

Towards Our Own *Lex Mercatoria*: A Need for Legal Consensus in Islamic Finance

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ABSTRACT

Lacking in terms of personal *lex mercatoria* governing the cross border transactions in Islamic finance may lead to uncertainty in trade financing. Global Islamic finance is faced with many unresolved issues that demand urgent attention from all parties involved. One of the pressing issues is the lack of standardisation to face globalisation within the industry. An attempt is made herein to propose a few options in having legal consensus towards the creation of *lex mercatoria* in Islamic finance. This paper proposes that, as the global market continues to increase and as interest in Islamic finance grows around the world, there is a compelling need to make future developments of the industry smoother by having its own treaties, conventions and model laws which form the basic financial instruments in order to avoid possible conflict and gain public confidence.

Keywords: Globalisation, international convention, international treaties, Islamic finance, *lex situs*, *lex contractus*

INTRODUCTION

The decision in Shamil Beximco's case failed to reflect the sanctity of Shariah law observation as the content in Art 5 of UCP600 on letter of Credits does not follow the tenets of Shariah. In light of that, Islamic Finance trades are riding on the existing

conventional *lex mercatoria*. Malaysia and other MENA regions, under the initiative of MIFC have developed standards that are merely guidelines with no binding effects. *Lex mercatoria* is defined as merchantile law. As part of *lex mercatoria* or merchant law, having Islamic finance as a separate *lex mercatoria* is pivotal. Legal Consensus means an agreement among the players to ensure the legal certainty in the industry. The well known *lex Mercatoria* was originally developed as a body of rules and principles

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among the European traders to regulate their dealings. The covenant covers usages and customs which are common to merchants and traders in Europe¹. It also includes finance and banking areas. *Lex mercatoria* is the Latin expression for a body of trading principles used by merchants throughout Europe in the medieval times. Meaning literally “merchant law”, it evolved as a system of custom and best practice, which was enforced through a system of merchant courts along the main trade routes. It functioned as the international law of commerce.

It emphasised contractual freedom, alienability of property, while shunning legal technicalities and deciding cases *ex aequo et bono*². The concepts also flow from the problem that civil law was not responsive enough to the growing demands of commerce that was in need for quick and effective jurisdiction, administered by specialised courts. The guiding spirit of the merchant law was that it ought to evolve from commercial practice, respond to the needs of the merchants, and be comprehensible and acceptable to the merchants who submitted to it. International commercial law today owes some of its fundamental principles to the *lex mercatoria* as it was developed in the medieval ages. This includes choice of arbitration institutions, procedures, applicable law and arbitrators, and the goal to reflect customs, usage and good practice among the parties.

One of the challenges in Islamic financial services industry is to develop financial services and instruments that

are Shariah compliant, commercially viable, valid and enforceable based on the prevailing governing laws³. Even in the Middle East, where the legal system is much more sensitive to Shariah, other issues arise. In Saudi Arabia, which uses Shariah as the only basis for its legal system, Islamic banking disputes are dealt with by a central bank panel, not a Shariah court. This was because of a view that the court may be expert in Shariah, but judges are often not expert enough in banking.

METHODOLOGY

This research is primarily based on primary sources of data. Islamic finance trade laws are still riding on the conventional trade conventions. Hence, few UNCITRAL Conventions were analyzed to best suit the practice of mercantile law in Islamic finance. The other main reference refers to the treaties employed in the United Nations Treaty Collection, such as treaties, agreements, conventions, charters, protocols and declarations. The methodology adopted included examination of specific cases decided pertaining to Islamic finance mainly decided in English courts and Malaysian cases were taken for comparative purposes.

THE NATURE OF INTERNATIONAL COMMERCIAL TRANSACTION

From a legal point of view, trade finance transactions can be particularly challenging when instead of dealing with one set of laws, there are a few sets of law involved- the law of both contracting parties and international laws or rules. In international commercial

law, it involves at least four distinct areas of law. The first is the law of contract. It provides the rules for interpreting the intention of both parties to the contract and fills in any gaps that the parties may leave out. The second issue is the payment system. By providing an alternative payment mechanism the law in this area provides the choices for the parties as to how to minimize the risk of nonperformance. The third area of concern is the security of the transaction. The fourth concern in international law is the bankruptcy law. It sets out various rights of conflicting investors when there is a fall out, financial distress and undermines the future deployment of the sets traded. Here is a brief list of international rules or laws that may affect international trade finance transaction:

- i. The Uniform Customs and Practices for Documentary Credits (UCP 600)
- ii. The Uniform Rules for Collections (URC)
- iii. The UNIDROIT Convention on International Factoring
- iv. The Ottawa Convention of 28 May 1988
- v. The Uniform Rules for Demand Guarantees
- vi. UNCITRAL Convention on Independent Guarantees and Stand-by Letters of Credit
- vii. Article VIII(2)(b) of the Articles of Agreement of the IMF (currency exchange rule)

All of these international rules or laws are governed by the common law and

conventionally recognized at international parlance. In order to penetrate the international market, Islamic finance has to ensure compliance on these laws.

JUSTIFICATIONS OR RATIONALE FOR HAVING OUR OWN LEX MERCATORIA AND LEX CAUCUS

Why do we need our own *Lex Caucus* or law of our own? This small part will explain the justifications on having the above propositions due to few anomalies in Islamic finance. The legal and judicial framework of Islamic finance lies within the Conventional Civil structure.

i) Cross border obstacle

Cross Border obstacles deals with the followings;

- a. Conflict of jurisdiction
- b. Conflict on choice of laws
- c. Pacta servanada Rule
- d. Party Autonomy Rule
- e. Dispute settlement mechanism

Party autonomy Rule is emphasised by Lord Atkin that “the proper law of the contract is the law which the parties intended to apply”. (R. v. International Trustee for the Protection of Bondholders A/G. [1936] 3 All E.R. 407 (C.A.); [1937] A.C 500 (H.L.) Pacta Sunct Servenda means Promises must be kept. It is *An expression signifying that the agreements and stipulations of the parties to a contract must be observed. Conflict of Law Choice maintains two important ingredients as follows;*

- i. *Lex loci contractus* (law of the place where the contract is made);
- ii. *Lex loci solutionis* (law of the place where performance of the contract is due).

lex loci contractus may not be suitable for the contracting parties from different countries; for example, one is from China and the other from Indonesia, and they agree in London to sell property situated in Malaysia. There is no closest connection to say that English law is to prevail. To apply *Lex loci solutionis* may not be appropriate when the parties' respective obligations may take place in different countries, which would mean that their respective obligations would be governed by different laws. In the Amin Rasheed case, Lord Wilberforce held that "in the absence of a choice of law it is necessary to seek the system of law with which the contract has its closest and most real connection." As opposed to the decision in Amin Rasheed that English law prevailed, it is submitted that the term "closest and most real connection" of the transaction should be determined by a "system of the chosen law" chosen by the parties and not by the law of the country where the case is being heard.

ii) *Contradiction of Principles among the English Judges*

Dispute Settlement mechanism may trigger some point of dissatisfaction due to limited avenues among the traders and the merchants opt for the English court to hear their disputes. *Shamil Bank of Bahrain v Beximco Pharmaceuticals*

Limited and Others [2004] 2 Lloyd's Rep 1 involved a *Murabaha* Agreement. In that case, there was a payment default by the defendants. The Agreement contained the following wording regarding the choice of law "*Subject to the principles of Glorious Shariah, this agreement shall be governed by and constructed in accordance with the laws of England.*" The Appeal Court held that "there could not be two separate systems of law governing the contract". Statute in the UK only contemplates the choice of the law of a country to govern contractual obligations. Whilst it is possible to incorporate specific provisions of foreign law into an English law contract (subject to certain limited restrictions), this Agreement referred to Shariah law in general and not to any specific provision that was intended to be incorporated. Principles of Shariah, it was pointed out, are not simply principles of law but relate to other aspects of life and behaviour and, in any event, are susceptible to differing interpretations depending upon the strictness with which they are interpreted or applied. Furthermore, it was said that it was highly unlikely that the parties had intended that English Court should determine any dispute as to the nature or application of religious principles. English Courts, in other words, determine disputes on the basis of English law (although there may be occasions where they also accept expert evidence of foreign law, this will be the law of a country and not religious law).

According to the art 3(1) of the Rome Convention on the Law Applicable to Contractual Obligations 1980, the parties

chose English law to be the governing law of agreement because Shariah is a non-national system of law. In any event, the convention will not permit a situation where two laws simultaneously govern the question of the enforceability of a contract. Firstly the judge remarked that the defenses were methods used by the defendants to get out of paying what was due from them. On deeper analysis the judge Morison J, stated (obiter dicta) if the court were concerned with the application of Shariah law and its impact on the lawfulness of the agreements, then the judge would require further investigation. There was an arguable case as to whether in a contract in conflict with Shariah law, there could be any recovery of any sum at all. The judge held that there cannot be two governing laws. A contract governed by English law may incorporate rules of another law, but clear words would have to be used. It could not have been the intention of the parties that it would ask a secular court to determine principles of law derived from religious writings of matters of great controversies. This is especially so when the bank has its own religious board to monitor the compliance of the bank with the board's own perception of Islamic principles of law in an International banking context.

Few cases involving Islamic Finance contracts have come before the English Courts but where they have, the Courts have traditionally been reluctant to examine issues of Shariah compliance when looking at the enforceability of an English law contract. However, in a recent High Court decision, it was held that there was an arguable case

that a Wakala (agency) agreement did not comply with Shariah law and was therefore void. Summary judgment was denied to the Claimant bank on this issue and the Islamic Investment Company in question will be able to run this argument at trial.⁴

There is no suggestion in this recent case that the English Courts will do anything other than look at English law when construing the terms of an English law document (the decision in *Shamil Bank v Beximco* will therefore be followed) and they will not, therefore, say that a document is unenforceable because it does not comply with some aspect of Shariah law (particularly since this is open to differing views). However, they might entertain an *ultra vires* argument if evidence is adduced that this is relevant as a matter of the law of incorporation of the Defendant.

iii. The Arbitrator's decision.

In the case of Petroleum Development (Trucial Coasts) Ltd. v. Sheikh of Abu Dhabi, Lord Asquith acted as an arbitrator in a dispute arising out of a contract executed in Abu Dhabi.⁵ He acknowledged the law of Abu Dhabi was based on Islamic law, but refused to apply the law because, according to him, "it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments." He described the ruler of Abu Dhabi as an absolute monarch who administers a "purely discretionary form of justice with some assistance from the Koran." After analyzing the choice of law issue, the

arbitrator relied instead on the principles of English law and ignored the Shariah law *in toto*. The same conclusion has been applied in the Ruler of Qatar v. International Marine Oil Co. Ltd.⁶ The arbitrator in the Ruler of Qatar case made a clear statement as to his belief concerning the inadequacy of Islamic law. After acknowledging that Islamic law was the proper law to apply, he stated that it does not “contain any principles which would be sufficient to interpret this particular contract.” Both arbitrators did not rationalize the decision of refusing Islamic law.

THE MALAYSIAN SCENARIO

Even though Malaysia is known as the hub for Islamic Finance, the conflict of jurisdiction and legal framework of Islamic finance in determining the skirmish between the Civil courts and Shariah courts have been long debated. The debate is based on the nature of the structural law in Malaysia. The Islamic finance cases are decided in Civil courts and not in Shariah court. This is due to the fact that the Civil Courts jurisdiction laid down in List 1 (Federal List), of the 9th Schedule of Federal Constitution shall include civil, criminal procedures, contracts, *lex mercatoria*, (*lex mercatoria* inclusive of banking and financial laws) arbitration, etc and the administration of justice. In contrast, the Shariah Court’s jurisdiction is laid down in Para 1 of List 11 (State List) of the 9th Schedule of the Federal Constitution. Para 1, in essence laid down the matters under the state list inclusive of family law, personal law, religion of Islam, divorce, *waqf*,

succession, offences against the religion of Islam (except which falls under the Federal Law). The amendment made to Article 121(1A) later declared that Civil Courts have no jurisdiction over matters within the jurisdiction of the Shariah courts. The amendment is to grant exclusive jurisdiction to Shariah Courts in the administration of Islamic laws. In other words article 121(1A) is the proviso to prevent conflicting jurisdictions between the civil courts and the Shariah courts. Many have argued that Islamic finance matters falls under the text of *lex mercatoria*. The term of “Islamic law” in Para 1, List 11 of the Ninth Schedule in Federal Constitution covers a wider interpretation. It was construed as a person professing the religion of Islam. Furthermore many commentaries on this issue propose that the list only applies to a person professing the religion of Islam and ignores the issue on Islamic law written in the same List.

Thus, it has no general application to other persons and legal persons⁷ such as banks and financial institutions who cannot be construed as professing the religion of Islam. Section 2 of the IBA however defines Islamic Banks as any company which carries out Islamic Banking business which is defined as any operations which do not involve any elements not approved by the religion of Islam.⁸ The scope is very comprehensive and includes banking and the constitution, organization, jurisdiction and powers of all courts other than Shariah courts and native customary courts. List II in the State List provides for the constitution,

organization and procedure of Shariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included which exclude Islamic banking.

Currently, the application of English law in Malaysia is based on the provisions of Section 3 and 5 of the Civil Law Act 1956. Section 5 of the Act provides that, in matters of mercantile law or commerce, English law is to be applied. As such, the jurisdiction is certainly vested in the civil courts. In addition, s. 3 of the Act provides for the application of the English law and rules of equity when there is a lacuna in the provision of any written law. In Malaysia, although there is the IBA, but as mentioned earlier, the Act is not exhaustive. Thus, any ambiguity, clarifications and interpretation will be referred to the civil courts.

i. Civil courts apply common law principles in deciding cases in muamalat law

Since the Civil courts hear Islamic banking matters, without doubt, the matters would be governed by the English common law principles. This has been decisively ruled in *Bank Kerjasama Rakyat Malaysia v Emcee Corporation*⁹, when the court held that:

“As was mentioned at the beginning of this judgment, the facility is an Islamic facility. But that does not mean that the law applicable in this application is different from the law that is applicable if the facility were given under conventional banking. The charge is a charge under the

National Land Code. The remedy available and sought is a remedy provided by the National Land Code. The procedure is provided by the Code and the Rules of the High court 1980. The court adjudicating it is the High Court. So, it is the same law that is applicable, the same order that would be, if made, and the same principles that should be applied in deciding the application”.

The same principles followed later on in *Bank Islam Malaysia Bhd v. Pasaraya Peladang Sdn Bhd* held that although the BBA facility was granted under Islamic principles, the laws applicable were the NLC and the Rules of the High Court 1980. The plaintiff in this case was granted an Islamic banking facility known as Al-Bai Bithaman Ajil (‘the said facility’) to the defendant pursuant to a property purchase agreement and a property sale agreement (‘PSA’). As security for the repayment of the said facility, the defendant charged in favour of the plaintiff ten pieces of land (‘the said lands’). The charges were effected by way of two Forms 16A of the National Land Code (‘NLC’). The charges were registered on 23 July 1997. The defendant defaulted in the repayment of the instalments and a notice of demand was accordingly issued to the defendant. The defendant failed to comply with the notice of demand. Consequently, the plaintiff issued and served on the defendant the statutory notice in Form 16D of the NLC. Again, the defendant failed to

pay the amount demanded. In this case, it was the plaintiff's application for an order for sale of the said lands under s. 256 of the NLC.

The court allowed the plaintiff's application where in this case, and explained Al-Bay Bithamin Ajil facility as a common Islamic banking facility involving immovable properties as collateral. It involved three separate agreements. The bank would purchase the property concerned from the chargor pursuant to the first agreement. In the second agreement, the bank would sell the property to the chargor. The third agreement was a charge given by the chargor to the bank to enable the bank to sell the property in the event of default by the chargor.

The use of term in Islamic finance was also disregarded by the court. In *Bank Islam Malaysia Bhd v Adnan bin Omar* [1994] 3 CLJ 735, the court still used the word loan when in fact sales and loans are two different concepts in Islam. There is also no noble attempt made by the court to examine the BBA features and framework from any Shariah experts.

The conflict of general laws like Malay Reservation Land law and Islamic finance principle is also highlighted in *Dato Hj Nik Mahmud bin Daud v Bank Islam Malaysia Bhd* [1996] 4 MLJ 295 (High Court). In this case, the transaction involved sale contracts, and under the Islamic law, the transfer of land is governed under the concept of the acquisition of ownership (tamlik wa tamalluk). However, the judge referred to National Land Code 1965. Examples of other

cases that follow English law principles and procedures are *Tinta Press v Bank Islam Malaysia Bhd* [1986] 1 MLJ 474 and; [1998] 3 MLJ 396 (Supreme Court).

In essence, the civil courts in the above cases failed to consider whether the application of the existing law and procedure would have contradicted the Shariah and affect the validity of the documents. The cases decided also indicate that the courts prefer to apply common law principles rather than refer to the Shariah rules. In such conflicts, it seems that the rules of the civil court system will prevail and consequently restrict the litigants to apply Islamic rules and principles unless ruled otherwise by the court or judge concerned. As a precaution, it also creates a limbo of limits to the growth of Islamic rules and principles in Islamic finance tributary.

ii. Reference to Shariah Advisory Council (SAC) was regarded as ouster clause and unconstitutional

Ouster clause means ousting the court's jurisdiction. The new Section 56(1) reads (1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, shall (a) take into consideration any published rulings of the Shariah Advisory Council; or (b) refer such questions to the Shariah Advisory Council for its ruling. Section 56(1) made it compulsory for the courts to refer to any established rulings should there any disputes pertaining to Shariah issues. Section 56(1)

(b) make it compulsory for the court to refer to the decision of SAC as expert evidence in court under section 45 Evidence Act 1950, should there a need to refer to any non established rulings pertaining to the practice.

The newly amended Act seems to possible problems faced by industry players. Hopefully there will be no excuse used by the civil courts to deliver their equitable interpretation without referring the disputes to the SAC. But one may ponder to what extent can the ruling survive in the Civil courts? The Federal Constitution provides for separation of powers between executive (Article 39) the legislature (Art 44) and the Judiciary (Art 121). In Sugumar Balakrishnan[1976]2MLJ 262, the Court of Appeal considered the relationship between the organs of government. Gopal Sri Ram JCA observed, “The Federal Constitution has entrusted to an independent judiciary the task of interpreting the supreme law and indeed all laws enacted by the legislative arm of the government. Hence, it is to the court that a citizens must turn to enforce their rights...the judicial power was vested impliedly in the judiciary as discussed in *Liyanage v The Queen* [1967] 1 AC 259. In other words it is important to ensure that powers of the judiciary are not usurped by the legislature or the executive. This would maintain the separation of powers which aims to prevent concentration of powers that may increase the likelihood of abuse of powers. Rule 137 of the Rules of the Federal Court clearly give inherent power to the court to hear any application or make any order as may be necessary to prevent

injustice. The Federal Court also has the inherent jurisdiction under the common law to deal with cases with a view to preventing injustices in limited circumstances. This is line with Section 3(1)(a) of the Civil Law Act 1956, which was promulgated in accordance with cl.(c) of art 121(2) of the Constitution which confers the Federal Court “such other jurisdiction as may be conferred by or under federal law” .

PROPOSING ON MECHANICS OF HAVING OUR OWN LEX MERCATORIA UPON LEGAL CONSENSUS

Highlighted above are some of the hick ups that may hinder growth to the Islamic finance industry. Thus, this paper attempts to propose our own *Lex mercatoria* in Islamic finance to avoid uncertainty in the market, consequently recognize the sanctity of Shariah contract. The proposed *Lex Mercatoria* may brings the industry to the next level of being recognized and adopted by the member countries and consequently enable to standardize the practice. The proposal on *Lex Marcatoria* in Islamic Finance may feature some of the ideas as follows;

i) International Treaties:

The creation of many international Model Laws in Commercial transactions was based on Euro-Centric since 100 years ago. Regardless of any issues, the westerners will take the lead. Now it is timely for Muslim countries like OIC to stand up and have their own Conventions on having an International

Convention on Islamic Finance. This is made possible. The creation of UN on human Rights Declaration was ousted by Islamic countries due to non compliance with Shariah values. As a result of that, the Cairo Declaration had their own human Rights Convention which is Islamic in nature. If that could be made possible, then the issue of having Islamic finance at Cross border transaction could be resolved. It is timely for us to have our standard guidelines and rules to be followed. To make that possible, one supervisory body needs to be on board. This is where the issue of World Islamic bank comes for centralization and uniformity of laws. Even international law is a mere soft law, but it gives at least a move out and options to the parties in Islamic finance to feel at least at ease to cater their problems.

ii) Centralization or decentralization?

The concept of decentralization is made possible if one country has its own uniformity of laws. However, to realize the centralization, the World Islamic Bank become the central body and uniforms all the scattered laws to become one. If we continue to have one law on board then Islamic law will definitely boom the market.

iii) Model Law in Arbitration, Mediation and other hybrid ADR

The Asian-African Legal Consultative Organization (AALCO), originally known as the Asian Legal Consultative Committee (ALCC) was constituted on 15 November 1956. It is considered to be a

tangible outcome of the historic Bandung Conference, held in Indonesia, in April 1955. Seven Asian States, namely Burma (now Myanmar), Ceylon (now Sri Lanka), India, Indonesia, Iraq, Japan, and the United Arab Republic (now Arab Republic of Egypt and Syrian Arab Republic) are the original Member States¹⁰. Later, in April 1958, in order to include participation of countries of the continent of Africa its name was changed to Asian-African Legal Consultative Committee (AALCC). At the 40th Session, held at the Headquarters of AALCC in New Delhi, in 2001, the name of the Committee was changed to Asian-African Legal Consultative Organization (AALCO). It might seem to be a small nomenclature change, however, it has great symbolic significance reflecting the growing status of the Organization and the place it has secured among the family of international organizations¹¹Forty-seven countries comprising almost all the major States from Asia and Africa are presently the Members of the Organization.¹²Since one of the mandates given to their respective Arbitration bodies includes Islamic finance, then this will be a great avenue to have one set of Model laws on arbitration and other ADR types.

The industry will entirely have the standardization of laws and rules which they may opt to settle disputes. Promoting hybrid ADR techniques like Med-Ex may also be the best option. The expert is already being named in the contract and dispute settlement clause. Since it is an optional binding approach, it creates more space for the parties to settle their disputes.

Strengthening the Existing Alternative Dispute Resolution ADR avenues like Kuala Lumpur Regional Centre for Arbitration KLRCA is a good start. In fact this is one of the objectives to promote Malaysia in Islamic finance. The facilities offered by KLRCA and incentives in Malaysia may invite litigants to settle disputes in Malaysia. By virtue of the Arbitration Act 2005, the court should not intervene in any proceeding or award given by the arbitrators.

Steps should be taken to promote more Islamic finance experts to become the Muslim mediators and arbitrators. This may also convince the industry that their case will be dealt with by someone who is knowledgeable in that particular area and a Muslim. Maybe KLRCA and Bar Council should take the challenge of training the experts on becoming well known and good Muslim arbitrators and mediators.

iv) Optional Protocol under International Commercial Arbitration & Conciliation UNCITRAL

An Optional Protocol to a Treaty is an instrument that establishes additional rights and obligations to a treaty. It is usually adopted on the same day, but is of independent character and subject to independent ratification. Such protocols enable certain parties of the treaty to establish among themselves a framework of obligations which reach further than the general treaty and to which not all parties of the general treaty consent, creating a “two-tier system”. The Optional Protocol to the International Covenant on Civil and

Political Rights of 1966 is a well-known example.¹³

It is hoped that the above suggestions and recommendations may instigate improvement of the present legal dilemma and guarantee a more practical approach for the industry.

CONCLUSION

In conclusion the separate law on Islamic finance is paramount to ensure the success of the industry at international level. This is also to avoid uncertainty in the market. It has been very difficult for the Court to resolve fundamental differences between scholars about Shariah principles, but on the other hand the Courts are accustomed to dealing with controversy between experts. Parties looking to enter into agreements incorporating Shariah principles should nonetheless consider including a dispute resolution provision referring disputes about Shariah and its applicability to a Shariah expert chosen by the parties or by a suitable institution. This might help to streamline the resolution of disputes and avoid the need for court proceedings which could be more costly. In addition, on the construction of the governing law clause which insisted on the application of Shariah law, the Court applied conventional *lex mercatoria*. Relying merely on the existing conventional *lex mercatoria* may affect the sanctity of Shariah contract as shown in few cases discussed above. As emphasised, cogent and well argued laws need to be formulated to avoid breathing within the conventional practice legally. The spirit to implement the Shariah law

in financial tributary in true mode will be fulfilled and realised only if we have a good legal framework acceptable and viable by all norms. There should be a comprehensive reform of judicial system.

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ENDNOTES

- ¹ Roy Goode(2004) Commercial Law, 3rd Ed, Penguin Book, USA, p 1173.
- ² Ex aequo et bono (Latin for "according to the right and good" or "from equity and conscience") is a legal term of art. In the context of arbitration, it refers to the power of the arbitrators to dispense with consideration of the law and consider solely what they consider to be fair and equitable in the case at hand. Article 38(2) of the Statute of the International Court of Justice provides that the court may decide cases ex aequo et bono, but only where the parties agree thereto. Through 2007, ICJ has never decided such a case. Article 33 of the United Nations Commission on International Trade Law's Arbitration Rules (1976) provides that the arbitrators shall consider only the applicable law, unless the arbitral agreement allows the arbitrators to consider ex aequo et bono, or amiable compositor, instead. retrieved from <http://www.answers.com/topic/ex-aequo-et-bono-2>
- ³ See also List I Feral List and List II State List Malaysian Federal Constitution defines Finance to include inter alia: Currency, legal tender and coinage; National savings and savings banks; (c) Borrowing on the security of the Federal Consolidated Fund; Loans to or borrowing by the States, public authorities and private enterprise; Public debt of the Federation; Financial and accounting procedure, including procedure for the collection, custody and payment of the public moneys of the Federation and of the States, and the purchase, custody and disposal of public property other than land of the Federation and of the States; Audit and accounts of the Federation and the States and other public authorities; Taxes; rates in the federal capital; Fees in respect of any of the matters in the Federal List or dealt with by federal law; Banking; money-lending; pawnbrokers; control of credit; Bills of exchange, cheques; promissory notes and other similar instruments; Foreign exchange; and Capital issues; stock and commodity exchanges
- ⁴ In *Islamic Investment Company of the Gulf v Symphony Gems NV & Others*[2002], the Islamic investment company, IICG, entered into a *Murabaha* Agreement with Symphony Gems. Under a *Murabaha* Agreement, the Islamic financial institution ("IFI") purchases an asset identified by its customer from the seller/manufacturer and then immediately sells the asset to the customer on deferred terms at a mark-up to the original purchase price. In that case, it was also argued that the terms of the *Murabaha* Agreement contradicted IICG's

constitutional documents which required that IICG carry out its business in a “*manner which is consistent with Islamic laws, rules, principles and traditions*”. The Agreement was therefore ultra vires or beyond the powers/capacity of IICG to enter into. In the UK, statute intervened many years ago to bring to an end the external operation of the *ultra vires* doctrine in invalidating transactions entered into by a company beyond its objects and powers as a protection for third parties who, when contracting in good faith, are entitled to assume that their counterparty has the requisite power/capacity to enter into the contract concerned. The Bahamas, where IICG was incorporated, has enacted a similar law. In any event, English Courts have shown some reluctance to apply the doctrine (described as a “technical” rule in another case) to enable a party to avoid its contractual obligations.

⁵ In re Arbitration Between Petroleum Dev. (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi, 1 INT’L & COMP.L.Q. 247, 250–51 (Sept. 1951).

⁶ Ruler of Qatar v. International Marine Oil Co. Ltd., 20 I.L.R. 534 (1953).

⁷ See Solomon v Solomon [1897]AC 22

⁸ A company is defined as a legal person, amongst others is capable of owning property, being subjected to legal rights and obligations, suing and being sued. The concept of legal entity (syakhshiyah l’tibariyah) is considered valid in Islam based on the foundation of baitul mal and waqf institutions. See for detail on the status of legal entity in Islam, Mahmood M Sanusi, The Concept of Artificial Legal Entity (Saksiyyah Ictibariyah) and Limited Liability in Islamic Law [2009] 3 MLJ lxxv; [2009] 3 MLJA 65

⁹ [2003] 1 CLJ 625

¹⁰ Refer to <http://www.aalco.int/content/research-and-trainings>

¹¹ *ibid*

¹² These countries are: Arab Republic of Egypt, Bahrain, Bangladesh, Brunei Darussalam, Botswana; Cameroon; Cyprus; Democratic People’s Republic of Korea; Gambia; Ghana; India; Indonesia; Iraq; Islamic Republic of Iran; Japan; Jordan; Kenya; Kuwait; Lebanon; Libya; Malaysia; Mauritius; Mongolia; Myanmar; Nepal; Nigeria; Oman; Pakistan; People’s Republic of China; Qatar; Republic of Korea; Saudi Arabia; Senegal; Sierra Leone; Singapore; Somalia; South Africa, Sri Lanka; State of Palestine; Sudan; Syria; Tanzania; Thailand; Turkey; Uganda; United Arab Emirates; and Republic of Yemen.

¹³ For details refer to http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml