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ISLAMIC FINANCE IN ENGLISH LAW: A LEVEL PLAYING FIELD?

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by

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Introduction[1]

1. Restrictions upon charging for the use of money have long been a feature of the world's great Abrahamic religions. Perhaps the best-known restriction to followers of Judaism and Christianity is to be found in Psalm 15:5:

   "*He that putteth not out his money to usury, nor taketh reward against the innocent. He that doeth these things shall never be moved.*"

2. This is no isolated injunction. Similar advice appears in numerous books of the Old Testament, but the restriction is not usually in absolute form. Sometimes the prohibition is against lending at interest to your brother (Deuteronomy 23:19-20) or to the poor (Exodus 22:25). But the prohibition is usually against *usury*, and that has generally come to be understood as meaning lending at excessive rates of interest, rather than against charging interest *per se.* And there are many passages which recognise the existence of the lawful charging of interest, both in the Old and the New Testament. Thus we find in Sir William Blackstone's Commentaries on the Laws of England this enigmatic observation:

   "*when money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for the use* … [the increase] *is called interest by those who think it lawful, and usury by those who do not.*"[2]

3. In the result the laws of most modern countries with cultures at least historically founded upon Christian principles now recognise the charging of interest as lawful, both as a matter of contract and also by way of judicially ordered compensation for the wrongful deprivation of money over time, by the charging of interest upon damages and on the late payment of judgment debts. In the UK the poor and vulnerable are protected by a statutory regime for the undoing of what used to be called extortionate credit bargains, and are now called unfair relationships: see s.140A of the Consumer Credit Act 1974 (c. 39), added in 2006 by amendment.[3]

4. But modern Islam appears, at least to the uninitiated like me, to have taken an altogether more rigorous line, in prohibiting the faithful from charging (or paying) interest (called *riba*) at all. And

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[1] Subject to some minor revision to the version as delivered. I gratefully acknowledge the assistance I have received from my judicial assistant Jonathan Turnbull in researching for, and preparing, this address.

[2] Blackstone, W. (1765-1769) *Commentaries on the Laws of England, Book II: Of the Rights of Things* at [*454].

[3] Inserted by the Consumer Credit Act 2006 (c. 14) section 19, replacing Section 137-140 of the Consumer Credit Act 1974 which dealt with Extortionate Credit Bargains. The 1974 Act also provides wider regulation of consumer credit agreements, for example requirements regarding licensing, advertising, disclosure requirements, terms and cancellation. These of course do not apply to commercial lending.

many countries which incorporate sharia principles into their national law do so as well. Thus we find it stated in the Quran (Sura II, verse 275):

"*Allah has made buying and selling lawful and has made the taking of interest unlawful.*"

5. And it carries on at verse 278: "*O ye who believe! Fear Allah, and give up what remains of your demand for usury, if ye are indeed believers*".

6. And in Surah III: verse 130 it says: "*O Ye who believe, devour not interest, for it goes on multiplying itself; and be mindful of your obligation to Allah that you may prosper.*"[4]

7. Although there may be some cracks in the uniformity of this prohibition (such that, for example, I understand that the law of Iran permits foreigners and those paying debts late to be charged interest[5]) there has been developed for the use of Islamic businesses and finance houses (and for those dealing with them) means of structuring the provision of finance (or its economic equivalent) which are designed to enable both those who need business finance and those who provide it to do so on terms which do not involve the charging of interest, but which nonetheless offer a product which achieves a broadly equivalent commercial or economic effect. This is what is generally called Islamic finance.

8. Two types of typical Islamic finance structures will serve as introductory examples. Suppose that a business A needs machinery with which to carry out a manufacturing process, the purchase of which would ordinarily be financed by a secured loan from a bank. Under the *murabaha* structure (between say the Islamic business A and an Islamic bank B, both concerned to comply with sharia principles), bank B would buy the machinery from the supplier at the price negotiated by company A (Price 1) and then sell it to its customer, company A, at a higher price, Price 2, payable by instalments. The difference between Price 1 and aggregate of the instalments making up Price 2 would typically be based on an interest rate, usually LIBOR (London Inter-Bank Offered Rate), and the risk of default by A would be factored into the premium over LIBOR built into Price 2.

9. A second example is the *Ijara*. Using the same abbreviations for the parties, the bank B buys the machinery at the price (Price 1) negotiated by company A, and then leases it to A at a rental set at a rate which would be expected to approximate to interest and return of capital over the expected useful life of the machinery. In both cases the bank's ownership rights over the

[4] I am not a scholar of Islam so please forgive any infelicities in translation of citations.
[5] Sabahi, B. (2005) *Islamic Financial Structures as Alternatives to International Loan Agreements: Challenges for U.S. Financial Institutions*, Annual Review of Banking & Financial Law, 24, 487-504.

machinery provide a rough commercial equivalent to mortgage security against default by the customer, while the rental or instalment payments by the customer provide a commercial return to the bank broadly equivalent to a conventional loan at interest. Similarly for the Islamic customer, these alternative arrangements enable it to finance its business activities on commercial terms which enable it to prosper in a non-Islamic environment where its competitors are free to finance their businesses by secured loan at a market rate of interest.

10. The purpose of this lecture is not to examine the fine detail of these two, or any other, types of Islamic finance structures. Rather it is concerned to examine how English law (strictly the law of England and Wales) accommodates these structures as part of the national and international financial business activity for which it has been, and seeks to remain, pre-eminent, while an increasing proportion of the world's disposable wealth becomes concentrated in the hands of people and organisations conscientiously committed to maintaining Islamic principles and codes of conduct in both their personal and business lives.

11. I should perhaps start by declaring something of an interest in this process of accommodation. I have spent the whole of my professional life practicing mainly in the field of business and property law, as a barrister in the Chancery and Commercial Courts, then as a judge of the Chancery Division (now part of the Business and Property Courts), then in the Civil Division of the Court of Appeal and since 2017 in the UK Supreme Court. At all those stages I have been involved in the development of both the common law, some aspects of statutory and procedural law reform, and in the never-ending process of keeping our law, our procedure and our courts up to date, relevant and above all accessible to all who may need, or wish, to have recourse to them.

12. Many people and businesses, those who or which live and are based here, have no alternative but to submit themselves to English law, as the law of the land, and to the English courts as those with jurisdiction over them and their property. But many others who live or are based abroad choose English law and the jurisdiction of the English courts (or English based arbitrators and mediators) as the framework for their business relationships and the arbiters of their disputes. If one compares the amount of international trade, finance and other business in which there is a main English party with the much larger amount of trade, finance and business governed by English law and jurisdiction, it becomes very apparent that English law punches well above its weight. In most modern countries businesses are broadly free to choose what system of law will govern their contractual relationships, particularly (but not only) in relation to cross-border transactions. Many contractual counterparties freely choose English law and jurisdiction for

maritime or cross-border transactions even when none of them have any other connection with England or the UK. English law for example is one of the two default options (along with New York law) provided in the market standard documentation for derivatives (the International Swaps and Derivatives Association's "ISDA Master Agreement"). For this reason it was estimated a few years ago that English law likely governed over €660 trillion worth of global derivative transactions. Similarly English law holds a significant global market share as a governing law for insurance, shipping and mergers and acquisition agreements.[6]

13. Legal business (that is the business of lawyers, arbitrators, judges and the courts) has become a major earner of foreign earnings for the UK, currently thought to bring in at least £6.8bn per annum generating a trade surplus of £5.4bn and the legal industry is estimated to contribute around £30bn annually to the UK economy.[7] It has become in effect a significant invisible export. There are thus two reasons why English law needs to accommodate Islamic ways of doing business. First there are an increasing number of purely domestic persons and businesses who wish to do business in accordance with Islamic principles.[8] They ought to be entitled as British citizens (or organisations) to be able to have those Islamic principles respected as far as reasonably possible, and to be able to do business in competition with others who have no such faith-based concerns, on a level playing field, i.e. as far as possible without discrimination or commercial disadvantage arising from their conscientious desire to follow the dictates of their faith. Secondly there are an ever-increasing number of Islamic based and/or motivated businesses overseas from which the UK is likely to benefit in terms of attracting them to use English law and English markets, and indeed from their choice to base themselves here.[9]

14. English common law is generally highly regarded by merchants and other business organisations, including banks, as an attractive choice of law because of its flexibility and above its predictability. It is flexible because it affords to business counterparties the widest possible freedom and inventiveness in how to structure their contractual relationships. It is predictable because it delivers a structure of rights and obligations which judges enforce in accordance with well-recognised rules, generally as a matter of right rather than discretion and following binding judge-made authority easily to be found in law books, with a little assistance from lawyers, rather than

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[6] LegalUK (2021) *The Economic Value of English Law*: https://legaluk.org/report/foreword/, see in particular Chapter 4.
[7] TheCityUK (2022) *Legal Excellence, Internationally Renowned*: legal-excellence-internationally-renowned-uk-legal-services-2022.pdf (thecityuk.com).
[8] According to the 2021 census the Muslim population of the UK grew by 1.16 million between 2011 and 2021, representing 33% of overall population growth (The Muslim Council of Britain (2021) *Census 2021 First Look* https://mcb.org.uk/wp-content/uploads/2022/12/MCB-Census-2021-%E2%80%93-First-Look.pdf.
[9] See TheCityUK (2022) *Islamic Finance: Global Trends and the UK Market*: https://www.thecityuk.com/media/1tbbofqr/islamic-finance-global-trends-and-the-uk-market.pdf.

applying broad principles of fairness and justice with variable and unpredictable outcomes in each case. Under the system of precedent the courts are bound by the decisions of higher courts. The Court of Appeal is (save in limited circumstances) bound by its own previous decisions as well as those of the Supreme Court, while the Supreme Court will generally follow its own previous decisions (and those of its predecessor, the House of Lords) save where changes in social or economic circumstances, or a realisation that their predecessors had gone uncharacteristically and horribly wrong, very occasionally call for a departure.[10]

15. English law is not however unmindful of the dictates of conscience. It tempers the sometimes rigid but predictable rules of the common law with what are called principles of equity. Some but not all of those principles are directed to restraining people from the full exercise of their common law rights where it would be unconscionable for them to do so. Thus an agreement may appear on its face to confer a valuable right on one party, but where its inclusion in the agreement is the result of a mistake, so that it fails to reflect the common intention of the contracting parties, it will be unconscionable for the party advantaged by that mistake to enforce that right against the other party. Equity comes to the rescue of the disadvantaged party by enabling him or her to have the agreement rectified, so as to bring it into accord with the parties' original common intention by the removal or alteration of the unintended contractual right.[11] Similarly where (let's say) a farmer assures his son that he will inherit the family farm on the father's death, and in reliance on that assurance the son spends his working life labouring there on low wages, equity will restrain the father from going back on his assurance by exercising his common law right to leave the farm in his will to someone else.[12] This is what lawyers call proprietary estoppel.

16. These principles of equity and the forms of equitable relief (such as an injunction or rectification) by which they are enforced, used to be obtainable only in separate Chancery courts, which might even restrain a common law court from granting one of its remedies to an unconscionable claimant. But since 1875 these equitable principles are now applied in all our courts and take precedence over the strict rules of the common law where the two come into conflict.[13]

17. Conscience is that internal space, or still small voice, which quietly tells each of us whether a proposed course of conduct, which may on its face appear to be perfectly legal, is nonetheless

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[10] See *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.
[11] See, for example, *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361 [2020] Ch 365.
[12] See, for example, my recent judgment in *Guest v Guest* [2022] UKSC 27 [2022] 3 WLR 911.
[13] Following the Supreme Court of Judicature Acts 1873 and 1875.

wrong. What are called the dictates of conscience do not necessarily speak with a single voice in all of us, but many of them may be said at least in cultural terms to have an originally faith-based origin, even though many people would now rightly protest that the dictates of conscience which they share with others have, for them, no faith-based impetus at all.[14] The concept that we should do equity to our neighbours is again deeply based in the Old Testament, and there are dicta of the Malaysian courts to the effect that the principles of equity derived from English law and now in force across the common law world also reflect many of the principles of sharia law.[15]

18. Equity respects and enforces only those dictates of conscience which we all share, regardless of their origin. And it rarely responds to a perception of unconscionability directly. Rather it develops principles (like proprietary estoppel) and remedies (like rectification) which respond to those shared dictates of conscience, and acts in accordance with those principles. Thus it does not say, because you are a Muslim it is unconscionable for you to enforce a contractual provision for interest, because abstaining from charging (or paying) interest is not a dictate of conscience which is shared among us all. Nor does a judge act in accordance with his or her own conscience, but rather with the principles developed by equity as the basis for the recognition and respect for those shared dictates which affect the consciences of us all, or at least of what are called all right-thinking people.

19. The legal rules and principles of modern English commercial law are an amalgam of common law rules, principles of equity, statutory and regulatory regimes and (where applicable) international conventions. In many ways our commercial law respects important sharia principles. Thus the fundamental sharia principle that people should abide by their bargain[16] is reflected in the same foundational rule of the English law of contract. And the essential lawfulness of free and fair trade is recognised by most modern Islamic jurists and by English commercial law alike.[17] Market manipulation such as hoarding to create artificial shortages (*ihtikar*) is frowned upon by sharia law[18], as is overbidding to drive up prices (*najash*) and concealment of vital information from a counterparty (*ghish*). Broadly in parallel there is in

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[14] See Klinck, D.R. (2010) *Conscience, Equity and the Court of Chancery in Early Modern England*.

[15] "*[T]he principle of equity is consistent with Islamic teaching*" per David Wong J in *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249 at 265 see also the repeated references to equity and good conscience by Hamid Sultan JC in *Malayan Banking Bhd v Ya'kup bin Oje & Anor* [2007] 6 MLJ 389.

[16] "*You who believe, fulfil your obligations*" Quran 5:1.

[17] "*Allah has made trade lawful*": Quran 2:275; "*Let there be among you traffic and trade by mutual goodwill*": Quran 4:29. The extent of this is not entirely uncontroversial, but a permissive approach seems to be the more widely accepted modern position: See Nethercott, C. R.; Eisenberg, D. M. (Eds.) (2020) *Islamic Finance - Law and Practice, 2nd Edition* at 2.80 and 4.54.

[18] "*As for all who hoard up treasures of gold and silver and do not spend them for the sake of Gods give them the tiding of grievous suffering*" Quran 9:34.

England regulatory prohibition of the manipulation of some markets[19], widespread regulation of anti-competitive practices[20], and legal remedies flowing from misrepresentation[21] and deceit.[22] Moreover where parties entered into a relationship of undivided loyalty or trust and confidence, which the law describes as a fiduciary relationship (such as partners in a partnership), they will have further duties of mutual full disclosure and good faith.[23]

20. Some sharia principles go further, or are more rigorous, than any English commercial law counterpart. Thus sharia limits the amount of risk or uncertainty allowed to be undertaken in commercial contracts (*gharar*), and generally prohibits pure speculation, as a form of gambling (*qimar*).[24] The Prophet ruled out sales of an article that did not yet exist or which was not yet in the control of the seller, whereas English common and commercial law (and critically the development of the concepts of legal and equitable interests under trusts) has been an environment in which futures and derivatives have thrived as almost nowhere else. And our statutory regulation of gambling is a pale shadow of the prohibition in sharia, so much so that one judge described the English gambling legislation as falling little short of a pact with the Devil.[25]

21. And so of course falls short our statutory regulation of lending at interest, now founded in the consumer protection concept of an "unfair relationship" between lender and customer.[26] Before the advent of the modern forms of Islamic finance alternatives, it might have been doubted whether any modern form of competitive finance product traded in England could have worked without provision for payment of interest at a reasonable or commercial rate. It is not merely that English law permits the charging and payment of interest, with minimal restrictions between commercial parties, but that a large part of English financial business and enterprise is founded upon it.

Giving effect to Islamic Finance

22. In various ways, and with varying degrees of success, English law permits contractual counterparties to frame their own legal relationships in a way which does pay due respect to the sharia principles generally, and in particular to the prohibition of interest. Commercial parties are

[19] See the Market Abuse Regulation (EU) No 596/2014 as amended by The Market Abuse (Amendment) (EU Exit) Regulations 2019 SI 2019/310.
[20] See The Competition Act 1998.
[21] See, for example, *Attwood v Small* (1838) 7 ER 684; 6 Cl & F 232.
[22] See, for example, *Derry v Peek* (1889) 14 App. Cas. 337.
[23] See, for example, *Helmore v Smith* [1887] LR 45 Ch D 436; *Law v Law* [1905] 1 Ch. 140.
[24] See, *Islamic Finance Law and Practice* (op. cit.) at 2.66 to 2.75.
[25] See *Calvert v William Hill Credit Ltd* [2008] EWHC 454 (Ch).
[26] Section 140A, Consumer Credit Act 1974.

in principle free to choose the law by which their contractual relationships are to be regulated, not only when they are based in different jurisdictions but also where both (or all) parties are based in England. This is because England was a party to the Rome Convention, then to the EU Rome I Regulation (to which we have adhered thus far post Brexit) which treats freedom of choice of governing law, within certain limits, as a foundational principle.[27] Where a dispute which is to be governed by a foreign law comes before the English courts – as they frequently do – the English judge will resolve it with the assistance of expert evidence on the relevant foreign law.

23. Why therefore, it might be asked, cannot parties to a finance transaction simply provide that their contract is subject to sharia law? There are two main difficulties in the way. The first is that the 'choice of law' available to contracting parties is limited to a choice between the laws of specific countries, which does not comprehend or include the choice of a transnational system of legal principles, such as is sharia.[28] This reflects no partisan or cultural dislike of the underlying principles, still less of Islam. The same exclusionary rule has been applied to a purported choice of Jewish law[29] and would probably strike down an attempt to make a contract subject to 'common law' which is now a set of rules and (since it includes equity) principles broadly shared by many countries around the world, but with no absolute uniformity as a single legal system administered by one country.

24. The second difficulty is that sharia law, so far as I understand, is better understood as <u>inherently</u> a set of principles rather than as a unitary body of law. It is in a sense like equity without the common law rules which underpin it. Sharia is generally interpreted by Islamic scholars around the Muslim world rather than just (or even primarily) by judges. And those interpretations appear to vary, sometimes quite widely, and in particular in relation to the charging of interest, as my reference to the more liberal Iranian jurisprudence demonstrates.[30]

25. The first of these difficulties might be evaded by the choice of law of a country which itself incorporated sharia principles into its national law, such as Saudi Arabia or Egypt. Some Muslim-majority countries (e.g. Pakistan) may prohibit the charging of interest altogether, but several do not, including Bahrain, Qatar, and Oman.[31] As already noted, Iran does not do so entirely. In

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[27] See Article 3 (Freedom of choice), Regulation on the law applicable to contractual obligations (EC) No 539/2008 ("**Rome I**") as applied in the UK (subject to minor amendments) by The European Union (Withdrawal) Act 2018, The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (UK Exit) Regulations 2019 (SI 2019/834) and The Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020 (SI 2020/1574).

[28] See *Shamil Bank of Bahrain EC v Beximo pharmaceuticals Ltd* [2004] EWCA Civ 19; 1 WLR 1784 ("***Shamil Bank***") at [48]. This was decided under the 1980 Rome Convention (the predecessor to the Rome I Regulation), but the analysis remains the same.

[29] *Halpern v Halpern* [2007] EWCA Civ 291; [2007] 1 C.L.C. 527 at [20] to [29].

[30] See e.g. *Shamil Bank* at [55].

[31] Sloane, P. D. (1988) *The Status of Islamic Law in the Modern Commercial World*, International Lawyer, Vol 22, No. 3, p. 743 at 756.

fact many Muslim-majority countries allow conventional finance to carry on in parallel with Islamic finance so as to facilitate international business. But even if this choice of sharia-compliant national law is adopted, the relationship between the parties will still to some extent be governed by English law, if that is the place where the contract is substantially to be performed: see Articles 3(3) and 9(3) of the Rome I Regulation.[32]

26. There is also more flexibility in an English-seated arbitration than in an English court, as my colleague Lord Richards explained when sitting as a first instance judge in *Musawi v RE International (UK) Ltd* [2008] 1 All E.R. (Comm); [2007] EWHC 2981 (Ch), where he upheld an arbitration award given pursuant to an agreement that any dispute would be arbitrated by an Ayatollah applying principles of Shia sharia law. This is because the English Arbitration Act expressly allows parties to agree how an arbitral tribunal should resolve a dispute and this is not restricted to a national law. [33]

27. Another means of circumventing the first difficulty is to provide for the contract to be governed by English law but then to incorporate relevant provisions of the sharia as terms of the contract. This is expressly permitted by the Rome I Regulation.[34] But a wholesale incorporation of sharia will not work: see *Shamil Bank of Bahrain v Beximo Pharmaceuticals Ltd* [2004] EWCA Civ 19; [2004[1 WLR 1784, where a provision that the governing law a was to be "*subject to the principles of the Glorious Sharia*" was held to be too uncertain to incorporate any sufficiently specific rules into the contract.[35] And a mere assertion that a contract otherwise governed by English law was "*in accordance with the Islamic Shariah*" made no difference to its interpretation or enforceability: see *Islamic Investment Company of the Gulf (Bahamas) Ltd v. Symphony Gems NV & Others*.[36]

28. An English law contract may be unenforceable if and to the extent that its performance would be illegal under the law of the place of performance.[37] But the English courts have been quite strict in the extent to which this principle holds sway. It is not enough that there is a common

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[32] These provisions create limitations to the application of the parties' chosen law where all elements of the contractual relationship are related to a country other than that of the chosen law, or where performance is to take place in another country and would be illegal under that country's law. There are also restrictions on the choice of law in certain relationships such as consumer (Article 6), insurance (Article 7), and employment (Article 6) relationships.

[33] At [81]-[82], although strictly speaking the applicable law was English law the arbitrator was obliged to resolve the substantive dispute by application of the principles of Shia Sharia law in light of the parties' agreement, pursuant to Section 46(1)(b) of the Arbitration Act 1996 (c. 23).

[34] Recital 13: "*This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.*"

[35] *Shamil Bank* at [49]-[55].

[36] Unreported, 13 February 2002 ("***Symphony Gems***").

[37] See *Ralli Brothers v. Compania Naviera Sota y Asnar* [1920] 2 K.B. 287 and the similar principles under Article 9(3) of the Rome I Regulation and *Regazzoni v Sethia* [1958] AC 301.

intention that performance takes place in a particular country where performance happens to be illegal. It is only if that is where the questionable performance ***must*** take place that the illegality rule will apply. Therefore unless, for example, the contract requires the payment of interest in a country which makes such payment illegal this will not usually come into play. One example of this was *Dana Gas PJSC v Dana Gas Sukuk Ltd* [2017] EWHC 2928 (Comm); [2018] 1 Lloyd's Rep. 177, where another of my colleagues, Lord Leggatt, (at that stage sitting as a first instance judge), rejected an argument by the UAE-based issuer of a *sukuk* (an Islamic-finance equivalent to a bond) that the *sukuk* structure was unenforceable because it included a purchase undertaking which effectively guaranteed a return to investors, which was said to offend sharia law and so be unlawful in the UAE. He held that the illegality/public policy principle was not engaged as there was no requirement for the purchase undertaking to be performed in the UAE.[38]

29. Finally, sharia restrictions on the charging of interest may become relevant if a corporate party is required by the law of the place of its incorporation or by its own constitution to observe sharia principles. Then it may be alleged that the entry into the contract in question was ultra vires (i.e. outside the corporate powers of) the company: see *Investment Dar Co KSCC v Blom Developments Bank Sal* [2009] EWHC 3545 (Ch).[39]

30. But none of these interesting possibilities really gets to the heart of the problem represented by the need for a level playing field. Parties which wish to abide by sharia principles do not deliberately enter into contracts which are not sharia-compliant, such as lending at interest, so that they or one of them may later evade performance on the ground that to do so would be illegal. And if in substance the transaction is a lending at interest, then dressing it up as something else does not (or at least should not) satisfy the dictates of an Islamic conscience in a way which the law should strive to accommodate. The real challenge is to find ways of enabling Islamic commercial parties which really do wish to be sharia-compliant to raise and provide finance in such a way as to enable them fully and fairly to compete in a marketplace where most of their competitors have no such scruples. And that is what the modern alternatives to financing other than by lending at interest seek to do. The solution has therefore been for parties wishing to abide by sharia principles to devise transactional structures which they and their advisors consider do comply with the sharia principles which they wish to respect.

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[38] *Dana Gas* at [79]-[84]. See also a similar analysis in *Symphony Gems*.

[39] Where it was held that there was a triable issue as to whether a *wakala* arrangement was void for being outside the powers of a Kuwaiti company on account of it allegedly not being sharia-compliant, in circumstances where the company's Memorandum of Association provided that it shall carry on its activities in a sharia-compliant manner.

31. In relation to such alternative types of transaction, the function of English law is to respect the true (rather than just pretended) differences between alternative types of transaction designed as far as possible to produce the same economic consequences. It should ensure as far as possible that types of financing which are genuine (rather than fake) alternatives to lending at interest do not suffer from inbuilt disadvantages which put their participants at significant economic disadvantage *vis-a-vis* their lending and borrowing competitors.

32. The foundational principle of freedom of contract under English law is in principle, and has been in practice, fertile ground for such endeavours. Leaving aside tax and regulatory issues to which I shall shortly return, English law has no agenda which seeks to shoehorn a financing transaction into the straitjacket of lending at interest, however similar its economic consequences may be. Parties may provide financial assistance or its economic equivalent to each other in whatever way they choose, and for whatever form of reward they wish to specify. The only concerns of English law are to avoid lending its aid to the perpetration of a sham, and to avoid helping parties using elaborate structures to avoid tax properly payable on the true substance of their transaction. But there is nothing remotely contrary to English law or public policy in parties structuring their commercial relationships in a way that accords with their faith-based or other conscientiously held beliefs about the way in which they should deal with each other.

33. Sham is a vivid word with an immediate colloquial meaning to most people. A sham marriage is a good example. The legal meaning of sham is a legal structure put in place between persons, usually in writing, deliberately (and usually for a dishonest purpose) erected so as to portray to the world a relationship or transaction between them which is different from that which they both intend that it should be.[40] Thus, for example, parties to what between them is intended to be a loan at interest might create and sign documents between them in the form of a *murabaha* or *ijara* to as to pretend to their Islamic friends and neighbours that they were dealing with each other in a sharia-compliant way. That would be a sham, and the court would not give effect to it.

34. **A Deep Dive – The Tax Arena** A related but more complex subject is tax avoidance – and I hope you will bear with me as I descend into some detail on a subject which you may not have anticipated being focussed on when you signed up to this event! As will shortly become apparent,

[40] See *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802.

it is one area which UK law has had to bend somewhat to accommodate Islamic finance structures.

35. Parliament seeks to levy tax on people, things, transactions and other events usually by describing them, sometimes simply and sometimes in bewildering detail, in the relevant taxing statute. Those upon whom the tax might otherwise fall can, with the assistance of expensive lawyers and accountants, try to devise elaborate structures which seek to avoid their property or dealings falling within the relevant statutory charge to tax, not by way of sham, but rather by transactional architecture by which the usual effect of the taxable transaction is achieved by an often complex and sometimes circular route which does not quite correspond with the statutory description. Then the court applies this test: "*The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically*."[41]

36. Now it may well be said, using my example of the business seeking finance for the acquisition of a machine, that if you look at the starting and end points of the *murabaha* or *ijara* (i.e. instalment sale or finance lease) by which two sharia-compliant parties have dealt with each other, they have started and ended at precisely the same economic points as parties who had financed the acquisition by a secured loan at interest. Does that mean that their dealings should be taxed as if they had been borrowers and lenders? No it doesn't. This is not simply because there is no tax-avoidance motive, but rather because the different routes between the same economic starting and finishing points are "*realistically*" different.

37. The fact that sharia-compliant finance structures deliberately use types of transaction (sale or lease) which differ from a secured loan at interest does give rise to a particular hump in the otherwise level playing field precisely because they <u>are</u> differently taxed, or would be if nothing were done about it. In particular, the sharia-compliant alternative may attract a greater tax burden than the secured loan used by competitors. No doubt if it attracted a <u>lesser</u> tax burden everyone would flock to use it. This is a very real problem to which the general law offers no ready solution. But the UK Parliament has intervened by a series of changes in the tax legislation, with a view to ironing out, or perhaps rolling out, those humps in the playing field. It has done so for the

[41] See the recent case *Hurstwood Properties (A) Ltd v Rossendale BC* [2021] UKSC 16 [2022] AC 690 at [13] where my colleague Lord Leggatt and I cited this statement of Ribeiro PJ in the Hong Kong case *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 52 (2003) 6 ITLR 454, as approved by the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2004] UKHL 51 [2005] 1 AC 684.

specific purpose of ensuring equal tax treatment as between Islamic and traditional finance products, and has taken the lead among countries outside the Islamic world in doing so.[42]

38. This started in 2003, when exemptions were included in the Stamp Duty Land Tax regime. As you probably know, Stamp Duty Land Tax or SDLT is a tax on the purchase of an interest in UK real estate.[43] This has potentially punitive consequences for certain Islamic finance structures. For example, the common *ijara* structure, which is often used for financing property acquisitions, involves the bank purchasing a property and leasing it to its customer. The customer is also given a right to purchase the property at the end of the lease. This has an economic effect similar to a conventional mortgage loan, with the rent payments under the lease replacing interest. However, unlike a conventional mortgage loan, where the customer simply purchases the property once with funds advanced by the bank, (and the mortgage does not attract SDLT), the *ijara* structure involves three transfers of an interest in the property (the purchase by the bank, the lease to the customer and then final purchase by the customer). Each of these would ordinarily trigger a charge to SDLT, as it was originally enacted.

39. The exemptions introduced for "*alternative property finance transactions*" sought to remove this multiple taxation.[44] Where a transaction fulfilled the usual features of an *ijara* structure, the lease and subsequent sale to the customer would be exempt from SDLT. Therefore only the initial purchase by the bank would be taxable – and that tax could be passed onto the customer via a tax indemnity built into (or for other sharia-related reasons agreed separately to), the *ijara* arrangement. Thus the overall tax effect was equivalent to a conventional secured loan.

40. This exemption also allowed for re-financing so that, where either the customer (or another of the customer's banks) sold the property to the bank in order to obtain financing, that sale would also be exempt.[45]

41. The SDLT exemptions have since been amended and extended. In 2006 they were amended to make sure they cover another structure that can be used as a sharia-compliant alternative to a repayment mortgage – the diminishing *musharaka*.[46] That structure involves the bank and customer acquiring a property jointly using money predominantly provided by the bank, in the

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[42] *Denwar, J. & Hussain, M.* (2022) *The Islamic Finance and Markets Law Review: United Kingdom*: https://thelawreviews.co.uk/title/the-islamic-finance-and-markets-law-review/united-kingdom

[43] Part 4 of the Finance Act 2003 (c. 14).

[44] Section 73 Finance Act 2003 and subsequently Section 71A Finance Act 2003 (added by paragraph 2 to Schedule 8 of the Finance Act 2005 (c. 7)).

[45] Sections 71A(2) and 73(2) Finance Act 2003.

[46] Section 168 of the Finance Act 2006 (c. 25) (amending section 71A and 73 of the Finance Act 2003).

same way a conventional mortgage arrangement might involve the purchase of a property with a deposit plus funds advanced by the bank. The bank then leases its beneficial interest in the property to the customer for a rental fee – equivalent to interest. During the term of lease the bank's beneficial interest is then slowly purchased by the customer.

42. Further amendment was required in 2010 to cater for *sukuk*.[47] These are Islamic finance investment certificates that perform similarly to bonds or other conventional debt securities. They involve investors purchasing certificates reflecting an interest in an underlying asset, which is frequently an *ijara* (i.e. Islamic finance lease) on property. Exemption was therefore made from SDLT for transfers as part of an Islamic finance bond structure.

43. However, it wasn't just SDLT that penalised Islamic finance. Sharia-compliant products typically generate a return – either a profit on investment, mark-up on a sale, or rent under a lease – which is economically equivalent to interest in conventional finance. However, given the prohibition on *riba*, the whole point is that it is not actually interest. The problem is that UK tax law often treats interest differently to profits. For example a borrower can often deduct interest paid from their income or corporation tax bill as an expense. Likewise, a lender may be taxed on interest received as income and it may be VAT exempt. The return on an Islamic finance product was therefore taxed differently to an equivalent conventional product.

44. Between 2005 and 2011 UK tax legislation was amended to address this. This was done by designating common Islamic finance products as "*alternative finance arrangements*". Where the return "*equates in substance*" to interest, it is designated as "*alternative finance return*". This is then treated in the same manner as interest for the purpose of income and corporation tax legislation, thereby allowing it to be tax deductible for the person paying the return.[48]

45. For example, this included the *murabaha* structure discussed earlier (i.e. where a financial institution purchases an asset and re-sells it on to its customer at a mark-up). Where the mark-up equates in substance to interest it is designated as an "*alternative finance return*", allowing the

[47] See Section 73C Finance Act 2003 and Schedule 61 Finance Act 2009 (c. 10) and The Stamp Duty Land Tax (Alternative Finance Investment Bonds) Regulations 2010 (SI 2010/814).
[48] See Chapter 5 of the Finance Act 2005, now repealed and replaced by Part 10A of the Income Tax Act 2007 (c. 3), Chapter 6 of Part 6 of the Corporation Tax Act 2009 (c. 4) and Chapter 4 of Part 4 of the Taxation of Chargeable Gains Act 1992 (c. 12) (inserted by Section 381 of the Taxation (International and Other Provisions) Act 2010 (c. 8)).

borrower to deduct it for income or corporation tax purposes.[49] *Tawarruq*[50] or *istisna*'[51] structures would also be covered by these arrangements.

46. Similarly in diminishing *musharaka* (i.e. joint purchase) arrangements the mark-up paid by the eventual owner (i.e. the quasi-borrower) to the financing party over and above the cost of acquiring the financing party's share in the property is treated as if it were interest, for tax purposes.[52]

47. As well as products equivalent to loans, amendments were made for arrangements by which Islamic financial institutions take deposits. Examples include *mudaraba* (a partnership structure whereby the bank invests money provided by a depositor and provides a return by way of profit share) and *wakala* (where the bank acts as an agent to invest the customer's money). Under these arrangements where the return to the investor "*equates in substance*" to interest it is to be treated as if it were interest for tax purposes. This allows the financial institution paying the return to claim deductions.[53]

48. In 2007 tax exemptions were expanded such that *sukuk* were defined as "*alternative finance investment bonds*" and so payment of returns to certificate-holders were to be treated in the same way for tax purposes as coupons (i.e. interest) on a conventional debt security.[54] In 2010 it was also clarified that Sukuk should also be regulated in the same way as debt instruments not as collective investment schemes, even though in substance they are structured as a collective investment not a debt security.[55]

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[49] Section 47 Finance Act 2005, now replaced by section 564C Income Tax Act 2007 and sections 503 and 511 Corporation Tax Act 2009.

[50] A lending facility based on commodity purchase and resale, where the bank purchases commodities on the market and then sells them to the customer for a deferred but marked-up price. The customer (or the bank on behalf of the customer) then sells the commodities back into the market to release cash for the customer. The mark-up on the market price paid by the customer is equivalent to interest.

[51] A sub-contracting structure by which a customer commissions the bank to construct or manufacture an asset for a fee payable at a later date and the bank then sub-contracts the construction/manufacture to a supplier. The mark-up on difference between the fee paid by the customer and the fee paid by the bank on the sub-contract is equivalent to interest.

[52] Section 47A Finance Act 2005 (inserted by Section 96 Finance Act 2006), now replaced by section 564D Income Tax Act 2007 and sections 504 and 512 Corporation Tax Act 2009.

[53] Section 49 and 49A Finance Act 2005, replaced by sections 564E-F Income Tax Act 2007 and sections 505-6 and 513-4 Corporation Tax Act 2009.

[54] Section 53 Finance Act 2007, adding s 48A of the Finance Act 2005 now replaced by sections 564G and 564S-U of the Income Tax Act 2007 and sections 507 and 513 Corporation Tax Act 2009.

[55] The Financial Services and Markets Act (Regulated Activities) (Amendment) Order 2010 (SI 2010/86), which inserted a definition of alternative finance investment bonds in Section 77A to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) and added them to the exclusions in paragraph 5 of the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (SI 2001/1062).

49. This series of reforms ultimately paved the way in 2014 for the UK Government to issue its own *sukuk* for £200 million.[56] Investor interest was around £2.3 billion. This was the first Sukuk issued by a sovereign state outside the Islamic world. A second £500 million sukuk was issued in 2021.[57] These *sukuk* generate returns based on rental of UK Government-owned properties. Investors purchase certificates from a special purchase vehicle. Those funds are used to purchase a head-lease of the UK Government properties, which are then leased back to the Government. The rental payments on the lease are used by the special purpose vehicle to pay regular return on the certificates, economically equivalent to interest. At maturity the Government buys back the head-lease and the certificates are redeemed for their principal value.

50. As noted earlier, aside from tax another issue that has required certain accommodations is the regulatory treatment of Islamic finance products. For example *ijara* arrangements did not fall within the definition of regulated mortgage contracts. Therefore the Treasury in 2007 introduced a specific (home purchase plans) to cover *ijara* and diminishing *musharaka* models of sharia-compliant home financing.[58]

51. Other lumps in the regulatory playing field may still exist, such as whether *mudaraba* are to be regulated as deposits (despite the fact that one of the essential characteristics of the structure is that the investors take an element of risk, which is antithetical to the capital-protected nature of a deposit under the UK regulatory regime), whether *musharaka* are regulated as collective investment schemes, and whether *takaful* (sharia-compliant mutual funds) are regulated as insurance.[59] I will spare you the detail of this, as the answers may well depend on the exact structure of the transaction in question.

Further into the Blue

52. I had to get to grips with some of these tax adjustments, when the Stamp Duty treatment of Islamic property finance came before the Supreme Court in 2018 in *Project Blue Ltd v Revenue and Customs Commissioners* [2018] UKSC 30 [2018] 1 WLR 3169 ("Project Blue"). Project Blue Ltd was a special purpose vehicle owned by the sovereign wealth fund of Qatar. It had agreed to purchase the old Chelsea Army Barracks for redevelopment from the Ministry of Defence. The

[56] HM Treasury Press Release (2014) *Government issues first Islamic bond*: https://www.gov.uk/government/news/government-issues-first-islamic-bond
[57] HM Treasury Press Release (2021) *UK bolsters Islamic finance offering with second Sukuk*: https://www.gov.uk/government/news/uk-bolsters-islamic-finance-offering-with-second-sukuk
[58] See the Regulation of Financial Services (Land Transactions) Act 2005 (amending Part 2 of Schedule 2 of the Financial Services and Markets Act 2000) and Chapter XVB of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (as inserted by FSMA (Regulated Activities) (Amendment) (No 2) Order 2006 (SI 2006/2383)). See also the FCA Handbook's Perimeter Guidance Manual at PERG 14.4.
[59] See *Islamic Finance Law and Practice* (op. cit.) at 3.36-61 for further discussion.

company sought to fund this by a sharia-compliant *ijara* arrangement with a Qatari financial institution. Under this arrangement Project Blue purchased the barracks from the Ministry for just under £959 million and simultaneously sold it to the bank for approximately £1.25 billion. The bank in return granted a 999-year lease back to Project Blue, coupled with options for the company to re-acquire the property at a later date.

53. This caused some confusion as to how the exemptions for *ijara* structures interacted with other exemptions, in the face of a slightly unusual *ijara* transaction. It was unusual because instead of the bank buying the property directly from the Ministry (and then leasing to Project Blue), Project Blue itself had initially purchased the property and simultaneously sold it onto the bank.

54. Project Blue argued that no SDLT was payable on its purchase from the Ministry because it had immediately on-sold it to the bank, and so could claim general sub-sale relief on that transaction.[60] That relief was not specifically aimed at Islamic finance transactions but clearly did apply here.

55. However, the bank claimed that no SDLT was payable on its purchase of the barracks from Project Blue, under the *ijara* exemption discussed earlier.[61] And Project Blue claimed that its acquiring of the lease and options to buy-back the property were also exempted. Therefore it was argued that nobody was required to pay any SDLT at all.

56. Unsurprisingly Her Majesty's Revenue and Customs (HMRC) disagreed. However, neither HMRC nor the courts were sure how the different exemptions worked together. At first HMRC tried to levy tax on the £959 million purchase by Project Blue from the Ministry, but subsequently sought instead to levy tax on the £1.25 billion value of the sale by Project Blue to the bank.

57. After disagreement in the courts below[62], this arrived at the UK Supreme Court. There was even disagreement within that court. The majority considered that both the sub-sale exemption and the *ijara* exemption did, in principle, apply and so the sale from the Ministry to Project Blue, the sale from Project Blue to the bank, and the subsequent lease and buy-back by Project Blue were all exempt.[63] However, they considered this was a legislative accident, and went on to apply an

[60] Section 45(3) Finance Act 2003 (c. 14) (this section was amended by the Finance Act 2013 (c.29) and sub-sale relief is now dealt with in Schedule 2A Finance Act 2003).
[61] Section 71A Finance Act 2003 (c. 14).
[62] The First Tier Tribunal held that Project Blue was liable to pay SDLT on the £959 million (on the basis of the anti-avoidance provision in Section 75A Finance Act 2003) in [2013] UKFTT 378 (TC); this was upheld by the Upper Tribunal in [2014] UKUT 564 (TCC); however it was then overturned by the Court of Appeal which held that SDLT was payable by the bank on the £1.25 billion (on the basis that the *ijara* exemption in Section 71A did not apply) [2016] EWCA Civ 485.
[63] Project Blue at [23]-[38].

anti-avoidance provision[64], meaning ultimately SDLT was payable by Project Blue on the £1.25 billion total value of the transaction.[65]

58. For my part, I disagreed, and considered that when read together with the sub-sale exemption, the *ijara* exemption did not apply to the transfer from Project Blue to the bank, meaning SDLT would be payable *by the bank* on the £1.25 billion.[66]

59. Neither of these solutions was completely satisfactory as they resulted in SDLT being payable on the value of the financing (£1.25 billion) rather than the £959 million purchase price that Project Blue paid the Ministry of Defence, as would have been the case if Project Blue had simply purchased the barracks with conventional financing.

60. In fact, Project Blue argued that this was discriminatory against those of Islamic faith as they would be more likely than others in the same market to use sharia-compliant financing. It argued that the transactions engaged Article 9 of the European Convention on Human Rights (the right to freedom of religion) and Article 1 of the First Protocol to the Convention (the protection from interference with one's property), together with Article 14, which requires that these rights be protected without discrimination (including on the ground of religion). So it was said that the Court should interpret the provisions of the statute to avoid a discriminatory result. The Supreme Court unanimously rejected that argument, on the basis that any discriminatory effect in respect of this particular (and unusual) set of circumstances was justified by the need to cast anti-avoidance provisions widely.[67]

61.

Parliament has now remedied this particular problem by an amendment to the legislation, which makes clear that the sub-sale relief will not apply where the *ijara* exemption applies.[68] Thus, in this sort of arrangement SDLT would now be payable on the initial £959 million sale by the Ministry to Project Blue, and the financing arrangements between Project Blue and the bank would be exempted. Thus the principle of equal treatment of Islamic finance structures and conventional financing is restored, after what some have labelled a wobble in the Supreme Court.

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[64] Section 75A Finance Act 2003 (c. 14).
[65] Project Blue at [39]-[64].
[66] Project Blue at [91]-[129].
[67] Project Blue at [65]-[80]; [100].
[68] By amendment to Section 45(3) Finance Act 2003 in Section 82 and paragraph 2 of Schedule 21 of the Finance Act 2011 (c. 11) – see *Project Blue* at [33]. Although as noted above Section 45 has now been replaced by Schedule 2A Finance Act 2003, the clarification has been retained in the new provisions.

Conclusions

62. Resurfacing now, from the deep waters of detailed tax legislation, you may ask why I have taken you to such murky depths. I think there emerge three points of interest. First, that UK lawmakers have tried (and I have no doubt will continue trying) to ensure that Islamic finance transactions are on a level playing field with conventional finance – even if that means they have to play by slightly different rules.

63. However, secondly, achieving this is not straightforward. Tax legislation, for example, does not refer expressly to Islamic finance. Rather it applies to any transaction that meets the characteristics of the typical Islamic finance structures for which it has been drafted. In that sense the legislation is agnostic. This is consistent with the principles that tax legislation does not inquire into one's motives for a transaction and in any event must apply to everyone irrespective of faith. However, given the myriad potential transaction structures, which continue to evolve, and the desire to make sure they receive neither worse, nor more favourable treatment, teething problems are unsurprising. As legislators become more familiar with the potential structures, unintended consequences will hopefully become less likely.

64. Thirdly, when considering the Project Blue dispute the courts approached the case at it would for any other transaction, applying the language of the legislation, in the context of the legislative intention to provide a level playing field, to the structure of the transaction that was before them. Again the approach is agnostic.

65. However, the courts are by no means blind to the Islamic imperatives of such arrangements. Some academics had argued that, in the Project Blue case, the *ijara* arrangement should simply have been treated as a mortgage in disguise, based on equitable principles that the test of whether something is a mortgage is a matter of substance rather than form.[69] If it looks, swims, flies and quacks like a duck, it is a duck. So if it has the same economic consequences as a mortgage and is taxed like a mortgage it is a mortgage. The Supreme Court unanimously rejected that approach.[70] To do so would run counter to an important purpose of the transactions, which was to comply with the prohibition on *riba* or interest. These were real transactions - not a sham. They were not a mortgage loan in substance. Equity does not force upon parties a form of

[69] See Farrand J. & Clarke A. (Eds.) (2023) *Emmet and Farrand on Title,* Volume 3, Part 8, Chapter 32.045 and Bulletins No. 78 (September 2016) pp. 1-5 *Alternative Finance & HMRC Blinkers,* and No. 85 (June 2018) pp 1-6 *When is a Mortgage not a Mortgage?*

[70] Project Blue at [87]-[91]; [100].

transaction different from that which they have chosen to use, where that choice was motivated by their own conscientious desire to avoid contradicting the tenets of their faith.

66. Leaving aside the tax provisions, typical Islamic finance structures have so far required no other amendments to English law in order to provide for their users a broadly level playing field alongside their non-Islamic competitors. Those structures simply take advantage of the existing basic concepts of English law: the contract, the lease, the partnership, the trust, the ability to separate legal and beneficial interests. In fact, many of the structures were already commonly used outside of Islamic finance: the *ijara* structure is similar to a hire-purchase arrangement or a sale and lease-back which have often been used in conventional finance, meanwhile the *mudaraba* and *wakala* arrangements are similar to conventional collective investment schemes. This demonstrates how the flexibility of the English common law facilitates business people and consumers to structure their dealings in accordance with their wishes and needs, whether commercial, practical or spiritual.

67. It would be wrong to suggest that the playing field as between Islamic and non-Islamic finance is, or even could be, as smooth as a snooker table. There will always be commercial and economic differences between, for example, the provider of finance whose security is outright ownership and one who merely holds a security interest, like a mortgage or charge, in the underlying asset. Ownership has advantages over a security interest, but it also brings with it responsibilities, risks and potential liabilities. These may be capable of being off-set by insurance or even collateral guarantees by the recipient of the finance, like the tax indemnity already discussed. But the law itself will never on its own be able to iron out all these little humps and bumps. Their minimisation will have to be left to the ingenuity of the participating parties.

68. Finally there will always be those who say that a legal system which submits issues about sharia principles to adjudication by an English judge or arbitrator will expose participants to the potential injustice of having as a judge someone who is unlikely to have the level of Islamic learning and experience which they would ordinarily be able to bring to bear on purely English legal issues. That is of course true as matters presently stand. Judges with Islamic learning and experience are probably a smaller proportion of the judiciary than the Islamic element of the wider population. I very much hope that this will change. However, some argue that secular courts, even when well-versed in Islam, are still inherently unsuitable venues for resolving Islamic disputes, which requires the expertise of Islamic scholars and should be resolved by conciliation

rather than adversarial proceedings.[71] It is said that bespoke ADR mechanisms should be established for Islamic finance. Ultimately that will be a matter for the industry, but for my part I note that English arbitration law gives the parties a wide choice of arbitrator and flexibility over procedure. Furthermore the encouragement provided by English procedural law to parties to disputes to resolve them if possible by mediation (a process focussed on conciliation which I understand to be positively encouraged by sharia as a matter of basic principle[72]) ought to provide a substantial opportunity for the development of a body of professional, Islamic-trained mediators to fill exactly that gap.

Perhaps the most reliable verdict upon the state of the playing field is that the UK's drive to welcome Islamic finance, combined with its position as a leading financial and legal centre, does appear to be attracting Islamic customers who wish to be sharia compliant. UK-based Islamic finance institutions hold 85% ($7.5 billion) of total European Islamic banking assets (excluding Turkey). This also far exceeds the Islamic banking assets in the United States ($636 million), suggesting the UK has managed to establish itself as the preeminent western hub for Islamic banking.[73] In the modern commercial world village, where business people are free to go anywhere in the world for their finance, that looks like a vote of at least some confidence that we are getting it right.

[71] See for example *Islamic Finance Law and Practice* (op. cit.) at 4.06-4.07.
[72] See Quran 4:40: "*But whoever pardons and seeks reconciliation, then their reward is with Allah*".
[73] TheCityUK (2022) *Islamic Finance: Global Trends and the UK Market*: islamic-finance-global-trends-and-the-uk-market.pdf (thecityuk.com)