

Judicial Support for the Islamic Financial Services Industry: Towards Reform-oriented Interpretive Approaches

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Abstract

This study examines different dimensions and permutations of invaluable judicial support to Islamic financial services and products and identifies specific areas where the judiciary has helped to shape the industry in line with the original value proposition of Islamic financial intermediation. While relying on qualitative legal methods with comparative case analysis from different jurisdictions, this study conducts cross-jurisdiction case analyses and identifies the role of judiciary in introducing sustainable practices. It concludes that the judicial function has played a significant role in ensuring justice and fairness through purposive interpretation of contracts, recognition and enforcement of foreign arbitral awards and judgments, consistency and predictability of outcomes, legal risk mitigation, and facilitation of mediation and arbitral proceedings, thereby positively reshaping the future of Islamic finance industry. Above all, the availability of binding judicial precedents, which is hitherto not common for Islamic law matters, is a welcome development in the Islamic finance industry.

Keywords

judicial function – dispute resolution – adjudication – Islamic finance – litigation

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1 **Introduction**

With a total asset worth USD 2.19 trillion by the end of 2018,¹ the Islamic financial services industry,² has maintained a steady growth as part of the global financial system. A sustained growth requires robust legal, regulatory and financial architectures that will be able to weather the storm of future financial crises.³ In addition to the regulatory authorities in any jurisdiction, one of the most important players, although less celebrated, is the judiciary which has the inherent powers to shape practices in the industry.⁴ Although there have been a number of common misconceptions about Islamic finance litigation,⁵ the broader role played by the judicial function in supporting the Islamic finance industry has not been given much focus in recent studies. The judicial role in, and support for, Islamic finance issues is as important as the role of the main regulatory authorities in the financial system of a country.⁶

The function of the judiciary in its interaction with Islamic finance matters is mostly appreciated through Islamic finance litigation – an emerging area of commercial litigation.⁷ Litigation is the most popular method of dispute resolution. Contractual parties have often resorted to litigation in order to enforce their rights, particularly in finance contracts. Undoubtedly, litigation has its advantages especially in terms of enforcement of contractual terms and settlement agreements.⁸ Since most Islamic finance transactions, particularly cross-border *shukūk* issuances, run into millions of US dollars, investors feel protected

1 The authors acknowledge the support of Bait al-Mashura Finance Consulting, Doha, and the participants at the 4th Doha Islamic Finance Conference held on 9 January 2018. Islamic Financial Services Board, *Islamic Financial Services Industry Stability Report 2019* (Kuala Lumpur: IFSB, 2019), p. 3.

2 The Islamic financial services industry comprises the Islamic banking, Islamic capital and money markets, and Islamic insurance (*takāful*) sectors. For a thorough analysis of these sectors, see M.K. Hassan, R. Kayed, & U.A. Oseni, *Introduction to Islamic Banking and Finance: Principles and Practice* (United Kingdom: Pearson, 2013).

3 See generally, I. Warde, *Islamic Finance in the Global Economy* (Edinburgh: Edinburgh University Press, 2000).

4 I. Bligh-Abramski, 'The Judiciary (*Qādis*) as a Governmental–Administrative Tool inv Early Islam', *Journal of the Economic and Social History of the Orient* 35(1) (1992): 40-71.

5 Z. Hasan & M. Asutay, 'An analysis of the Courts' decisions on Islamic finance disputes', *ISRA International Journal of Islamic Finance* 3(2) (2011): 41-72.

6 A. Zakaria, 'A judicial perspective on islamic finance litigation in Malaysia', *IIUM Law Journal* 21(2) (2013): 143-182.

7 R. Markom & N. Yaakub, 'Litigation as dispute resolution mechanism in Islamic finance: Malaysian experience', *European Journal of Law and Economics* 40(3) (2015): 565-584.

8 F. Cabrillo & S. Fitzpatrick, *The Economics of Courts and Litigation* (Cheltenham: Edward Elgar Publishing, 2018).

when all associated legal risks are well catered for, including choice of law, legal enforceability of the agreement, dispute resolution, and the recourse element in the transaction documents.⁹ Such confidence is required to ensure that financial consumers are well protected against any untoward event relating to their investments. As such, ~~more than 98% of the~~ Islamic finance cases are adjudicated upon by civil court judges who have experience in hearing and determining related commercial disputes.¹⁰ Although the Shari'ah issues that appear in Islamic finance litigation may not be suited for the civil courts, the procedure for inviting expert opinions as well as specific procedures for referrals to a Shari'ah Advisory Council in some jurisdictions such as Malaysia has reinforced the position of civil courts as suitable forums for resolving Islamic finance disputes.¹¹

While relying on a key aspect of the legal and regulatory framework for Islamic finance, this study examines the judicial role in facilitating Islamic finance transactions within the industry through numerous interpretative approaches, fair processes and support directives, which involve a combination of intrinsic and extraneous processes relating to English law and Shari'ah to ensure parties get effective access to justice. This study examines different dimensions and permutations of invaluable judicial support in Islamic financial services and products and identifies specific areas where the judiciary has helped to shape current practices in the industry. While relying on qualitative legal methods with comparative case analysis from England, Malaysia, Qatar and United Arab Emirates, this study conducts cross-jurisdiction case analyses and identifies the role of the judiciary in introducing sustainable practices in the Islamic finance industry.

Against the above backdrop, this article is organised in five major sections. After this Introduction, Section 2 briefly examines the nature of the judicial function in the modern Islamic finance industry and the emergence of Islamic finance litigation as a specialised field. Section 3 identifies the different judicial approaches in dealing with Islamic finance matters coming before the

9 A. Lahsasna, *Shari'ah Non-Compliance Risk Management and Legal Documentations in Islamic Finance* (Singapore: John Wiley & Sons, 2014); also see R. McCormick, 'Legal Risk Management: Red Flags and Risk Scenarios', *Journal of International Banking and Financial Law* 21(2) (2016): 51.

10 U.A. Oseni, *Islamic Finance Litigation: An Empirical Analysis of the Practitioners' Views on Dispute Resolution*, Second Prize Award Paper, 4th Kuala Lumpur Islamic Finance Forum Essay Competition, 4 October 2011, Kuala Lumpur, Malaysia, 2011 (unpublished).

11 M.J. Lee & U.A. Oseni, *IFSA 2013: Commentaries on Islamic Banking and Finance* (Selangor: Malaysian Current Law Journal Sdn. Bhd., 2015).

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courts, while Section 4 identifies areas of major judicial support for the Islamic finance industry and Section 5 provides the conclusion and recommendations.

2 Judicial Function and Islamic Finance Litigation

The socio-economic importance of the judicial function in any society stems from the ability of laymen to have unhindered access to justice to enforce their rights.¹² This overarching function has been recognised in different times and climes. In fact, in the general realm of politics of a particular society, Aristotle described someone who holds the position of a judge as being the personification of justice whose primary role is to mediate between the two disputes, thereby maintaining justice.¹³

2.1 Judicial Function in Islam

In Islam, the importance of the judicial function in society is well documented in the primary sources of Sharī'ah as well as books of principles of Islamic jurisprudence since the inception of Islam in the 6th century.¹⁴ This informed the emergence of specific books on judicial code of conduct written by leading Muslim jurists such as works by Al-Khassaf, Ibn al-Qāss, Al-Māwardī, 'Abd al-Rāfi', and Fadīlāt.¹⁵ The judiciary and its function has been a major organ of the state in Islamic law, as Muslim jurists who wrote extensively on administration of the state such as Al-Māwardī and Abū Yāala dedicated entire chapters of their respective treatises on the judicial function in the state.¹⁶ One unique aspect of the judicial function in most classical *fiqh* books is the inclusion of

12 C. Doyle, 'Consumer Access to Justice: A Comparison of Consumer Class Action Litigation in the United States of America and the Republic of Chile', *Willamette J. Int'l L. & Dis. Res.* 22(1) (2014): 137; also see A. Zuckerman, 'Lord Woolf's access to justice: *plus ça change*', *The Modern Law Review* 59(6) (1996): 773-796.

13 D.C. Mirhady, 'Aristotle and the Law Courts', *Polis: The Journal for Ancient Greek Political Thought* 23(2) (2006): 302-318.

14 There are numerous Qur'ānic legal texts and prophetic legal precedents on justice and the judicial function during the time of the Prophet.

15 A. al-Khassaf, *Adab al-Qāḍī (Commentary by 'Umar b. 'Abd al-Aziz)*, in: F. Ziyadeh (ed.) (Cairo: American University in Cairo, 1978); A. al-Qāss, *Adab al-Qāḍī*, in: H.K. al-Jubūrī (ed.) (Tā'if, Saudi Arabia: Maktabah al-Siddiq, 1989); I. 'Abd al-Rāfi, *Mu'īn al-Ḥukkām 'alā al-Qadāyā wa-l-Aḥkām* (Beirut: Dār al-Gharb al-Islāmī, 1989); and J.M. Fadīlāt, *Al-Qadā fī l-Islām wa Adab al-Qāḍī* (Oman: Dār Ammār, 1991).

16 A. al-Māwardī, *Al-Aḥkām al-Sultāniyyah wa l-Wilāyat al-Diniyyah* (Cairo: Maktabah al-Anjlu al-Misriyyah, 1992); and A. Abū Yāala, *Al-Aḥkām al-Sultāniyyah* (Beirut: Dār al-Fikr, 1974).

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

Among numerous issues that fall under the jurisdiction of the courts, commercial matters and other contractual issues have been adjudicated upon by courts since the advent of Islam. Just like other civilisations such as the Roman civilisation, which gave birth to the modern civil law tradition,¹⁷ and English common law, the Islamic legal tradition recognised and practiced the judicial function over the centuries while relying on fundamental sources of law in its adjudication.¹⁸ Furthermore, unlike the nature of adjudication in the early days and over the centuries in Muslim states, modern courts operate in pluralistic legal systems that are based on English common law, continental civil law, both common law and civil law, or some other legal systems that take their origins from a successive reign of both common law and civil law with some significant element of Islamic law.¹⁹ This is reflected in the different permutations and variations in legal systems across the world since some of the legal systems have undergone legal acculturation or some sort of legal mutation.²⁰

2.2 Prominent Role of the Courts in Dispute Resolution in Islamic Finance

The increasing importance of Islamic finance products has remarkably increased the number of related cases litigated in the courts.²¹ Some contractual arrangements involving Islamic finance products have generated controversies which have sometimes led to protracted litigation.²² The dramatic surge in Islamic finance litigation in the last decade has formidably established this form of litigation as a professional field of practice. Law firms specialising in Islamic finance, whether for consultancy and advisory purposes or litigation, have sprung up across the world from Doha to Dubai, Singapore to South Africa, London to Luxemburg and from Malaysia to Malta. More law firms have

17 G. Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (Switzerland: Springer International Publishing, 2015).
 18 G.M. Āzād, *Judicial System of Islam* (No. 72) (Pakistan: Islamic Research Institute, International Islamic University, 1987).
 19 R. Grassa & K. Gazdar, 'Law and Islamic finance: How legal origins affect Islamic finance development?', *Borsa Istanbul Review* 14(3) (2014): 158-166; and K. Reid, 'The Idea of Mixed Legal Systems', *Tulane Law Review* 78(1-2) (2003): 5-40.
 20 D.S. Clark, 'Legal Systems, Classification of', in: J.D. Wright (ed.), *International Encyclopedia of Social & Behavioral Sciences* (New York: Elsevier, 2015), pp. 799-806.
 21 Hasan & Asutay, *supra* note 5.
 22 U.A. Oseni, 'Dispute management in Islamic financial services and products: A *maqāṣid*-based analysis', *Intellectual Discourse* 23(S) (2015): 377-400.

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established Islamic finance units to advise governments, corporate bodies and private individuals on Shari'ah-compliant transactions and Islamic mortgage products and *takāful*.

It is pertinent to note that Islamic finance litigation came under the lime-light around the twilight of the 20th century, starting with developments in the Malaysian courts, which were as a result of the teething problems the then nascent industry faced. Markom *et al.*,²³ examined the observable trends in the adjudication of Islamic banking and finance cases in the civil courts in Malaysia between 1986 and 2010, a period of dramatic developments in Islamic finance litigation. Although this study is a comprehensive work on the subject matter, its conclusion is that Islamic banking and finance cases should be adjudicated in Shari'ah Courts from the Court of First Instance to the appellate stage. This suggestion, although commendable from an academic perspective, lacks practical implications and application to the current reality of the Islamic financial services industry in Malaysia and elsewhere. It is worth noting that Buang had earlier proposed a similar framework where the Shari'ah Courts could be the appropriate forum for the resolution of Islamic finance disputes.²⁴ In both earlier studies, there was no proposal for court-annexed dispute resolution.²⁵ It is on record that court-annexed alternative dispute resolution (ADR) is increasingly becoming popular in Malaysia with the introduction of Practice Direction No. 5 of 2010 which institutionalised court-annexed mediation that may either be judge-led mediation or court-referred mediation.²⁶ Since all the civil courts in Malaysia have been mandated to apply this as a preliminary step in all cases, the *Mu'āmalāt* Bench has found a better way to resolve its disputes. Through the Practice Direction, the *Mu'āmalāt* Bench can engage the services of expert arbitrators or mediators who are learned in Islamic banking and finance.

Furthermore, in Malaysia, the Court of Appeal had performed excellently over the years in disposing appeals relating to Islamic finance and Shari'ah-compliant transactions emanating from the *Mu'āmalāt* Bench. For instance, all 25 *Mu'āmalāt* appeals registered in 2015, which were brought forward to 2016 were disposed in 2016. Similarly, in 2016, 29 appeals were registered, of

23 R. Markom *et al.*, 'Adjudication of Islamic banking and finance cases in the civil courts of Malaysia', *European Journal of Law and Economics* 36(1) (2013): 1-34.
24 A.H. Buang, 'Islamic Contracts in a Secular Court Setting? Lessons From Malaysia', *Arab Law Quarterly* 21(4) (2007): 317-340.
25 Markom *et al.*, *supra* note 23; Buang, *ibid.*
26 A.M. Ashgar Ali, 'Practice Direction in Mediation', in: M.N. Ishan Jan & A.M. Ashgar Ali (eds.), *Mediation in Malaysia: The Law and Practice* (Kuala Lumpur: LexisNexis, 2010).

which 12 appeals have been disposed.²⁷ The success recorded in the Malaysian courts is a result of the necessary infrastructure put in place to ensure Islamic finance matters are not only resolved expeditiously but also effectively. These include setting up the *Mu‘āmalāt* Bench itself and establishing a procedure for mandatory court referrals to the Sharī‘ah Advisory Council (SAC) on any Sharī‘ah matter during any proceedings before the court.²⁸

In English, and Doha and Dubai courts (Dubai International Finance Centre (DIFC) in particular), there have been instances where the courts were faced with applying Sharī‘ah in Islamic finance disputes. The current position of the law is that the courts may apply Sharī‘ah indirectly.

While the English and DIFC courts will not directly apply Sharī‘ah principles, there are ways in which they can indirectly apply them. In particular: they can apply Sharī‘ah principles that are incorporated in an agreement; they can apply a national law that itself applies Sharī‘ah principles; they can use Islamic law as an aid to construction; and/or they can decide a justiciable issue of IF [Islamic finance] principle on which the rights of a party are conditional.²⁹

It is therefore important to point out that it is possible for the English court to apply Sharī‘ah by incorporation of the principles into the agreement. The English Court of Appeal explained in *Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd.*,³⁰ that the provisions of foreign law can be incorporated into the contract in form of private legislation although this rule is subject to the requirement of certainty. The court must be able to identify with certainty the relevant rules being incorporated by the parties. In *Shamil*, the court suggested that relevant ‘provisions of foreign law or an international code or set of rules’ could be incorporated but such law, code or set of rules must have specific black-letter provisions appropriately codified rather than general principles. Therefore, it is believed an English court may apply incorporated terms

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

28 E.R. Engku Ali *et al.*, ‘Dispute Resolution Mechanisms in the Islamic Finance Industry in Malaysia: Towards a Legal Framework’, *Al-Shajarah* 20(S) (2015): 19-40.

29 R. Reed, ‘The application of Islamic finance principles under English and DIFC law’, *Butterworths Journal of International Banking and Financial Law* 29(9) (2014): 573-577 at 574.

30 [2004] EWCA Civ 19, [2004] 1 W.L.R. 1784, [2004] 4 All E.R. 1072, [2004] 2 All E.R. (Comm) 312, [2004] 2 Lloyd’s Rep. 1, [2004] 1 C.L.C. 216, (2004) 101(8) L.S.G. 29 Times, 3 February 2004, 2004 WL 62027.

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in a contract which are based on a codified Islamic law. In today's Islamic financial services industry, what is obtainable is the Sharī'ah Standards of the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) and perhaps the Ottoman *Mejelle*.³¹

In the DIFC case of *Deyaar Development P.J.S.C. v. Taaleem P.J.S.C. & National Bonds Corporation P.J.S.C.*,³² the Court of Appeal agreed that the *Murābahah* Agreement in question sufficiently incorporated the Sharī'ah Standards of AAOIFI and OIC Islamic *Fiqh* Academy. The court emphasised that: 'on a true construction of the *Murābahah* Agreement, Sharī'ah Standards were incorporated into the *Murābahah* Agreement as they were sufficiently certain. This was because there was sufficient reference and identification of specific aspects of Sharī'ah law'. This important judicial support to Islamic finance through the recognition of codified standards is unprecedented and will further deepen further reforms in the industry. In a way, it might change the negative perceptions of some experts on Islamic finance litigation.

2.3 Islamic Finance Litigation: A Niche for Commercial Lawyers

The judicial support of Islamic finance issues can be better accessed in examining trends in Islamic finance litigation. Therefore, Islamic finance litigation should be understood from the perspective of a whole continuum of dispute resolution processes, which may include court-annexed processes, including arbitration. In an empirical study,³³ it was revealed that 74.5% of Islamic finance practitioners in a survey, including the legal practitioners among them, claimed that they have never been involved in the settlement of an Islamic finance-related dispute, whether directly or indirectly. While a negligible 6.6% have been involved in litigation, 3.8% have been involved in arbitration. In all, the research found that the increasing importance of Islamic finance litigation has blurred the views of many practitioners, particularly the legal experts, who are not ready to seek amicable means for the resolution of disputes in the Islamic finance industry.³⁴ This has created a niche for Islamic finance litigation in both international and domestic commercial litigations. With the growing interest of legal practitioners, economists, finance experts and accountants in Islamic finance, a new global pool of experts is emerging. As for the legal practitioners, an emergent legal system or a major field in legal practice has

31 Reed, *supra* note 29 at 575.
32 [2015] DIFC CA 010.
33 Oseni, *supra* note 10.
34 *Ibid*.

definitely been brought to light. Foster describes it as a ‘rapidly developing transnational legal system’ which many commentators fail to realise.³⁵

3 Judicial Approaches in Dealing with Islamic Finance Disputes

The adjudication of Islamic finance matters in the courts has witnessed different approaches over the years based on the available case law in leading jurisdictions. The ~~four~~ approaches identified are: parties are bound by their agreement; justice and equity of the case; consideration of the substance of the agreement; ~~and~~ consideration of the case as a whole.³⁶ Although in his analysis of the four approaches, Tun Arifin Zakaria, a former Chief Justice of Malaysia, argued that the approaches are those of the Malaysian courts in deciding Islamic finance matters,³⁷ a further probe into the approaches reveal that the English court as well as civil courts in Qatar, Dubai, and elsewhere would also adopt similar approaches. Based on the trends in the English court, this study adds to the list a fifth approach, which is the application of the commercial purpose test.

3.1 *Parties Are Bound by Their Agreement*

The approach which prefers that parties are bound by their express agreement has its origin in Shari‘ah itself, as there is a legal maxim which provides: ‘Muslims are bound by their stipulations [or agreements]’.³⁸ In one of the earliest Islamic finance cases adjudicated by the court in Malaysia, *Tinta Press Sdn Bhd. v. Bank Islam Malaysia Bhd.*,³⁹ the Supreme Court held that parties are bound by their agreement. At such an early phase of Islamic finance litigation globally, there was not much reference to Shari‘ah principles but the court specifically considered the lease agreement and held the parties to be bound by it. This approach is the strict non-interventionist approach where the court focuses on the agreement without necessarily examining other extraneous factors.

35 N.H.D. Foster, ‘Islamic Finance Law as an Emergent Legal System’, *Arab Law Quarterly* 21(2) (2007): 170-188 at 186.

36 Zakaria, *supra* note 6 at 160.

37 *Ibid.*

38 This is contained in a Hadith related by Al-Bukhari, Abū Dāwūd and Al-Hakim and classified *sahih* or sound. See M. al-Bukhari, *The Translation of the Meanings of Sahih al-Bukhari* (M.M. Khan, trans.), (Riyadh: Darussalam Publications, 1997).

39 [1987] CLJ Rep 396/2 MLJ 192.

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During the early period in the history of the Islamic financial services industry, there were no statutory Shari'ah Committees, although Islamic banks and windows had their in-house Shari'ah advisors. Generally, during that period, Islamic financial institutions only received *ad hoc* Shari'ah advisory services from leading scholars. Thus, the courts were proactive in giving full support to Islamic finance contracts that have been duly verified by scholars and executed by the parties. This element of judicial support was very helpful during the early phase of the development of Islamic finance in the 1980s. This is reflected in the position of the court in *Arab Malaysian Merchant Bank Berhad v. Silver Concept Sdn. Bhd.*⁴⁰ where the court established the general principle of rebuttable presumption to the effect that Islamic banking business and Islamic finance contracts generally are presumed to be in order unless and until such presumption is rebutted. It was surmised that such rebuttal could be a formal statement or resolution of the in-house Shari'ah advisory body of the financial institution in question.

3.2 Justice and Equity of the Case

There are situations where the court goes beyond strict legal principles while trying to apply some extraneous legal principles to the matter before it, particularly if the court feels such will serve the ultimate interest of justice and equity of the case. In practice, this is allowed in commercial arbitration when the parties expressly empower the arbitral tribunal to act as such.⁴¹ However, it is rare in judicial proceedings for a judge to apply principles of equity and fairness. However, this commendable role of the judiciary has been seen in some

⁴⁰ [2005] 5 MLJ 210.

⁴¹ Article 28(3) of the UNCITRAL Model Law on International Commercial Arbitration provides: 'The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so'. In the 'Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006', it is explained that: 'Article 28(3) recognizes that the parties may authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiable compositeur*. This type of arbitration (where the arbitral tribunal may decide the dispute on the basis of principles it believes to be just, without having to refer to any particular body of law) is currently not known or used in all legal systems. The Model Law does not intend to regulate this area. It simply calls the attention of the parties on the need to provide clarification in the arbitration agreement and specifically to empower the arbitral tribunal. However, paragraph (4) makes it clear that in all cases where the dispute relates to a contract (including arbitration *ex aequo et bono*) the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction'. UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006* (Vienna: UNCITRAL, 2006), p. 34.

Islamic finance cases in Malaysia. For instance, in *Malayan Banking Berhad v. Ya'kup bin Oje & Anor*⁴² in a case involving the bank facility of Al-Bai Bithaman Ajil (BBA), the court was asked to determine whether the bank was entitled as of right to full profits in the event that the Islamic facility was terminated prematurely. As there were no clear guidelines on rebate for Islamic finance facility from the regulatory authorities at that time, although there were resolutions of SAC, Hamid Sultan J (as he then was) decided to apply the principles of justice and equity while emphasising that: 'Equity in this case applied both to the plaintiff as well as to the defendants'. The judge further emphasised:

When parties enter into Islamic commercial transaction, it is always subject to Qur'ānic injunction to act with justice and equity and there is a need for the parties entering into such commercial dealing to respect Islamic worldview on such transaction; more so in the fairness to ensure that the deal is completed as per the terms and the need to mitigate the breach, taking into A consideration various principles, inclusive of the concept that says that excess profit is not permissible.⁴³

In order to further ensure that he is not going beyond his judicial function, the judge referred to relevant statutory provisions that allow him to apply principles of equity in the case. In the above case, the court prevented the bank from recovering the total amount of profit which it was entitled to had it been there was no premature termination but also held that the customer should pay the outstanding balance owed promptly. The basis of the decision was that apparent injustice which was reflected in the amount the defendant had to pay (RM 167,797.10) compared to the original amount received from the bank (RM 80,065). Such salutary judicial support helped in shaping the future development of the Islamic financial services industry in the country. As a matter of fact, this encouraged the regulatory authority to come up with clear policy guidelines on rebates in Islamic finance facilities.

3.3 *Consideration of the Substance of the Agreement*

It is interesting to note that there are cases where the court had gone beyond the compliance of the parties to the terms of the agreement, including the procedural requirements. The court in those cases had considered the substantive principles of Shari'ah although the court is a civil court with a judge not necessarily trained in Shari'ah. This practice is not so common in the English court,

⁴² [2007] 6 MLJ 389.

⁴³ *Ibid.*, pp. 399-400.

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as the judges had consistently avoided making decisions or given opinions on Shari'ah issues. The Qatari and DIFC courts also avoid scrutinizing Shari'ah issues, but a Malaysian court once considered the substantive Shari'ah principles of the case. In a collective judgment delivered by the court for 11 separate cases involving Bank Islam Malaysia Berhad and Arab Malaysian Finance Berhad, the court held that the BBA is not a *bona fide* sale but a financing transaction that is contrary to the relevant Islamic banking laws in the country. In the case, *Arab-Malaysian Finance Bhd. v. Taman Ihsan Jaya Sdn. Bhd. & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)*,⁴⁴ the court went into the analysis and definitions of 'Islam', 'Muslim', and '*Madhāb*', and concluded that:

This court holds that where the bank purchased directly from its customer and sold back to the customer with deferred payment at a higher price in total, the sale is not a *bona fide* sale, but a financing transaction, and the profit portion of such Al-Bai' Bithaman Ajil facility rendered the facility contrary to the Islamic Banking Act 1983 or the Banking and Financial Institutions Act 1989 [now repealed and replaced with Islamic Financial Services Act 2013] as the case may be.⁴⁵

Although the decision was reversed at the Court of Appeal, the above case is a clear example where the court goes into the substantive part of the agreement and attempts to interpret Shari'ah issues. Similar practice was experienced in *Affin Bank Berhad v. Zulkifli Abdullah*,⁴⁶ where the court took a step further to calculate the amount of profit the bank would have earned up to the date of the final judgment of the court. The foregoing analyses on the judicial approach to the construction of Islamic finance agreements revealed some glimpse into how a court delves into the substance of the dispute by addressing Shari'ah issues in the case with the intention of ensuring fairness in the final decision of the court. This approach is generally referred to as the *interventionist approach* although it is considered by some as eroding the sacrosanct principles of judicial impartiality and neutrality. One could however argue that, in complex Islamic finance cases such as cross-border *shukūk* transactions, the interventionist approach may be more appropriate to dissect every relevant fact of the case and address all issues raised in the interest of justice and fairness. Although the non-interventionist approach seems to be the prevailing model in the English court, the court's decision in the *Shamil* case

44 [2008] 5 MLJ 631.
45 *Ibid.*, p. 659.
46 [2006] 4 MLJ 1.

showed that the court may adopt the interventionist approach when the facts require it to do so.⁴⁷

3.4 Consideration of the Case as a Whole

The approach of considering the case as a whole is based on the premise that it is usually a difficult challenge for the court to exercise its judicial function in applying positive law to Islamic finance transactions. In *Bank Kerjasama Rakyat Malaysia Bhd. v. Emcee Corporation Sdn. Bhd.*,⁴⁸ the court held:

The facility given by the appellant to the respondent was an Islamic banking facility. But that did not mean that the law applicable in this application was different from the law applicable if the facility was given under conventional banking. The charge was a charge under the National Land Code. The remedy available and sought was a remedy provided by the National Land Code. The procedure is provided by the Code and by the Rules of the High Court 1980. The court adjudicating it was the High Court. Therefore, the same law was applicable, the same order that would be, if made, and the same principles that should be applied in deciding the application.⁴⁹

The holistic approach to a case as established above has also been upheld in *Tan Sri Khalid Ibrahim v. Bank Islam Malaysia Berhad*⁵⁰ and in the more recent case of *Maybank Islamic Bhd. v. M-IO Builders Sdn. Bhd. & Anor.*⁵¹ In the latter case, the court was faced with a question ‘whether a contract which did not comply with Shari’ah on one hand, but in compliance with the law of contracts on the other hand, would be legally enforceable’.⁵² The court therefore held:

The purported non-compliance with the *murābahah* principles did not render the contract illegal and unenforceable. The validity of the contract in this case should be viewed from the law that generally governs the contract between parties in this country. The provisions of the Contracts Act 1950 still govern Islamic contracts. The MOD facility agreements were not one that could be avoided under s 24 of the Contracts Act nor an illegal

47 Zakaria, *supra* note 6 at 156.

48 [2003] 1 CLJ 625.

49 *Ibid.*

50 [2012] 3 CLJ 249.

51 [2017] 2 MLJ 69.

52 *Ibid.*, p. 82.

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contract under s 25 and therefore remained an enforceable agreement and had to be adhered to.⁵³

In most cases, the holistic approach allows for a fair consideration of the case before the court, as fairness to both parties requires that once a party has benefitted from a facility, such a party cannot later plead non-compliance as a defence. Islamic finance customers cannot enjoy the benefits of an Islamic finance facility from a bank and later claim it is not Shari'ah compliant when they default. A party cannot approbate and reprobate at the same time; hence, the maxim *qui approbat non reprobat* [one who approbates cannot reprobate or he who ratifies cannot repudiate] is firmly embodied in English common law.⁵⁴

3.5 Application of the Commercial Purpose Test

The application of commercial purpose test by the courts in deciding cases before them is well documented in many English cases. As held recently in the Australian case of *Ecosse Property Holdings Pty Ltd v. Dee Gee Nominees Pty Ltd*⁵⁵ in interpreting ambiguous clauses in agreements, the court places greater weight on presumed commercial purpose of the underlying agreements than the language used or adopted by the parties. In *US Bank Trustees Ltd v. Titan Europe 2007-1 (NHP) Ltd.*,⁵⁶ the court observed:

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

Therefore, as held in *Rainy Sky v. Kookmin Bank*⁵⁷ where any term of a contract is subject to more than one interpretation, it is appropriate to adopt the interpretation which is most consistent with business common sense or such interpretation that serves the commercial purpose of the original intention of the parties.

53 *Ibid.*, p. 83.
54 H.C. Black, *A Law Dictionary Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 2nd edn. (Clark, NJ: The Lawbook Exchange Ltd., 1995), p. 978.
55 [2017] HCA 12.
56 [2014] EWHC 1189 (Ch), at [25].
57 [2011] UKSC 50, at [30].

It appears that the English court also gave judicial support to the above principle where the court held the parties to be bound by their agreement despite the insistence by a party that the underlying *murābahah* agreements were not Shari‘ah compliant. In the often-cited *Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd.*,⁵⁸ the Court of Appeal held that the court should lean against a construction which would defeat the commercial purpose of the agreements. The Appellate Court dismissed the appeal and affirmed the decision of the High Court while emphasising that the reference to ‘Shari‘ah law’ in the governing law clause was a mere reference to the fact that *Shamil Bank* conducts its business in accordance to Shari‘ah principles. The court further observed that the sole interest of *Beximco* was to obtain advances of funds and Shari‘ah was not supposed to be an issue in the interpretation of the governing law clause and such law should not necessarily have any impact on the validity of the agreements. Therefore, the court gave effect to the commercial purpose of the agreements, which was mainly to obtain advances of funds.

4 Major Judicial Support for the Islamic Finance Industry

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

4.1 Encouraging Amicable Settlement in the Interest of the Parties

There are situations where the judge encourages the parties to explore amicable settlement, which reflects the original practice in Islamic law where the judge is conferred with the inherent powers to settle a case before the court amiably if he/she deems fit. In Islamic law, the judge ‘is endowed with multiple roles with a largely inquisitorial justice system, and the roles of mediator and conciliator are included amongst them’.⁵⁹ In addition, provisions for recognition and enforcement of awards in Islamic law clearly require that for the purpose of enforcement, an award should be referred to the judge. The

⁵⁸ [2004] EWCA Civ 19, [2004] 1 W.L.R. 1784, [2004] 4 All E.R. 1072, [2004] 2 All E.R. (Comm) 312, [2004] 2 Lloyd’s Rep. 1, [2004] 1 C.L.C. 216, (2004) 101(8) L.S.G. 29 Times, 3 February 2004, 2004 WL 62027.

⁵⁹ A. Othman, “An Amicable Settlement is Best”: *Ṣulh* and Dispute Resolution in Islamic Law’, *Arab Law Quarterly* 21(1) (2007): 64-90.

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implication of this is that the judge is involved in the process.⁶⁰ It is either the judge who earlier referred such a case for arbitration or the disputing parties who independently appointed a third-party neutral as an arbitrator to resolve the matter.

In a rather unique proceeding, the court at the QICDRC was faced with a preliminary objection relating to the jurisdiction of the court in *Daman Health Insurance Qatar LLC v. Al Bawakir Company Ltd.*⁶¹ where it decided it had jurisdiction but encouraged the ‘parties to settle the dispute without further recourse to the court’ since the defendant accepted that it owed the claimant and the claimant had signified interest that it will accept the settlement sum. In a similar vein, there is also some indications that the much-awaited decision of the Federal Court of Malaysia on the powers of the SAC with regards to Shari’ah matters referred to them by the court was settled out of court. In *Tan Sri Khalid Ibrahim v. Bank Islam Malaysia Berhad*,⁶² the appellant questioned why the decision of the SAC should be binding on the court and argued that the court in a way had abdicated from its judicial responsibility if judicial powers were to be conferred on another quasi-judicial body. The case was pending before the Federal Court but the issue was never determined, as it is believed that the parties settled out of the court due to its sensitive nature and its potential impact on the entire Islamic financial services industry in Malaysia. It is generally believed that the judges at the apex court encouraged the parties to settle out of court.⁶³ This benign role of the court in encouraging the parties or even supporting the parties who signify the intention to settle amicably was emphasised by Vincent Ng J. in *KTL Sdn. Bhd. v. Azrahi Hotels Sdn. Bhd. (formerly known as Virtual Amber Sdn. Bhd.); Advance Hotels Supplies (M) Sdn. Bhd. & Anor, Supporting Creditors*,⁶⁴ thus:

Modern day courts, in this era of rapid development are lumbered with an ever-increasing backlog of cases [...]. Thus, in the interests of justice and good grace a defendant’s or respondent’s request for an adjournment of the hearing to another date to settle the matter amicably ought to be

60 A. al-Khallaf, *Adab al-Qāḍī (Commentary by ‘Umar b. ‘Abdul-Azīz)*. (A. al-W. al-Afghānī & A.B.M. al-Hāshimī (eds.) (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1994), pp. 481-486.
61 Case No. 04/2017. Judgement delivered on 13 July 2017.
62 [2012] 3 CLJ 249.
63 S.M. Kamal (2014, February 14), ‘Khalid confirms out-of-court settlement with Bank Islam for undisclosed sum’, *Malaymail Online*, 14 February 2014, available at: <http://www.themalaymailonline.com/malaysia/article/khalid-confirms-out-of-court-settlement-with-bank-islam-for-undisclosed-sum>, accessed 20 February 2014.
64 [2003] 5 MLJ 503 at 508.

allowed; but allowed on terms such that the court’s time is not wasted in permitting the latter party to renege on his promise to settle, especially after being given reasonable time – nay, such time as requested – to settle.

Therefore, the judicial support for Islamic finance should be understood from the perspective of quasi-judicial mechanisms available to resolve Islamic finance matters. For instance, in Malaysia, the court-annexed dispute resolution framework is called Kuala Lumpur Court Mediation Centre (KLCMC) which, among others, provides for mediation of Islamic finance cases by judicial officers in their capacity as mediators to ensure amicable settlement of disputes. The judicial support to mediation and arbitration involving Islamic finance disputes is similar to the general practice in commercial dispute resolution. This is recognised in the UNCITRAL Model Law and it is considered best practice for the courts to benignly facilitate mediation and arbitral proceedings.⁶⁵

4.2 Recognition and Enforcement of Foreign Arbitral Awards

There are several cases where the court had referred the parties to mediation or arbitration during the course of the proceedings. In addition, the court is the proper forum for the recognition and enforcement of foreign arbitral awards. For any foreign award to be enforced in a particular jurisdiction, there is a need for filing of such decision in the competent court for its recognition and enforcement subject to the procedural requirements of each jurisdiction. Given the unique nature of cross-border Islamic finance transactions such as *sukūk* and their multijurisdictional nature where the transaction documents are governed by different laws. For instance, the International Islamic Centre for Reconciliation and Arbitration’s (IICRA) ‘arbitral award in a case involving *iğārah muntāhiyah bi t-tamlīk* (lease contract ending with ownership or financial lease) between an Islamic bank and an individual foundation based in Sharjah was recognised and enforced by a Sharjah Court in its judgment No. 953/2013 on 16 March 2014’.⁶⁶ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention), aptly provides for a framework for common legislative standards for the recognition and enforcement of foreign arbitral awards. Both the DIFC and Qatar Financial

65 P. Binder & J. Sekolec, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (London: Sweet & Maxwell, 2005); also see UNCITRAL, *supra* note 41.

66 IICRA, ‘*Maḥākīm Imārah al-Shāriqah ta’tamid aḥkām al-markaz al-Islāmī al-duwalī lil-muṣālahah wa-l-taḥkīm*’, available at: <http://iicra.com/ar/news/detail/3c3e586123>, accessed 19 July 2015; also see U.A. Oseni, ‘Dispute resolution in the Islamic finance industry in Nigeria’, *European Journal of Law and Economics* 40(3) (2015): 545-564.

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Centre (QFC) arbitration laws are based on the UNCITRAL Model Law which also provides for the recognition and enforcement of foreign arbitral awards.

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One of the most significant judicial support for the development of Islamic finance is the refusal to recognise and enforce a foreign arbitral award which contains interest (*ribā*) on the ground of public policy.⁶⁷ Since *ribā* is prohibited in Islamic finance transactions, even in judgment debt, Qatari courts have refused to recognise and enforce foreign awards containing interest elements. However, actual financing charges incurred may be recovered after proper valuation has been made. Malaysian courts do not also award interest in judgments but have introduced Shari'ah-compliant modes of computing financing charges and compensation through the principles of *ta'wīd* (compensation) and *garamah* (penalty) introduced in the Rules of Court 2012. Similarly, the influence of the judiciary in refusing to award interest has also been felt in the drafting of Islamic finance contracts where parties now expressly waive interest. In practice, a common boilerplate clause in most Islamic finance contracts states:

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

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

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

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⁶⁷ Article 34(2)(b)(ii) of the UNCITRAL Model Law provides that a foreign arbitral award may be set aside by the court on the ground the award is in conflict with the public policy of this State.

to side-track the rule.⁶⁸ The concept of judicial precedent is often expressed as *stare decisis*, which means stand by what has been decided.⁶⁹ Islamic finance cases are not free from the doctrine of judicial precedent. The doctrine is necessary for the predictability of the legal system. When a judgment is handed down by a court, its binding effect has ripple effects in the overall industry because future contracts must be structured in line with such decision and future cases must be decided in light of the decision.⁷⁰

A typical example of the reliance on binding precedents in Islamic finance is the usual defence from Islamic finance consumers who have defaulted in payments that the underlying Islamic finance facility is not Shari'ah compliant. There is an emerging trend in Islamic finance litigation where defaulting customers raise a defence during legal proceedings, and such defence relates to the certainty-doubt conundrum. This 'Shari'ah defence' is mainly used in raising doubts about Shari'ah compliance of the Islamic finance facility. The English courts as well as the Malaysian courts have been very consistent in ensuring justice and fairness between the customer and the Islamic bank. The 'Shari'ah defence' which is often regarded by the courts as 'a lawyer's construct' in Islamic finance has its historical antecedents in one of the earliest English case involving an Islamic facility, *Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd and others*.⁷¹ This was later re-emphasised in the Court of Appeal decision in *Beximco Pharmaceuticals Ltd & Ors v. Shamil Bank of Bahrain EC*,⁷² where the earlier decision of the lower court was upheld and such Shari'ah defence was considered as a mere 'lawyer's construct'. A similar issue was also raised in *The Investment Dar Company KSCC v. Blom Developments Bank SAL (Rev 1)*.⁷³ Many similar cases of recovery of funds advanced by Islamic banks to bank customers have also appeared in courts of leading jurisdictions such as Malaysia and United Arab Emirates. It is interesting to note that the courts in such jurisdictions followed the decisions in the English courts. This is the beauty of judicial precedents which may either be

68 R.J. Kozel, 'Stare Decisis as Judicial Doctrine', *Washington and Lee Law Review* 67(2) (2010): 411-466.

69 J. Knight & L. Epstein, 'The Norm of Stare Decisis', *American Journal of Political Science* 40(4) (1996): 1018-1035.

70 U.A. Oseni & M.K. Hassan, 'The Dispute Resolution Framework for the Islamic Capital Market in Malaysia: Legal Obstacles and Options', in: M.K. Hassan & M. Mahlknecht (eds.), *Islamic Capital Markets: Products and Strategies* (Oxford: John Wiley & Sons, Ltd., 2011).

71 [2003] All ER (D) 25 (Aug).

72 [2004] EWCA Civ 19.

73 [2009] EWHC 3545 (Ch).

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authoritative or persuasive in nature and have had so much impact on the development of modern practice of Islamic finance.

In the landmark case of *Dana Gas PJSC v. Dana Gas Sukuk Ltd.*,⁷⁴ the claimant brought a claim against the defendant where the questions before the court related to the alleged unenforceability of a *murābahah* agreement which was governed by the laws of the United Arab Emirates, and the validity and enforceability (or otherwise) of the Purchase Undertaking under the English Law. After a series of interlocutory applications in the English court and similar proceedings in the Sharjah court in UAE, which both included anti-suit injunctions and the joinder of parties applications from some investors, a situation of conflict of laws arose where the English court rulings were declared unenforceable in the UAE. Nevertheless, the English court ruling was quite instructive and supportive of the global *ṣukūk* market, as any contrary decision would have cast doubt on all outstanding *ṣukūk* in the market. A huge reputation risk was avoided through the position upheld by the English court as emphasised in Legget J.'s judgment as follows:

I conclude that, even on the assumptions made for the purpose of the preliminary issue, all the grounds on which Dana Gas has sought to challenge the validity and enforceability of the Trustee's rights under the Purchase Undertaking to oblige Dana Gas to pay the Exercise Price are unfounded. Accordingly, I will make a declaration that the Purchase Undertaking is valid and enforceable in accordance with its terms.⁷⁵

Thus, the English court gave effect to the agreement of the parties which is a fundamental principle under the Islamic contract law. In the Purchase Undertaking for the transaction, all parties entered into it with the assumptions that the Mudarabah Agreement was lawful and enforceable under UAE law, and that the Sale Agreement could be lawfully made and considered valid and effective. It is instructive to note that all the transaction documents were approved by renowned Shari'ah scholars. The claim of invalidity only arose after Dana Gas could not fulfil its duties under the transactions documents. Therefore, the claim of non-Shari'ah compliance and unenforceability may be considered a 'lawyer's construct' as explained above.

In order to avoid the uncertainties around, and bad publicity generated by, the plethora of suits in different courts, and the consequential reputation risk

74 [2017] EWHC 2340 (Comm).
75 [2017] EWHC 2928 (Comm), para. 86.

on the global *shukūk* market, the shareholders of Dana Gas unanimously agreed on 21 June 2018 to a consensual *shukūk* restructuring of the USD 700 million *murābahah shukūk*. As a direct response to the Dana Gas case, lawyers drafting debt capital market documentation have introduced a clause as part of the boilerplate clauses in transaction documents. The clause is known as ‘Shari’ah compliance’ in *shukūk* documentation. For instance, in a Purchase Undertaking, the following clause now appears as a boilerplate clause:

To the extent permitted by law, [Trustee] hereby agrees that it has accepted the *Shari’a* compliant nature of the Transaction Documents to which it is a party and further agrees that:

- (a) it shall not claim that any of its obligations under the Transaction Documents to which it is a party (or any provision thereof) is *ultra vires* or not compliant with the principles of *Shari’a*;
- (a) it shall not take any steps or bring any proceedings in any forum to challenge the *Shari’a* compliance of the Transaction Documents to which it is a party; and
- (b) to the extent permitted by law, none of its obligations under the Transaction Documents to which it is a party shall in any way be diminished, abrogated, impaired, invalidated or otherwise adversely affected by any finding, declaration, pronouncement, order or judgment of any court, tribunal or other body that the Transaction Documents to which it is a party are not compliant with the principles of *Shari’a*.

The above precedents have influenced the current practice in legal documentation in Islamic finance with the inclusion of a fundamental clause in Islamic finance agreements which seeks to waive any form of ‘Shari’ah defence’ in the event of a dispute. The right to bring a ‘Shari’ah defence’ is now explicitly waived in drafting Islamic finance agreements where the customer undertakes not to raise any defence relating to Islamic principles underlying the transactions in the event of default in payment. This clause is important as it seeks to ensure certainty of the transaction.⁷⁶ It is common to read this proviso in standard Islamic finance agreements, that the borrower, ‘waives all and any defences based on Shari’ah law’. Since there are various juristic interpretations

⁷⁶ K. Bälz, ‘Islamic Financing Transactions in European Courts’, in: S.N. Ali (ed.), *Islamic Finance: Current Legal and Regulatory Issues* (Cambridge, MA: IFP Harvard Law School, 2005).

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of different aspects of Islamic financial transactions, raising a defence, which may be legitimate, will jeopardise the entire transaction; hence, once a transaction has been certified by a competent Shari'ah board and the parties to the agreement have agreed to the terms of the contract, a 'Shari'ah defence' cannot be raised later in the event of a default of payment.

5 Conclusion and Recommendations

It is impossible to discountenance the pivotal role of the judiciary in shaping the Islamic finance industry. Moving forward, one would envisage a situation where there is a formal integration of the process of dispute resolution to enhance the adjudication of Islamic finance dispute and provide a platform where parties have effective access to justice. The whole continuum of dispute management starts from the structuring and drafting process where great care is taken to ensure potential legal risks associated with the rights, duties and obligations of parties are well clarified in the transaction documents. This is considered part of the dispute avoidance mechanisms. Subsequently, the dispute resolution processes should be well considered to include sustainable processes such as mediation and arbitration before exploring litigation. In practice, particularly in cross-border *ṣukūk* and corporate commodity *murābahah* transactions, there is a general tendency to defer court adjudication of disputes emanating from such Islamic finance transactions based on the *Scott v. Avery* case.⁷⁷ Nevertheless, as demonstrated above, whether court intervention is contractually deferred or not, the court is the ultimate forum for dispute resolution in Islamic finance. The jurisdiction of the court, whether civil or Shari'ah, to hear and determine an Islamic finance dispute cannot be ousted but it may be delayed through a two- or three-tiered dispute resolution clause in the Islamic finance contracts.

Finally, the judicial function in the Islamic finance spectrum should also be understood from its numerous roles in supporting developments in the Islamic financial services industry. The courts have demonstrated that the judiciary can and had supported Islamic finance in different ways. Some of the ways demonstrated in this study include the purposive interpretation of contracts,

⁷⁷ A *Scott v. Avery Clause* is a clause within an agreement where the parties agree to submit any dispute between them to arbitration as a preliminary step before exploring the option of a court action. It does not exclude but only differs the option of litigation as a last resort since parties cannot by a contract oust the jurisdiction of the courts. This principle was established in the case of *Scott v. Avery* (1865) 5 HL Cas 11.

recognition and enforcement of foreign arbitral awards and judgments, consistency and predictability of outcomes, legal risk mitigation, and facilitation of mediation and arbitral proceedings, thereby positively reshaping the future of Islamic finance industry. In addition, the availability of binding judicial precedents, which is hitherto not common for Islamic law matters, is a welcome development in the Islamic finance industry. Since the industry is still evolving, more judicially inspired reforms will be felt in the coming years and decades.

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