessex Natural Resource Fund Class B	0.90%	39.63%
Passport Materials Fund, L.P.	0.60%	15.54%

# The Blame Game

By Khalil Jarrar, J.D.

While contemplating the various topics to cover for Lex Islamicus for this month's edition, the only thing that came to mind is the financial wreck that has been depicted in the press and the implications of this impending collapse for Dubai, the region and the Islamic finance industry as a whole.

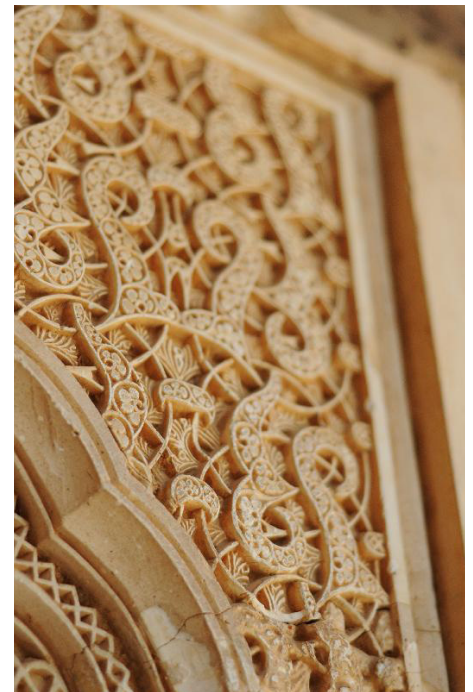
In the wake of the economic concerns surrounding Dubai one wonders what exactly has gone astray, is it that the guiding principles of Islamic finance have led to such instability or is it the lack of observance to such guidance? Should we expect more investments borne out of Islamic finance to follow the same destiny?

Not long ago voices were blaming the worldwide meltdown of the financial system on Capitalism and similar calls for Islamic financial institutions to assert their weight in the global capital markets.

Then again, capitalism was never the cause of the financial crisis to begin with, nor has Islamic finance been an accomplice; it all boils down to simple human greed and overlooking the basic principles of a sound investment (whether these are contained in Islamic finance guidelines is besides the point).

Both Islamic finance and capitalism have profound investment principles that seek to protect the invested capital and avoid the exploitation of the investors and the weaker party. On the other hand, exotic financial instruments have been introduced into the marketplace (and blessed by Shari'a boards) with the aid of crafty service providers that were sure enough to not only structure a complex instrument but also to create a veil that could not be pierced by the average investor or even the most prudent ones. This has been documented extensively in structured products across the US and Europe and the issue is equally relevant for Islamic finance contracts and documentation.

A recent inquiry involved reviewing a contract for a real estate investment in the Gulf region. The contract elaborated over 180 pages long. Most tellingly, special attention was given to specific clauses that would protect the investment company of any liability whatsoever. Even the arbitration clause, which should be the first resort to resolve a dispute amicably and which was discussed in the previous Lex Islamicus, was drafted in such a way that was limited to residents of London and Paris. To add insult to injury the jurisdiction for such arbitration was in one of the many offshore jurisdictions creating a forum of no-convenience even for the wealthiest of investors. Whether this particular offering circular referred to a Shariah compliant investment should be irrelevant, the essence of the contract should be fair and (hopefully) favourable for both parties for it to be feasible.



The courts in the past have resorted to restricting forum shopping sought by plaintiffs to claim the highest damages by plaintiffs, a decision that should be revisited today and impose exemplary damages to large companies disclaiming all liabilities in bad faith to deprive investors of all available remedies. After all, good faith and fair dealing is an implied covenant in every contract and cannot be abrogated (once again this is not exclusive to Islamic finance but is part of various best practices when mitigating legal or litigation risk).

“We have our own economic philosophy and system which others do not have,” Sheikh Yusuf al-Qaradawi told a conference in Doha, Qatar. “The collapse of the capitalist system, which is based on usury and securities rather than commodities in markets, shows us that it is undergoing a crisis and that our integrated Islamic philosophy – if properly understood and applied – can replace the Western capitalism,” Qatar’s Gulf Times quoted him as saying. The operative word in his statement is ‘if properly understood and applied’ and it is here that the principals and agents in an Islamic finance contract need to understand and properly apply their knowledge and interpretation of Shari’ah. Effectively a duty of care should lean towards investors/consumers, and again this is part of well-documented agency risk (a substantial body of work has been devoted in conventional finance to this topic).

Nevertheless, not for the lack of knowledge it is at times for the loose-fitting generalities in compliance and the tailored fatwa’s to appease the highest bidders. The rapid growth of Islamic financial instruments has created an industry that I term fatwa incorporated, which only answers to a few but tends to neglect the majority. Even before applying the proper financial instruments, one must recall that subject matter knowledge and diversification is imperative. Many have argued repeatedly that certain Islamic finance instruments of today are lacking on both accounts.

In December 1863, H. McCulloch, U.S. Comptroller of the Currency and later Secretary of the Treasury, wrote to all national banks (quoting relevant excerpts):

“Let no loans be made that are not secured beyond a reasonable contingency. Do nothing to encourage speculation. Give facilities only to legitimate and prudent transactions.”

“Distribute your loans rather than concentrate them in a few hands. Large loans to a single individual or firm, although sometimes proper and necessary, are generally injudicious, and frequently unsafe. Large borrowers are apt to control the bank.”

“Extravagance, if not a crime, very naturally leads to crime.”

“Pursue a straightforward, upright, legitimate banking business. ‘Splendid financing’ is not legitimate banking, and ‘splendid financiers’ in banking are generally either humbugs or rascals.”

Effectively, gamblers must not manage society’s saving. McCulloch would have argued that central banks should institute qualifying psychological testing to bar bank lenders with gambling propensity from wheeling and dealing in customers’ deposits and shareholders’ equity. The again, if the remuneration structure in Islamic finance is so closely tied to engineering the next marvel, should there be a test of competency for these instruments or a best-practice approach towards ensuring investors are educated of the various aspects of Islamic finance contracts (some rather untested in courts of law).

He further asserted other principles that are closely aligned with Islamic principles prohibiting Gharar and encouraging the circulation of loans and wealth. These basic principles are faith-neutral and independent of being labeled as capitalist or religious principles. Hence, before financial structures are created an entity should always shore up the foundations and not let greed and quick profit blind it from common sense and prudent investing. It is time to stop the blame game and stick to the basic principles of investment, Islamic finance or otherwise. Nomenclature should always be reflective of the principles behind it not just a packaging to preserve the status quo or a new embroidery on an old garment.

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# The Future of Talent: An Islamic Finance Perspective

By Fuwad Beg, Managing Director, Yasaar Human Capital

Although figures vary there is no doubt that the Islamic Finance sector has a predicted growth rate which is unprecedented within the current climate. At the heart of this growth is the necessity to build organisations globally and to capitalise on both the weak economic trust left by the conventional market as well as the resolute appetite from investors to look at the Islamic Finance sector much more favourably; thus fuelling the demand for the development of more products to market.

A direct consequence of this growth and investor appetite is the need for Islamic Finance sector organisations to attract, grow and develop their talent.

## Hiring:

Even with this predicted growth, the downside of the current climate is that the majority of the global Islamic Finance sector companies are in a holding pattern when it comes to hiring on general level. Although clearly there is a natural cycle of attrition that is within the market place and although this is inevitable within the Islamic Finance sector it is know where near the attrition rate of the conventional market place.

Even with the flow of candidates from the conventional finance market place to the Islamic one there is a 'war for talent' simply because the competencies required are very much finite and it is not always as easy as studying for the IFQ and then jumping straight into an Islamic Finance sector position.

Of course the Islamic Finance sector does need to do its part in developing new talent and hiring new blood into the system but the current roles are focussed towards more senior individuals who have experience within the industry as opposed to the requirements for fresh graduates for example, something which is also currently reflected in the conventional market place.

## Nuances:

When hiring within the GCC, for example there are other regional nuances which affect hiring. Due care and attention needs to be taken when hiring candidates that work for affiliated or partner companies, because simply, many company boards are run by a few key individuals which in itself is not a good situation but one which is a current reality. Therefore, when CEO's try to recruit key individuals, ethics dictate that they really should try to avoid hiring candidates that come from companies which are related to activities of Board members.

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Although, in reality it creates a shortage of candidates especially if fresh talent is not being developed within an organisation or the industry in general.

Within South East Asia and in particular within Malaysian, Hong Kong and Singapore market place very few regional nuances actually occur and generally speaking the hiring process in the region very much follows universal norms.

However, it would be foolish to suggest that any region within the Islamic Finance map is without internal stereotypes of one form or another which translates to preferences given by Boards for senior appointments to people who are either natives of the country, friends, brothers etc, etc, but it is certainly far from the equivalent of the political analogy of, 'smoke filled rooms.'

Simply, the closer and more expansive the network the more chances of getting a job which one would argue is a universal norm and also applies to Islamic Finance.

## Competencies:

The competencies of employees that are required by Islamic Finance sector organisations are very much similar to those required by conventional organisations. For example within the banking sector the intricate knowledge of how the industry works, client lists, the ability to sell and market experience is invaluable to any organisation and these pre-requisite norms also apply to the Islamic banking sector, especially as many large conventional banks have Islamic windows and this logic also applies to takaful or re-takaful companies. Potential candidates must possess knowledge of Islamic Finance that is relevant to their job or market, coupled with the usual experience required to perform the job that they are required to do.

However, specific skills such as structuring contracts or products and of course, detailed Shariah services as carried out by scholars, whom are all required to have an in-depth and intricate knowledge of Shariah Law and its implications in order for candidates to execute their job functions correctly and this is applied across all regions, mature or developing.

## Human Capital Leadership:

For the leaders at the helm of Islamic Finance sector companies, the responsibility is to foster and develop talent and best practice within their own organisation and the industry as a whole.

Human Capital strategies across the Islamic Finance sector are currently very diverse in effort and nature. In multinational corporate, 'Islamic windows' the development and use of human capital strategies which cover talent attraction, development and retention as well as human resource development and training are very much in line with conventional industry standards and such create internal value for both current and future employees and the industry as a whole.

However regions such as the Gulf show us that there are many instances where Islamic Finance and Takaful organisations have not yet been successful in fully developing human capital strategies especially in the area of compensation and benefits.

A recognised framework for comparative salaries and benefits has not been developed across the Gulf and what tends to happen is that some countries and their subsequent organisations pay salaries dependent upon country norms rather than industry norms.

This, on an internal perspective is fine, however, can also be detrimental for a company in the attraction of talent from different Gulf countries as well as on a Global basis and when hiring is essential in the development of the company such strategies pay dividends.

The Far East and in particular Malaysia which is one of the most mature markets within the Islamic Finance sector, looks more towards regional trends as opposed to global trends when it comes to compensation and benefits which are actually on par with other parts of the world.

The Malaysian market also provides an additional attraction to candidates considering the region simply because if they have worked within this maturity level then the experience it provides on a global level is invaluable.

### The future:

The old adage goes that, '... the future is not ours to see,' although the predictions for the industry are generally very good. We will most likely see a growth in the amount and types of products available as well as the availability in more geographical areas, which will mean that unless resources are put into training and developing new and existing talent then there will be an even more finite pool of candidates to draw from.

Although HR activity within Islamic Finance sector is developing, it is only fully developed in Islamic Finance windows which have a larger corporate system to extend HR best practice.

In Malaysia there are a variety of HR Acts and a government ministry as well as the forging of best practice through the Malaysian Institute of Human Resources.

Although governments within the GCC are committed to developing human capital its is very much from a national perspective rather than a industry perspective and generally there is not a single voiced regional HR body represented within the GCC, that looks at HR best practice such as the CIPD in the UK.

### Conclusion:

As the industry grows the requirements for qualified candidates to enter the market will also increase. As of yet the two biggest markets are the GCC and Malaysia but there are institutions across the globe that are looking at developing Islamic Finance products be it a bond, an index or another vehicle for investment.

Clearly there is a long way before Islamic finance will be on par with conventional finance but one thing that the current climate has show us is, that the industry is certainly here to stay and for people looking to get into the industry although now may not be the best time, it is a viable career option at all levels.

# Islamic Law in Secular Courts (Again): Teachable Moments From the Journey

By Hdeel Abdelhady, Senior Associate, DLA Piper; Co-Chair, Islamic Finance Committee, American Bar Association.[1]

## Introduction

A trio of English Court cases illustrates some of the issues and complications that arise when secular courts are asked to resolve disputes involving Islamic law and Islamic financial institutions. These cases also demonstrate the need for the further clarification and harmonization of Islamic law, particularly in banking and finance. The relevant and dispositive portions of these cases are discussed in Part I of this Section. Part II discusses the lessons and applicability of these cases, and suggests steps that should be considered to promote clarity and predictability in Islamic banking and finance.

For explanations of the Arabic terms and concepts used in this Section, please refer to *Contemporary Islamic Finance: An Introduction to Essential Concepts*, at page one of this publication.

## PART I: CASE SUMMARIES

### Jivraj v. Hashwani, [2009] All E.R. (D) 272 (Jun)

In *Jivraj v. Hashwani*, the Court was faced with the issue of whether an arbitration clause requiring that “[a]ll arbitrators . . . be respected members of the [Islamic] Ismaili community” violated English anti-discrimination laws or public policy. The Court enforced the arbitration clause.

The parties, Jivraj and Hashwani, were London residents and members of the Ismaili Muslim community. Ismaili Muslims are members of the Shia sect of Islam. In 1981, the parties entered into a joint venture agreement for the development of real estate (the “JVA”). The disputed arbitration clause (quoted in part above) was contained in the JVA.

Differences arose between the parties and they submitted their disputes for settlement by Ismaili Muslims in accordance with the JVA. After two rounds of arbitration/conciliation, issues between them remained unresolved. In July 2008, Hashwani asserted a claim against Jivraj for a sum certain plus interest compounded quarterly over a period of approximately 14 years. Hashwani also applied to the Court for an order appointing an arbitrator, Sir Anthony Colman, pursuant to the arbitration clause of the JVA. The parties stipulated that Colman was not a member of the Ismaili community.

Jivraj sought a court declaration that Colman’s appointment was invalid under the JVA. Hashwani demurred, arguing that the arbitration clause was discriminatory, in violation of the Employment Equality (Religion or Belief) Regulations 2003 (the “EER”), the Human Rights Act 1998, and public policy. The Court held that the EER, which prohibit religious discrimination in employment, did not apply. The EER applied to “employment” relationships having certain characteristics, including employment at fixed places and times, significant accountability, remuneration in exchange for services, relative flexibility in termination, and vicarious liability. In contrast to employees, arbitrators are autonomous, not remunerated as a rule, and removable only by Court order. The arbitrator-litigant relationship lacked the



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indicia of an employment relationship protected under the EER, and was outside of the EER's proscriptive ambit. Even if the EER had applied, the challenged discrimination would have been permitted under the EER's "genuine occupational requirement" exception, which applies where "being of a particular religion or belief is a genuine and determining occupational requirement." Jivraj submitted evidence of the religious importance to Ismaili Muslims of dispute resolution, including the Ismaili Constitution, which promotes dispute resolution among its adherents. On the strength of the evidence, the Court concluded that "one of the more significant and characteristic spirits of the Ismaili sect is an enthusiasm for dispute resolution", which constituted an "ethos based on religion."

The Human Rights Act, which prohibits discrimination by "public authorities" (including courts and "tribunals"), was inapplicable because, *inter alia*, neither Jivraj nor Hashwani was a public authority, and they contracted out of the HRA by choosing arbitration. The Court rejected Hashwani's public policy challenge on structural grounds, namely that it is not the role of courts to fill real or perceived gaps in legislation "under the guise of public policy."

## Musawi v. R.E. International (UK) Ltd., [2007] All E.R. (D) 222 (Dec)

On application for enforcement of an arbitration award, the England and Wales High Court of Justice was required to decide whether an English arbitration award decided under Shia *Shari'ah* was enforceable. The Court held that it was.

In 1987, the Claimant, Sayyed Mohammed Musawi, entered into an agreement with Dr. Sayyed Mohammed Ali Shahrestani for the joint acquisition, development and ownership of a plot of land adjoining Wembley Stadium in London (the "1987 Agreement"). At the time, Musawi, a Shia theologian, was the leader of the Shia Muslim community in India and wanted to invest that community's funds to yield income for charitable uses. Shahrestani, also a Shia Muslim, was an architect and engineer with business interests that included construction. Shahrestani was well-known and respected in the Shia community in India. Shahrestani and the two other individual defendants (his nephews) were beneficial owners of R.E. International.

The parties intended the 1987 Agreement to be "Islamically binding." They described their joint venture as a *Mudaraba*. Musawi, as *rabb ul-maal*, was to arrange and provide capital. Shahrestani, the *mudarib*, would contribute know-how, management and other services. They agreed to divide net profits equally.

The parties purchased the Wembley land in 1988, but did not develop the land as planned. Subsequently, they held discussions and exchanged correspondence (the binding effect of which was in dispute) to determine their respective ownership interests in the Wembley land. Having failed to agree, in September 2003 they agreed to arbitration and entered into an arbitration agreement by which they elected "Islamic legal standards" as governing, and appointed an ayatollah "as arbitrator and Islamic legal judge." The arbitrator issued an award in June 2004. The defendants challenged enforcement of the award on a number of grounds, and asserted a counterclaim. The Court was required to decide whether, *inter alia*, Shia *Shari'ah* was valid governing law in an English arbitration conducted in England.

The Court held that Shia *Shari'ah* was valid governing law, on authority of the English Arbitration Act 1996, which provides that "[t]he arbitral tribunal shall decide the dispute. . . if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal." "Other considerations", the Court found, included *Shari'ah* or other non-national law.

## Beximco Pharmaceuticals Ltd. v. Shamil Bank of Bahrain E.C., [2004] EWCA Civ 19; Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd., [2003] All E.R. (Comm) 849.

\* Note: The following discussion refers to and relies upon both the trial and appellate court decisions in *Shamil*.

At issue in *Shamil* was the proper construction and effect to be given under English law to a governing law clause which provided that: "Subject to the principles of the Glorious Sharia'a, this agreement shall be governed by and construed in accordance with the laws of England." The issue arose on appeal from a USD 49.7 million judgment for the plaintiff-appellee, Shamil Bank of Bahrain EC (Islamic bankers), a Bahraini bank. The five defendants-appellants were two Bangladeshi companies, Beximco Pharmaceuticals Ltd. and an affiliate, two directors of those companies, and the companies' parent.

The *Shamil* dispute arose out of two tripartite "*Murabaha*" transactions between the Bank and both the first defendant ("D1") and second defendant ("D2") in 1995 and 1996. In 1995, the Bank advanced to D2, the Bank's agent pursuant to an agency agreement, USD 15

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million to purchase goods for immediate onward sale to D1, at a pre-agreed price and on a deferred credit basis. The pre-agreed price comprised the ostensible cost of the goods, USD 15 million, plus the mark-up, which apparently was USD 2,586,583. Payments and repayments were to commence in March 1996, with a final payment of USD 15,323,322 due on December 28, 1997. The 1996 transaction was identical to the first, except that D2 was the purchaser and D1 was the Bank's agent.

The defendants defaulted on their obligations under the 1995 and 1996 agreements. Negotiations ensued and resulted in two "exchange and satisfaction and user agreements" between the Bank and D1 and D2 (the "Exchange Agreements"). The Exchange Agreements purported to discharge the indebtedness under the *Murabaha* agreements (the indebtedness was the unpaid "cost-plus" amount and curiously termed "accrued compensation" claimed by the Bank). In exchange, the Bank obtained "unencumbered title to certain assets" of the first two defendants. The Bank then leased the assets to the defendants in exchange for "user fees" payable in installments. The latter arrangement was styled an *Ijara*. The remaining defendants guaranteed the obligations of D1 and D2 under the Exchange Agreements. The Bank's *Shari'ah* Board certified for 1995 and 1996, that "all the bank's business throughout the said . . . [period], including investment activities and banking services, were in full compliance with Glorious Islamic Sharia'a." It was not clear from the testimony if the Bank's *Shari'ah* Board had reviewed the disputed agreements.

At trial, it was "common ground . . . [between the parties] that . . . when . . . [they] entered into the Morabaha agreements and subsequently, neither side was under any illusion as to the commercial realities of the transactions, namely the provision by the bank of working capital on terms providing for long term repayment." The defendants argued that the disputed agreements were interest-bearing loans "dressed up" in Islamic garb, and therefore were invalid under Islamic Law, which categorically prohibits the payment and collection of interest. The question was whether the contractual proviso that English law governed, "subject to the principles of the Glorious Sharia'a", had the effect of rendering *Shari'ah* the governing law (by itself or with English law) or incorporating *Shari'ah* as a contractual term of reference. The proviso had neither effect, the Court held.

At English common law and under the Contracts (Applicable Law) Act 1990, the "proper" law of a contract must be English law or the law of another country, and not a "non-national system of law, such as . . . *lex mercatoria*, or 'general principles of law', or . . . the law of Sharia'a." Therefore, *Shari'ah*, a non-national system of law, could not be governing law, alone or with English law. English law permits the application of only one system of law to govern an issue. Had the parties selected two national systems of law, only one would have applied.

Conceding the points of law made by the Court, the defendants advanced an alternative construction, that the *Shari'ah* proviso should be construed and given the effect of incorporating *Shari'ah* as a contractual term of reference. But the *Shamil* governing law clause, on its face, was insufficiently specific to achieve incorporation. "The doctrine of incorporation can only sensibly operate where the parties have by the terms of their contract sufficiently identified specific 'black letter' provisions of a foreign law or . . . set of rules to be incorporated as terms of the relevant contract such as a particular article . . . of the French Civil Code."

The vagueness of the governing law clause was particularly problematic in light of disagreement between the parties' expert witnesses as to the substance and applicability of *Shari'ah* with respect to the disputed agreements, and Islamic banking and finance generally. The Bank's expert, testified, as paraphrased by the Court, "that the precise scope and content of Islamic law in general, and Islamic banking in particular, are marked by a degree of controversy within the Islamic world, best exemplified by the fact that the actual practice of Islamic banking differs widely within the Islamic world." Had the disputed agreements in *Shamil* effectively identified specific *Shari'ah* rules or principles as contractual terms of reference, then the outcome likely would have been different. As the appellate court itself observed, given the "general consensus upon the proscription of . . . [interest] and the essentials of a valid *Murabaha* agreement . . . the defendants would have been likely to succeed" had *Shari'ah* been incorporated.

## PART II: LESSONS AND SUGGESTIONS

### A. Lessons

The *Jivraj*, *Muswai* and *Shamil* decisions yield readily applicable practical lessons. Some are discussed briefly below.

#### *Appointment of Muslim Arbitrators*

*Jivraj* is clear that, in English arbitration, parties wishing to appoint arbitrators having specific religious beliefs or affiliations must demonstrate a *bona fide* need for the requirement. The evidence in *Jivraj* of the religious significance of dispute resolution in the Ismaili

The Ismailis involved in *Jivraj* were part of a tightly-knit community whose religious values were reflected in the Ismaili Constitution and other evidence submitted to the Court. Members of other Muslim groups would most likely have difficulty making a similar case so compellingly, as the majority of Muslims are not socially organized around a constitution or other contemporary expatiations of community values based on Islam. While *Jivraj* likely could be helpfully invoked in similar cases, it should not be assumed that future challenges will equally withstand scrutiny under English law, based on precedent.

#### *Forum Selection, Governing Law and Incorporation of Contractual Terms of Reference*

Three important lessons on forum selection, governing law and the doctrine of incorporation emerge from the *Shamil* and *Musawi* decisions. First, parties litigating in England and wishing to apply *Shari'ah* as the substantive law of decision should opt for arbitration under the Arbitration Act 1996. Second, English courts will apply only English law or other national law (including choice of law rules) as the substantive law of decision, and *Shari'ah* is excluded from these categories. Third, parties should identify in Islamic contracts or in arbitration agreements the specific *Shari'ah* rules and principles by which they intend to be bound before English Courts or in English arbitration. Such specific rules and principles might include *Qur'anic* chapters (*suwar*) or verses (*ayat*), or contemporary interpretations of Islamic banking and finance law, including AAOFI standards, fatawa issued by the *Shari'ah* Boards of Islamic financial institutions (e.g., the Dallah Al-Baraka Group's compilation of its *Shari'ah* Opinions on *Murabaha*), or resolutions of the Fiqh Academy of the Organisation of the Islamic Conference.

## B. Suggestions

The *Jivraj*, *Musawi* and *Shamil* cases are not the first, and will not be the last, of their kind. Secular courts in England, the United States, Canada and other jurisdictions have been, and will continue to be, presented with disputes that involve Islamic law and Islamic institutions. As secular courts decline to apply and interpret Islamic law, or apply Islamic law in limited fashion with the assistance of experts, the further development and clarification of Islamic banking and finance law will be curtailed, unnecessarily. The Islamic banking and finance industry, like conventional banking and finance, must offer transparency and predictability. Predictability will not result from cases like *Shamil*.

Given the diverse and democratic nature of Islam, it would be neither realistic nor appropriate to expect that Islamic banking and finance law will be completely harmonized across the jurisprudential schools (*madhahib*), sects (e.g., Sunni and Shia), and geographically and culturally diverse constituencies of the Faith. Nevertheless, substantive harmonization, clarity and predictability can be facilitated by non-controversial industry-wide and institution-specific procedural norms, and through specialized dispute resolution. Such procedural measures also would curb the complications that present when Islamic disputes come before secular courts. A few suggestions, inspired by the lessons of *Jivraj*, *Musawi* and *Shamil*, are offered briefly below.

#### *Enhancement of the Role of Shari'ah Boards in Governance*

Cases like *Shamil* unavoidably raise questions about the efficacy of *Shari'ah* compliance measures employed by Islamic banks that undertake, or appear to undertake, transactions that are designed to be, have the effect of being, or are perceived as non-compliant with *Shari'ah*. Because the authority to formulate the *Shari'ah* standards of most Islamic financial institutions resides exclusively with *Shari'ah* Boards, those Boards should have a heightened role in ensuring compliance with the standards that they set and best understand. It is well known that the demand for *Shari'ah* scholars exceeds their supply, and the demands on their limited time are many.

For practical and structural (governance) reasons, *Shari'ah* Boards cannot immerse themselves in day-to-day *Shari'ah* compliance control. But they can be empowered to more effectively perform their *Shari'ah* compliance auditing functions, without upsetting governance structures or placing undue demands on their already limited time. One way to empower *Shari'ah* Boards is to provide them with dedicated legal counsel and/or compliance officers, with responsibility for reviewing transaction and business documentation. *Shari'ah* Board lawyers, compliance officers or other dedicated employees would operate independently of the executive management and executive directors of Islamic banks, and would report to and consult with *Shari'ah* Boards. This would strengthen internal *Shari'ah* compliance.

#### *Publication of the Fatawa of Islamic Financial Institutions*

As *Shamil* demonstrates, the dearth of accessible evidence of Islamic banking and finance law cultivates fertile ground for confusion and unchecked interpretations. To help fill this void, Islamic financial institutions (particularly larger banks) should publish their fatawa (in Arabic, with English translations subject to translation standards), on a regular and industry-wide basis and in conformity with agreed standards (e.g., the posting of *fatawa* on bank websites and/or to a central website). This straightforward step would educate, and promote transparency, accountability and predictability.

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## Regulation of Islamic Law Experts

English and other secular courts are not equipped to interpret Islamic law. As Islamic banking and finance grows, so will the number of disputes and the need for experts. The Islamic banking and finance industry has a vested interest in ensuring that persons acting as Islamic banking and finance experts before courts and in other fora, are sufficiently qualified to do so. Some regulation is warranted. For example, the establishment of a roll of experts certified (after testing or other appropriate qualification) by one or more entities, should be considered. Of course, measures would be necessary to ensure that such regulation would not have the undesirable effect of excluding *Shari'ah* interpretations or points of view. Courts, litigants and others would not be required to select experts from this roll, and non-listed parties would not be prohibited from acting as experts. That said, the existence of such a list of experts (or other evidence of their qualification) would introduce standards, raise visibility and encourage consistency and quality.

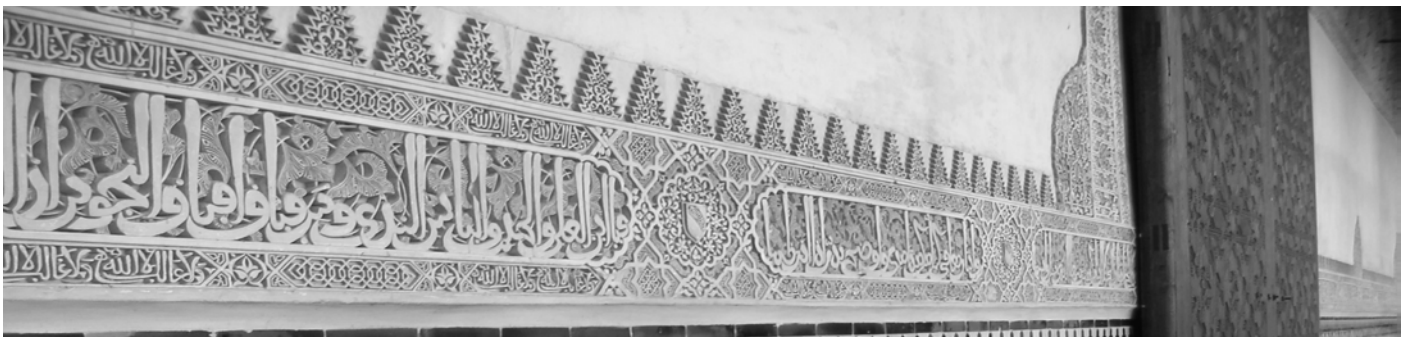
## Specialized Dispute Resolution Forum

All commercial systems depend on courts and legal processes that provide transparency, fairness and predictability, to grow and thrive. Islamic banking and finance is no exception. Islamic banking and finance has a wide geographic reach, and crosses national, legal and political boundaries. Parties to cross-border Islamic finance agreements, like others engaged in international commercial activities, make governing law and forum selections based on their desire for predictability. As the appellate court in *Shamil* aptly observed, "English law is a law commonly adopted internationally as the governing law for banking and commercial contracts, having a well-known and well-developed jurisprudence . . . which is not open to doubt or disputation on the basis of religious or philosophical principle." Indeed, the frequency of selection of English and other secular laws and fora by parties to Islamic contracts bears this out.

There is a clear need for a specialized forum for the resolution of Islamic banking and finance disputes, to accommodate parties and facilitate the further development, documentation and publication of Islamic banking and finance law, as practiced currently. Such a forum must offer the same transparency and predictability that is provided by English and other preferred systems, with the much needed added benefit of expertise. This type of forum should be non-governmental (except to the extent that government-owned financial institutions participate in its funding), and its jurisdiction should be based on consent, including the standing consent of Islamic financial institutions to the forum's jurisdiction. The forum could be funded by participating Islamic financial institutions (assuming adequate conflicts protocols), the fees it collects, and other financial support. As to location, the forum could be housed in one or more Islamic financial centers, and provision should be made for the conduct of non-judicial proceedings (e.g., arbitration) at locations chosen by litigants. These thoughts on how a specialized forum might be organized, financed and located are very preliminary and are intended to illustrate, with broad strokes, what a specialized forum might look like. What is clear now is the need for specialized dispute resolution for Islamic banking and finance. Further discussion is required.

[1] This article first appeared in *International Law News*, Vol. 38, No. 4 (Fall 2009), a publication of the American Bar Association Section of International Law.

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