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ENFORCEMENT OF ISLAMIC CONTRACTS: ISSUES IN THE LIGHT OF CONTEMPORARY LEGAL FRAMEWORKS – FQ 6133

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ABSTRACT

This paper concludes that jurisdictional issues pertaining enforcement of Islamic contracts will remain and increase going forward. Various factors contributing to this was explored. This will impact on the application of Shariah in enforcing Islamic contracts both at the domestic and international levels. This is particularly pertinent to existing players in the industry. New entrants into the industry may have to consider approaching this issue much alike the current players. It is intimated by the paper that the current players themselves were either historically handicapped at the onset of embarking in the industry. Most are conscious of the issues; some do not see the issue as permanently stifling. Others have tried and still trying to move the agenda along. The paper have looked at the jurisdictional as multi-faceted in nature thus discussions have tried to incorporate other jurisdictions (apart from the Common Law) in trying to deepen the understanding of the challenges going forward. Although the paper touches on Sukuk since its commands a high percentage of the industry but it needs to be documented that challenges of jurisdictional transcends the Sukuk. In this manner, the writer is actually reminding himself of the bigger picture within the Islamic finance industry. Some emphasis will also be put into discussing alternative dispute resolution (ADR) mechanisms. This paper also stresses on the ends or namely the objectives of contracts in Islam as a means to secure the Maqasid al Shariah which protects not only individuals but also the collective as a whole. Whether the industry is living the spirit of the Maqasid remains questionable.

TABLE OF CONTENTS

	Pages
Abstract	(i)
Part 1:- Introduction	1-8
A) The "din" of Islam, the "triangular " relationship of Allah, Man and Nature as explained by the 1st hard code of Islam, the Holy Quran	1
B) The 2nd hard code of Islam: The Sunnah	5
C) Early developments: Post Prophet Muhammad s.a.w	8
Part 2: The technical areas imbued with theory nevertheless situated within the dynamics of history	9-22
A) The Prerequisites of Shariah Contracts	9
B) Types of Shariah Contracts	11
C) The concept of (Mal') property according to Muslim jurists	12
D) Pertaining the soundness and the legal effects of contract	14
E) Theoretical analysis and dynamics of history	15
F) Final Decline of the Islamic Legal System	21
Part 3: The present jurisdictional situation and challenges	23
A) Domestic Jurisdiction	23-40
B) Exporting Islamic Banking and Finance	28
i) First Jurisdictional Hurdle	29
ii) Second Jurisdictional Hurdle	29
Case Study: East Cameron Sukuk	37
iii) Third Jurisdictional Hurdle	38
iv) Fourth Jurisdictional Hurdle	39

C) Alternatives and suggestions put forward 40

Part 4: Concluding Remarks 41

Part 5: Bibliography

Important Note: - All Quranic quotes are denoted by Q followed No.(Surah) and No. (Ayah). Example Q 2 -36 means Al-Baqarah Ayah 36

بسم الله الرحمن الرحيم

Part 1:- Introduction

A) The "din" of Islam, the "triangular " relationship of Allah, Man and Nature as explained by the 1st hard code of Islam, the Holy Quran

From ***Dictionary.com,*** religion is defined as a set of beliefs concerning the cause, nature, and purpose of the universe, esp. when considered as the creation of a superhuman agency or agencies, usually involving devotional and ritual observances, and often containing a moral code governing the conduct of human affairs.

Nasr (2002) states in Arabic, religion corresponds most closely to "*al-dīn*". Religion with respect to the Latin root *religare* , meaning "to bind" and therefore religion binds us to God, *al-dīn* meanwhile to some Arabic commentators is derive from *al-dayn* , which means "debt". *Al-dīn,* therefore, means the repaying of our debt to Allah.

The debt to Allah as per the following examples namely the gift of creation (Q 96: 1-3), gift of vicegerency (Q 2: 30), the gift of sustenance (Q 2: 22), the gift of aql' (Q 3:7), the gift of Al-Quran (Q 2:185), the gift of the Messengers (Q 10: 48) etc.

Contained within the above is the Shariah as a body of law, rules and guidelines that deals with all aspects of existence. For our purpose, to observe the Shariah is to render justice to oneself. Man's existence is both physical and spiritual. Both these planes of existent need sustenance. The grant of vicegerency provides an opportunity for Man to secure both the

physical and the spiritual. The right to utilize and owned (private) the resources provided by Allah, to use the aql' in securing and accumulating wealth are guaranteed by the Shariah via the laws governing transactions among human beings which is essentially contractual in nature.

The needs to regulate dealings are natural in Islam. Other Quranic injunctions points to the growth of the family unit that expands into larger communities, nations with increasingly complex structure and in need of various forms of security and one of it being economic security (Q 49:13). This entails specialization, division of labour that leads to an exchange driven economy.

Whilst it is logical to move the discussion to contracts, we must emphasize some fundamental aspects of Man not addressed earlier. Created in the best mould (Q 95:4) nevertheless frailties still abound. Firstly, Man is forgetful of the covenant (meethaq) with Allah as the creator and all the correspondent obligations towards Allah. Related to our forgetfulness is the fact that we remain an Abd' (servant) of Allah in spite of gift of Khilafah. (Q 47:38 – man remain poor in contrast to Allah who is rich). Our other frailties are tendency for foolishness, a restless disposition and misuse of the gift of **"free will".** Out of these frailties arise the notion of transgression and injustice (zulm'). It is interesting to note that the first transgression by Man was in the economic sphere namely the sanctity of a property belonging to Allah (Q 2: 35-36)

Since the Al-Quran represents the true foundation of knowledge, it is there we reference to the economic ills pervading existence namely the causes and the effect on society. (Q 2:278-279) is the declaration of war on usury by Allah and Prophet Muhammad s.a.w. (Q 2:275) makes the distinction between trade and usury. This relates to the riba al-nasiah (the Prophet s.a.w. meanwhile instituted riba al-fadl).

The effects of the above are pointed out below. Firstly, usury causes wealth to flow from the poor to the rich that entail the circulation of wealth amongst the rich (Q 59:7). This unlawful gain or "unjustified increase" is believed to be the "illah" behind the prohibition of riba. Commentators like El-Gamal (on the concept of time value of money) and Zubair Hasan (on whether capital in itself productive and has a pre-determined rate associated with it) have analysed the area in comparison with the alternatives being employed (debt based murabaha contracts – the conclusions arrived at is not encouraging base on the welfare criterion). Usury causes disparities in income and wealth, socially disruptive since it breeds resentment. If we expand this to take into account the "credit" driven economy, this leads to the impoverishments of nations (much touted by Ahmad Kameel Mydin Meera). The other two banes of Man's life are the gharar (cited as "uncertainty) and maysir (gambling). The notion of gharar still engenders much interest and debate nevertheless pronouncements of the Al-Quran and Sunnah does point to the need to banish the information "vacuum" and speculative tendencies arising. For the purpose at hand, we reaffirm that the above is unlawful and has bearing on contracts.

The juxtaposed activities follows (Q 4:32) pointing to concept of work, active partake in economic activities (trade have been mentioned earlier) as legitimate source of wealth creation and accumulation. Another aspect that we derive from this is the acceptance that inequality in possession, wealth is an objective fact. Inequalities in possession, wealth (group as economic status) also lead to disparities in knowledge and bargaining power in contracting. To address this the Shariah has stipulated certain rules and connected to this includes permissible activities in accumulating wealth, permissible subject matter governing exchange and other adjuncts to preserving the sanctity of contracts from initiation and to the desired completion or the undesired eventualities of non-performance, dispute and enforcement matters.

Another point that needs mentioning is the notion of consent. Allah has given Man "free will" thus Allah alone can take away the right of free consent. (Hanafi thought distinguishes choice and consent which has bearing in certain contractual matters, nevertheless it just point to the intellect or the use of ray' (reason) which is the distinguishing mark of Hanafi thought).

Insofar the preceding has look at the Shariah, property, wealth accumulation and contract heavily focussed on the Al-Quran which is 1st hard code in Islam. Suffice to conclude that coverage is comprehensive even if we did not discuss areas like the law of inheritance, the concept of damages and the recommended methods on how to contract in Islam.

B) The 2nd hard code of Islam: The Sunnah

Acting as source of law in Islam is the collectively termed the Sunnah (in which Hadith is part) of Prophet Muhammad s.a.w. Without going into the classification of Hadith, the most important to point out is that Allah guides, protects and responsible for instigating certain actions of the Prophet.

For the purpose of our exercise the above is held as belief. Thus the approach in presenting the sanctity of contracts is from the prophet character which earned him the exalted position of Al-Amin (the Trustworthy). His own examples pertaining to the work ethics required in Islam was evidenced prior to prophet hood namely when he was still a child, engaging in a Mudarib enterprise with his future wife to be, his active involvements in wars fought in the defence of Islam.

His commitment to perform and meet obligations entails the entire sphere of his prophet hood; a clear event that comes to mind is his commitment to the Treaty of Hudaybiyyah.

From Sahih Muslim, we further cite the following as the required standards of behaviour for contracting parties in Islam.

Ibn 'Umar (Allah be pleased with them) reported Allah's Messenger (May peace be upon him) as saying: Do not go out to meet merchandise in the way, (wait) until it is brought into the market. This hadith has been reported on the authority of Ibn Numair but with a slight change of words

Ibn 'Umar (Allah be pleased with them) reported Allah's Messenger (may peace be upon him) as saying : Both parties in a business transaction have the right to annul it so long as they have not separated; except in transactions which have been made subject to the right of parties to annul them.

Hakim b. Hazim (Allah be pleased with him) reported Allah's Messenger (may peace be upon him) as saying: Both parties in a business transaction have the right to annul it so long as they have not separated; and if they speak the truth and make everything clear they will be blessed in their transaction; but if they tell a lie and conceal anything the blessing on their transaction will be blotted out.

Abdullah b. Dinar narrated that he heard Ibn 'Umar (Allah be pleased with them) saying: A man mentioned to the Messenger of Allah (May peace be upon him) that he was deceived in a business transaction, whereupon Allah's Messenger (May peace be upon him) said: When you enter into a transaction, say: There should be no attempt to deceive.

Ibn 'Umar (Allah be pleased with them) reported that Allah's Messenger (May peace be upon him) forbade the sale of palm-trees (i.e. their trults) until the dates began to ripen, and ears of corn until they were white and were safe from blight. He forbade the seller and the buyer.

All of the above pronouncements are then crystallized as the basis of handling various matter pertaining contracts from the permissibility of the subject matter perspective, from the performance perspective, from the criteria to reject based on gharar (uncertainty), on deception.

From the actions of the Prophet to inspect the markets entails the enforcement point of view to ensure a "just" environment exists. His other actions in terms of refusing to set a "maximum price" in the markets also points to the commitment of Islam to a free market in exchange where intervention should and must remain limited to protect the freedom of parties to engage in lawful transactions without the spectre of government/states coercion.

Therefore it goes without saying that the two primary sources of Islamic law have laid the foundations for the body of law governing commercial transactions of various kinds in Islam. For the purpose of distinction we group the two hard codes as being the "revealed' form of Islamic law.

Since both the Al-Quran and Sunnah are of eternal relevance, both not only captures the realities of Islam at that juncture in history but also serve as reminder of future challenges that needs addressing by subsequent generations.

C) Early developments: Post Prophet Muhammad s.a.w

Following the prophet's death, the ensuing period saw further development of ijtihad in resolving matters arising. The introduction of new laws entails referring to the primary sources (the two hard codes) and secondary sources (namely the ijma' (consensus opinion), qiyas (analogical deduction), istihsan (juristic preference), urf' (custom) etc). Secondly it was the period of continuous expansion of the Islamic civilization engulfing other civilizations. Expansion also entails the accumulation of new wealth. New problems in terms of dealings with legacy institutions, beliefs, structures etc emerged.
It is then natural that a flowering of ideas and thoughts took place. The four most influential in contributing to this are listed below.

1) Imam Malik – Maliki School (circa 711 - 795). Locality Madinah.
2) Imam Abu Hanifa – Hanafi School (circa 699 - 765). Locality Iraq.
3) Imam Shafii – Shafii School (circa 767 – 820). Locality (various)
4) Imam Hambali – Hambali School (circa 780 – 855). Locality (Baghdad although he also travelled extensively)

What essentially an Arab domain became intertwined with other nationalities ((Imam Hanafi was an Iraqi). The mazhabs or organized school of thought emerged much later. Diversity ensued but tolerated. This ability to assimilate isn't new since Islam emerged sandwiched fortunately at the tail end of the declining Roman and Sassanid empires. Mekah itself was a centre attracting its fair share of Christian and Jewish visitors. Pilgrims flock to the house built by Prophet Ibrahim a.s. Present day "hajj" economics had its roots in pre-Islamic times. Thus trading and contracting is second nature to the Arabs. Islam came and differentiated what is and what is not valid.

The above touched the theological and philosophical (epistemological and ontological) and a little of the historical basis of contract in Islam. In Western thought, the subject of contract, its origins, foundations, purpose and objectives stems from the secular conclusion of the relationship between Man and Nature. Nature is seen as object or resources to be exploited/utilized to meet the "material interest" of Man.

On the basis of scarcity, maximization, rational "self-interest" contracts are seen as both basis of social organization, governing relationship between individuals, relationship between individuals and authority (state, governments etc). "Social Contract" theories to a large measure relates to the protection of the accumulative process namely rights pertaining to ownership, alienation, exchange and transfer of natural and value-added resources. These transactions take place in a "market" which involves buyers, sellers, subject matter, price underlined by **"man-made"** rules (laws, by-laws, regulations and also custom). Markets fail due to various reasons, one being the failure to protect the sanctity of contracts.

Part 2: The technical areas imbued with theory nevertheless situated within the dynamics of history

A) The Prerequisites of Shariah Contracts

The Al-Majalla Al Ahkam Al Adaliyyah defines "contracting is the connection of an ***offer*** with an ***acceptance*** in a ***lawful*** manner, which marks its effect on the ***subject*** of that connection".

Following on the definition, we may extract the following namely the pre-requisites that must be fulfilled in the formation of a contract namely the presence of the Pillars (arkan) of the contracts.

1. Statement (sighah) of contract and its conditions
2. Two contracting parties (‘aqidan) and the conditions
3. The subject matter of a contract (ma’qud ‘alayhi) and its conditions

The Hanafi school points to **Item 1** as being the only pillar of a contract (the other schools includes all three). For our purpose, we will put aside the difference and introduce it in the event that it impacts on our discussion.

The table below illustrate the pillars and the conditions associated. It represents the general pillars/conditions. Exceptions, differing opinions have been excluded for reasons of brevity.

Pillars	Conditions
Statement (sighah) namely offer and acceptance	Preference of the “past tense” Acceptance must conform to an offer Clarity of Offer and Acceptance Connection of Acceptance and Offer (majlis al-‘aqd or session of contract)
Two contracting parties	Legal capacity in terms of reaching puberty, sane and mature
Subject matter of a contract	It must be suitable, known to both parties, capable to be transferred (handed over), presence of subject matter

B) Types of Shariah Contracts

Different scholars and school of thought have classified contracts differently. The following are widely accepted in classification of contracts:-

1. Point of view of soundness and legal effects according to the Shariah
2. Point of view of having only intentions of contracting parties, or having both intentions and actual possession of the subject matter
3. Point of view of their subject matters and the desired objectives
4. Point of view of their statement (sighah)
5. Point of view of being named by the Shariah or not being so

From the above, we isolate ***Item 1*** *and* ***Item 3*** (italics) as highly relevant to the main objectives of this paper.
Item 3 sees contracts ('Uqud) being divided into the following:-

1. Contracts of Transfer of Ownership
2. Contracts of Elimination
3. Contracts of Removing Restrictions
4. Contracts of Imposing Restrictions
5. Contracts of Partnership
6. Contract of Security
7. Contracts of Safekeeping

The above entails action or performance that brings about the desired objectives. Taking the contract of sale or exchange as an example, this contract being one of the nominate contracts can be broken down into several components namely the object of exchange which must be in the first place a **lawful** commodity; it must be ascertainable, agreed as being the object of exchange by the contracting parties and deliverable. The object of

exchange must fulfil the qualifications to be recognized as mal' (property), which has value (mutaqawwam) and gives rise to ownership (milkiyyah). There is also a consideration or price attached to the exchange.

C) The concept of (Mal') property according to Muslim jurists.

1. Hanafi School - According to al Sharakhsi, mal is which is created, beneficial to humans, valuable and can be kept (al Sharakhsi, (1989), v11, p79). Furthermore, al-Taftazani gave two definitions of mal. First mal is anything to which humans are inclined naturally and can be kept (al-Iddikhar) to be used whenever it is required (al-Taftazani, (1996) v1, p412). Second, mal is anything which is beneficial to humans and would decrease in its value and become worn after usage. The limitation of al-Iddikhar, as defined by al-Taftazani excludes al-Manfaah. This is because according to the Hanafi School, usufruct can be owned, but cannot be categorized as mal. On the other hand, the other Hanafi jurist, al-Kasani views it differently as he defines mal to include usufruct as an integral part of it. He indicates in his book, in the chapter of Will and Testament, that will is an affirmation of ownership to the heir, and the place of the ownership is mal and mal is either corporeal or usufruct (al Kasani, (1982) v7, p385).

There is no consensus amongst the Hanafi. Some view that mal covers only tangible things excluding usufruct and rights. And there is a second view on the definition, which covers both the tangible and intangible. Therefore, all the properties, goods, usufructs and rights can be classified as mal.

2. Maliki School - According to al-Shatibi (al-Shatibi (1975), v2, p17), mal means everything that can be possessed, and the owner has an exclusive right of possession of the object when he owns it. Hence, in order for an object to become mal, it will depend on the relationship between the owner and the object, as the need to own and use the object is based on the fact that the object is beneficial to the owner.

3. Shafii School - Al-Suyuti referring to al-Shatibi, an object cannot be classified as mal unless it is valuable and can be sold. In addition, someone has to be accountable for the object if it is damaged. Al-Shatibi further clarified that the object can still be classified as mal even though it is a small amount, such as a coin or any equivalent for it, because people are still interested in owning it (al-Shatibi (n.d) p409). According to Imam Shafii in his chapter Luqatah (lost property), the valuable things should have two criteria: first, they should be beneficial to people. Second, in general, their values will increase when the prices rise. Al-Zarkashi defines mal as anything beneficial, that is, the object is ready to be used to gain its benefits. He explains further that the object can be in physical form (something immovable and moveable) or usufruct (Al-Zarkashi, (1985), v3, p222).

4. Hambali School - According to al-Hijawi, mal is anything beneficial and permissible according to the Shariah and permissibility to use it should be under normal conditions. Al-Hijawi defines normal condition as darurah and hajah circumstances, where Shariah provides exceptional application as special treatment to ease hardship (al-Hijawi, (n.d) v2, p59).

According to al-Buhuti, mal is anything which is absolutely beneficial or anything which is permissible to posses under normal circumstances. He clarified further that anything which is not beneficial or prohibited to be consumed under the Shariah law such as insect and intoxicant. He also explained that anything which is permissible under h*ajah* circumstances is also excluded from the mal category as a dog used as a guard. He clarified further that anything is permissible under *darurah* circumstances, is not mal such as an animal not slaughtered according to the Shariah (al-Buhuti, (1996), v2, p7-8).

D) Pertaining the soundness and the legal effects of contract

1. The Hanafi School classified the legal effects into
    i) Sahih (Valid)
       further sub-divided into effective (nafidh) and dependant (mawquf)
    ii) Bathil (Void)
    iii) Fasid (Irregular)

2. The other schools classified the legal effects
    i) Valid
    ii) Invalid.

Related to the legal effects, it is imperative to also mention the prohibited elements in a contract namely the concepts of Duress (Ikrah), Mistake (Ghalat), Inequality (Ghubn) and Deception (Taghrir). Opinions differ on these terms and their ramifications for contracts. Nevertheless suffice that contracting parties should be on the lookout to avoid these appearing.

E) Theoretical analysis and dynamics of history

The early scholars did not develop a so-called general theory of contract but preferred standalone analysis of one contract (e.g. contract of sale) in their writings. Saleh (1990) referred to fiqh being casuistic not dogmatic, it is meant to solve cases whilst declining to devise theories from the solution given to those cases. A general theoretical approach would essentially involved developing an abstract framework whereby the respective components are then developed.

Hidayat Buang (2000) addressed the Western analysis and presented various contributions from the main proponents of the respective schools. My reading points to diversity in thought that gravitates along a central idea. It has been mentioned that contracts is not a new phenomenon to the Islamic mind, there was essentially no need to apply the adage that necessity is the motherhood of all invention. What was required essentially was to ensure that the ground realities complied with the methodological framework as extracted from the Al-Quran and the Sunnah.

Hallaq (2005) observed the following:-

1. The modern ***resurgent*** of Islam saw the demands towards for the re-application of the Shariah in all matters affecting Muslim
2. The Islamic legal system was in place in the 10th century
3. Historical records on the judicial system, cases dealt with, on conduct of participants etc are sparse

For there to be a resurgent there need to be a decline which revolves around the inconsistencies in leadership since 661 A.D. (the death of Ali Ibn Talib).

The first setback to expansion occurred in 732 A.D. when Abd al-Rahman al-Ghafiki was defeated at Tours by Charles Mattel thus marking an important date in the “Clash of Civilizations”. It is also imperative to note that all four of the founders of the Sunni mazhabs were persecuted by the state thus Muslim legal thought never co-existed peacefully or at best the founders were neutral towards the state. The state meanwhile had its judicial offices most importantly the institution of the “qadi” which began as early as the Umayyad reign. As delegates of the state (sometime subordinated to state interests), the institution dispensed justice well appreciative of the independent “jurists” and the respective schools. The institution survived till the demise of the Ottoman Empire (1299-1923). The empire is perhaps the most applicable bell weather of Islamic fortunes since at it heights it spanned three continents. The Mejelle itself is a product of the empire. Meanwhile legally trained academics like Hidayat Buang (2007) saw the decline as a result of Muslims’ indifferent attitude towards the application of the Shariah (an opinion which is shared by many others).

Kuran (2003) saw the economic decline of the Middle East as a result of the Islamic legal system (in this case he points towards the inheritance system) unable to support the more sizeable Western type corporations. Kuran also agreed with Hallaq on the 10th century as being the period the Islamic legal system concluded its formative period. However of interest is the following from Kuran.

Quote: - “from around the tenth century to the eighteenth, the Middle East's Christian and Jewish traders routinely opted for Islamic contractual forms. Writing in Spain in the twelfth century, Maimonides complained of Jewish traders doing business in an "Islamic manner.”

Unquote: - The reach of the Islamic legal system transcended Muslims since the minorities had a choice in terms of the laws that had jurisdiction over them. They however preferred the system which shows at its zenith the Islamic legal system was superior to existing systems.

I have intentionally not used the word Shariah instead the Islamic legal system since there is the ***issue namely how close did the system approximate to the Shariah***. Ibn Qayyim (1292-1350), a student of Ibn Taymiyah (1263–1328) discussed the use of "hiyal" or legal trick in relations to the issuance of fatwas in his book *I'laam ul Muwaqqi'een 'an Rabb il 'Aalameen* as per Nawir Yuslem Nurbain (1995).

It also follows from the above that the Islamic legal system is fully equipped to address issues related to discharge namely bringing a completion to the contract.

Wohidul Islam (1998) stated that Niazi identified the following as leading to discharge.

1. By performance;
2. By express agreement
3. By operation of the doctrine of frustration; and
4. By breach.

The theological framework of the system orientates itself towards the end goal of performance which is **Win-Win** situation. Thus the following serves as "preventive" measures reducing the mathematical probability of a "**Lose-Win"** or "**Lose-Lose"** situation. The far-sightedness of the system entails ensuring full consent is in place, ensuring expeditious exchange of counter values (exception for "salam" and "istisna" contracts), providing certainty and validity in terms of the mal', upholding justice by placing utmost duty on the "seller" and protecting "buyers" interest, alleviation of hardship in "debt" based contracts, avoidance of extraneous "shurut" (conditions) and providing adequate "khayr" (options) to the contracting parties.

The above can also be interpreted by reference to the legal maxims *(qawa'id al-kulliyah al-fiqhiyyah)*. The following is from the Mejelle.

1. Necessity *(darurat)* allows actions which would otherwise be prohibited (Art. 21);
2. Hardship is solved by tolerance (Arts. 17 and 18);
3. There shall be neither retaliatory damage nor causing of damage (Art. 19);
4. Necessity is judged according to its merits (Art. 22);
5. A damage must be brought to an end (Art. 20);
6. A major damage may be replaced by a lesser one (Art. 27).

Performance leading to discharge entails fulfilment of the actions as stipulated by the contract. Transfer of the mal' into the possession of the buyer entails the performance under a contract of sale. Performance of the contracted work entails the performance under a contract of Ijarah. Performance of the stipulated agency work by an agent entails the performance under a contract of Wakalah.

Other form of discharge which involves entails non-performance entails the following as per Wohidul Islam (1998). This entails his summary of the positions of various jurists:-

1. Dissolution by mutual agreement (iqalah);
2. Automatic dissolution by death, destruction of subject matter, expiry of period, achievement of purpose and stipulated repudiation, etc;
3. Dissolution by revocation and termination (Al-Faskh):
   a) unilateral termination in permissible contracts (`Uqud jdizah)/ contracts of licence,
   b) termination for nullity and illegality,
   c) termination for options (Khiyarat),
   d) termination by non-approval to suspend contracts,
   e) termination for breach or fault;
4. Dissolution for impossibility (istihalah) of contractual performance — doctrine of changed circumstances, doctrine of frustration, doctrine of intervening contingencies, doctrine of force majeure and act of God, etc.

Saleh (1989) meanwhile address the remedies available for breach of contract as per the following:-

1. Interdiction (haft-). Most schools of law' validate the seizure of the assets of a debtor who is then prevented from engaging in any legal transaction with regard to those assets (hair).

2. Imprisonment (hat's). Instead of interdiction and sale of seized properties by the Shariah judge, Abu Hanifa recommends the imprisonment of a well-to-do debtor until he himself settles his debts.

3. Prevention of Travel

4. Lien (habs al `ayn). A lien may be created by the agreement of creditor and debtor; such as with regard to a pledge contract.

5. Reinstatement of the mal' (restitution). The most complete and natural compensation is attained by remitting to the creditor the like of the property which is lost or impaired by a defect, whenever possible.

6. Payment of damages. Payment of damages can be resorted to. However this is based on the actual damages ascertained.

Ma'sum Billah (2006) identified rescission, payment of damages, specific performance, injunctions, restitution and quantum meruit award as the available remedies under a breach of contract.

The formulation arrived by the writers are based on their on their analysis of previous juristic opinions. It must be pointed that the fuqahas differ on some of these avenues available.

Much of the logic behind these opinions was based on ensuring that "riba" and "gharar" elements are avoided whilst ensuring justice and equity is upheld more so in the event that one of the contracting parties may have fallen into hardship prior to discharging the contract. The remedies mentioned above are also available under other legal systems with variations remaining in the details.

Much of the above remains either partially implemented or survives as historical models since the onset of the decline in Islamic civilization.

F) Final Decline of the Islamic Legal System

The stagnation and eventual decline of Islam is to be mirrored again the rise of the West. Essentially this process started as early as the 14th century with the rise of the small city states namely Venice and Florence. Prosperity was achieved from trading and financing activities which challenged the monopoly held by Muslims on the trade routes. Political units also grew in size from city-states to nation-states and a few became empires that directly/indirectly control vast territories initially under the influence of Islam. The major powers were Britain, France, the German Habsburg followed by other so-called middle powers. Essentially the legal systems were based on the common law (Britain) whilst Europe went for the civil law system. Both these powers introduced their legal systems into their conquered lands. Under the guise of modernization, the legal and other Western institutions were advanced whilst the application of the Shariah was curtailed largely to matters of family and religion.

Opinions differ with regards to the history of the common law in Britain. Some traces it back to the Norman Conquest in 1066. More interestingly, Makdisi (1999) put the Common Law as having its origins in Islam. Notwithstanding this, the establishment of common law gave rise to a concept of justice the emphasized the uniform application of standardized laws and procedures. This concept was embodied in the doctrine of stare decisis that emphasized the importance of legal precedents established in previously settled cases. A legal system essentially is representative of historical development of a nation and thus

as Britain prospered in the Industrial Revolution much of its laws were oriented towards protecting industry and commerce. Procedure practiced in common law courts is the accusatorial (adversarial) system, i.e., a regulated confrontation between the parties. Extensive law of evidence and trial methods have been developed. The judge is passive. The leading role comes to the parties and their lawyers.

The civil law is practised in the majority of countries, especially in continental Europe and former colonies of those countries. A legal rule is laid down in the form of a legislative enactment based on the doctrine of legislators and legal scholars rather than on the practice of the courts. Legislation comprises express legal rules in a general and comprehensive manner. Legislation developed out of the Roman law of Justinian's Corpus Juris Civilis. The most influential codes are the Napoleonic Code and the German Code. The code provisions have been implemented by an increasing number of statutory provisions. Civil law principles: (i) solution of each case is to be found in the provision of the written law, (ii) precedents, however authoritative, are not binding, and (iii) the deciding court must demonstrate that its decision is based on provisions of the written law and not merely on precedent. Decisions of the civil court - *jurisprudence* - are the illustration of general principles. Precedents may be highly persuasive but they are never conclusive. Procedure practiced in the civil law courts is inquisitorial. The judge is given a strong role. The judge can adopt the role as examiner, counsellor and advisor, as insistent promoter of settlements. He is entitled and bound to question, to inform, encourage and advise parties, lawyers and witnesses and counteract any mistake.

Part 3: The present jurisdictional situation and challenges

From wiki, Jurisdiction (from the Latin ius, iuris meaning "law" and dicere meaning "to speak") is the practical authority granted to a formally constituted legal body or to a political leader to deal with and make pronouncements on legal matters and, by implication, to administer justice within a defined area of responsibility.

We will contend that the discussion on jurisdictional issues must be seen as multi-faceted. The following illustrates the multifaceted nature of the discussion.

A) Domestic Jurisdiction

Initially the concerns evolve around the traditional market for Islamic finance namely in the Middle East (including countries of Northern Africa) and Turkey, the Indian Sub-Continent and South East Asia (especially Malaysia).

The Middle East had a diverse experience of Western and Shariah legal influence. McCormack (2009) observed that certain scholars suggest that countries in the region can be divided into three categories based upon the extent to which Shariah affects their legal system: (1) countries that primarily follow the Western system, where Shariah plays a minor role; (2) countries with codified laws based primarily upon Shariah; and (3) countries with westernized commercial codes, but legal interpretation and the legal system itself are based upon Shariah. The countries that make up the first category are Lebanon, Syria, and Egypt; the second category consists of Saudi Arabia and Yemen; the third category is made up of Iraq, Jordan and Libya.

Certain countries like the United Arab Emirates, Bahrain, Kuwait, Iran, Oman and Turkey were excluded in the study. Ballantyne (1998) meanwhile also concluded the diverse position of the Shariah with regards to Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.

Regardless of the classification, these countries are predominantly Muslim and any harmonization between their present laws, Shariah and international laws is within their control. Some may want to harmonize their laws with international laws e.g. Saudi Arabia as per Amr Daoud Marar (2006). Others may on the other hand persist to retain their existing law without infusing the Shariah. Then there are countries with "special considerations" like Turkey which desires EU membership and Iran (Shiite and subject to Western led sanctions).

Thus we infer that national interest remains the deciding factor in the selection of the legal system to be put in place.

The Indian sub-continent namely India and Pakistan has followed a divergent course namely Pakistan has an on-going experiment with regards to applying Shariah in all facets of life. As recent of Sept 2010 the Indian government has said it was **not legally feasible** for banks in India and its branches abroad to undertake Islamic banking activities. This is essentially a blow to Islamic banking since India and China are seen as the fastest growing economies in Asia.

The Indian experience thus far may have bearing on other countries planning to introduce Islamic Banking.

Malaysia is seen by many as an example of a moderate Muslim nation to emulate due to the domestic penetration of Islamic finance and its ability to export the industry abroad. It is however seen as a clear example between applications of Islamic contracts and the interpretation by the civil courts. The relevant laws, acts, regulations deemed applicable are listed below (list are non-exhaustive and year of amendment not stated).

1. The Federal Constitution as the supreme law of the Federation.
2. The Contracts Act, 1950
3. The Hire Purchase Act, 1967
4. The Sales of Goods Act, 1957
5. The Specific Relief Act, 1950
6. The Banking and Financial Institutions Act (BAFIA), 1989
7. Islamic Banking Act (1983)

Most cases cited are with relations to the Bai Bithaman Ajil (BBA) contract and the interpretations of the civil courts using its understanding of contracts (under the common law of Britain), The Contracts Act, 1950 which is an import from the Indian Contract Act of 1872 which traces back again to Britain and Draft Code for the State of New York (Field Code) as per Vohrah & Min Aun (2000).

The specific cases are Affin Bank Bhd v Zulkifli Abdullah [2006] 1 CLJ 438, Malayan Banking Bhd v Marilyn Ho [2006] 3 CLJ 796, Malayan Banking Bhd v Ya'kup Oje & Anor [2007] 5 CLJ 311, Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd [2003] 1 CLJ 625, Dato' Haji Nik Mahmud bin Daud v Bank Islam Malaysia Berhad [1996] 1 CLJ 576, Bank Islam Malaysia Berhad v. Adnan Bin Omar [1994] 3 CLJ 735, Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor and Other Appeals [2009] CLJ 6

22, Bank Islam Malaysia Bhd v. Azhar Osman and Other Cases [2010] CLJ 5 54, Bank Kerjasama Rakyat Malaysia Bhd v. Sea Oil Mill (1979) Sdn Bhd & Anor [2010] CLJ 1 793, Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd & Another Case [2010] CLJ 4 388.

It is not the wish of this paper to analyze each of case but serves to point out the ***number of cases*** pertaining the BBA contract and to point out the **doctrine of "stare decisis"** or legal principle by which judges are obliged to respect the precedents established by prior decisions which was applied in *Affin Bank Bhd v Zulkifli Abdullah* [2006] 1 CLJ 438 whereby the presiding judge made reference to the following cases *Bank Islam Malaysia Berhad v. Adnan Bin Omar* [1994] 3 CLJ 735, *Bank Islam Malaysia Bhd v. Shamsuddin bin Haji Ahmad* [1999] 1 LNS 275, *Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd* [2003] 1 CLJ 625, *Bank Islam Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd* [2005] 5 AMR 381, *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993]4 CLJ 476, *The Co-operative Central Bank Ltd v. Y & W Development Sdn Bhd* [1997] 4 CLJ 170.

Whilst the above have attracted interest from practitioners, academia and regulators namely the appeal to the use "Musyarakah Mutanaqisah" (diminishing partnership) contracts in financing housing facilities, to reference such matters to the National Shariah Advisory Council (NSAC) under Bank Negara Malaysia (BNM) purview. This was essentially the recommendation in the *Malayan Banking Bhd v Ya'kup Oje & Anor* [2007] 5 CLJ 311 which the learned judge saw in line with dispensing justice and equity.

... the court can on their own motion decide the issue or alternatively call experts to give their views, pursuant to s 45 of the Evidence Act 1950 or pose the necessary questions to the Shariah Advisory Council for their views...

Azahari (2009) saw this with reinvigorating the spirit of "ijtihad" among the stakeholders going forward. Hidayat Buang (2007) saw the issue as the Shariah courts and the Civil courts as having insufficient breadth of knowledge in dealing with Islamic contracts. He cited *Bank Islam Malaysia Berhad v. Tinta Press Sdn. Bhd. & Ors.* [1986] 1 MLJ 356, concerning Ijarah facility, the court, in explaining the nature of the contract, resorted to the English principles to explain the contract. Nothing was said on the principle of Ijarah as basis of the contractual relationship between the bank and defendant. Tracing back to 1983, he iterated the government has insisted that the aim of Islamic banking was an alternative to conventional banking. By doing this, no substantial change is made to the existing legal scheme of the country.

The writer sees the expansion as a political landmine for the existing government or future governments for that matter by virtue of Muslims themselves may have their own thoughts on the expansion whilst a certainty of backlash should be forthcoming from Non-Muslims. It remains an area best thread slowly.

Bank Negara in 2009 has strengthened the Shariah Advisory Council making its decision binding **may resolve future contention or may smell of the notion of "corrective maintenance"** since the horses may have fled the stable in the case of BBA however in the area of Al-Ijarah Thumma al Bay' (AITAB) facilities governed by the Hire Purchase Act, 1967 and the

supposed introduction of an Islamic variant as per Wadji Dusuki & Irwani Abdullah (2006) it seems that jurisdictional issues may be less unsettling (further research required to ascertain the actual reasons).

There are some who sees that although challenges remain, Malaysia must be seen as a success story in operationalizing Islamic banking. This is to be attributed to the status quo in operations namely the partial harmonization of the Shariah and the civil law in operations. Hassan (n.d) demonstrates the success by invoking statistics relating to the growth of Islamic banking as a growing contributor to the nation's GDP.

Thus we conclude that the jurisdictional divide will be a feature that will colour the Malaysian legal landscape into the foreseeable future mainly due to political and economic considerations.

Rounding up on the traditional markets of Islamic Banking and Finance suffice that other considerations ranks higher than the desire to progress towards increasing the coverage and use of Shariah laws.

B) Exporting Islamic Banking and Finance

Islamic finance has grown tremendously over the last two decades. Essentially the Middle East, South East Asia predominantly Malaysia and Europe were instrumental bringing multiple product offerings are available for example Sukuk, takaful related products, wealth management products in terms of Shariah compliant unit trusts, private equity funds, Islamic derivatives and remaining being standard Islamic Banking offerings.

i) First jurisdictional hurdle

This is the Fiqh related issue pertaining to the contract of Bai Bithaman Ajil (BBA) governing the Sukuk offering. Malaysian issuers of the Shafii disposition were not able to convince Middle Eastern issuers of other mazhabs to accept the offerings. Inevitably new structures of Sukuk needed to be introduced. As of 2004 AAOIFI reported that there are 14 types of "sukuk" structures introduced within duration of 14 years. The increased number of Sukuk structures led to the appeasement of the Middle Eastern investors.

ii) Second jurisdictional hurdle

The second is the "governing laws" governing offerings. Whilst we may be more familiar with issues on Bai' (sale) and Sukuk related contracts other offerings are also affected by jurisdictional concerns. We begin however with addressing Sukuk due to it making a sizeable portion of the industry.
AAOIFI defines Sukuk as "…certificate of equal value representing, after closing subscription, receipt of the value of the certificates and putting it to use as planned, common title to shares and rights in tangible assets, usufructs and services, or equity of a given project or equity of a special investment activity" as per AAOIFI standard 17.

Utilization of the Common Law is preferred due to the following.

- Lead banks are usually a foreign institutions hailing out of Europe, the UK or the United States.
- The lingua franca of finance remains English.
- The originating countries were either former colonies of Britain or had their laws closely linked to the Common Law.

- Offshore incorporated entities are sometime used in Sukuk transaction. These entities located in offshore financial centres are served by new and basic legal structures if compared to existing legal structures.
- Legal counsels with Islamic finance know-how are predominantly Common Law trained
- Shariah advisors do not have any say over the law. Their involvement is task specific much like accounting firms roped in to advice on tax
- External parties like rating agencies, other banks and the regulators also have task specific functions

Earlier analyses of the regions infer that the use of any other laws besides the Common Law will not make the Sukuk "acceptable" and "marketable".
At this juncture, it is imperative to cite the existing cases that have come under purview of the British courts since there are a **minimum of two contrasting positions** that can be taken.

1) The Common Law court accepts use of the Shariah as long as specific clarity in the terms being use is inputted in the contract.

2) The Common Law courts do not accept the use of the Shariah and it will adjudicate based on the applicable law of the land

Other positions maybe argued however certain assumptions of ceterus paribus needs to be maintained to establish a more solid foundation of putting clear sunlight between alternatives (if available).

Case 1: Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd and Others, EC [2004] EWCA Civ 19

The Court of Appeal was asked to consider whether the arrangement fell foul of Islamic Shariah principles such that the borrowers could escape liability under the financing scheme. The Court held that Shariah principles did not apply and that the financing scheme was enforceable.

In 1995 the Bank agreed to provide the Borrowers with a working capital facility. So as not to offend against the prohibition under Shariah of the charging of interest (Riba) the financing took the form of Murabaha contracts. Murabaha agreements are contracts for the sale of goods whereby the seller (here the Bank) agrees to purchase, in its own name, goods specified by the buyer (here the Borrower) and sells them to the buyer on a deferred payment basis, payable in instalments. The difference between the original price and the deferred price is the Bank's profit.

The Murabaha agreements contained the following governing law clause:

"**Subject to the principles of the Glorious Shariah, this Agreement shall be governed by and construed in accordance with the laws of England"**

The borrowers defaulted, claiming that the facilities were actually interest bearing loans thus invalid. The High Court and Court of Appeal granted summary judgment to the Bank on its claims concluding that the principles of Shariah did not apply to the Murabaha agreements, principally because that had not been the parties' intention.

The Court's reasoning was as follows:

The reference to the "Glorious Shariah" in the governing law clause was merely intended to reflect the Islamic religious principles according to which the Bank held itself out as doing business. It was not a system of law designed to trump the application of English law as the governing law.

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 was 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.**

The general reference to principles of Shariah in the governing law clause did not identify those aspects of Shariah which were intended to be incorporated into the contract. It was insufficient for the Borrowers' to contend that the
basic rules of Shariah applicable in this case were not controversial. Those basic rules were neither identified nor referred to in the contract.

Both sides accepted that there were areas of considerable controversy and difficulty to applying Shariah to matters of finance and banking. Consequently it was "**improbable in the extreme, that the parties were truly asking [the Courts] to get into matters of Islamic religion and orthodoxy.**"

The fact that there might be general consensus upon the proscription of Riba and the essentials of a valid Murabaha agreement did no more than to indicate that if the governing law clause had sufficiently incorporated the principles of Shariah into the agreements, the Borrowers' would have been likely to succeed.

The Court also noted that there was no suggestion that the Borrowers' had been in any way concerned about the principles of Shariah either at the time the agreements were made or at any time before the proceedings were started. In the Court's opinion, the Shariah defence was "a lawyer's construct." Therefore the Court leant against a construction which would defeat the commercial purpose of the documents.

Some may see the above that the English courts as neutral towards the Shariah, both Jarrar (2009) and Agha (2009) especially the latter sees issues going forward if litigation remains the choice of dispute resolution.

Case 2: The Investment Dar Company KSCC v Blom Development Bank SAL, [2009] EWHC 3545 (Ch)

A Lebanese bank, Blom Developments Bank SAL ("**Blom**"), provided The Investment Dar Company KSCC ("**TID**") (a Kuwaiti company) with funding totalling approximately US$10million (the "**Principal Amount**") through a wakala (or agency) based deposit / investment structure. This particular structure was originally put in place in October 2007.

The wakala (or agency) was structured as a 'master' arrangement under which Blom as muwakkil (or depositor) would, from time to time, deposit funds with TID as wakeel (or agent). TID instigated each of these investments through 'investment offers' (i.e. funding requests). TID was required to invest those funds in a pre-agreed manner, and any such investment was to be in accordance with Shariah.

In response to these claims, the argument put forward by TID and its legal counsel was that:

- TID was required by its constitutional documents to comply with, and conduct its business activities in accordance with, Shariah;
- The wakala (or agency) arrangements did not comply with Shariah; and as a consequence of the foregoing, TID did not have the proper legal capacity at the outset to enter into the wakala (or agency) arrangements – and that such arrangements went beyond the corporate power and authority of TID and should therefore be considered ultra vires (or void).

The Master hearing Blom's application found that there was an arguable defence to the contractual claim, but not to the trust claims and therefore issued a summary judgment ordering TID to pay to Blom the Principal Amount but not the Expected Profit (in respect of which the Court felt there was a case to be argued).

TID elected to appeal the summary judgment with a view to overturning the order to pay the Principal Amount to Blom.

Clifford Chance LLP (2010) viewed the TID/Blom litigation different from the Shamil Bank litigation. In the Shamil Bank litigation, the Court refused to take into account Shariah principles on the basis that enforceability

should be determined solely by English law. In this case however, the decision of the Court rests upon an analysis of capacity and authority.
In order to determine whether TID had proper legal capacity, it is necessary to consider the relevant Kuwaiti laws as they apply to TID, but – given the express statements as to Shariah in TID's constitutional documents – it would also be necessary to consider the underlying issue of Shariah compliance. This is not something that an English court would be equipped to answer on its own. It goes on to recommend its client to request copy of fatwa or documents establishing the Shariah compliant nature of the transactions, also representations on Shariah compliance & non-conflict with constitutional and authorization documents and documents should include an express waiver of any Shariah related defences.

Other cases that worth citing is *Islamic Investment Co. of the Gulf (Bahamas) Ltd v. Symphony Gems & Ors, Fordham International Law 25 (2003):150.* In this murabaha related case, the English courts again declined to be drawn into commenting on the Shariah aspect of the transaction.

This paper circles back to the subject matter of Sukuk. Unlike the cases cited above involving contract of sale & agency, Sukuk issuances are of **complex subject matter** due to the learning curve involved since Islamic debt securitization has an approximate age of 20 years (old forms of securitization excluded) contrast to the Prophet s.a.w prophet hood and revelation of the Al-Quran which took 23 years. Complexity entails the forms and the "human" factor issue.

Mahmood Sanusi (2009), Zahraa (1998) and Shafiq Ur Rahman (2010) reviewed the Shariah acceptance of concept of juristic person and limited liability entities. However legitimate form itself does not guard against moral hazard, agency problem and rules non-compliant behaviour. To support the "human" issue this paper cites that in both the Shamil Bank and TID case, the British courts saw certain defences as legal construct. In simple lay men language the lawyers were acting in a dubious manner to advance the cause of the clients.

Another given pertaining Sukuk issuance is the complexity of documentation. The Nakheel prospectus was 237 pages, the 1Malaysia Sukuk Global Berhad was 196 pages, the Petronas Global Sukuk Ltd was 270 pages and the Abu Dhabi Islamic Bank (ADIB) Sukuk was 205 pages.

Most pertinent to our study is the governing laws and the interpretation. Taking the Nakheel Sukuk the following extract is from the governing law section which both complexity and volume.

The Declaration of Trust, the Transaction Administration Deed, the Agency Agreement, the Certificates, the Co-Obligor Guarantee and the Dubai World Guarantee will be governed by English law and subject to the non-exclusive jurisdiction of the ***English Courts****.*

The Purchase Agreement, the Lease Agreement, the Servicing Agency Agreement, the Sukuk Assets Sale Undertaking, the Purchase Undertaking, the Subscription Rights Sale Undertaking, the Agency Declaration, the Security Agency Agreement, the Mortgages and the Share Pledge will be governed by the laws of the UAE as applied by the ***Dubai courts.*** *The courts of Dubai have non-exclusive jurisdiction to hear all disputes relating to each of those documents.*

The 1Malaysia issuance had three governing laws namely Malaysian, English and American laws.

We have not seen the defaulting cases of Sukuk being dealt by the British courts as yet but suffice to intimate it may involved the need for specialist expert witness to be brought in playing an essentially more active capacity compared to their use in the above cases.

Case Study: The East Cameron Sukuk

This case hails from the United States, which is essentially the new frontier for Islamic finance. The case itself is representative of the "asset based" or "asset backed" debate, assessing whether a "true sale" has taken place in favour of the Sukuk holder, the ranking of Sukuk holders for Sukuk in default. East Cameron sukuk was issued in July 2006 in the United States as a Musyarakah sukuk to support capital and operating costs of drilling and operating wells in the Gulf of Mexico and it raised about USD 170 million. The so-called underlying asset is called ORRI, Over-Riding Royalty Interest in Oil and Gas assets in the Gulf of Mexico. At the point of issuance, there was a legal opinion of a "true sale" having taken place. But, on Oct 2008, the originator filed for Chapter 11 bankruptcy requesting to re-classify the sale of the ORRI to the East Cameron Gas Sukuk SPV as a secured loan rather than a "true sale". Thus far the Louisiana court still recognizes the "true sale" position thus supporting the Shariah position however at last checking the re-organization under Chapter 11 is still on-going.

The above three cases leaves us at an **uncertain position** with regards to the British courts actual stance pertaining cases involving Shariah contracts. It must be reiterated again that the Common Law is judge made and they remain subject to the prevailing social conditions of the land. Their perception of Islam as a foreign import leaves room for changing stance on Islamic finance. Case in point is the uproar over Archbishop of Canterbury calling for aspects of Islamic Shariah law to be adopted in Britain as reported in 2008. Sukuk meanwhile was singled out on the basis of complexity and the East Cameron case is seen as the initial test for the introduction of Islamic finance into the US.

iii) Third jurisdictional hurdle

The internationalization of laws is seen as the next hurdle which in itself hasn't been tested. Ever presence in the background of the Common Law is the application of European Union laws such as the European Contract Law, 1995 and whether Britain will in the long run trade in it legal sovereignty in certain areas. Gordley Ed. (2004) intimated to the different origins and thus the current position. How this will feature in affecting Shariah contracts in the European context is uncertain. Similarly the countries within the EU, old, new and non member states have diverse legal systems. Introduction of Islamic finance into one country does not guarantee economies of scale for rolling out in similar fashion in others.

Besides EU laws, the United Nations itself has introduced for example United Nations Convention for the International Sale of Goods (CIGS) & United Nations Convention on the Law of the Sea which is seen most pertinent to commercial transactions. How this will pan out in the future can only be speculated.

Balz (2005) meanwhile has made comparisons between the common law handling of the Symphony Gems and the Shamil Bank cases comparing it with applying German law and came to the conclusion that German law may be more sensitive towards the application of Islamic rules. Whether this finding attracts practitioners' remains subject to other considerations intimated in the choice of common law by the originators of Sukuk. Thus we may conclude in relations to the above hurdle, **uncertainties** abound.

iv) Fourth jurisdictional hurdle

Although jurisdiction pertains to legal matters, the paper takes the position that other considerations play an important in determining the development of Shariah compliant offerings for the international market. Firstly the role of accounting with the existence of various governing bodies emphasizing different standards. This in itself impact on the treatment of Islamic finance transactions especially in matters of taxation e.g. Clifford Chance (2010) commenting on the issue of Islamic Finance and indirect tax treatment in Luxembourg. Disparities only increase the cost of product development and roll-out. The regulatory environment also poses a challenge namely Islamic finance needing to be up to date with regards of regulatory development. Basel III comes to mind however more pertinent is the role of Financial Services Authority (FSA) in the UK, similarly Her Majesty Revenue & Customs (HMRC) guidelines pertaining to Islamic securitization. The United States meanwhile as part of the regulatory reform of the Obama administration has embarked on employing new rules in the securitization and derivates market as per Mayer Brown (2009).

Thus it is not only the legal systems that impacts the Islamic offerings but also the other variables above since the variables themselves affect structuring which may impact on the validity of the Islamic contracts applied.

C) Alternatives and suggestions put forward

i. Less preference for litigation but instead increasing the use of arbitration. This entails the suggestion being put forward by the likes of Samir Salleh and Oliver Agha. Whilst it has its own attractiveness, it is an option which must be pursued by contracting parties with clear understanding pointing towards the desire to achieve an amicable solution. However some detractors may point to the substitution of the common law to an arbitration panel which may not apply the Shariah. Thus there maybe the need for a Shariah arbitration industry to be set up.

ii. If we foresee that Common Law jurisdiction will apply in certain disputes, putting in the recommendations of the British courts perhaps is the next best alternatives available. This is essentially seen in the light that the recommendations themselves are not extraneous to be implemented.

iii. Enhancing the role of regulators and standard setting bodies. It is unfortunate that issues pertaining structure, validity only crops up when a crisis emerges. This is essentially not the basis of prohibiting “riba” and “gharar”. Prohibitions entails ensuring all controllable risks elements are mitigated against, the remainder is uncertainty and not within the control of Man. What is more worrying is that mistake kept on being repeated which is an inexcusable lapse in character. A growing trend in corporate set-ups is independent directors and growing minority shareholders activism. This has not really come to the fore in Islamic finance. It is suggested as a measure.

iv. Industrial training of practitioners may need to be formalized as a pre-requisite to employment. Curricular needs serious attention. We must not have a cook-up version for example the syllabus of the Certified Credit Professional-i (CCP-i) is actually identical to its conventional version. At the most basic level if training is given lip service how is the person expected to comprehend the structure of a Sukuk.

v. Perhaps with regards to Sukuk there are as many solutions to the issues themselves. The divide between bankers, legal minds, Shariah minders and the originators will seemingly persists unless an independent body or individuals are able to shift through the ”mind field” associated with the final structure being proposed.

Concluding remarks:-

Some of the above alternatives and suggestions the author picked up from reading whilst some of it arises out of simple analysis. Thus its begs surprise that some form of it has not been put into place or if they have been, it has not been trumpeted in public. A domestic experiment is essentially preferred. Having been a practitioner for 13 years and now looking at the industry from the outside, the writer remains questioning of the industry, of the contributions it claims to impart on the Maqasid al Shariah. Some Muslim nations may grow rich, some may retain their existing wealth but what remains hopeful is that we learn the lessons of the following verse:-

مَّآ أَفَآءَ ٱللَّهُ عَلَىٰ رَسُولِهِۦ مِنْ أَهْلِ ٱلْقُرَىٰ فَلِلَّهِ وَلِلرَّسُولِ وَلِذِى
ٱلْقُرْبَىٰ وَٱلْيَتَٰمَىٰ وَٱلْمَسَٰكِينِ وَٱبْنِ ٱلسَّبِيلِ كَىْ لَا يَكُونَ دُولَةًۢ
بَيْنَ ٱلْأَغْنِيَآءِ مِنكُمْ ۚ وَمَآ ءَاتَىٰكُمُ ٱلرَّسُولُ فَخُذُوهُ وَمَا نَهَىٰكُمْ عَنْهُ
فَٱنتَهُوا۟ ۚ وَٱتَّقُوا۟ ٱللَّهَ ۖ إِنَّ ٱللَّهَ شَدِيدُ ٱلْعِقَابِ ﴿٧﴾

Q 59:7 What Allah has bestowed on His Messenger (and taken away) from the people of the townships,- belongs to Allah,- to His Messenger and to kindred and orphans, the needy and the wayfarer; In order that it may not (merely) make a circuit between the wealthy among you. So take what the Messenger assigns to you, and deny yourselves that which he withholds from you. And fear Allah. for Allah is strict in Punishment.

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