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Challenges of Retaining **Shari'ah Compliance in Islamic Finance**

Reports on SOAS-QFC Islamic Finance Workshop & Public Lecture - 2018

Centre for Islamic and Middle Eastern Law (CIMEL)
SOAS University of London

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Report on
SOAS – QFC Islamic Finance Workshop & Public Lecture

February 21 & 22, 2018

Challenges of Retaining Shari'ah Compliance in Islamic Finance

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TOSHIBA

Executive Summary

The default event involving the Dana Gas *Sukuk* issuance provided a timely case study for the 2018 SOAS-QFC Islamic Finance Public Lecture & Workshop. The workshop discussion dealt with a broad range of issues including: the parameters of what shari'ah compliance means; the role of governance in determining shari'ah compliance; and reflections on challenges to shari'ah compliance and what they mean for the industry.

A fundamental implication of Dana Gas's decision to question the shari'ah compliance of its own *sukuk* issuance highlighted the complex hybridity of Islamic financial law and the ways in which this hybridity can run up against the municipal laws of nation states. This is particularly so for those Muslim-majority jurisdictions, which have reserved a role for the shari'ah in their commercial and civil codes, since Islamic finance transactions comprise legal elements, which test the boundaries of the shari'ah.

The industry's innovative approach to the shari'ah is roundly criticised for its artifice and the tendency for its products to mirror conventional risk and reward profiles. Yet this criticism may often reflect an ignorance of market demands and regulatory requirements which require compromises to be made in relation to the realisation of Islamic principles. It may also idealise profit- and loss-sharing to an extent that is unrealistic and ignores the necessity and usefulness of debt-based products, particularly those backed by assets. Indeed, the shari'ah offers a number of reasons for allowing such compromises including public benefit (*maslaha*), a desire to avoid harm and to provide refuge in the case of necessity (*darura*), and in relation to its greater goals (*maqasid al-shari'ah*). Emphasising the meaning of shari'ah compliance as an ethical spectrum as opposed to a binary structure of lawful (halal) and unlawful (haram), may contribute to a more balanced assessment of the industry's financial practices.

The primary means of addressing this long-simmering credibility gap is to reinforce shari'ah governance. Shari'ah governance, in essence, is commensurate with shari'ah compliance. Shari'ah governance frameworks typically comprise three pillars: the shari'ah supervisory board; the internal shari'ah department and a central shari'ah board, which is often an organ of the central bank. Yet very few jurisdictions have developed governance at this level (Malaysia, Bahrain, etc.). Moreover, the small scale of the Islamic finance industry leads to underinvestment in R&D, which stifles the development of shari'ah governance. A further suggestion for shoring up shari'ah compliance is the standardisation of Islamic financial law, which standard-setting organisations such as AAOIFI and the IFSB currently undertake.
However, standardisation, particularly in wholesale markets, has remained largely a goal, rather than becoming a reality. Further, in some cases it may disadvantage

customers of Islamic financial institutions by standardising terms which shift the greatest risk to customers while directing a disproportionate share of the return to the financial institutions (see Report on the Public Lecture by Mr Michael McMillen). Finally, contractual warranties are often used to prevent claims that the terms of a contract do not comply with the shari'ah, but their use may fall short in terms of legitimacy bestowed to the transaction.

Historically, the legitimacy of a mufti's fatwa could not be contested so long as it had been reached according to the school's methodology (*madhab*) or principles of jurisprudence (*usul al-fiqh*). Yet the modern world has upended this understanding. Technology has allowed greater access to information and provides a worldwide platform from which the lay person can express his or her views. The legitimacy of fatwas, as demonstrated in the case of Dana Gas but also in relation to many others, can be questioned with sometimes disastrous consequences. Yet questioning may ultimately be a good thing; it may lead to innovation and even possibly to compromise or acknowledgement that Islamic principles may not always be given full expression in modern financial markets.

The recognition that the challenges to shari'ah compliance are also a result of the complexity of financial markets and ways in which Islamic structures are given effect may require a larger circle of practitioners to become involved in the determination of shari'ah compliance. Shari'ah scholars alone may struggle to acquire the requisite knowledge to make such determinations in view of the numerous disciplines which financial markets embody (e.g. finance, accounting, law, English, Arabic). However, the professionalisation of shari'ah scholars would go a long way in shoring up the confidence, credibility and legitimacy of the Islamic finance industry. This includes the establishment of associations for determining and vetting qualifications and standards related to the profession.

Background

The 12th annual public lecture and workshop on Islamic finance took place under the auspices of the Centre of Islamic and Middle Eastern Law (CIMEL) at SOAS University of London from 21-22 February 2018. The annual events, which SOAS inherited from the LSE and Harvard, are made possible with the generous support of the Qatar Financial Centre Authority. As chair of CIMEL at SOAS I am excited to be able to bring this important workshop and public lecture to SOAS, a vibrant centre of academic discussion in the heart of London.

First and foremost, I would like to thank Professor Syed Nazim Ali of the Hamid bin Khalifa University in Doha, Qatar, for his suggestion to transfer these events to SOAS. Furthermore, Nazim's expertise in conceptualising and organising these events is invaluable. I would also like to thank Mr Husam El-Khatib, Counsel of Dechert LLP, for his considerable organisational assistance and his ideas concerning the workshop and public lecture themes. Finally, I owe thanks to Professor Frank Vogel, Founding Director of the Islamic Legal Studies Program at Harvard Law School, and Principal Investigator of the Study of the Commercial Law of the Kingdom of Saudi Arabia. Professor Vogel's expertise in relation to the intersection of shari'ah and commercial law provides an important scholarly perspective and rigour to the workshop. Professor Vogel has moderated the workshop since it was initiated in 2006.

The public lecture and workshop allow a select group of around 30-35 leading shari'ah scholars, economists, legal practitioners, bankers and academics to gather together for a day long closed-door discussion on an important contemporary theme within the field of Islamic finance. The workshop and public lecture are unique events with almost no parallel in the Islamic finance industry.

The workshop, in particular, is designed to discuss in the most rigorous fashion a contemporary topic, which participants choose by poll. Because the workshop is not open to the general public and adheres to Chatham House rules, which means that the information of the workshop may be reported but the source of the information may not be explicitly or implicitly identified, discussion is critical and without social or industry constraint. The public lecture is given by an esteemed practitioner in the Islamic finance industry. It addresses a particularly important topic which is related to the principal workshop theme.

Workshop Report:

Challenging the Shari'ah Compliance of Islamic Finance

Dr Jonathan Ercanbrack

The meaning of shari'ah compliance is at the root of Islamic finance and its particular value proposition. Arguably, the relevance of shari'ah compliance has never been more important as the Islamic finance industry's future growth and development depends, in large part, on the integrity of this distinctive mode of finance and banking.[1] Its significance is highlighted in light of the recent default event involving Dana Gas, a United Arab Emirates (UAE) energy company, and its $700m *sukuk* issuance. Dana Gas sought to restructure the $700m issuance so that profit distributions are halved on the grounds that the structure had become unlawful 'due to the evolution and continual development of Islamic financial instruments and their interpretation'.[2] Although Dana Gas has recently 'won the support of its creditors' by securing their approval to restructure the $700 million *sukuk*, there is concern that the case highlights a more fundamental problem with the principal value proposition of Islamic finance, namely its compliance with shari'ah.[3] The announcement set an odious precedent since other firms could seek to escape their debt by claiming shari'ah non-compliance. More fundamentally, the case threatens to undermine confidence in the industry.

The default of the Dana Gas *Sukuk* and subsequent legal developments provided workshop discussants with a useful, albeit somewhat disheartening, case study for examining shari'ah compliance in Islamic financial markets. The workshop discussion commenced with an analysis of the legal dispute in relation to the structure of the *sukuk* issuance.

The dispute between Dana Gas and investors represented by Deutsche Bank highlights the complex hybridity of Islamic financial law (IFL). The way in which this hybridity can be squared with authentic notions of shari'ah, which generally refers to classical *fiqh* as well as the holy sources, is central to the determination of shari'ah compliance. IFL is not merely the classical shari'ah, which has been facilitated and regulated in modern financial markets. On the contrary, IFL is comprised of an

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1 Although the volume of growth of the Islamic financial services industry has stagnated in recent years, in 2017 the industry grew at 8.3 per cent. See Islamic Financial Stability Board, 'Islamic Financial Stability Report 2018' (IFSB 2018)

2 Dana Gas, 'Dana Gas Outlines Broad Terms for Sukuk Discussions' (UAE, 13 June 2017). The $700 million sukuk issuance was the result of the restructuring in 2013 of a $1 billion sukuk issuance, which originally had been issued in 2007

3 Rebecca Spong, 'Dana Gas Wins Over Creditors for Sukuk Restructuring Plans' (Arabian News, 5 June 2018) http://www.arabnews.com/node/1316431/business-economy accessed 30 July 2018.

amalgamation of legal inputs including the commercial principles of the shari'ah, English or New York law, international financial services law and modern Islamic financial standards. Its particular composition varies according to the municipal legal system in which it is facilitated and regulated as well as the type of transaction. For example, Malaysian IFL incorporates Malaysian common law, Malaysian financial services law and central bank – issued Islamic standards.

Cross-border transactions often comprise a more diverse body of legal influences including classical shari'ah, English law, the municipal law of the originator, market-developed Islamic financial structures and global Islamic standards. The variation of legal influences is greater in these cross-border transactions because they must be facilitated and regulated in multiple municipal legal systems.

Multiple governing laws governed the Dana Gas *Sukuk* and both the Sharjah and English courts vied for jurisdiction of the case. Dana Gas filed a motion in the UAE courts which sought to declare the *mudaraba sukuk* unlawful under UAE law. It also obtained injunctions in the UAE court and the English court, prohibiting investors from taking any action under the *mudaraba* agreement or the purchase undertaking until a final decision was reached in those proceedings.[4]

The prospectus's governing law clause provides that UAE law governs the *mudaraba* agreement, the share pledges and the mortgage and subject to the non-exclusive jurisdiction of the UAE in relation to these aspects of the transaction. The declaration of trust, the agency agreement, the purchase undertaking, the sale undertaking, the security agreement, the security agency agreement, the ordinary and exchangeable certificates are governed by English law and subject to the non- exclusive jurisdiction of the English courts. Recent issuances including some recent defaults indicate that the use of multiple governing laws for such transactions is market practice.[5] Yet legal hybridity is a cause of legal uncertainty and, according to discussants, an important consideration in relation to shari'ah compliance.

Specifically, Dana Gas's claims concerning shari'ah compliance relate to the scheduled redemption or purchase undertaking of the issuance in which the *mudarib* liquidates the *mudaraba* assets and repays *sukuk* holders their investments. A purchase undertaking to buy back the underlying assets from the originator at face value on the 'scheduled redemption date' or in the event of a default indicates that the investors have not assumed the risks of ownership associated with the underlying *sukuk* assets. The originator has retained true ownership of the assets and thus the originator's credit history reflects the credit profile of the *sukuk* issuance. According to

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4 Dana Gas PJSC v Dana Gas Sukuk Ltd [2017] EWHC 2340 (Comm).

5 The following sukuk defaults all contained governing law clauses with multiple governing laws: the 2008 East Cameron Partners sukuk, the 2009 The Investment Dar sukuk and the 2009 Saad sukuk. For an in-depth analysis see Sweder van Wijnbergen and Sajjad Zaheer, 'Sukuk Defaults: On Distress Resolution in Islamic Finance' (Duisenberg School of Finance – Tinbergen Institute, 2013) https://papers. tinbergen.nl/13087.pdf accessed 04 August 2017.

the prospectus the 'certificates shall be redeemed in full by the Trustee on the Scheduled Redemption Date in cash for an amount equal to the Standard Redemption Amount as at such date. The Trust shall be dissolved only following such payment in full in respect of both the exchangeable certificates and the ordinary certificates.[6] The 'standard redemption amount' is defined as 'the aggregate principal amount of the exchangeable certificates then outstanding plus all unpaid accrued periodic distribution amounts and all other accrued and unpaid distribution amounts […].[7] Therefore, investors will be compensated in full irrespective of the assets' performance in addition to the regular profit distributions. The issuance offers a similar risk and reward profile as a conventional bond.

Articles 693 to 709 of the UAE Civil Code deal with the *mudaraba* contract.[8] Article 704 of the UAE Civil Code provides that:[9]

1. The owner of the capital shall alone bear any loss, and any provision to the contrary shall be void.
2. If any of the capital in the *mudaraba* is lost, that shall be accounted for out of the profits, and if the loss exceeds the profits the balance shall be accounted for out of the capital, and the *mudarib* shall not be liable therefore.

As discussed, the Dana Gas *Sukuk* issuance contains sale and purchase undertakings which require Dana Gas as both the originator and *mudarib* of the securitisation to repay *sukuk* holders their investments. The provisions contravene article 704, sections 1 and 2, in that the *mudarib* is required to repay *sukuk* holders their investments or 'redemption required amount'. Dana Gas sought to invalidate the transaction in the Sharjah court on this basis. The company's claim in the English court argued that these provisions of the UAE Civil Code render the purchase undertaking unlawful.[10]

The legal issues involved in the dispute between Dana Gas and investors highlight a fundamental deficiency in the system of shari'ah governance. In almost all cases, the shari'ah is no longer the governing legal system of nation states. Therefore, Islamic finance, including Islamic capital markets, does not possess the infrastructure which allows these transactions to be facilitated and regulated with confidence. Specifically, the Dana Gas dispute demonstrates the reliance of the Islamic finance industry on

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6 Dana Gas, 'Dana Gas Sukuk Limited' (Offering Circular, 8 May 2013) 18 http://www.londonstockexchange.com/specialist-issuers/ islamic/danagas-prospectus.pdf accessed 1 August 2017.

7 Ibid, 116.

8 UAE Civil Code (n 21).

9 Ibid art 704.

10 The English court determined the validity of the Purchase Undertaking under English law. Under English law a Purchase Undertaking is a valid and enforceable contract since it is lawful to guarantee an investment's return. This is the case irrespective of the position of UAE law on the matter. See Dana Gas PJSC (a company incorporated under the laws of the United Arab Emirates) v Dana Gas Sukuk Limited, Deutsche Trustee Company Limited, Deutsche Bank AG, Commercial International Bank (Egypt) SAE, Blackrock Global Allocation Fund, Inc. [2017] EWHC 2928 (Comm).

municipal legal systems for dispute resolution and enforcement. Cynical debtors try to exploit this weakness by challenging the shari'ah compliance of transactions in secular legal systems. This weakness is compounded by the fact that some Muslim-majority jurisdictions such as the UAE have retained elements of the shari'ah in their civil codes and have given it an interpretational role in their constitutions. The articles of the Civil Code discussed above highlight this situation. The result is a lack of certainty, which surfaces when litigants in cases such as these contest shari'ah principles.

Well known cases in which shari'ah compliance has been contested include the *Islamic Investment Company v Symphony Gems, Beximco v Shamil Bank*, the *Investment Dar v Blom* and now *Dana Gas PJSC v Dana Gas Sukuk*. Each case highlights the absence of a complete and functioning legal system, which resolves disputes and enforces judgments according to shari'ah.[11] Yet these cases also illustrate the effectiveness of English law as a sure means of enforcing parties' contractual agreements, even those which incorporate shari'ah principles. Islamic finance has relied on English law for this and other reasons but cross-border transactions such as the Dana Gas *Sukuk* usually involve the municipal legal system in which the assets are located and in which the transaction is issued. According to some investors, a greater unwillingness to use local law in future transactions may be the result.

Back to Basics

The implications of the Dana Gas *Sukuk* default extend well beyond the municipal legal issues highlighted above, despite some discussants' analysis that shari'ah compliance had been made less relevant in view of cases like this and others. Others argued that it was far too simplistic to view Islamic finance transactions as subject only to municipal law and perhaps English law (in cross- border transactions). The fatwa or shari'ah legal opinion comprised a fundamental element of Islamic finance transactions. Without it, such transactions are without merit since their underlying value structure would be absent. The different sets of views recall similar dissension when, in 2007, Sheikh Taqi Usmani (then chairman of the AAOIFI shari'ah board) declared that 85 per cent of the *sukuk* market could not be seen as shari'ah compliant. Similar to the Dana Gas *Sukuk*, Usmani was referring to the use of purchase undertakings in conjunction with *mudaraba* and *musharaka* contracts. Such contracts 'should not be based on an exercise price which is calculated by reference to the face value of the *sukuk* at the maturity date or upon the earlier dissolution of a *sukuk*'. Permissible practice allows agreement according to the 'net asset value, market value,

[11] See Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems 2002 WL 346969; Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain E.C. [2004] EWCA Civ 19; The Investment Dar Company KSCC v Blom Development Bank SAL [2009] EWHC 3545 (Ch); and Dana Gas PJSC v Dana Gas Sukuk Ltd & Ors [2017] EWHC 2928 (Comm) (17 November 2017).

cash equivalent value or any price agree upon at the time of purchase'.[12] Only in the event of negligence or malfeasance can the full value of capital be repaid. *Sukuk* holders, as investors in *mudaraba* or *musharaka* equity partnerships, must bear some of the risk of the underlying assets. As discussed, the purchase undertaking involved in the Dana Gas *sukuk* removed the risks of ownership and thus *sukuk* holders acted as creditors to Dana Gas.

Similar to the 2007 episode, the default reopens the debate about what shari'ah compliance really means, what its fundamental principles are, and whether these principles require reinterpretation in a dynamic market context. Specifically, the prevalent notion that *sukuk* based on the *mudaraba* contract are the only type of legitimate *sukuk* needs to be reconsidered. While *sukuk* based on the *murabaha* have long been seen as standard market practice, there has also been a recognition that the *sukuk* market cannot solely be based on pre-existing assets. But this requires ingenuity because international investors want fixed price instruments, which the purchase undertaking makes possible. If the fixed price feature of most *mudaraba* sukuk issuances is not seen as legitimate, there needs to be a revisiting of basic principles or perhaps just the way we view the fixed price aspect of transactions. A fixed price, after all, is not a guarantee. It is merely a contractual undertaking to pay a certain amount at maturity. Counterparty risk still exists and, in the case of *sukuk*, is tied directly to the performance of assets. Yet investors do not want to expose themselves to the commercial risk of a company. They want to invest a certain amount of money and to receive a pre-agreed return. The market demands a bond-like structure. Short of giving up on the growth of *sukuk* markets, this fact requires adaptation.

Shari'ah compliance is often framed in an either/or binary while the shari'ah itself represents a legal tradition that is diverse and its exhortations are often opaque. For commercial and legal reasons the industry is wedded to the 'compliant' description; it underscores the industry's value proposition but it obfuscates the most fundamental quality of the shari'ah, namely its diverse range of interpretations whether these derive from the holy sources or the positive law (*fiqh*). It also curtails a more holistic perspective in which broader social and environmental issues are important variables in the determination of what is shari'ah authentic. Unsurprisingly, there is debate concerning whether alternative terms such as 'shari'ah-based', 'shari'ah observant' or even 'shari'ah tolerant' can also be used to highlight the spectrum of shari'ah authenticity. This may allow for greater variation, including variation in the types of returns investors receive.

The debate about the value proposition of Islamic finance has resurfaced in response to the default of the Dana Gas *Sukuk*. If the products of Islamic finance are frequently

[12] Farmida Bi, 'AAOIFI Statement on Sukuk and its Implications' (Norton Rose Fulbright, September 2008) http://www.nortonrosefulbright.com/knowledge/publications/16852/aaoifi-statement-on-sukuk-and-its-implications.

viewed as conventional clones, replicas of conventional products, which lack shari'ah authenticity, it stands to reason that the viability and growth of Islamic finance are in doubt. This reasoning is based on the observation that Islamic finance products are developed to replicate conventional financial results. Using Islamic contracts to meet the requirements of otherwise conventional end products results in superficial transactions that lack authenticity. There is a need to design Islamic products that reflect Islamic aspirations in modern markets instead of digging in the past for Islamic contracts to fit the conventional mould.

A forceful counterargument is that replication is a natural and practical response to market forces and the behavioural norms of mainstream financial markets. Moreover, people's financial needs are common: deposit and saving accounts, investment opportunities, ways of financing goods, services and projects are common to people, corporations and even states, irrespective of their cultural, religious or geographical heritage. Moreover, capitalist commercial behaviours and norms, which include risk and return expectations, are represented in nearly every region of the globe. It is not fair or reasonable to expect Islamic investors to forgo profit as a penalty for abiding by their faith.

A further argument does not seek to debunk, in principle, the similarity of conventional and Islamic finance in relation to use of debt as the building block of financial products. It questions the supposed superiority of profit- and loss-sharing products to debt-based financial instruments. There is no evidence in any of the sources of Islamic law that financial institutions should limit themselves solely to PLS modes of financing. In its most extreme form, there are voices that argue that debt-based modes of financing such as the *murabaha, ijara, istisna* and *salam* cannot be expected to achieve the socio-economic objectives of an Islamic economy. Yet the use of debt-based instruments in Islamic finance is markedly different than conventional finance, which trades debt at a discount, uses complex derivatives and short selling products. In other words, the analysis of the merits of Islamic finance must take into consideration not only the financial products which are sold into the market but also those which do not take place at all.

Leaving the permissibility and favourability of equity and debt contracts aside, it is important to consider some of the primary principles of Islamic commercial law and how Islamic finance measures up to these. The first concerns the generation of profit according to the assumption of liability and its attendant risks. As was evidenced in the legal structure of the Dana Gas *Sukuk*, but also in the vast majority of Islamic finance products (retail and wholesale), this principle is ignored. This highlights the overpowering demands of market forces that returns are fixed and liability approximates conventional practice. Second, the time value of money or the notion that the present value of money is larger than the same nominal sum in the future due to its potential earning capacity is an important principle because it is the conceptual

basis for charging interest.[13] Considering the benchmarking practices of the industry, it is difficult to see that shari'ah scholars do not value time in monetary terms. Ultimately, scholars have been content to sign off on transactions in which such principles are contravened as long as the contracts are structured in a way that technical, piecemeal shari'ah legal rules are adhered to. The bigger picture, the underlying ethical and moral principles of such structures, which result in conventional economic outcomes, are not the decisive factors.

There are some good reasons for allowing these types of transactions from a shari'ah perspective. Considerations of harm or unfairness, of achieving the pubic good (*maslaha*) and of attaining the *maqasid al-shari'ah* are routinely discussed by shari'ah boards. There may also be commercial or regulatory reasons for approving certain products if a particular market need can be met. Certainly, there are many positive aspects of Islamic financial products, even those which are synthetic or conventional approximations, in relation to meeting people's financial needs. Yet the positive aspects of these products almost always require compromise in relation to Islamic principles. It is an acknowledgement of a vastly changed financial context in which the literal application of Islamic rules no longer gives effect to the types of economic outcomes which are traditionally associated with Islamic commercial principles. The big question is whether this compromise is too much; whether it betrays Islamic principles to an intolerable extent.

Often the answer to this question may reside in people's intentions. The *qadi* or judge is forced to evaluate the individual acts, dispositions and statements of human beings. After all, only God knows the minds of His subjects and thus only He is in the position to punish them for their innermost convictions (which He shall do in the Hereafter). Human judges are not in the position to judge as God would do. According to the Hanafi and Shafi'i schools of law, the intentions and motives of human beings (the "invisible and interior" (*bātin*)) can only be deciphered from their acts and statements (the "apparent and exterior" (*ẓāhir*)).[14] On the other hand, the Hanbalis and Malikis are also concerned with hidden intentions if these become plainly evident in light of circumstances. In general, therefore, the legality of an act or disposition in the temporal world is emphasised in a textual materialism in which the form of the law takes on greater relevance.

The propensity of Islamic finance to favour legal form over economic substance may reflect an aspect of this legal culture. A whole genre was dedicated to the use of legal

[13] It is a debatable point in view of the historical and contemporary fact that merchants and traders (and now financial institutions) accepted spot payments of a lesser sum while charging a mark-up for deferred payment purchases. The argument is that the costs and risks associated with deferment make this practice acceptable. Therefore, it is differentiated from the concept of the time value of money.

[14] Baber Johansen, 'Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh', Ruud Peters and Bernard Weiss (eds) Vol. 7 (Studies in Islamic Law and Society. Leiden: Brill, 1999), 70-71.

stratagems known as *ḥiyal*, (sg. *ḥīlah*). Ibn Qayyim al-Jawzīyah (d. 751/1350) (a Hanbali jurist) wrote that *ḥiyal* represent the subtle management of aspects of a legal transaction in ways for which they were not intended.[15] However, for those who ascribed to these means (the Hanafis and Shafi'is), one could utilise ḥiyal to make lawful that which otherwise is unlawful; to create what the Ḥanafīs called "makhārij" (sg. *makhraj*) or 'exits'.[16] *Ḥiyal* represent an attempt by the jurists to ease the difficulties posed by scrupulous adherence to the shari'ah without having to trespass the divine laws on account of the exigencies of everyday life. A real-life example in today's financial world is the commodity *murabaha* or *tawarruq*, which is regularly used as a financing and liquidity tool. In the past the *bay' al-wafa'* or the *bay' al-'uhdah* were used widely throughout Muslim polities for similar purposes.

In this light it is also worth recalling that Islamic law makes ample provision for relieving the hardship and need which arise in exceptional circumstances. While such relief is meant to be temporary, the principle that God wishes ease and not hardship for his believers may go some way to explaining legal circumvention. But a financial culture based on legal circumvention can hardly be satisfactory in the long term to the devout and others who believe that Islamic principles can become a reality.

A Matter of Governance

It was suggested that the way to deal with this great diversity of interpreting and practicing the shari'ah in a financial context is to create a solid governance structure. In effect, shari'ah compliance is meeting the requirements of shari'ah governance. Defaulting parties' cynical and sometimes not so cynical use of the shari'ah compliance claim to escape their obligations can be mitigated in a robust shari'ah governance structure. The shari'ah governance framework of an Islamic financial institution comprises three important pillars: the shari'ah supervisory board; the internal shari'ah department; and the central shari'ah supervisory board, which often is an organ of the central bank. However, there are very few Islamic finance jurisdictions, which have erected a governance structure in which all three pillars are present and functioning effectively. An important reason for this is the scale of the Islamic finance industry, which in relation to conventional finance, is very small. This makes the cost of developing adequate governance structures much more expensive. Moreover, there may be a general reluctance to devote sufficient resources to research and development within organisations, which may help to explain the underdevelopment of shari'ah governance functions within Islamic financial institutions. Despite both AAOIFI's and the IFSB's considerable work in relation to shari'ah governance, which has resulted in the publication of a series of Governance Standards, their adoption has been limited. Even where standards have been adopted, they are not always observed or strenuously enforced.

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[15] Satoe Horii, 'Reconsideration of Legal Devices (*Hiyal*) in Islamic Jurisprudence: The Hanafis and Their "Exits" (Makharij)' (2002) 9 I.L.& S., 312-13.
[16] Ibid.

In those few jurisdictions where the 3 pillars of shari'ah governance are present, there are serious concerns about the way it functions in practice. Some of the most pressing concerns relate to: the policies and function of the internal shari'ah review and audit governance; the independence of internal shari'ah department officers in relation to their appointment and dismissal; and, more specifically, whether the shari'ah audit report is submitted to the CEO as opposed to the audit committee of the board of directors (where moral hazard is less apparent).

Many countries have been reluctant to develop robust legislative and regulatory frameworks for the industry, which encourage its growth according to its own terms. There are different reasons for this but perhaps the primary one is a general reluctance to interfere with the word of God, as historically this represents an area of legal and religious development in which the ruling polity was careful not to interfere. To have done so would have been to interject secular authority into the mechanisms of deriving God's law, disturbing a carefully maintained balance between religion and ruler (or in today's world, the nation state). A more mundane explanation may be that some jurisdictions simply do not have the requisite expertise or capacity to develop industry-specific legal and regulatory frameworks for the industry.

Malaysia and Bahrain are notable outliers to this generalisation and each is exemplified for its robust shari'ah governance framework. Malaysia, in particular, has facilitated a state-of-the-art regulatory system for Islamic finance wherein shari'ah governance is comprehensive and effective. The Shari'ah Advisory Council (SAC), a central bank organ, has been given legal authority to ascertain Islamic law for the purposes of the Islamic finance and *takaful* industry. The SAC's guidelines prevail over the *fatawa* of individual IFIs' shari'ah boards (also mandated by law), creating the highest degree of standardisation worldwide. The Central Bank Act 2009 included provisions that would bind the courts to SAC guidelines and rulings. Article 56(1)(a)-(b) provides that 'in any proceeding relating to Islamic financial business before any court or arbitrator, any question arises concerning a shari'ah matter, the court or the arbitrator, as the case may be, shall (a) take into consideration any published rulings of the Shari'ah Advisory Council; (b) refer such question to the Shari'ah Advisory Council for its ruling'. Furthermore, article 57 provides that 'any ruling made by the Shari'ah Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under section 55 and the court or arbitrator making a reference under section 56'. Disputes involving questions related to shari'ah will be decided by the SAC and the court is bound by the SAC's ruling. Malaysia's common law courts have issued a number of judgments subsequent to the enactment of the Act, which have upheld the validity and enforceability of controversial contracts such as the BBA, *bay' al-'inah* and *murabahah* by referring to the authority of the SAC or SAC shari'ah guidelines.[17]

[17] For example, see Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and Other Appeals [2009] 6 CLJ 22; CIMB Islamic Bank Bhd v LCL Corp Bhd [2011] 7 CLJ 594. Remarkably, the Islamic Financial

Non-Muslim majority jurisdictions such as the United Kingdom have felt unable to regulate the shari'ah compliance function of Islamic financial institutions, which arguably results in a general lack of shari'ah authenticity.[18] However, Muslim majority countries have not always taken a different approach. There does seem to be momentum for developing industry-specific regulatory frameworks in the aftermath of the Global Financial Crisis in such countries as they have recognised the importance of robust legal and regulatory frameworks for attracting FDI and generating sustainable economic growth.

An example of this trend is the growing significance accorded to the external shari'ah audit (ESA), which may help to buttress shari'ah governance frameworks. ESA is not dissimilar to mainstream audit and assurance practices and may face similar challenges. The scope of ESA, requirements for public disclosure and industry capacity in relation to carrying out such audits are variables upon which the effective functioning of ESA depend. Yet ESA is increasingly seen as an important aspect of shari'ah governance. Bahrain, Oman and Pakistan have implemented the ESA as an integral aspect of their shari'ah governance frameworks.

Furthermore, Islamic standard-setting organisations' ongoing efforts to standardise IFL are generally seen as important for strengthening shari'ah governance, reducing transaction costs and increasing business efficiencies. The diversity of shari'ah concerning contracts and contractual rules creates uncertainty and ambiguity in relation to the determination of shari'ah compliance. Although diversity can be an important source of innovation (amongst many other positive effects), the modern business world mostly deals in standardised contracts. Therefore, modern financial markets generally exert pressure on market participants to deal in standardised contracts. There are a number of reasons for this: Standards foster certainty, transparency and predictability in Islamic financial markets with respect to a number of overlapping issues: accounting requirements; auditing requirements; regulatory requirements; legal documentation and action; public transparency; shari'ah compatibility; and marketing purposes.[19] Standards help IFIs to: reduce transaction costs; improve legal documentation; and mitigate legal challenges; reduce the time

Services Act 2013 provides that any person who contravenes the SAC's interpretation of the shari'ah is liable to eight years' imprisonment or to a fine not exceeding twenty-five million ringgit ($6.275m) or both. Therefore, the legislator employed the highest degree of regulatory intervention, ensuring a high level of standardisation amongst financial institutions.

[18] Notably, HSBC Amanah closed its retail operations in the United Kingdom. While the country acknowledged 'strategic reasons' for its departure from the market, observers cited a low uptake of Islamic retail products. British Muslims and other investors are sceptical about the shari'ah authenticity of such products.

[19] Mohd Daud Bakar, 'The shari'ah Supervisory Board and Issues of shari'ah Rulings and Their Harmonisation in Islamic Banking and Finance' in (eds) Simon Archer and Rifaat Ahmed Karim, Islamic Finance: Innovation and Growth (Euromoney Books and AAOIFI, 2002) 88.

and effort required of shari'ah scholars; and reduce the time necessary to market new products.[20] Consumer confidence in the industry is improved considerably as a result.

However, standardisation also undermines diversity and impinges upon parties' autonomy or parties' consensual agreements. Moreover, standardised contracts, particularly contracts of adhesion – so-called take-it-or-leave-it contracts – impose a set of risk allocations, which may be unfair or unjust. Therefore, calls for greater standardisation should be considered in view of objectives and possible trade-offs.[21]

Challenging Shari'ah Compliance

The Dana Gas default highlighted an unusual situation in which the originator called into question the shari'ah compliance of sukuk which its own scholars had verified as shari'ah compliant. Participants agreed that the episode exposed fundamental questions about: (1) the period of time in which the fatwa remains valid (2) the authority to determine shari'ah compliance; (3) the desirability of challenging shari'ah compliance; (4) and the lack of transparency surrounding the reasoning behind *fatawa*.

Traditionally, the shari'ah is represented as a legal system that has been built up over centuries as the result of countless acts of juristic interpretation. There is no final arbiter in an Islamic legal system, which would be empowered to determine the validity of law for any given legal matter. Instead, jurists' individual determination of the law from the primary and secondary sources of Islam represents a probable assessment of what God's law is. A jurist does not claim to make law himself; rather, his analysis of what God's law is, represents his best judgment as to what the holy sources themselves decree. As a result, his evaluation in the form of a *fatwa* or legal opinion is non-binding, paving the way for a great diversity of legal opinions on a single matter. The authority of any one opinion resides in the respective jurist's learning, piety and social standing.

Yet the modern context of financial markets has upended the traditional mode of law-making. The law-making authority of the *fuquha'* (learned scholars) has been replaced by the nation state as the final arbiter of law. shari'ah scholars operate in a private capacity as members of shari'ah governance boards and yet their *fatawa* still carry weight in relation to the legitimacy of Islamic financial transactions. Scholars have retained the authority to determine the lawfulness of financial transactions according to shari'ah and thus whether the product comes to market. While their *fatawa* remain non-binding and hence, in principle, subject to revision, financial markets rely on their enduring validity. This is a fact that underscores the fundamental changes that

[20] Her Majesty's Treasury, 'The Development of Islamic Finance in the UK: The Government's Perspective' (HM Treasury 2008) 19. 21 For further detailed analysis see Michael McMillen's report, 'Redefining and Retaining shari'ah Compliance in Islamic Finance'.

[21] (SOAS Islamic Finance Lecture, SOAS, 21 February 2018).

differentiate the classical and contemporary financial environment. In the globalised world of rapidly disseminated information, financial markets require stability, transparency and foreseeability. In classical *fiqh*, there is the possibility of revising a fatwa if the ruling is premised on a custom, which may vary over time. However, it is also said that a ruling based on a definitive shari'ah legal text (*nusus*) may not be altered. It stands to reason, however, that, irrespective as to whether the textual basis of the respective fatwa is customary or definitive, in a classical financial context, the revision or retraction of a ruling would have limited negative consequences. In traditional economies, the reach of transactions was limited in terms of geography, contractual parties and asset size.[22] On the other hand, in modern financial markets, its effects can be disastrous because markets are globalised, highly interconnected and the size of financial transactions can be extremely large.

Contractual warranties indicating parties' acceptance of the financial product's compliance with the shari'ah are the usual means of mitigating this risk, but warranties, while legally effective, fall short of securing the legitimacy of transactions. The solution as discussed above is increased standardisation and robust shari'ah governance, preferably along the lines of the Malaysian model. It is likely that the diverse qualities of the shari'ah will always entail some amount of dissension in relation to notions of authenticity.

The complexity of today's financial markets and municipal legal systems requires practitioners to develop increasingly specialised knowledge of their respective field. This challenging feat is exacerbated in the case of shari'ah scholars who are expected to have an expert understanding not only of shari'ah, Islamic jurisprudence (*fiqh*), Arabic and finance but should also have some knowledge of law, accounting and, preferably, English. There are very few individuals who can claim to have achieved this feat and consequently there are a limited number of highly qualified scholars worldwide. This is a governance issue that has long been discussed and there are hopeful signs that progress is being made. However, it is also an issue which underscores the complex nature of Islamic financial law. Namely, IFL is not solely the prerogative of jurists. Lawyers, bankers, product developers, accountants and regulators all play a role in shaping this developing legal system. Should shari'ah scholars have the sole authority to determine the shari'ah compliance of financial products in view of this fact?

[22] According to the records of the Cairo Geniza, the largest single store of records from the fourth/tenth to the tenth/sixteenth centuries (the Fatimid and Ayyubid dynasties), most trade was conducted based largely on informal relationships rooted in mutual trust and friendship and lacked any formal legal instrumentation. Formal partnerships, the principal form of business association, tended to be of shorter duration and limited to specific undertakings. See S.D. Goitein, 'The Cairo Geniza as a Source for the History of Muslim Civilisation' (1955) 3 Studia Islamica, 82; and S.D. Goitein, A Mediterranean Society (vol. 1, Economic Foundations, University of California Press 1967).

Perhaps an important way of answering this question is to consider whether shari'ah scholars are in the position alone to understand the way in which Islamic principles operate in today's complex financial environment. A useful example concerns Egypt's Grand Mufti, Shaikh Shawki Allam, who recently opined on the unlawfulness of Bitcoin, the highly valued cryptocurrency. The Grand Mufti (and other lesser known scholars) cited a number of reasons which, many analysts agree, reflect an ignorance of economics, monetary policy, and the nature of cryptocurrencies. But even more troublesome is the fact that incidences such as these, which can represent a knee jerk reaction to the pitfalls of innovation, fail to understand that such innovations may in fact be better aligned with Islamic principles than the current system of fiat currency in relation to the fractional reserve banking system. Irrespective of the rightfulness of the bitcoin fatwa, the point is that scholars' *fatawa* on matters in which they do not possess specialised knowledge may in fact undermine Islamic principles. It is not surprising then that there is general agreement that financial practitioners and lawyers should be included in the process of determining the shari'ah compliance of Islamic financial transactions. The suggestion is that positions on the shari'ah board be reserved for these practitioners' input.

The dichotomy between classical practices and modern realities is equally evident in relation to questions concerning the right to contest *fatawa* and whether such debate is desirable. Traditionally, once a jurist has issued a fatwa based on the methodological rules for interpreting the holy sources, it could not be contested. A mujtahid may also exercise his ijtihad in relation to the legal matter, resulting in a different opinion, but this does not overrule the earlier ruling. The social context in which jurists operated may have buttressed this modus operandi. In today's world, it is a moot point whether someone may contest a fatwa. The dissemination of information via information technology enables literally anyone to voice an opinion. Of course, some opinions carry greater weight than others or, for other reasons, are able to sway public opinion. In the short term, such opinions may undermine an Islamic financial transaction or even the entire market.[23] Arguably, however, such debates have had mid- to long-term positive effects. Consider, for example, the debate concerning Deutsche Bank's 'shari'ah compliant' total return swap. While the transaction was roundly criticised for contravening shari'ah principles, the debate encouraged discussion about the risks which IFIs countenanced and their hedging requirements. Previously, the focus had centred almost solely on the speculative

[23] In 2011, Goldman Sachs decided not to issue $2 billion sukuk after it had been heavily criticised by an unaffiliated, little known scholar.
For background, see: https://www.ft.com/content/1af110fe-3448-11e4-b81c-00144feabdc0. Another interesting example concerns Deutsche Bank's development of a derivative product. See Deutsche Bank, Deutsche Bank Academic Paper (London, n.d.), www.eurekahedge.com. Deutsche Bank, in partnership with a shari'ah consulting firm, developed a very interesting derivatives product, and provided an intriguing shari'ah legal analysis of its structure. The structure was strongly criticised by prominent scholar, Yusuf Talal DeLorenzo. See
https://uaelaws.files.wordpress.com/2012/06/delorenzo-copy.pdf. See also Harris Irfan, Heaven's Bankers (Overlook Press 2015) for a well-informed analysis of the debate. The debate did not prevent the structure from being introduced to the market.

nature of derivatives transactions.[24] Such debate certainly helped to lay the foundation for the International Islamic Financial Market's (IIFM) dissemination of several standardised derivatives products including the ISDA/IIFM *Mubadalatul Arbaah* profit rate swap; and the ISDA/IIFM *Tahawwut* Master Agreement (TMA).[25] The *Mubadalatul Arbaah* profit rate swap and the *Tahawwut* master agreement (also intended for profit rate swaps) were created in partnership with the International Swaps and Derivatives Association (ISDA), which specialises in creating legal standards and documentation materials for over-the-counter derivatives. [26]

There is broad agreement that debate about the shari'ah authenticity of financial products should not be confined to limited individuals. Society as a whole, including academics or professional researchers, who are trained to undertake in-depth research, have valuable insights to contribute. Moreover, there is considerable common interest in sustainable development and much merit in entertaining outside perspectives.

An aspect of opening up debate to wider society requires increased levels of education for transactional participants, at a minimum. More broadly, the Islamic finance industry will benefit from educating outsiders about the industry, its mechanisms as well as its objectives. Greater transparency concerning transactions including the legal and ethical reasoning scholars employ in arriving at determinations of shari'ah compliance are an essential aspect of the endeavour.

Transparency is a necessary element of any type of robust governance structure, including shari'ah governance.[27] At present, transparency in the industry is lacking. *Fatawa* are not usually publicly available, often due to proprietary interests, and, quite possibly, due to fears that innovative transactions may be publicly criticised. Yet this opacity and reluctance to engage in vigorous debate undermines efforts to educate the public, and, ultimately to strengthen shari'ah governance.

One of the most important ways of strengthening shari'ah governance involves the professionalisation of shari'ah scholars and their role in the shari'ah supervisory board. The activities of shari'ah scholars, including their level of expertise and requisite experience, has developed in a relatively ad hoc manner. Moreover, it stands to reason that the establishment of a professional association of shari'ah scholars in which scholars' education, qualifications and experience are vetted, and to some extent, standardised, would instil confidence and credibility in the shari'ah governance function. It is well documented that shari'ah scholars face a number of conflicts of interest which undermine their credibility, and, indirectly the shari'ah authenticity of financial products. Most prominently, these include instances in which: scholars

[24] A prominent example of this debate can be seen in: Kamali, MH (2000) Islamic Commercial Law: An Analysis of Futures and Options, Islamic Texts Society. Also, see Irfan (n 20).
[25] International Islamic Financial Market, Documentation, 2012, http://www.iifm.net.
[26] ISDA, About ISDA, 2012, http://www2.isda.org/about-isda/.
[27] Sunlight is the best disinfectant.

occupy multiple shari'ah boards; and where remuneration policies link fees to assets under management. Moreover, there is an insufficient distinction between the roles they perform in a financial institution. Scholars provide advice in relation to a financial product or transaction. Additionally, they monitor the way in which an IFI transacts and manages the product over the course of its term. And, finally, they are to undertake an independent annual audit of all prior year activities. It is likely that actual or potential conflicts of interest arise at some point in this process. A professional association of shari'ah scholars would help to establish professional standards for the roles and activities of scholars active in the financial services industry. Just as importantly, it would go a long way toward addressing the growing criticism directed at scholars and the perceived lack of shari'ah authenticity associated with the industry.

Concluding Remarks

Default events involving the shari'ah, such as the one involving Dana Gas *Sukuk*, bring to the surface many unresolved challenges facing the Islamic finance industry. shari'ah compliance, the cornerstone of the industry, is the industry's most valuable asset but it is also its greatest challenge and vulnerability. An analysis of discussions and commentaries from the SOAS Islamic finance workshop underscores this fact. The notion of shari'ah compliance, which is a term used in modern financial markets, belies considerable diversity in what is understood by the term. Not only does it mean different things to different people, many leading practitioners advocate interpreting the term in a fluid manner and harnessing its unique variability to meet diverse financing needs.

Despite the relative youth of the Islamic finance industry, considerable progress has been made in developing an appropriate legal and regulatory architecture for the industry. Yet this architecture remains fragmented and incomplete both within and across jurisdictions. Its fundamental weakness resides in the incongruity between municipal legal systems and the law which embodies Islamic financial products: Islamic financial law (IFL). IFL is a legal system that is created in global financial markets but which is implemented in nation states' legal systems.

This incongruity has given rise to numerous legal challenges concerning the interpretation of shari'ah principles. Legal challenges in jurisdictions in which elements of the shari'ah have been integrated into the municipal legal system are paradoxically most problematic. An example is the Dana Gas dispute in which the structure of the *mudaraba sukuk* issuance was contested due to its professed contravention of the UAE Civil Code's shari'ah-derived provisions for the *mudaraba* contract.

There is considerable disagreement about what constitutes shari'ah authenticity and whether the industry's tendency to approximate conventional transactions should be recognised and reinterpreted. However, there is near unanimous agreement that consumer confidence in the shari'ah authenticity of the industry can be strengthened by implementing and strenuously enforcing a robust shari'ah governance framework.

shari'ah governance is essentially seen as the bedrock of shari'ah compliance. And yet it remains highly fragmented and underdeveloped in nearly every jurisdiction which facilitates Islamic finance.

Malaysia's state-centred model of governance is highly desirable, although its emulation is not always possible. Standardisation is seen as a means of buttressing shari'ah governance, but it is not a panacea, nor is it without its demerits. Widespread adoption of standards as agreed by Islamic standard-setting organisations such as AAOIFI and the IFSB has not taken place, highlighting diverse industry practices and, in some cases, a disjuncture between standards and market practice.

The governance model in which shari'ah scholars alone determine the shari'ah compliance of financial transactions has been called into question as a result of the Dana Gas default and in view of the complexity of finance. There is a realisation that Islamic financial transactions require input from numerous practitioners and that scholars alone are often not in the position to judge the ways in which Islamic principles play out in complex financial markets. The suggestion that practitioners participate as full members of the shari'ah supervisory board is increasingly met with approval.

The desirability of challenging shari'ah scholars' *fatawa* is generally seen in a positive light as it encourages positive change and growth. Of course, when an issuing institution challenges the ruling of its own shari'ah board, this is a deeply destructive event. It must be curtailed with stronger governance and the development of regulatory frameworks specific to the industry. Professionalisation of the role of shari'ah scholars in the shari'ah supervisory board, including the vetting and standardisation of their education, qualifications and experience, is considered an important step forward in shoring up confidence in the industry.

Summary of Commentaries

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This is a brief compilation with selective editing, from the notes and commentaries shared by individuals prior to the workshop titled, "Challenging the Shari'ah Compliance of Islamic Finance Products." A list of contributors is placed at the end of this report.

The Fatwa and Who Can Challenge It

A fatwa represents the opinion of a shari'ah scholar in view of the principles of Islamic jurisprudence. It is possible, indeed a common occurrence, to have multiple fatwas on the same matter of interest depending on the differences in the interpretation of Islamic teachings. It is not a binding rule as a matter of secular law or for that matter, even the religious law. It may have evidentiary value in a secular proceeding, but will not be determinative of itself.

Traditionally, only the eminent scholars had the authority to challenge a fatwa issued by an Islamic scholar. However, considering the complexity of the financial products and the depth of knowledge required to fully understand their application, it has been argued that subject knowledge experts also have a potentially significant contribution to make in the debate. It is argued that this will expand the knowledge and perspective brought to bear in reaching transactional and operational interpretations. Then there is the dilemma of whether they should be involved only in a consulting role or they should have a say in the final decision making. Should they have a seat on the shari'ah boards and more importantly should the shari'ah board have the final decision-making authority or should it be the jurisdiction of the corporate board of the financial institution or perhaps the financial regulators?

Evolution of Shari'ah Advisory and Supervisory Function

The main challenge for the early practitioners of Islamic, or shari'ah-compliant, finance was to find ways to convince their potential customers that the products and transactions being offered were intrinsically in conformity with shari'ah principles and that the client could enter into such products and transactions with an assurance that he/she would not be compromising his/her personal adherence to shari'ah principles.

The practice of ijtihad conducted by Islamic scholars and jurists in other areas of *fiqh* came to be applied to the relatively arcane area of finance and business activity. It should be noted that the trigger for this activity was pulled when newly established

IFI's first started to engage in cross-border, moderately sophisticated products and transactions. The earliest engagements with the shari'ah scholars involved giving them summaries, sharing first drafts and Arabic translations without direct communication with the lawyers. The frustrations involved in this 'process' finally started being alleviated when, in the late 1990's, Islamic financiers, reluctantly initially, allowed their shari'ah scholars to have a direct dialogue with their lawyers. Sitting face to face around a table was a revelation, in the sense that shari'ah scholars and lawyers could immediately communicate with each other in a manner that was far more efficient than before.

As transactions become more sophisticated, shari'ah scholars started getting concerned that shari'ah factors were taking a backseat in the face of more "important" factors relating to accounting, auditing, tax and regulations. It was also becoming apparent to the early financial practitioners that they needed to identify individual shari'ah scholars whose knowledge extended beyond Islamic jurisprudence to include finance, banking and some of the other topics identified above. The consequence of this was the emergence of a relatively limited pool of individuals who came to be considered as the 'go to' shari'ah scholars. Around the same time, the internal functions within financial institutions began to be instituted to better manage the shari'ah aspects.

Shari'ah Compliance and Its Challenges

In the world of Islamic finance and banking (industry) with multiple jurisdictions, shari'ah law is to be seen as an additional layer or virtual jurisdiction, which is to be complied with and adhered to. Understanding what constitutes shari'ah compliance has been the most stubborn challenge of Islamic finance and the recent case of Dana Gas *Sukuk* epitomises this. While shari'ah compliance is the backbone of Islamic finance and is at the heart of its value proposition, the uncertainties on its definition and understanding continue to linger despite extensive discussions on the subject, both in public including litigation and in private professional and academic circles. Under the Malaysian law, section 28(2) of the Islamic Financial Services Act 2013 (Act 759) defines "shari'ah compliance" as follows*:*

For the purposes of this Act, a compliance with any ruling of the Shari'ah Advisory Council in respect of any particular aim and operation, business, affair or activity shall be deemed to be a compliance with shari'ah in respect of that aims and operations, business, affair or activity.

One may extrapolate the definition of shari'ah compliance from the above provision in cross-border transactions to the adoption of AAOIFI standards in cross-border transactions. That is, in cross-border legal documentation involving Islamic finance transactions, parties may choose to define "shari'ah compliance" in their agreements to mean "a compliance with the sharī'ah standards of AAOIFI in respect of that aims and operations, business, affair or activity."

It is argued that the industry has several shortcomings which have been responsible for its ad hoc development. One such feature has been the reluctance to invest in functions and activities that do not directly support the P&L account; they are often seen as an unnecessary or unaffordable expenditure which also explains the weakness of R&D across the IFSI. Moreover, there continues to be a major shortfall in availability of qualified shari'ah scholars, especially since the accrual of the knowledge and experience required to discharge their function from a position of awareness and confidence takes many years to develop. Lack of disclosures regarding fatwas from institutions who invest their resources in order to further exploit that effort for their own purposes, has not been very helpful to the industry either. Governments too, with a few notable exceptions, have been reluctant to interfere in this sector for various reasons.

The industry has faced a barrage of criticism and scepticism such as the lack of shari'ah authenticity in the products, the absence of any differentiation in the Islamic financial products vis-a-vis their conventional counterparts and preference of form over actual substance. The matter of shari'ah compliance goes beyond just compliance with *fiqh* principles. While it is mandatory to comply with the minimum requirements as provided in the sources of shari'ah, shari'ah compliance should be extended to include the interest of the people within a particular society in accordance with the intent of shari'ah. This is where *maqasid* and *maslahah* come into play beyond the literal interpretation of the legal texts in the Qur'an and Sunnah. The role of *Maqasid-al-shari'ah*, in the overall scheme of shari'ah compliance, is often been brought up in the recent discussions.

It has been argued that the entire basis upon which the shari'ah compliance (or otherwise) of a financial product, or transaction, is determined, has been developed in an ad hoc, or piecemeal fashion. This development has largely taken place in the private financial and investment sector. Very often the 'product' or 'output' of the shari'ah advisory process has evolved in response to problems encountered, rather than in anticipation of identified needs. The 'products' or 'outputs' referred to in the last sentence are the structures currently deployed in many financial products or transactions and the (usually) unilateral fatwas that have been issued to validate or legitimise each arrangement being entered into.

While Islamic shari'ah itself has evolved over nearly 1400 years, there have also been debates on the need for flexibility and adaptability in the changing and ever-evolving world of finance. The divergence in views on shari'ah compliance among the scholars themselves has also added to the ambiguity of the subject, while it is considered as an inevitable and natural consequence of ijtihad among the students of Islamic jurisprudence. There have been several efforts to standardise Islamic financial law for financial products and services, but such standards have only been partially successful so far.

In the case of investments too, it is argued that shari'ah tolerance is marketed as shari'ah compliance, considering that almost none of the securities which pass the shari'ah screening criteria are one hundred per cent shari'ah compliant. While the shari'ah scholars have provided some flexibility in certain areas such as the proportion of capital which can be based on fixed interest-bearing debt and the proportion of total income which can be derived from non-compliant sources, there is no consensus on the exact amount or even the methodology of calculation of these parameters. To make matters worse, these screening criteria are modified in unfavourable market conditions to prevent adverse effects on the investment portfolios.

The emergence of new technologies such as fintech is posing novel challenges to the industry. Failure to comprehend them fully leads to incorrect shari'ah rulings or delayed adoption of technologies which are likely to cause lasting damage to the growth of the industry. The case of Bitcoin epitomises this problem with contradictory fatwas, many of which are based on an improper or incomplete understanding of the subject, causing confusion in the minds of consumers who prefer to have a less ambiguous perspective from shari'ah scholars.

Finally, there is also a 'fear of the unknown' with respect to Islamic finance, especially among non-Muslims but even among Muslims who have no or limited or in some worse cases, a bad experience with Islamic finance. A natural antidote to this fear is a campaign to increase awareness about the field and to ensure at the very least that the population that is served by the industry understands the objectives and the rules which are used to implement them.

It is suggested that insights and wisdom among imperfect humans are bound to vary but that we should nevertheless be able to communicate with each other if we endeavour to fulfil the three prerequisites of Aristotle's "Rhetoric":

- Ethos - the message should be sincere and express the speaker's best judgement
- Pathos - the audience should be inclined to listen to the message with an open ear and mind
- Argument - the message should rationally make sense and be convincing

Standardisation of Shari'ah Rules

Standardisation induces stress into the system as a force that resists diversity and impinges upon consensual agreement; at the same time standardisation may alleviate other stresses within the system. Economists relish the transactional efficiencies of standardisation, particularly the transaction cost reductions. The major reason for businesses to prefer standardised contracts relates to the nature of the modern business firm, including its organising ability and internal organisation. Standardised contracts are an extension of vertical integration which eliminates outsiders and thus uncertainties. It increases predictability of the market and helps to stabilise external

market relationships. An important function of standardised contracts is to serve hierarchy and internal segmentation needs of the business organisation itself. There are greater efficiencies and significant internal cost reductions are obtained. It is possible to have a system of a transit of transactions though segmented departments. Use of expensive managerial and legal personnel is limited. There is a reduction in training costs, and it gets easier to impose discipline and keep automatic checks on sales personnel. Standardisation may not always be the right option and is more appropriate in the following situations:

- The risks are identified and well understood
- There is an agreement on the risk allocations
- The risk allocations are reasonably fair from the individual and social welfare perspectives
- The transaction would be uneconomic if the transaction costs were not limited in some manner or some social welfare objective is served
- Retail banking, consumer sales and consumer foods transactions are typically cited as the appropriate areas for standardisation

Some of the institutions which have taken initiatives towards standardisation of shari'ah rules are as follows:

- AAOIFI Standards
- Central Bank of Malaysia (Shari'ah Advisory Council)
- Islamic Fiqh Academy
- Other shari'ah boards

While some of these organisations have been able to attract substantial adherence in the Islamic finance industry, none has been able to establish its authority globally. Further, while adherents of any of the above standards will find clarity in the definition and application of shari'ah compliance, there are observable differences among these standards. Examples of these differences in shari'ah rules include:

- The status of debt and its trading, as well as the tolerable benchmark of debt percentages underlying tradable securities;
- The practice of *tawarruq* as a financing or deposit product and related issues;
- The extent of risk transfer and risk mitigation that can be agreed upon by the parties in specific contracts, such as sale, lease and equity-based contracts;
- The permissibility of combining two or more contracts in the transaction structure; and
- The use of legal ruses in Islamic finance products.

These differences lead to a non-standard definition of shari'ah compliance and open the doors to confusion and scepticism, especially among the consumers of Islamic finance products. It has, however, also been argued that standardisation might limit freedom in structuring transactions and considering that Islamic finance is a very

young industry, especially as measured by the extent and degree of structural testing that has occurred, it might be premature or even inappropriate to talk of standardisation at this stage of development. However, it may be a good long-term goal.

Shari'ah Compliance Risk

Despite the issuance of fatwas and the presence of a shari'ah supervisory board (SSB), an Islamic financial institution cannot isolate itself from the risk of shari'ah compliance of its financial products and services. The sources of this risk are as follows:

- Differences in legal philosophy, especially when the fatwa has been derived from the rulings of obscure jurists or less popular schools of thought
- Insufficient disclosures and the absence of details on the fatwa
- Perceived complexity and incomprehensibility of the financial structure owing to lack of knowledge/awareness in the client or insufficient explanation by the issuers
- Perceived inadequateness in addressing religious concerns of the consumers
- Shari'ah supervisory board not accepted as a qualified authority on the subject

Experts have suggested various measures to mitigate shari'ah compliance risk, some of which are listed below:

- Taking warranties from the counter-party that the agreement is shari'ah compliant and/or an express undertaking that it will not seek to argue against the shari'ah compliance of the arrangement
- Explicit legal undertakings in the contract to ensure proper conduct of the counter-party while avoiding the use of the term 'shari'ah'
- Necessitating shari'ah compliant certifications from the shari'ah boards of both parties to the contract
- Including an arbitration clause with a provision to have any shari'ah compliance issue to be arbitrated by a shari'ah expert

Shari'ah Governance Systems

Shari'ah compliance, in its entirety, is a very robust process encompassing the structuring, executing, monitoring, restructuring, recovery as well as settlement stages. Recent cases of litigation, which have thrown light on the non-shari'ah compliance of certain transactions can all be found to have their genesis in lapses of shari'ah governance systems at various stages. In a recent study that examined 68 Malaysian court cases from 2011-15 where shari'ah compliance was challenged, it was revealed that the core issue that triggers such shari'ah compliance risks "arise(s) from the peculiarity and inefficiency in implementing shari'ah contracts by IFIs […]

Perhaps this could be the reason why legal challenge appears unabated." shari'ah corporate governance in Islamic financial institutions is generally built on three important pillars: the shari'ah supervisory board, the internal shari'ah department and the shari'ah supervision at the central bank level. Unfortunately, in some jurisdictions, the presence of these bodies is either not maintained at all, or these institutions are deprived of some of their main duties and functions. Therefore, any institution or jurisdiction lacking clear policies in any of these three components suffers from lack of a genuine shari'ah corporate governance.

Islamic banking in Malaysia, however, is based on strong legal and governance foundations. The Islamic Banking Act in Malaysia which was enacted in 1983, contained a provision for the establishment of a Shari'ah Advisory Board approved by Bank Negara (the Central Bank of Malaysia) - a licensing condition for establishing an Islamic bank. In order to manage potential conflicts and differences of opinions among the shari'ah committees of different Islamic banks, a central Shari'ah Advisory Council (SAC) at Bank Negara's level was established in 1997. Central Bank Act 2009 spells out in Clause 58, "When the ruling given by a shari'ah body or committee constituted in Malaysia by an Islamic financial institution is different from the ruling given by the Shari'ah Advisory Council, the ruling of the SAC shall prevail."

Shari'ah board members are typically appointed during the annual general meetings by the board of directors of the company. They are paid a retainer fee along with a variable compensation based on the hours of work. While the corporate governance structures have evolved over several years with widely researched, documented and practised norms and procedures to align the board's interests with the interests of the shareholders, these rules are still being developed for shari'ah governance.

It is argued that the manner of appointment and payment of the shari'ah board creates inherent conflicts of interests for shari'ah board members who are otherwise required to be independent in their shari'ah rulings. There is a lack of a clear set of policies on the internal shari'ah review and audit governance, and whether the credibility and moral obligation of the shari'ah board members will be impacted if they do not cooperate with a financial institution that does not have a shari'ah department. Succession planning for shari'ah board members is another pressing and challenging corporate governance issue. Although there is reference to the independence of the shari'ah board, there is hardly any reference to the independence of the internal shari'ah department officers with regard to their appointment and dismissal. Another governance issue arises from the fact that shari'ah audit reports, unlike the common internal audit reports, are submitted to the CEO of the company and not to the audit committee of the board of directors.

On the positive side, though, the shari'ah governance structures have come a long way, demonstrating significant improvement compared to the structures of the 1980s. This is despite the industry being in its early stages of development. Contemporary

trends in the field of shari'ah governance such as the external shari'ah audits are further augmenting this progress.

The Primacy of Law over Values

Values are the bedrock of Islamic finance which shares conceptual similarities with Socially Responsible Investments (SRIs) and Impact investments. These values, derived in accordance with the Divine guidance, in the case of Islamic finance, are then embedded into the financial structures through an ethical review process involving scholars of jurisprudence. Thereafter, the legal process takes over the execution and enforcement of the transaction whose accuracy and effectiveness will depend on the effectiveness of the preceding steps, i.e. identifying the comprehensive set of values accurately and effectively embedding them into the structures. Shortcomings in the implementation of shari'ah principles can then be argued to have their roots in the process formulation stage, which runs counter to the argument that, 'law taking precedence over values' is the source of the problems.

It is, however, also argued that the shari'ah boards, who are entrusted with the obligation to ensure the incorporation and implementation of values discussed above, only have the power of persuasion and lack any real teeth or power of enforcement. There is no separate legal system to enforce the shari'ah in financial transactions and as a natural consequence, it depends on the municipal legal system to ensure enforcement. In fact, in matters of disputes over complex financial matters, municipal law takes precedence as the subject is regarded outside the jurisdiction of shari'ah courts/boards.

For instance, the following securities law disclosure in the Dana Gas case highlights the issue: "The shari'ah advisory board of Dar Al-Shari'ah have confirmed that the Transaction Documents are, in their view, shari'ah compliant. However, there can be no assurance that the Transaction Documents or the issue and trading of the Certificates will be deemed to be shari'ah compliant by any other shari'ah board or shari'ah scholars. None of the Trustees, Dana Gas or the Delegate makes any representation as to the shari'ah compliance of the Certificates and/or any trading thereof, and potential investors are reminded that, as with any shari'ah views, differences in opinion are possible. Potential investors should obtain their own independent shari'ah advice as to the compliance of the Transaction Documents and the issue and trading of the Certificates with shari'ah principles. […] In addition, prospective investors are reminded that Dana Gas has agreed under the English Law Documents to submit to the jurisdiction of the courts of England. In such circumstances, the judge will first apply English law rather than shari'ah principles in determining the obligations of the parties."

It has also been observed that shari'ah matters were, in many cases, exposed to the judges' interpretations, who may not always be well trained in "shari'ah matters". This

was evident, for example, in the case of *Affin Bank v Zulkifi bin Abdullah*, where the learned judge had stated, "When the gratification of being able to satisfy the pious desire to avoid financing containing elements of *riba*, gives way to the sorrow of default before the end of tenure of an *Al-Bai' Bithman Ajil* facility, the revelation that even after the subject security had been auctioned at full market value, there remains still a very substantial sum owing to the bank, comes as a startling surprise. All the more shocking when it is further realised that a borrower under a *riba*-ridden loan is far better off."

Shari'ah Authenticity and *Maqasid Al-Shari'ah*

The shari'ah compliance of a transaction basically implies that the structure is free from elements of *riba, gharar, maysir/qimar*, and that the nature of the transaction and the product itself does not fall under the prohibited list under the shari'ah as well as the laws of the state. In other words, it is the minimum standard required for commercial transactions, which excludes all prohibitive elements of the shari'ah and fulfils the higher objectives of the shari'ah (*maqasid al- shari'ah*). The requirement of fulfilling *maqasid al-shari'ah* would address all other aspects of *maslahah*, ensuring mutual benefits among the parties to the transaction and taking the social impact of such product into consideration.

A constant criticism faced by the Islamic finance industry is its perceived legacy of preferring form over substance whereby the "shari'ah-compliant" products differ from their conventional counterparts only in name while their economic and commercial aspects are exactly the same. Consumers question the relevance and differentiation of these products and often feel that while they may be "shari'ah-compliant", they are not necessarily "shari'ah-based". Some of these characteristics of the Islamic finance industry are a result of the evolving process of the industry. At its inception, the Islamic finance industry was exploring avenues to fulfil the dual requirement of compliance with municipal law and the shari'ah. A natural consequence of this was the reverse engineering of the conventional products, which seemed to satisfy the requirements of businesses, individuals and governments. Keeping the end product in mind and utilising the established basic building blocks (acceptable transactions) from Islamic finance, the founding scholars of Islamic finance industry created the shari'ah compliant versions of the existing conventional banking and finance products. In some cases, it is argued, mere legal ruses (*hilah*) were used to circumvent a shari'ah prohibition. "*Tawarruq*", a widely criticised product of the Islamic finance industry is an example of this.

The end result of these efforts, allegedly, was the creation of products, some of which had a very synthetic feel about them and seemed to reflect the morals and values of the conventional market rather than that of Islam. The primary principles of conventional banking, including the earning of the time value of money using money and earning returns on capital without taking any risk, started seeping their way through, into the Islamic finance products, thus rendering them void of the principles of Islam.

The counter-argument to the above claims has been that such a comparison does not take the larger differences of the Islamic finance industry into account. The Islamic finance industry, for instance, prohibits trading debt at a discount or through Credit Default Swaps (CDS), gambling and speculation through derivative trading or short selling and the like, which are the primary causes of instability in the conventional financial system. Further, they feel that calls for Islamic finance products to be based only on profit and loss sharing principles or even suggesting that equity-based products are superior to debt-like financial instruments are unjustified. They argue that there is no evidence from the Quran or the Sunnah, to support the claim that the products based on the principle of profit and loss sharing, such as *mudarabah* and *musharakah* are to be given any superiority over debt-based products. The industry is free to use any shari'ah compliant instrument, whether it is *murabahah, istisna, salam, ijarah* or even *tawarruq*, as long as it does not contradict any explicit text or principle.

Critics also point out to the shortcoming of the methodologies of *usul-al-fiqh*, which they argue are based on medieval societal values hindering innovation and adaptation and are obsolescent in the face of dramatic transformations in legislative processes, technology, industry and commerce. *Maqasid*, on the other hand, will provide a more relevant approach to innovate in accordance with contemporary requirements.

However, it is important to understand that *maqasid* has three different forms: the ultimate general objectives of shari'ah or *Al-maqasid Al-Ammah*, the *maqasid* of Islamic economics and the *maqasid* of Islamic finance. The widely held definition of *Maqāsid al-Sharī'ah* is that it aims to safeguard faith (*dīn*), self (*nafs*), intellect (*'aql*), posterity (*nasl*), and wealth (*māl*). Whereas the main objectives of Islamic economics is to establish social justice, eliminate poverty, tangibly reduce economic disparities, free society of corruption and to institutionalise zakāh, an interest free system, and the moral and ethical instruments of Islamic teachings. The primary objective of Islamic finance, on the other hand, is to free Muslims and non-Muslims alike from non-permissible financial arrangements and their associated negative consequences. These non-permissible elements could include among others explicit, *ribā, gharar*, gambling, dealing in non-permissible goods and services as well as other non-permissible activities in whatever forms and structure they are presented. It is argued that in the current circumstances and given the varied scope and objectives of the different forms of *maqasid*, it might be premature and unwarranted to expect Islamic finance to fulfil all of them.

Reconciling Shari'ah Governance and Civil Law

In the Islamic finance industry, it is argued that there is a very misleading distinction between '(Western-style) law' and 'shari'ah'. The two are perceived to be very different while there is a good case to suggest that they are not entirely different and can be considered to be sub-categories of what can justifiably be called as 'law'. Inability to

distinguish between 'law' and 'legal system' lends to the misleading nature of the term 'shari'ah compliance' itself. The use of the non-legal word 'compliance' with the word 'shari'ah', rather than 'law' seems to suggest that shari'ah compliance is not a legal matter contrary to the true essence of the word which means legal validity. However, when issues with shari'ah compliance are seen as legal issues, their formulation becomes rather simple. The 'Financial Shari'ah', as we have just argued, when seen as law, is without a properly functioning legal system. Inter alia, because of the emergent nature of the system, its infrastructure struggles to provide sufficient legal certainty while a lack of dispute resolution or enforcement mechanisms imply that it needs to rely on municipal legal systems.

Countries, both in the Islamic and the Western world are accommodating shari'ah compliant transactions into their legal frameworks in different ways, formally in some cases, and in others treating them as special cases. Malaysia, for instance, seems to have made significant strides in ensuring that the Islamic laws on commerce and finance enjoy legal recognition in the civil courts. In order to ensure certainty in shari'ah matters, the Central Bank Act 2009 of Malaysia spells out in Section 56, "When in any proceedings relating to Islamic financial business before any court or arbitrator, any question arises concerning a shari'ah matter, the court or the arbitrator, as the case may be, shall either take into consideration any published rulings of the Shari'ah Advisory Council; or refer such question to the Shari'ah Advisory Council for its ruling. A similar clause can also be found in Capital Markets and Services (Amendment) Act 2010, Clause 316F. It has been made obligatory that judges and arbitrators refer shari'ah matters to the Shari'ah Advisory Council of Bank Negara or Securities Commission as the case may be. Under the federal constitution of Malaysia, the power to decide the legal cases is conferred to the court of law. In *Mohd Alias Ibrahim v. RHB Bank Bhd & Anor,* the High Court's reference of shari'ah issues to the SAC of the Central Bank of Malaysia, pursuant to sections 56 and 57 of the CBMA, was contested by the plaintiff. The plaintiff contended that the impugned provisions are unconstitutional as they usurp the judicial power of the court, provided under Article 121(1) of the Federal Constitution, and delegate the courts' decision-making power in relation to the Islamic financial business to the SAC. In addition, the binding nature of the SAC rulings on the court, by virtue of the impugned provisions, allegedly affects the parties' natural right to be heard. These are some of the reasons why the plaintiff claimed that sections 56 and 57 of the CBMA should be declared invalid for being unconstitutional. In the aforementioned case, Mohd Zawawi Salleh J, inter alia, held:

- The issue of whether the facility is shari'ah-compliant or not is only one of the issues to be decided by the court. And although the ascertainment of Islamic law as made by the SAC will be binding on the court as per the impugned provisions, it will be up to the court to apply the ascertained law to the facts of the case. The court still has to decide the ultimate issues which have been pleaded. Consequently, the final decision remains with the court. (para 96)
- The sole purpose of establishing the SAC is to create a specialised committee in the field of Islamic banking to speedily ascertain Islamic law on financial

> matters so as to command the confidence of all in terms of the sanctity, quality and consistency of the interpretation and application of shari'ah principles pertaining to Islamic finance transactions before the court. The SAC cannot be said to be performing a judicial or quasi-judicial function as the process of ascertainment has no attributes of a judicial decision. Hence, this is not an attempt by the executive to take over the judicial power traditionally exercised by the courts. (paras. 102, 105 & 106)

The above judgment has been confirmed by the Court of Appeal in Court of Appeal Civil Appeal No. W-02-1420-2011. It has become clearer that the SAC's role is to ascertain the shari'ah matters and it is the role of the court to apply the SAC's view on the facts of the case and consequently arrive at a decision. The Central Bank Act 2009 has been replaced by the Islamic Financial Services Act 2013 (IFSA). All the above provisions are maintained in the new law.

Kuwait adopted a new framework for the regulation of Islamic finance and banking in 2003 wherein emphasis is laid on regulating the Islamic finance industry within the established legal framework. Interestingly, a significant number of international Islamic finance deals have chosen English law as the applicable law of their contracts. The judgment at the trial of *Shamil Bank of Bahrain EC vs Beximco Pharmaceuticals Limited*, for instance, brings legal certainty on the issue of liability in Islamic finance transactions which are governed by the English law. Antony Dutton of Norton Rose, the law firm representing the case, noted, "The decision ultimately demonstrates that the English courts are content to leave issues of shari'ah compliance in the hands of the religious supervisory board of an Islamic financial institution unless the parties have made a very clear choice to the contrary."

There have been several instances of litigations in the municipal courts where the enforceability of obligations in financial transactions was questioned on the grounds of their non-compliance with the shari'ah. These have triggered intense debates, both in the Islamic finance industry and academia. We will look at two of these high profile litigations - the Dana Gas litigation case and the case of *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia*.

The recent Dana Gas cross-border litigation, which is still evolving, had again touched off a maelstrom of controversy across the global Islamic financial services industry. It is pertinent to note that the Dana Gas case is not the first where a party to Islamic finance litigation had challenged the sharī'ah compliance of a product. However, the nature and extent of the challenge involved in the Dana Gas case, being a cross-border case where legal action have been instituted in several jurisdictions, makes it different and unique in the recent history of Islamic finance. In fact, the unprecedented nature of some issues raised in the case, including the forum *non conveniens* preliminary objection, makes it unique.

Scores of cases involving the challenge by one of the parties of the sharī'ah compliance of the Islamic finance product have been heard and determined by the courts over the past two decades. This had led to conflicting expert opinions on what constitutes the underlying principle of Islamic law on a specific question relating to the transaction in dispute. Though in advanced jurisdictions such as Malaysia, such challenge of shari'ah-compliance has been predominant in Islamic home financing litigation over the past two decades, there has not been such a huge controversy at the global level as that of the current Dana Gas case. Other jurisdictions where such challenge had been experienced in cases having some foreign elements, and thus, considered cross-border litigation are found in both the English and American courts. The Dana Gas case has become a lightning rod of controversy, which some in the industry see as a positive development, which calls for concerted efforts to address this perennial issue head-on.

Let us now look at some of the specifics of the case. The obligor had issued a *mudarabah sukuk* in 2006 with a purchase undertaking clause included in the contract after obtaining approval from its shari'ah advisors, who simply followed the prevailing norm in the market. After intense debates on the subject, AAOIFI, in Feb 2008, prohibited the purchase undertaking at a fixed exercise price in *mudarabah sukuk*. In the opinion of the majority of the AAOIFI scholars, a fixed exercise price amounted to a guarantee of *mudarabah* capital, which contradicts the shari'ah requirements of a *mudarabah* contract. Dana Gas restructured the *sukuk* in 2013, replicating the same documents, without any further consultation with shari'ah scholars. Later, they began litigation alleging that the structure contravened UAE law, which was in line with shari'ah requirements. Despite using the AAOIFI argument concerning *sukuk*, it was presented as a new development in Islamic financial law. Accordingly, the *sukuk* issuance was invalid. Since AAOIFI rules were not opted into via arbitration nor were they enforced as part of UAE law, this ruling would only be applicable if a UAE court decided as such. UAE law consists of two codes: the commercial and the civil code. The UAE civil code has many similarities to the rules of classical Islamic *fiqh*. As the *sukuk* was structured based on a *mudaraba* contract, the provision did indeed mirror the AAOIFI ruling to some extent, as worded in article 704 of the UAE civil code: "The owner of the capital shall alone bear any loss, and any provision to the contrary shall be void." Article 714 too upholds the prohibition of interest: "If the contract of loan provides for a benefit in excess of the essence of the contract otherwise than a guarantee of the rights of the lender, such provision shall be void but the contract shall be valid." The question then arises as to how the conventional banks were able to exist. This was answered by the Constitutional Department of the UAE Federal Supreme Court, in its Decision. No. 14/9, issued on 28th June 1981 in which it permitted charging of simple interest in connection with banking operations, stating that this was a necessity for the economic existence of the UAE and for the wellbeing and benefit of the public. The Court held that the contractual interest received by a bank was lawful, for as long as a compelling need to maintain the system of interest remained, and would only remain lawful until such a time when the need was eliminated by a new banking system." The Civil Code argument was never challenged,

however, due to the competing authority of the Commercial Code or UAE Federal Law No. 18/1993, which was introduced to expressly permit interest on delayed payment. The law takes precedence over the Civil Code, in respect of the commercial transactions that fall within the former's ambit.

The UK High Court, discussing the case of the Purchase Undertaking being under English law has several interesting findings on the subject in their ruling: "The complaint made by Dana Gas which underpins its claim in these proceedings is that the Purchase Undertaking has the effect of guaranteeing to the Certificate holders the return from their investment by removing the risk of a loss of capital. This is said to be inconsistent with the prohibition of *riba* (essentially, compensation for the use of money), which is a principle of shari'ah, and with laws of the UAE which give effect to that principle." The UK judge has avoided taking any view of the outcome of Dana Gas claim under the UAE law but has assumed that their position is right, though not relevant under the English law governing the purchase undertaking. The conclusion, after much deliberation, is to enforce the purchase undertaking, as a matter of English law and declare the event of default, as a consequence.

In the case of *Tan Sri Abdul Khalid bin Ibrahim*, the client challenged the validity of the contract which was based on a *Bay Bithaman Ajil* facility, alleging non-compliance of the structure based on the opinion of three shari'ah scholars. The judge remarked that the client had entered into the agreement with the bank voluntarily and reaped benefits from the arrangement, adding further, that it was not open to him to then say that the BBA terms should have been interpreted and implemented differently.

The above two examples highlight the challenges which the legal enforcement of shari'ah compliance entails. Several different shari'ah opinions are often available; variations in the opinions from the same scholars exist as a result of the evolving nature of the industry; and managerial and/or shari'ah advisor lapses have taken place at various stages of the structuring and execution of the transaction, among other challenges. For many investors, Dana's case is alarming because it raises the prospect that other companies with Islamic debt could justify not honouring their obligations by claiming shari'ah standards had changed since the debt was issued. Dana's existing *sukuk* was originally certified as shari'ah compliant by Dar Al Shari'ah, a unit of Dubai Islamic Bank. A by-product of the Dana case, it is argued, may be a wider implementation of the AAOIFI standards, which are followed wholly or in part by regulators across the globe. However, only a handful of countries, including Bahrain and Sudan, have made them mandatory.

There is also the case of the Arcapita bankruptcy, which is the second of its kind in the US after the East Cameron oil and gas *sukuk* bankruptcy. The case involved the restructuring of existing shari'ah compliant debt and using a new shari'ah compliant debtor-in-possession financing as part of the reorganised plan. The case had several implications for the Islamic finance industry, some of the pertinent ones among them were:

- US bankruptcy courts appear willing to integrate and honour shari'ah principles into their decisions and measures
- Islamic investors need to give careful consideration at the outset of the transactions as to how a US bankruptcy court will interpret and treat their Islamic financing arrangements
- The Court in the present case applied a substance over form approach. This should encourage broader respect and participation in the Islamic finance industry in the US

While there are indeed genuine concerns related to shari'ah compliance, the industry needs to be wary of individuals and entities who use 'shari'ah compliance' as a soft target to avoid fulfilling their obligations and extract discounts or favourable negotiated settlements. These issues also tend to be blown out of proportion, especially in cases of some high profile litigation, which creates unwarranted anxiety and uncertainty about the entire Islamic finance industry. These issues have been well articulated by Rohana Yusuf in *Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor*, where she highlighted:

"*Their customers often contract on the basis that the transaction is (sic) Syariah-based in the conservative sense; and when there is default in the facility, only then they are advised by the customer's lawyers that the facilities they have entered into are strictly not Syariah-based and the contractual terms are to their disadvantage when they end up paying more than what the conventional banks charge their customers in interest as well as penalties. In consequence of the advice, the customers make an attempt to challenge the facilities, either to escape liability as a whole or reduce the quantum of the claim.*"

Acknowledgement:

The above summary is based on the commentaries received from the following persons prior to the workshop:

- Samir Alamad, *Head of shari'ah Compliance & Product Development – Al Rayan Bank U.K*
- Engku Rabiah Adawiah, *Professor, IIiBF, International Islamic University Malaysia*
- Muhammad Al Bashir Muhammad Al-Amine, *ICD shari'ah Advisor, Islamic Development Bank Group, Jeddah, Saudi Arabia*
- Michael Altenburg. *Partner, MAF Group, Lucerne, Switzerland*
- AbdulKadir Barkatulla, *shari'ah Advisor, London, U.K*
- Richard de Belder & Omar Shaikh, *Islamic Finance Council U.K*
- Jonathan Ercanbrack, *Deputy Director, SOAS University of London, London, U.K.*
- Nick Foster, *Senior Lecturer, SOAS University of London, London, U.K.*
- Michael Gassner, *IslamicFinance.de, Geneva, Switzerland*
- Ashraf Md Hashim, *Chief Executive Officer, ISRA Consultancy & Deputy Chairman, Shari'ah Advisory Council, Bank Negara Malaysia*
- Harris Irfan , *Partner, Gateway LLP; Managing Director, Cordoba Capital*
- Akram Lalddin, *Professor & Director, ISRA, Kuala Lumpur, Malaysia*
- Michael J.T. McMillen, *Global Head, Islamic Finance, Curtis, Mallet-Prevost, Colt & Mosle*
- Neil D. Miller, *Global Head of Islamic Finance, Linklaters LLP, Dubai, UAE*
- Shariq Nisar, *Professor, Rizvi Institute of Management Studies & Research, Mumbai, India*
- Umar A. Oseni, *Executive Director, International Islamic Liquidity Management Corporation (IILM), Kuala Lumpur, Malaysia*
- Aamir A. Rehman, *Partner, Hoopoe Capital & Senior Fellow at Columbia University, New York*
- Rodney Wilson, *Emeritus Professor, Durham University, United Kingdom*

Public Lecture Report:

Redefining and Retaining Shari'ah Compliance in Islamic Finance

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Redefining Shari'ah Compliance

The paper, presented as an invitation to further thought and discussion, first considers the calls for redefinition of the concept of shari'ah compliance in Islamic finance. Questions are raised as to why redefinition is thought necessary or desirable. Does the perceived need relate to (a) an inadequacy of the rules for shari'ah compliance as conceived or stated; (b) the objectives served by those rules; or (c) a failure of the rules to give effect to fundamental objectives? The iterations are many.

Suggesting that the principal structural paradigm—*maqasid al shari'ah*—is inadequately considered in contemporary Islamic finance, the paper hints at the some of the initial jurisprudential inquiries. What approach is to be taken: traditionalist, rationalist, textualist, literalistic, extractive, or a composite? What theory should guide us: Shatibi's, the Zahiris', or policy implementation? Which objectives are of the essence? What are the priorities of the various objectives? Categorical insistence of Ghazali? Do we add concepts such as Qarafi suggests or use the broader concepts of Taymiyyah or Kamali? How do we parse out individual preferences regarding objectives and rule applications, most of which are cloaked—but only cloaked—in objective verbiage. Who should decide: the learned only, or the relatively uninformed majority, or a combination?

The paper considers both the nature of compliance rules (including principles) and an example of a common plea regarding the rules as applied in the transactional context. What values and objectives are served by the rules as currently formulated and applied? Are the primary purposes (in addition to giving effect to the fundamental essence of compliance in its pure revealed sense) to promote the values of harmony, consistency, certainty, predictability, and desirable objectives (such as equality of treatment and justice).

Rules being a necessity, the most oft-heard criticisms and calls for modification seem related to the application of the rules in practice: that they do not reflect the underlying objectives or are ignored and circumvented. Circumvention is the most frequently discussed concern and addressing circumvention requires an understanding of its

purpose. Is it to evade implementation of the underlying objective, possibly because it is thought illegitimate or inappropriate? To modify the value, priority, or importance of an objective? Or to achieve some objective not served by an existing rule? Is the purpose legitimate or illegitimate, laudable or reprehensible? Most cases of circumvention seem outside the definition-redefinition context, and within the realm of enforcement.

Calls for standardisation of shari'ah rules (again, including principles) are increasingly frequent. They are, in part, a plea for uniform rules. They bring into view the tensions between desires for and against diversity. Acknowledging the fact of diversity, we sometimes proclaim both its legitimacy and its benefits. We even institutionalise diversity. In each case, consider the defence of the interpretive variations of the different *madhahib*. The paper posits that AAOIFI's generalised statements of shari'ah principles are an attempt to establish (standardise) fundamental principles while preserving diversity in application in different jurisdictions.

Standardisation resists diversity, limits freedom, impinges on consensual freedom, and imposes a set of risk allocations that may or may not be appropriate. A critical question is: what are the costs and benefits of standardisation?

The personal opinions offered in the paper are that (i) standardisation is sometimes appropriate and beneficial, and sometimes unfair, unjust, and harmful, and (ii) calls for standardisation are currently premature (with some exceptions) and mostly made with inadequate consideration of both the objectives and consequences of achieving standardisation. The considerations vary depending upon the subject of the inquiry: principles and concepts; contracts; or both.

Economists laud transaction cost efficiencies. Bankers extoll immediate transactional cost reductions. Both focus on the short-term and ignore the long-term costs. The incomplete contract paradigm of Hart and Moore is of relevance here. Standardised contracts are an extension of vertical integration, which eliminates outsiders and related uncertainties in the business chain to stabilise external market relationships and exert market control. Standardised contracts also serve hierarchy and internal segmentation needs of business organisations. They promote efficiencies and internal cost reductions by facilitating transactional transit through departments, minimising the use of expensive managerial and legal time, reducing training costs, and providing automatic checks and discipline on those implementing the business. They also limit discretion to the highest echelons of the firm and thus consolidate power.

Lawyers are concerned with (a) risks and their allocations, (b) rights and their invocations, and (c) benefits and burdens and their realisations. So, the question to the lawyers is whether the standardised formulation addresses the relevant risks fairly and in accordance with the agreed positions of the parties.

Contracts are authorised private writings of law for a business relationship. The premise is equal bargaining power. Most standardised contracts are adhesion contracts: take-it-or-leave-it contracts. Consider the click-to-use computer program or parking ticket. There is no bargaining at all (let alone equal bargaining); risk allocations are dictated. Users can "shop" for a different contract, and do shop based upon organisational reputation. But they cannot negotiate. The customary "implied-in-law" provisions and protections that are supplied by courts are overridden, for the most part, in a standardised contract. Organisational discretion and mandate become the law for transaction. There is "organisational domination, leavened by the ability to choose the organisation by which [the adherent party] will be dominated", to quote a leading scholar. The most powerful participant prevails in a standardised contract. It is worth considering Oscar Wilde's observation: "consistency is the last refuge of the unimaginative" (or those deprived of imagination).

Standardisation seems appropriate where (1) the risks are identified and well understood, (2) there is agreement on the risk allocations, (3) the risk allocations are reasonably fair from both transactional and social welfare perspectives, and (4) the transaction would be uneconomic if transaction costs were not limited in some manner or some overriding social welfare objective is served. Who then is to determine the social welfare objective, if it is considered at all? A business that is not a disinterested party? Retail banking, consumer sales, and goods transactions may be appropriate for standardisation. But for the most part, Islamic finance in its present state is too immature and inexperienced to adopt widespread standardisation. The risks and their permutations are not yet well enough identified or understood.

Retention of Shari'ah Compliance

Retention of shari'ah compliance was discussed in terms or the necessities of the relevant populations (a) understanding the objectives of Islamic finance, (b) understanding both the rules and the basis for the rules that implement the objectives, and (c) internalising those objectives and rules. The opinion was offered that none of these three necessities have been achieved by the current user population (which is largely retail customers) or the broader target population (which should be the conventional (interest-based) financial community whose acceptance and cooperative participation is necessary if Islamic finance is to expand across the entire financial spectrum, achieve the imprimatur of legitimacy, and integrate in the global financial system).

It is suggested that the primary foci of the Islamic finance industry, from the compliance perspective, should be (i) enhancing the level of transparency regarding both transactions and the workings of the industry and (ii) increasing the level of education of the existing and target populations. The current user population has an inadequate understanding of fundamental principles or how products allocate financial risk. Disclosure to customers is inadequate. Transparency is undervalued by the industry. Integration with conventional financial markets—especially corporate-commercial

markets—is critical for the long-term success of Islamic finance. Conventional market participants (both commercial and retail) have minimal, if any, understanding of the objectives of Islamic finance and a fleeting, and inaccurate, conception of the relevant rules and their purposes. There is considerable trepidation in both the present client population and the conventional financial community, much of it attributable to insufficient knowledge. The suggestion is that the Islamic finance industry focus more intently on internalising transparency as an industry value and educational efforts directed to both Muslim and non-Muslim target populations.

APPENDICES

1. Workshop Agenda

Reception & Welcome

8:30 a.m. Reception and Coffee

9:00 a.m. Welcome Remarks by Dr Nazim Ali

9:05 a.m. Opening Remarks on behalf of SOAS, Dr Jonathan Ercanbrack

9:15 a.m. Introduction by Workshop Moderator, Professor Frank E. Vogel

Part 1: Shari'ah Compliance Case Study: Dana Gas Sukuk

9:25 a.m. **Presentation**: A quick overview of the legal, financial and moral issues faced in the recent Dana Gas *sukuk* trials and how challenging shari'ah compliance has become of focus.

9:40 a.m. **Participants' Views – Open Floor Discussion**

Opportunity for each participant to explain briefly their views on the following. Do you agree/disagree with the following statements and questions:

- **Who is Responsible for this Disarray** – Is it Dana Gas, or rather, the *sukuk* certificate holders/creditors who are the risk takers (Rab Al Mal)? Or, perhaps the advisors who advised the company at issuance, or even post-issuance when it was advised as being no longer shari'ah compliant? Or was it due to the inherent structural problems within the product itself, for example, the use of purchase undertakings in mudarabahs, or utilising multiple conflicting laws and regulations (i.e., UAE law and English law on top of shari'ah Law)?

- **Challenging shari'ah Based on its Evolution** – Should one be able to challenge compliance for changes to the "evolution and continual development of Islamic financial instruments and their interpretation"?

- **Moral Obligation to Pay vs Complying with Local Law** – Should complying with changes or even the discovery of a 'common mistake' in the validity of an agreement in the underlying law over-ride any moral or ethical obligation under shari'ah to pay creditors?

- **Challenging Product Compliance** – Can (or should) the issuer (or even an investor/creditor) of a *sukuk* be prevented from challenging the shari'ah- compliance of its own *sukuk* after it is issued?
- **Purchase Undertakings** – Given what we now know, can they still be used or should they be avoided altogether? Should it be the end of the road for Purchase Undertakings in Islamic finance products?

- **Mudarabah *Sukuk*** – Any future use or are its days numbered?

- **Conflicts of Law** – Does Islamic finance suffer, or is its growth being inhibited, because shari'ah law does not take precedence over local or transactional laws (such as English law)? Or rather, has local law helped promote the growth of Islamic financial products, and in effect provided the much needed level of certainty and standardisation missing from the current application of the shari'ah rules? To what extent does English law allow shari'ah arbitrage?

- **Prevention** – What in your opinion can be done to prevent scenarios such as the Dana Gas *Sukuk* legal challenge from happening again? Or rather, should this type of action be encouraged?

11:00 a.m. **Tea/Coffee Break**

11:15 a.m. **Summary** – Moderator to provide a summary of all the points of view and frame questions. (10 mins.)

Part 2: Challenging Shari'ah Compliance – Certification

11:25 a.m. **Participants' Views** – Open Floor Discussion
Opportunity for each participant to explain briefly their views on the following issues with shari'ah compliance. Do you agree/disagree with the following questions and statements:

- **What Makes a Product Shari'ah Compliant**
  » is it its certification, or

  » its intrinsic adherence to the rules, or

  » its adherence to the principles, or just the absence of non-compliant elements (i.e., like interest, riba and gharar, etc)?

  » is it because it fits within a defined structure (i.e., ijara, mudaraba, murabaha, etc), or

  » is it because of the intention of the parties to be Islamic compliant that makes it compliant?

- **Lack of Certification** – Does the lack of certification make it non-compliant?

- **Shari'ah Auditing** – Who is responsible if an auditor finds non-compliant elements in an audited IFI? In a product? In operations?

- **Ignorance of shari'ah** – Is ignorance of shari'ah rules an excuse if an offered product or service is discovered to be non-compliant?

- **Who is Authorised to Review and to Audit Certified Financial Products** –

» The public or only skilled scholars or professionals?

» If the public – are there any limits?

» If just professionals or scholars – what can the public rely on for certainty of opinions?

» What if the scholars get it wrong, what recourse do the affected parties have?

» What qualification should the issuer and the reviewer (if different) have?

» Who is authorised to critique certified compliance – (i.e., the advisors to Dana Gas who advised the company that the *sukuk* is no longer compliant.)

1:00 p.m. **Lunch**

1.45p.m. **Summary** – Moderator to provide a summary of all the main points of view.

Part 3: Ensuring Compliance – Shifting Opinions

3:00 p.m. **Participants' Views – Open Floor Discussion**
Opportunity for each participant to explain briefly their views on the following issues with shari'ah compliance. Do you agree/disagree with the following statements:

When can opinions be modified, replaced or rescinded –

- **Changing Retrospective Opinions** – Should shari'ah scholars have the freedom to amend their previous advice (i.e., with new developments/thinking), without subjecting their old decisions to critical review?

- **Clash of Fatwas** – Do differences of opinion or conflicting views on a product make that product non-compliant? Is it sufficient that one scholar/board opine in favour of a product/structure, even if all others do not agree? How many opinions are required?

- **Rescinding a Fatwa** – When should an old fatwa become null and void?

- **Fatwa Revocation** – If a fatwa can be revoked, is there a transition period or period allowed to revoke opinions?

- **Fatwa Development** – Can new, more developed opinions override an old opinion even if used in a product currently in use?

- **Discovering Non-Compliance** – If a product is certified compliant but in an subsequent audit is found to contain non-compliant elements, does this make it automatically non-compliant?

- **Compliance Rectification** – Is there any timing permitted for rectification of non-compliant parts of a product? Or is it automatically deemed non-shari'ah compliant and void?

- **Amending or Replacing Opinions** – Can the certifier have room to change his or her opinion – if so, under what conditions? What is the method for amending opinions under shari'ah, if any?

- **Reduced Risks but not Removed.** Risks of non-compliance can only be reduced / minimised but not removed entirely. Do you agree with this?

- **Conflict of Opinions** – SSB opinions. Which takes precedence, the resolutions of a SSB centralised shari'ah advisory council (SAC) or that of an internal shari'ah Committee?

- **Source of the Opinion**: Do the above answers differ depending on what form the fatwa underpinning the respective financial product is predominately derived from: Hiyal and Maqasid, or Akham derived and driven?

- **Conditional Fatwas** – When using legal exceptions and legal strategems to authorise the permissibility of potentially controversial shari'ah products, should there be time limits or other specific conditions placed on their widespread use?

Part 4: Exploring the Way Forward for Shari'ah Compliance

3:30 p.m. **Summary and Open Floor Discussion**
Participants to discuss—and, where possible, reach consensus on—points or issues within areas to be raised by the Moderator.

4:30 p.m. **Discussion on Future Workshop and Action Plan** – Participants to assist the Moderator in drafting the workshop summary including suggested solutions.

5:00 p.m. End of Workshop

2. List of Previous Workshop (2006-2018)

- **Challenging Shari'ah Compliance of Islamic Finance Products (2018)**
  Hosted: SOAS University of London
  Sponsored: Qatar Financial Centre, Hamad Bin Khalifa University, ISRA

- **Fin Tech and Islamic Finance (2017)**
  Hosted: London School of Economics
  Organized: Hamad Bin Khalifa University and London School of Economics

- **Islamic Infrastructure and Sustainable Development Goals (2016)**
  Hosted: London School of Economics
  Organized: Hamad Bin Khalifa University and London School of Economics

- **Revisiting Islamic Securitisation and Structured Products (2015)**
  Hosted: London School of Economics
  Organized: Hamad Bin Khalifa University and London School of Economics

- **Use and Abuse of Limited Liability (2014)**
  Hosted: London School of Economics
  Organized: Harvard Law School and London School of Economics

- **Insolvency and Debt Restructuring in Islamic Finance (2013)**
  Hosted: London School of Economics
  Organized: Harvard Law School and London School of Economics

- **Islamic Financial Intermediation: Revisiting the Value Proposition (2012)**
  Hosted: London School of Economics
  Organized: Harvard Law School and London School of Economics

- **Reappraising the Islamic Financial Sector (2011)**
  Hosted: London School of Economics
  Organized: Harvard Law School and London School of Economics

- **Islamic Financial Ethics and Ethical Governance (2010)**
  Hosted: London School of Economics
  Organized: Harvard Law School and London School of Economics

- **Risk Management (2009)**
  Hosted: London School of Economics
  Organized: Harvard Law School and London School of Economics

- **Sukuk: Economic and Jurisprudential Perspective (2008)**
  Hosted: London School of Economics
  Organized: Harvard Law School and London School of Economics

- **Tawarruq: A Methodological Issue in Shari'ah-Compliant Finance (2007)**
  Hosted: London School of Economics
  Organized: Harvard Law School and London School of Economics

- **Select Ethical and Methodological Issues in Shari'ah-Compliant Finance (2006)**
  Hosted & Organized: Harvard Law School and London School of Economics

3. List of Previous Public Lectures (2007-2018)

Year	Chair	Industry Professional	Academic/ Scholar	Theme
2018	Dr Jonathan Ercanbrack	Michael McMillen	Nick Foster	Redefining and Retaining Shari'ah Compliance in Islamic Finance
2017	Justice Ross Cranston		Volker Nienhaus	Fintech in Islamic Finance: Shari'ah and Regulatory Issues
2016	Justice William Blair	Aamir Rehman	Siraj Sait	Revitalising Islamic and Social Finance: Rising to Current Humanitarian Challenges
2015	Justice William Blair	Jaseem Ahmed		Islamic Finance Standardisation: Is it a Mirage?
2014	Prof David R Kershaw	Farmida Bi	Paul Mills	Risk Sharing and Cooperative Finance
2013	Justice William Blair	Azman Mokhtar	Frank E. Vogel	Islamic Finance and Shari'ah Compliance: Reality and Expectation
2012	Justice Ross Cranston	Muhktar Hussain	Volker Nienhaus	Global Calls for Economic Justice: The Potential for Islamic Finance
2011	Sir Howard Davies	Iqbal Khan	Haytham Tamimi	Building Bridges Across Financial Communities
2010	Sarah Worthington	Stephen Green	M Umer Chapra	Global Perspectives on Islamic Finance
2009	Sir Howard Davies	Ian Pearson	Esam Ishaq	Islamic Finance in the United Kingdom: Current Initiatives and Challenges
2007	Justice Ross Cranston	Michael Hanlon	Mohammed Elgari	Islamic Finance: Relevance and Growth in the Modern Financial Age

4. List of Workshop Participants

Workshop Organisers

Dr Jonathan Ercanbrack, Chair, Centre for Islamic and Middle Eastern Law, School of African and Oriental Studies (SOAS), University of London, London, U.K.

Prof S Nazim Ali, Research Professor & Director, Center for Islamic Economics & Finance, College of Islamic Studies, Hamad Bin Khalifa University, Doha, Qatar

Mr Husam El-Khatib, Counsel, Corporate, Finance, Mergers and Acquisitions, Dechert LLP, Riyadh, Saudi Arabia

Moderator

Prof Frank E Vogel, Founding Director, Islamic Legal Studies Program, Harvard Law School Principal Investigator, Study of the Commercial Law of the Kingdom of Saudi Arabia

Participants (in alphabetical order)

Prof Habib Ahmed, Sharjah Chair of Islamic Law and Finance, Durham Business School, Durham University, U.K.

Dr Samir Alamad, Head of Shari'ah Compliance & Product Development, Al Rayan Bank, Birmingham, U.K.

Prof Engku Rabiah Adawiah Bt Engku Ali, Professor & Shari'ah Advisor, IIUM, Malaysia

Prof Mehmet Asutay, Professor, Durham Business School, Durham University, U.K.

Mufti Abdulkadir Barkatulla, Shari'ah Advisor, London, U.K.

Ms Farmida Bi, Partner and Head of Islamic Finance–Europe, Norton Rose Fulbright, London, U.K.

Prof Rajeswary A Brown, Emeritus Professor in International Business, Royal Holloway College, U.K.

Mr Nick Foster, Senior Lecturer, School of African and Oriental Studies (SOAS), University of London, London, U.K.

Mr Michael Gassner, Chief Executive Officer, IslamicFinance.de, Geneva, Switzerland

Prof Ashraf Md Hashim, CEO, ISRA Consultancy Dy Chairman, Shari'ah Advisory Council, Bank Negara Malaysia

Mr Harris Irfan, Managing Director, Cordoba Capital Ltd, London, U.K.

Prof Mohammed Akram Laldin, Shari'ah Advisor and Executive Director, ISRA, Kuala Lumpur, Malaysia

Sharif Masser, SOAS, London, U.K.

Mr Michael J.T. McMillen, Partner, Curtis, Mallet-Prevost, Colt & Mosle LLP, New York, USA

Mr Neil D Miller, Global Head of Islamic Finance, Linklaters LLP, Dubai, UAE

Mr Kamal Naji, Advisor, Special Projects, CEO Office, Qatar Financial Centre Authority, Doha, Qatar

Prof Volker Nienhaus, Former Professor, University of Bochum; Adjunct Professor, INCEIF, Germany

Prof Shariq Nisar, Professor, Rizvi Institute of Management Studies and Research, Mumbai, India

Prof Siraj Sait, Director, Centre for Islamic Financial Law and Communities, University of East London, London, UK

Ms Jennifer Schwalbenberg, Associate Director, Business Dev and Legal, DDCAP Ltd, London, U.K.

Mr Omar Shaikh, Chairman, UK Islamic Finance Council, Glasgow, U.K.

Sh Haytham Tamim, Shari'ah Scholar, London, U.K.

Mr Siraj Yasini, Executive Director-Head of Islamic Finance, The Bank of Tokyo-Mitsubishi UFJ, Ltd. Dubai, UAE

Volunteers

Dr Ali, Ali, Post-doctoral Researcher, Institute of Advanced Legal Studies, London, U.K.

Muhammad Husain Ali, Student, Kings College London, U.K.

Rabii Malik, Student, St Anne's College, Oxford University

Haris Yaqeen, Student, St. Antony's College, Oxford University

مركـــز قطـــر للمـــال
Qatar Financial Centre

Your platform to growth

East to West & West to East

World-class regulator

100%

Up to 100% Foreign ownership

10%

Corporate tax on locally-sourced profits

Steamlined & transparent company registration & licensing process

%

Compelling tax & business environment

100%

Repatriation of profits

Trade in any currency

Legal environment based on English common law

Quick & Easy

Set Up

Step one
Submit Business Case

Step two
Submit Application for Licence

Step three
Receive Licence & Begin Operation

What do we license?

Financial Services

Asset Management
Retail Schemes (UCITS type)
Qualified Investor Schemes;
Private Placement Schemes

Banking
Corporate/Wholesale Banking;
Investment Banking;
Private Banking

Fiduciary Businesses

Insurance/Reinsurance
Captive Insurance;
(Re) Insurance Brokerage;
Islamic Finance

Investment Advice &

Investment Services

Professional & Business Services
Advisory/Consulting;
Audit;
Tax consultancies;
Information technology consultancies;
HR consultancies;
Logistics planning and consulting;
Environmental consulting;
Project management;
Legal;
Estate planning and will writing;
Activities of patent and copyright agents;
other legal activities not elsewhere classified
Information services;
Media representation

services;
Advertising agencies;
Public relations;
Marketing and brand management;
Specialised design activities;
Event management services;
Third party administrator;
Loss adjustment;
Architectural activities;
Engineering design activities for industrial process and production;
Engineering related scientific and technical consulting activities;
Urban planning and landscape architectural activities;
Accreditation;
Other services

Non-Financial Services

Corporate Headquarters, Management Offices & Treasury Functions

Special Purpose Companies
Professional Associations

Holding Companies Single Family Offices

Trusts & Trust Services

Corporate Solutions

Investment Clubs

Foundations

LLC (G)s
Business Councils

CIMEL Centre of Islamic and Middle Eastern Law
SOAS University of London

The Centre of Islamic and Middle Eastern Law was established in 1990 at the School of Oriental and African Studies in recognition of the growing importance of law in both its Islamic and Middle Eastern dimensions. The analysis of the various systems of law at work in the Islamic and Middle Eastern world as well as an active interaction with Middle Eastern and Muslim lawmakers and scholars are crucial for the future of stability and for the rule of law in its various forms inside each jurisdiction. The rule of law will also determine the parameters of the relationship with Europe and the West generally. In an increasingly small and interdependent world, CIMEL operates as a scholarly legal bridge for research and practice at the crossroad of Islam, the Middle East and the West.