Choice of Law and Islamic Finance

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Abstract

The past decade has seen the rapid growth of Islamic finance on both international and domestic levels. Accompanying that growth is a rise in the number of disputes that implicate Islamic law. This remains true even when the primary law of the contract is that of a common law or civil law country. If judges and lawmakers do not understand the reasoning of Islamic finance professionals in incorporating Shariah law, the result could be precedents and codes that hamper the growth of a multi-trillion dollar industry. This note compares the reasoning of the English court in Shamil Bank v. Beximco Pharmaceuticals to the practice of forums specializing in Islamic finance dispute resolution. The note then addresses other perceived difficulties in applying Islamic law in common law and civil law courts. The practice of Islamic finance alternative dispute resolution (ADR) forums shows a consistent reliance on the use of national laws coupled with Shariah. Also, there are cases showing that U.S. courts and European arbitrators are willing to use Islamic law. Research indicates that the decision in Shamil Bank v. Beximco Pharmaceuticals was not consistent with the intentions of the parties or the commercial goals of Islamic finance. Finally, this note concludes that it is not unreasonable for a Western court to judge a case if the dispute arises out of an Islamic finance agreement.

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INTRODUCTION

Financial experts estimate the current worth of Shariah-compliant assets at almost one trillion U.S. dollars globally.¹ As measured by these assets, the global market for Islamic financial services has grown ten percent per year since the mid-1990s.² The potential market for Islamic financial products could be as high as four trillion U.S. dollars.³ The bulk of these assets are held by commercial banks, while investment banks, sukuk,⁴ equity funds, and the assets of takaful⁵ account for twenty-five percent of Shariah-compliant assets.⁶ Strikingly, business activities in the Islamic financial sector are not confined to countries whose legal systems are Shariah-based. The United Kingdom, a common law country, ranks ninth in the world in holdings of Shariah-compliant assets.⁷ In the United States, there are approximately nineteen providers of Islamic financial products, including banks, mortgage providers, and investment brokers.⁸

In common law and civil law countries, the Islamic banking phenomenon experiences growth based on two factors. The first is that the sector is profitable for investors.⁹ It represents a viable source of growth with an increasingly positive reputation for responsible management. The second factor fueling growth of Shariah-compliant finance is increased demand stimulated by rising numbers of Muslims in common law and civil law countries.¹⁰

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⁴ Sukuk is the Arabic plural form of sakk. The word sakk is of Persian origin, and itself comes from the English word check. The term sukuk has come to encompass all Islamic bonds, hedge funds, and shariah-compliant stocks and securities. See NATHIF J. ADAM & ABDULKADER THOMAS, ISLAMIC BONDS: YOUR GUIDE TO STRUCTURING, ISSUING AND INVESTING IN SUKUK 42-64 (2004) (providing an extensive explanation of the origin of the term and its role in both historic and modern Islamic finance).

⁵ Takaful, similar to mutual insurance, is a risk-sharing entity that allows for the transparent sharing of risk by pooling individual contributions for the benefit of all subscribers.” McKenzie, supra note 2.

⁶ Id.

⁷ Id.


⁹ Id. at 2.

¹⁰ Id. at 1.
The demand for Shariah-compliant services within a non-Shariah legal system creates potential conflict of law issues. Specifically, a conflict of law arises where the choice of some form of Islamic law is incorporated into the terms of the contract. Ambiguity may lie in the terms used within the contract to describe the various types of Shariah-compliant transactions. European and U.S. courts succeed at varying degrees in interpreting such clauses. Contract language affects performance and expectations for parties to financial transactions. Judges evaluating cases subject to Shariah may even have to overcome constitutionally imposed limitations on their ability to interpret laws derived from religious sources.

The practices to date of Islamic finance in alternative dispute resolution should serve as a guide for common law and civil law courts in interpreting the method in which Shariah should be applied to the contract alongside national laws. This note seeks to prove that whenever a reference to Islamic law is made within a contract, it is with the intent that Islamic legal principles be applied in the contract's interpretation when deciding disputes arising from that contract. Choice of law is the element most commonly added to a contract—often directly to the arbitration clause. The inclusion of choice of law clauses that reference Islamic law and a national system is the industry practice in Islamic finance. Local choice of law doctrine and policy concerns should not prevent courts or arbitral tribunals from recognizing the validity of a clause that references both Islamic law and a national system.

I. SHARIAH AS A CHOICE OF LAW

A. "A Purely Discretional Form of Justice": Islamic Law in Western Tribunals

Shariah as a choice of law for common law courts and arbitrators is not peculiar to the current era of Islamic finance. Early cases demonstrate that arbitrators denied that Islamic law was sophisticated enough to utilize in complex commercial disputes. 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. He acknowledged that Abu Dhabi's law, which was based on Islamic law, should be applied. He subsequently 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 principles of English law.

13. Id.
14. Id.
The arbitrator in \textit{Ruler of Qatar v. International Marine Oil Co. Ltd.} arrived at the same conclusion as Lord Asquith in \textit{Trucial Coast}. The arbitrator in \textit{Ruler of Qatar} 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.” The arbitrators’ opinions in both cases do not attempt to give any principle through which they arrive at the decision not to apply Islamic law, other than very general statements about their disdain for it.

Had the arbitrators attempted to answer the question before them, they would have found that there was expansive literature on Islamic contract law. Recently, a British court was asked to decide whether Shariah is a legitimate choice of law in the United Kingdom. In \textit{Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd and others}, the Court of Appeals was asked to consider whether a particular contract was invalid under Shariah law. In that case, Beximco Pharmaceuticals entered into a \textit{murabaha} agreement with Shamil Bank of Bahrain, a financial institution holding itself out to be a bank that conducts its business within the limits of Shariah law. The agreement was signed by the parties and resulted in the acquisition of nearly forty-seven million dollars in assets. The agreement contained a choice of law clause that read, “[s]ubject to the principles of the Glorious Sharia’a, this agreement shall be governed by and construed in accordance with the laws of England.” When Beximco failed to make payments under the agreement, Shamil Bank claimed the amount outstanding under the agreement. Beximco claimed that the agreement was invalid because it contained a hidden form of \textit{riba}. The Appellate Court acknowledged that if the phrase “[s]ubject to the principles of the Glorious Sharia’a” was a valid choice of law clause, then Beximco would succeed under the agreement.

\begin{itemize}
  \item \textit{Shamil Bank of Bahrain EC v. Beximco Pharm. Ltd.,} [2004] EWCA (Civ) 19, [1], [2004] 1 W.L.R. 1784, 1787 (appeal taken from Eng.).
  \item \textit{Murabaha}, often called “cost-plus” by Westerners, is an agreement in which one party acquires an asset with the promise that the other party will purchase it, usually in installments. As in retail transactions, the original purchaser makes a profit by selling the product at a higher price. The difference between this type of transaction and a traditional mortgage is that the original purchaser, most often a bank, acts much like a middleman by retaining an ownership interest in the product until the goods are completely paid for. \textit{See Handbook of Islamic Banking} xvii, 52 (H. M. Kabir Hassan & Mervyn K. Lewis, eds., 2007) (defining murabaha).
  \item \textit{Riba}, often translated as “interest,” literally means “an excess” in Arabic. An important fact to consider in \textit{Shamil Bank} is that there was no explicit interest in the agreement, compound or simple. \textit{Riba} often arises due to the way the transaction is carried out, where interest is in effect charged on the borrower. “[Riba] is defined as ‘any unjustifiable increase of capital whether in loans or sales.’ It is essentially any unlawful or unjustified gain. Any contracts which include an excessive profit margin will also be considered as a form of riba if it is exploitative, oppressive, or unconscionable.” Kutty, \textit{supra} note 21, at 604.
\end{itemize}

\begin{itemize}
\item 17. \textit{Ruler of Qatar v. International Marine Oil Co. Ltd.,} 20 I.L.R. 534 (1953).
\item 18. \textit{Id.}
\item 19. \textit{Id.}
\item 20. \textit{Id.; Trucial Coast,} 1 INT’L & COMP. L.Q., at 247.
\item 23. \textit{Murabaha}, often called “cost-plus” by Westerners, is an agreement in which one party acquires an asset with the promise that the other party will purchase it, usually in installments. As in retail transactions, the original purchaser makes a profit by selling the product at a higher price. The difference between this type of transaction and a traditional mortgage is that the original purchaser, most often a bank, acts much like a middleman by retaining an ownership interest in the product until the goods are completely paid for. \textit{See Handbook of Islamic Banking} xvii, 52 (H. M. Kabir Hassan & Mervyn K. Lewis, eds., 2007) (defining murabaha).
\item 24. \textit{Shamil Bank,} [2004] EWCA (Civ) 19, [1], [6], [2004] 1 W.L.R. at 1787–89.
\item 25. \textit{Id. at} [15]–[17], 1 W.L.R. at 1790–91.
\item 26. \textit{Id. at} [1], 1 W.L.R. at 1787.
\item 27. \textit{Id. at} [21], 1 W.L.R. at 1791–92.
\item 28. \textit{Id. at} [27], 1 W.L.R. at 1795. \textit{Riba}, often translated as “interest,” literally means “an excess” in Arabic. An important fact to consider in \textit{Shamil Bank} is that there was no explicit interest in the agreement, compound or simple. \textit{Riba} often arises due to the way the transaction is carried out, where interest is in effect charged on the borrower. “[Riba] is defined as ‘any unjustifiable increase of capital whether in loans or sales.’ It is essentially any unlawful or unjustified gain. Any contracts which include an excessive profit margin will also be considered as a form of riba if it is exploitative, oppressive, or unconscionable.” Kutty, \textit{supra} note 21, at 604.
\item 29. \textit{Shamil Bank,} [2004] EWCA (Civ) 19, [55], 1 W.L.R. at 1801.
\end{itemize}
The appellate court found this statement to be invalid, however, because the 1980 Rome Convention on the Law Applicable to Contractual Obligations (Rome Convention) allows only one system of law to govern a contract and also requires that the chosen law be that of a particular country. According to the court, if the intention of the parties was to incorporate Shariah law into the contract, then they did not do so effectively; instead, they would have had to identify a foreign law or code and, more specifically, to which part of the contract the clause applied. The appellate court, in strict application of this principle, stated, "It is plainly insufficient for the defendants to contend that the basic rules of the Sharia applicable in this case are not controversial. Such ‘basic rules’ are neither referred to nor identified."

B. The Need for Combined-Law Contracts

*Shamil Bank* has been positively accepted by commentators in its two main propositions concerning Shariah as a choice of law: (1) the Rome Convention requires that the law of a contract be that of a country; and (2) there can be only one law which governs a contract. This conclusion would likely be the same for other common law jurisdictions. European civil law jurisdictions will also probably require that the law governing a contract be that of a state. These propositions are not present in arbitration forums: it is possible to allow one system of law to govern a contract and still subject the same agreement to Shariah.

The increase in banking transactions correlates with an increase in disputes arising out of these contracts. The result of *Shamil Bank* is problematic for contracting parties who would like to “mix” laws, as Beximco purported was its intention. Before explaining this issue, perhaps it will be useful to explain other choice of law clause options that are available to contractors.

Theoretically, contracting parties to a Shariah-compliant transaction may choose from three options: that the contract be (1) subject exclusively to Islamic law; (2) subject solely to a state legal system, whether or not said system be based on Shariah law; or 3) subject to a combined system that pairs a national legal system with Islamic principles. The third option of a combined system is different than incorporating specific principles of Islamic law into the contract in a manner that

30. *Id.* at [40], 1 W.L.R. at 1795–96.
31. *Id.* at [52], 1 W.L.R. at 1800.
32. *Id.*
34. *Id.*
specifically identifies to what extent each principle applies. A combined system of a state legal system and general principles of Shariah would be better characterized as cumulative, meaning that the state system of law is subject to Shariah. Disputes under the contract may be analyzed under the state system, and in cases of conflict, Shariah will prevail.\textsuperscript{39}

Currently, English law is the most popular choice of law for the governing of disputes arising under agreements purporting to adhere to Islamic principles.\textsuperscript{40} Some of these contracts contain no references to Islamic law and may even include a "waiver of Shariah defense," meaning that in case of a dispute the parties agree to waive any argument that the agreement is invalid under Shariah law.\textsuperscript{41} Such stipulations attempt to rectify what has become known in the industry as the "Sharia risk," a term associated with the risk that one party will fail under its contact obligations and then state the entire agreement is void for being invalid under Islamic law.\textsuperscript{42} This risk exists despite the fact that multinational law firms have created entire divisions dedicated to Shariah-compliant financial transactions.\textsuperscript{43} However, the current culture of Islamic finance is liberal, with parties beginning with the assumption that a deal is Shariah-compliant, and contracting parties are not necessarily knowledgeable of Islamic law.\textsuperscript{44} Muhammed Al-Jasser, governor of the Saudi Arabian Monetary Agency states:

We have richness in diversity…. Everything is permissible unless it is shown to contravene Islamic tenets. Someone has to tell me if and how it contravenes explicitly. In fact, most conventional financial products are fine…. Regulators and supervisors are not religious scholars. They are in charge of financial stability. The safety of the institution is paramount.\textsuperscript{45}

The state of choice-of-law in Shariah-compliant finance may be described in four key principles: (1) a combined-law clause will likely be found to be repugnant to the laws of common law and civil law countries; 2) Shariah or Islamic law as a choice of law will likely be held to be of ineffective because it does not represent the law of a nation; (3) the law of England is a popular choice of law for contracts involving Islamic financial services; and (4) all deals are permissible unless shown to contravene Islamic principles. Almost all of these contracts contain an arbitration clause, particularly those involving parties from different national jurisdictions.\textsuperscript{46} Most arbitration in Islamic finance is done using combined-law, meaning under one
nation's laws subject to Shariah law. 47 Considering the outcome and publicity of the Shamil Bank case, this result seems counterintuitive, and in order to facilitate an understanding of the work of the arbitrators, it will be necessary to enter into some discussion about the role Shariah occupies in today's legal systems.

C. Shariah in Modern Legal Systems

Shariah is the name for "all the laws of Islam including Islam's whole religious and liturgical, ethical, and jurisprudential systems." As put by one Saudi scholar speaking at a U.S. university:

Broadly defined, the Shari'a consists of "everything written by Muslim jurists throughout the centuries" . . . . Narrowly construed, "the Shari'a is confined to the undoubted principles of the Qur'an, what is true and valid of the Sunna, and the consensus of the community represented by its scholars and learned men during a certain period and regarding a particular problem, provided there was such a consensus." 48

Shariah decisions are arrived at through consideration of a group of "legal proofs and evidence that . . . will either lead to certain knowledge of a Shari'ah ruling or at least to a reasonable assumption concerning the same" made by those qualified to make such rulings. 49 The primary sources of proof used to arrive at these rulings are the Qur'an and the Sunnah. 50 Jurists may use these sources to arrive at verdicts by referring to precedential authority in the opinions of the Companions 51 along with scholarly consensus, analogous reasoning, and policy-related considerations such as public interest, precautionary measures, and custom. 52

Within Shariah law, some laws are immutable while others are interpreted according to the particularities of the situation, including the relative good that a specific decision may bring to the community. 53 This grey area is the province of al-ijtihad, which is the use of legal reasoning to arrive at a correct opinion when there is no clear text on the issue. 54 In a dispute arising from a financial transaction, the

47. Id. at 90.
50. AL-ALWANI, supra note 48, at 1.
51. IBRAHIM ABDULLA AL-MARZOUQI, HUMAN RIGHTS IN ISLAMIC LAW 10, 30–33 (2d ed. 2001).
52. Id. at 70.
53. Id. at 38, 47, 58, 61, 65, & 70.
55. AL-MARZOUQI, supra note 51, at 44. The term al-ijtihad appears quite often in works discussing Islamic finance because many transactions engaged in by Muslims today are innovative when judged against the classical text and thus are not clearly permissible or impermissible to the lay businessperson. The following narration, perhaps, is the most illustrative statement of the purview of al-ijtihad in Islamic jurisprudence:
status of a specific issue will fall within one of the following categories: (1) obligatory; (2) recommended; (3) merely permissible; (4) ill-advised; or (5) unlawful. For purposes of this discussion, the last category is the most important because it is the source of the "Shariah risk" mentioned above.

The term "unlawful" may be roughly equated, in the mind of the western lawyer, as being "unconstitutional." In fact, several Muslim-majority countries adopt Shariah as the primary source of legislation. For example, Saudi Arabia's Basic Law of the Government states "[t]he Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution . . . ." Likewise, Oman does not have an official constitution, but its Basic Law of the Sultanate proclaims that "[t]he religion of the State is Islam and the Islamic Shariah is the basis of legislation." Other nations incorporate Shariah into their legal systems to varying degrees. The United Arab Emirates (UAE), Sudan, Yemen, Syria, Egypt, Kuwait, Iraq, Pakistan, Iran, and Qatar regard Shariah as the primary source of law. For example, in the UAE, the passage of the UAE Law of Civil Transactions of 1985 was regarded by some as a veritable "virtual return to the Shari'a." In other countries, such as Malaysia, Indonesia, Libya, Algeria, and Morocco, Shariah law is highly influential and remains a source of legislation. For example, the Libyan Civil Code states, "In the absence of an applicable legal provision the judge shall decide in accordance with the principles of the Islamic Shari'a . . . ." Judging from the various levels of incorporation, in the modern legal

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[Upon commissioning Mu'adh ibn Jabal as the leader of a group of missionaries to the Muslims in Yemen, the Prophet Muhammed] asked: How will you judge when the occasion of deciding a case arises? He replied: I shall judge in accordance with Allah's Book. He asked: (What will you do) if you do not find any guidance in Allah's Book? He replied: (I shall act) in accordance with the Sunnah of the Apostle of Allah . . . . He asked: (What will you do) if you do not find any guidance in the Sunnah of the Apostle of Allah . . . ? He replied: I shall do my best to form an opinion and I shall spare no effort.


57. See William Ballantyne, Introduction to ISLAMIC LAW AND FINANCE 1, 3 (Chilbi Mallat ed., 1988), available at http://www.soas.ac.uk/cimel/materials/islamic-law-intro.html ("In a jurisdiction where the Shari'a applies, contracts not in accordance with its precepts are quite simply illegal.").

58. This was euphemistically referred to by one Muslim law professor as "what we call the establishment clause." Mohamed Mattar, Address at the Johns Hopkins School of Advanced International Studies Islamic Law Forum: Islamic Law in U.S. Courts: Theory and Practice (Oct. 2, 2005).


62. Kutty, supra note 21, at 620.

63. Id. at 595, 596 n.16.

64. Id.
system Shariah law acts as: (1) an immutable source of constitutional law; (2) a precedential source of common actions and defenses; (3) and a source of treatise for the interpretation of civil codes. To understand this statement, one may consider the Nizam, or supplementary Saudi laws. These regulations are regarded as valid only to the extent that they are consistent with Shariah law,* although in practice these laws are rarely challenged or overruled.**

It is because of this broad level of applicability that a combined-law clause is used explicitly in Islamic finance transactions, as well as in practice by both courts of law in Muslim-majority countries and the arbitral tribunals that specialize in Islamic finance ADR.

D. Current Practices in Islamic Finance Dispute Resolution

The present environment in the law of Shariah-compliant finance is unprecedented in that non-scholars of Shariah are being called upon to interpret Islamic law. Those versed in business and finance laws draft contracts to agree with Shariah principles to the best of their ability. Of course, the realities of life cannot be drafted out of a contract, and disputes do arise.

All of the major players in the sukuk market are parties to the New York Convention.67 This list includes Malaysia, Qatar, UAE, and Bahrain.68 The rules and practices of arbitration centers in these countries and others demonstrate a consistent practice of combined-law arbitration.

Islamic banks normally retain a specialized board for approval of financial transactions, and this branch may double as an arbitration body. These panels may judge disputes through a mixture of national law and Shariah principles. For example, the Philippines Monetary Board created the Al-Amanah Islamic Investment Bank of the Philippines (Islamic Bank) on April 28, 1992.69 Although the Philippines is the world’s most populous Catholic nation, its legal system reflects a combination of civil law, common law, and Islamic law.70 The Monetary Board is an organ of the Bangko Sentral ng Pilipinas, or the Philippines Central Bank, and was created under the Constitution of the Philippines.71 There is no religious requirement for membership on the bank’s Monetary Board;72 however, in creating the rules and regulations for the Islamic Bank, the Monetary Board was required to follow the

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66. See Parker, supra note 45 (quoting Al-Jasser).
68. Id.
69. ABDEL AZIZ DIMAPUNONG, ISLAMIC BANKING RESEARCH INST., ISLAMIC BANK ARBITRATION 6 (2006).
principles of Shariah law. The charter for the Islamic Bank provided for the creation of a board of arbitration with jurisdiction to settle any disputes arising from conflicts between the Islamic Bank and its investors or shareholders. This regulation provided that members of the Islamic Bank's Sharia Advisory Council will also act as the Sharia Arbitration Council and will have authority to adjudicate controversies involving less than $100,000. The Islamic Bank did not have authority to operate except within the authority granted to it by a primarily non-Muslim body, and the Sharia Arbitration Council was bound to act within national limits of due process; however, the Sharia Arbitration Council's primary function was still to aid in "maintaining [the Islamic Bank's] unique Islamic cultures and operating policies that are Sharia' compliant."

In Indonesia, Islamic banking disputes also are decided through a mix of Shariah and civil law. In fact, conflicts that emerged with the rise of Islamic banking have contributed to that country's legal development in what it categorizes as religious and civic law, as well as to the development of the Indonesian commercial arbitration system. Indonesia maintains a dual system of courts: one for civil matters and one for Shariah matters. During the initial growth of Islamic banking in Indonesia, there was confusion as to which court would have competence to hear cases related to Islamic finance. Civic courts were generally not academically qualified to judge financial matters pertaining to Shariah law, but the jurisdiction granted to religious courts was limited to hearing cases relating to marriage, probate, wills, and endowments. Religious scholars took the first step to set up a qualified body to hear such disputes, creating an ad hoc tribunal known as "Basyarnas," or the National Shari'ah Arbitration Body. While the creation of an official Shariah arbitral tribunal enjoyed positive favor from the people of Indonesia, the Basyarnas system was characterized by poor accessibility due to lack of full-time personnel and permanent, wide-spread infrastructure. Despite its known deficiencies, the Basyarnas was able to serve the ends for which it was created in that it used "Islamic law... as the basic principle" in settling disputes arising from financial disagreements that also invoked the civic laws. Eventually, the competence of religious courts was increased to hear "any act or business activity which is undertaken in accordance with Islamic principles which consists of Syariah banks, Syariah micro financing institutions, Syariah insurance, Syariah reinsurance, Syariah portfolio management, Syariah bonds and Medium-term security, Syariah security market, Syariah finance, Syariah pawn broking, Syariah retired fund institutions and

73. DIMAPUNONG, supra note 69, at 6.
74. Id. at 9.
75. Id. at 25.
76. Id. at 5.
77. Id. at 9.
78. Id. at 25.
80. Id. at 1.
81. Id. at 1-2.
82. Id.
83. Id. at 1.
84. Id. at 5.
85. RASYID, supra note 79, at 5.
Syariah business." This new regulation extended the authority of religious courts to non-Muslims, provided that they were involved in a dispute concerning "Islamic economic matters." In such disputes the religious courts, like the Basyarnas, must rely on both the "material law" related to Islamic financial transactions and Shariah law.

It is standard practice for better-established arbitral tribunals to utilize a combined-law approach to hear cases involving Islamic finance. Indeed, acceptance of a mixed choice of law is written into the rules of many of these specialized bodies.

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) houses a specialized department to arbitrate Islamic financial disputes. The Asian-African Legal Consultative Organisation (AALCO) established KLRCA in 1978 to facilitate commerce between its 47 member states. AALCO membership includes preeminent nations in Islamic finance, such as the UAE, Bahrain, Qatar, Saudi Arabia, Malaysia, Brunei Darusalam, and emerging economic power Nigeria. The KLRCA promulgated the Rules for Islamic Banking and Finance Arbitration (KLRCA Rules), a specialized regulation applicable to any "commercial contract, business arrangement or transaction which is based on Shariah principles." The KLRCA Rules suggest a model arbitration clause, to which they add: "Parties may wish to consider adding[:] The law applicable to this agreement/contract shall be that of . . . ." Rule 38 states that "[i]f the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by the law." It is obvious that, as with any modern arbitral tribunal, the KLRCA allows parties to choose the law which shall govern the arbitration. As a forum specialized in Islamic finance, the KLRCA also provides in its rules that "[t]he arbitral tribunal shall apply Shariah principles and the law designated by the parties as applicable to the substance of the dispute." This statement explicitly provides for the application of Shariah law in combination with the chosen law of the parties as necessitated by the terms of the contract and facts surrounding the conflict. However, the KLRCA presupposes that when a Shariah principle is in dispute the arbitrator will not be competent to judge the matter. In such cases where a Shariah principle is in dispute, Rule 33 provides that the arbitrator shall adjourn the proceedings and refer the issue

86. Id. at 6. As an aside, English-speaking Muslims are still at odds on the best spelling of the word "Shariah." However, Malay-speakers are more unified in their approach, almost always choosing to use the spelling "Syariah." Peter Tan, Malay Loan Words Across Different Dialects of English, 14 English Today 44, 49 (1998).
87. RASYID, supra note 79, at 6–7.
88. Id. at 7.
90. Id.
93. Id. rule 1(1).
94. Id. rule 38(10).
95. Id. rule 39(1).
to either the Shariah Advisory Council of the Central Bank of Malaysia or a Shariah expert agreed upon by the parties. 96

The United Arab Emirates houses three main arbitration centers that routinely hear disputes regarding Islamic finance matters. Among its institutions are the Dubai International Arbitration Centre (DIAC), the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC), and the International Islamic Centre for Reconciliation and Commercial Arbitration (IICRCA), the last of which is a specialty forum created by the Islamic Development Bank to cater to the Islamic finance industry. 97 The practices of the ADCCAC are ambiguous; however, its charter does provide for a relaxed requirement of professional experience for one who seeks to apply to the "Conciliator's Panel" if the applicant is a university graduate of "economics, commerce, law or Islamic law 'Sharia.'" 98 This may allude to the center being a friendly forum for the combined-law approach. The IICRCA will apply the procedural and substantive laws chosen by the parties, and its rules explicitly state that the center will not apply laws which it judges to be "incompatible with the Shariah." 99 Said rules define Shariah as "the various Islamic schools of thought and the opinions of Fiqh academies and Shariah boards of Islamic financial institutions." 100 The DIAC does not purport to specialize in Islamic financial dispute resolution, but it is housed within the Jebel Ali Free Zone, and in the same city as the Dubai International Financial Centre, both Islamic banking hubs and renowned free-trade zones. The Dubai International Arbitration Centre's Rules and Procedures allow parties to choose the law that governs the arbitration, 101 and the center is staffed with legal scholars widely published in the fields of Shariah and Islamic finance. 102 These characteristics, combined with the center's status as the region's busiest arbitration center, imply that the center would interpret a clause stipulating the arbitration be governed under "the laws of so-and-so nation, subject to the principles of the Shariah" as a statement of intent and binding choice of law.

At a more domestic level, the Muslim Arbitral Tribunal (MAT) in the United Kingdom provides yet another example of the principle of choice of law in Islamic dispute resolution. Although most known for family law arbitration, the MAT hears a range of issues, including commercial and debt disputes. 103 According to its procedural rules, the MAT will "[i]n arriving at its decision . . . take into account the Laws of England and Wales and the recognised Schools of Islamic Sacred Law." 104 The MAT states that its overriding objective is to ensure that a judgment is secured "in accordance with Qur'anic Injunctions and Prophetic Practice." 105 True to its

96. Id. rule 33.
97. Akhtar, supra note 36, at 12.
98. ABU DHABI COMMERCIAL CONCILIATION AND ARBITRATION CENTRE CHARTER art. 13 (emphasis added) (on file with author).
100. Id.
105. Id. rule 1(1).
goals, the MAT’s rules stipulate that an arbitral tribunal must consist of at least one “[s]cholar of Islamic Sacred Law” and one “[s]olicitor or [b]arrister of England and Wales.” The MAT has had some success in its approach, as indicated by a 15% increase in the use of the MAT by non-Muslims in 2009.

In fact, although the use of Shariah law in commercial arbitration has a mostly negative history, pre-Shamil Bank cases show that nothing prevents a Western tribunal from using a combined-law approach.

In State of Saudi Arabia v. Arabian American Oil Co., the arbitrator subjected the law of Saudi Arabia to the general principles of jurisprudence as he knew them. In that case, Onassis, a Greek transport company, was given a quasi-monopoly from Saudi Arabia to transport oil from out of the country. ARAMCO protested, arguing that under its concession agreement it had the right to choose its own method of transporting oil. The case went to arbitration in Geneva, and the tribunal recognized the applicability of Saudi Arabian law. Despite the clear mandate, the arbitrator decided that the rights of ARAMCO could not be “secured in an unquestionable manner by the law in force in Saudi Arabia... [and that Saudi] laws] must be interpreted or supplemented by the general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence.”

In Sanghi Polyesters Ltd. (India) v. The International Investor KCFC (Kuwait), the parties came into a dispute concerning an istina’a agreement. The parties agreed to arbitrate the dispute at the ICC, and Mr. Samir Saleh, a qualified attorney and scholar of Shariah, was appointed arbitrator. The contract contained a choice of law clause stipulating that any dispute should be “governed by the Law of England except to the extent it may conflict with Islamic Shari’ah, which shall prevail.” The entire dispute in the arbitration proceedings was whether the application of Shariah law would serve to invalidate the contract and prevent the defendant from a return of its investment capital. The losing party challenged the judgment in English court, and the judge recognized that there was no issue regarding the law of England and Wales and that the only issue was whether the contract was “invalidated in the manner claimed... under Shari’a law.” The judge ruled that there had been no

106. Id. rule 10.
110. Id.
111. Id.
113. Sanghi Polyesters Ltd. (India) v. Int'l Investor KCFC (Kuwait), [2000] 1 LLOYD'S REP. 480, 480 (2000). Istina’a is a form of contract where one party, paid in advance, is contracted to manufacture something. The practice is widely accepted as valid under Shariah, although there has been and continues to be debate among Muslim scholars on the contract’s legality due to the Islamic prohibition of selling items which you either do not yet own or whose possession is uncertain. See generally Al-Bashir & Al-Amine, supra note 46 (describing the application of istina’a in Islamic banking transactions).
115. Id.
117. Id.
serious irregularity or injustice and that the award would stand. This shows that before 
*Shamil Bank*, even in Western courts there was no supposition that a contract 
subject to Shariah principles was governed by two complete and distinct bodies of 
law; there was not a cognitive hurdle to prevent supplementing and interpreting a 
contract governed by a national law but applying general principles of a different 
system.

In conclusion, there is a resistance by some courts, echoed by European legal 
scholars, to apply Shariah to contracts which invoke another national law. This 
judgment is based on the principle that only one law can govern a contract and the 
Rome Convention's requirement that the law of a contract be that of a national 
system. Scholars also support these conclusions by general precepts of common law 
and legal reasoning, reflecting what Lord Asquith would have likely called "mere 
common sense." In spite of these firm statements from courts and scholars, the 
practice of arbitral tribunals judging matters of Islamic finance has been to apply the 
principles of Shariah to fulfill the intent of the parties, who used Islamic financial 
instruments instead of conventional bank products. But, rather than dispensing with 
one law or the other, arbitral tribunals judge the dispute to the greatest extent 
possible in accordance with the chosen national law, and only resort to applying 
Shariah principles as a gap-filler or when Islamic law sources are the basis of the 
specific issue being raised. To say the least, the actual practice of Islamic financial 
dispute arbitration demonstrates that the logical barrier that prevents a judge from 
subjecting a national law to Shariah principles is not absolute, nor is it an excessively 
complicated process. It is the *lex mercatoria* of Islamic finance and the adopted 
procedure of all arbitration centers that are accustomed to hearing disputes from 
Islamic finance.

II. THE FUTURE OF ISLAMIC FINANCE DISPUTE RESOLUTION IN THE 
WEST


Several holdings from the case of *Shamil Bank* are worth highlighting. The first 
is that the English appellate court prohibited the use of a combined-law clause based 
on the principle that a contract cannot be governed by two systems of law and the 
statement in the Rome Convention on the Law Applicable to Contractual 
Obligations that a "contract shall be governed by the law chosen by the parties." The 
second important holding of the *Shamil Bank* court was that the reference to 
Shariah in the disputed contract was nothing more than a non-binding statement of 
intent. In arriving at this conclusion, the appellate court argues that (1) the Rome 
Convention does not contemplate the choice of a non-state legal system such as 
Shariah; (2) even if the parties intended to incorporate some aspects of Shariah, they 
did not stipulate which principles should be applied; and (3) although Muslim

118. *Id.*
I.L.M 1492, 1493 (1980).
scholars differ on the application of Shariah, it is unlikely that the parties wished that a secular English court would decide principles of Islamic law.\textsuperscript{121}

The Rome Convention has since been replaced by Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I).\textsuperscript{122} In declaring that the law of a contract must be a national system, the court in \textit{Shamil Bank} relied on Articles 1(1), 3(1), and 3(3) of the Rome Convention.\textsuperscript{123} In doing so, the Appellate Court draws attention to the statement in Article 1(1) that "[t]he rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different \textit{countries}" and to the text of Article 3(3), which references "foreign law."\textsuperscript{124} The correlating articles in Rome I have been revised, and the reference to the "laws of different countries" no longer appears in Article 1(1).\textsuperscript{125} However, the text of Article 3(3) of Rome I still allows for the same construction in \textit{Shamil Bank}, as it currently states:

Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.\textsuperscript{126}

Article 3(1) remains unchanged, and still reads, "[a] contract shall be governed by the law chosen by the parties."\textsuperscript{127} Thus, the continued use of the singular form of "law" is in tension with clauses that subject a national law to Islamic financial principles. These clauses will be viewed as violative of the rule that only one system of law may govern a contract. Even outside of the European community and without reference to their treaties regarding the law governing contracts, the legal rulings of \textit{Shamil Bank} are likely to appear in other systems. Some commentators believe that other common law and civil law jurisdictions would arrive at the same conclusion as the court in \textit{Shamil Bank} given similar facts.\textsuperscript{128} Also, with particular concern to the Rome Convention's apparent prohibition of the use of combined-law clauses, arbitrators who are called on to judge under the law of a European Union country may find themselves compelled to disregard Shariah provisions in a contract. This is problematic because the law of England and Wales is currently the most favored choice of law for international finance, and according to \textit{Shamil Bank}, under English law a murabaha agreement will be treated the same as an interest-bearing loan, barring contrary contractual stipulations.

This result is unnecessary, however. The statement in a contract that a national law shall be subject to Shariah is not in fact equivalent to two laws governing a contract. Indeed, the appellants in \textit{Shamil Bank} argued that the reference to Shariah

\begin{itemize}
\item\textsuperscript{121} \textit{Id.}
\item\textsuperscript{122} Rome I, supra note 35, at 10.
\item\textsuperscript{123} \textit{Shamil Bank}, [2004] EWCA (Civ) 19, [40, 48], 1 W.L.R. at 1796, 1798.
\item\textsuperscript{124} \textit{Id.} at [48], 1 W.L.R. at 1798 (emphasis added).
\item\textsuperscript{125} Rome I, supra note 35, at 10.
\item\textsuperscript{126} \textit{Id.} (emphasis added).
\item\textsuperscript{127} \textit{Id.} art. 3(1).
\item\textsuperscript{128} \textit{See, e.g.}, Chuah, supra note 34, at 126 (stating that the case decision has generally confirmed commentators' beliefs that the applicable law of contract must be that of a country).
\end{itemize}
be treated as an inclusion of the lex mercatoria of Islamic finance and that the appellate court apply those principles which relate to murabaha contracts. The appellate court still found this reasoning too much to bear, demanding even greater specificity as to Shariah's scope of applicability. However, industry practice shows that the statement is intended to serve as a gap-filler provision because the contractual arrangements of Islamic business are often not defined within common law jurisprudence or civil regulation. Terms such as riba, murabaha, and gharar are still novel items in the jurisprudential and financial systems of many countries, and Islamic law nations have not codified the extent of each financial instrument; this allows parties the freedom of innovation, and Shariah may be kept in mind when disputes do arise. Judges and arbitrators should therefore not consider a Shariah-termed, combined-law contract as one involving two legal systems. This is because, according to the practice of parties involved in Islamic financial transactions, the terms of the contract themselves are inherently Shariah-based. Thus, reference to Islamic law does not stack two systems of law against each other, but states the intention of the parties in realizing the transaction and ensuring that their business relationship continues to be Shariah-compliant.

The argument that Shariah is a comprehensive social code of conduct that applies outside of a state's legal framework should not create so much confusion that application of Shariah becomes untenable. Only such Shariah-related legal issues that are logically related to the terms of the contract need be entertained. Obviously, the judge need not consider principles related to personal behavior inasmuch as these did not affect the free will of parties in forming the agreement. In this respect, a judge can serve as a gatekeeper. In doing so, the judge should apply the chosen law of the parties, and when an issue is raised concerning a Shariah matter, the judge should allow both sides to present their experts or to agree to send the issue to an expert chosen by the parties.

All of this means to say that the reasoning of the court in Shamil Bank was hasty. In determining the obligations of parties, courts should look to the intentions of parties and their understanding of the meaning of the contract. A court should do its best to give effect to those intentions without breaching legal principles. In interpreting the intention of the parties, the appellate court in Shamil Bank did not look to the prior negotiations between the parties, the common practices of the Islamic financial industry, or the motives of the parties in choosing to use Islamic banking procedures. Instead, the Shamil Bank court claimed to interpret the contract in light of the commercial goals that it served to accomplish, as English law requires. In doing so the appellate court explained that the goal of Beximco was but to acquire working capital through an agreement couched in Islamic terms. This construction implies significant insincerity on the part of both parties, while it assumes that Beximco was acquainted with the intricacies of Islamic law. The end

129. See Shamil Bank, [2004] EWCA (Civ) 19, [49]–[50], 1 W.L.R. at 1798–99 ("... Mr Hacker argues that the clause should be read as incorporating simply those specific rules of Shariah which relate to interest and to the nature of Morabaha and Ijarah contracts, thus qualifying the choice of English law as the governing law only to that extent.").
130. See id. at [52], 1 W.L.R. at 1800 ("Thus the reference to the 'principles of ... Sharia' stands unqualified as a reference to the body of Shariah law generally.").
131. See HANDBOOK OF ISLAMIC BANKING, supra note 23, at 39–40 (defining gharar as "speculation").
133. Id. at [60], 1 W.L.R. at 1802.
result was that the words "[s]ubject to the principles of the Glorious Sharia’a" are rendered superfluous, but Shamil Bank is still left to represent itself to its British customers as an "Islamic bank."\footnote{134}

Because the appellate court made its decision without reference to the commercial ends of a murabaha contract in Islamic finance, it essentially made its own decision as to what constitutes a murabaha agreement without reference to any Islamic source. If it had inquired otherwise, the appellate court may have found that in practice the reference to Shariah in Islamic financial transactions is not intended to reflect a choice of a separate and distinct system, but that it is a clause commonly employed by the Islamic finance sector to ensure that deals remain Shariah-compliant even throughout the exigencies of litigation. Furthermore, if one party holds itself out to be an Islamic bank, and the other party chooses to conduct business with it rather than a conventional Western financial institution, it would be illogical to conclude, as did the appellate court in \textit{Shamil Bank}, that either party to a Shariah-compliant deal is "indifferent to the form of the agreements... or the impact of Sharia law upon their validity."\footnote{135} If that were a logical statement, then it raises the question: why not just seek another more traditional, less cumbersome, and widely available form of financing rather than deal with an Islamic bank from the Kingdom of Bahrain?

B. Judging Under Shariah: The U.S. Experience

There is concern by U.S. scholars that a choice of law that necessitates looking into Shariah law will run afoul of the First Amendment prohibition of state endorsement of a particular religion.\footnote{136} From an arbitration standpoint, the fear is that the recognition of an arbitration award will be attacked on public policy grounds in the enforcing courts.\footnote{137}

Use of the First Amendment as a weapon against enforcement of an arbitration award is not an unfounded fear in the case of Islamic finance. The Ann Arbor-based Thomas More Law Center is involved in federal litigation protesting the federal bailout of financial institutions. The Center, self-described as "dedicated to the defense and promotion of the religious freedom of Christians," claims that the federal appropriation of funds to AIG violates the Establishment Clause because the money is used to finance Shariah-compliant products.\footnote{138} This "conveys a message of disfavor of and hostility toward Christians, Jews, and those who do not follow or abide by Islamic law."\footnote{139} While it is still being litigated in the courts, the Eastern District of Michigan has so far denied a motion to dismiss by defendant Timothy Geithner.\footnote{140}

\begin{footnotes}
\item[134] \textit{Id.} at [52], 1 W.L.R. at 1800.
\item[135] \textit{Id.} at [60], 1 W.L.R. at 1802.
\item[136] \textit{See, e.g.,} Trumbull, \textit{supra} note 44, at 615 (stating that judicial enforcement of contracts raises First Amendment concerns).
\item[138] \textit{Id.}
\item[139] \textit{Id.}
\end{footnotes}
Enforcement of an arbitration award is not safe from similar attacks in other jurisdictions. In Canada, for example, the government of Ontario amended their Arbitration Act to make family dispute arbitration decisions based on religious principles unenforceable.141 This amended legislation, enacted after decades of Canadian enforcement of the arbitral decisions of the Jewish Beit Din,142 was in reaction to a campaign by the Islamic Institute for Civil Justice to increase the recognition and enforceability of Muslim personal law arbitral decisions in Ontario.143

The United States, for the most part, has not reacted with the same fervor against religious arbitration. To the contrary, U.S. courts are rather consistent in enforcing agreements to arbitrate though the agreement may specify that the arbitration take place in a religious court and under religious law. Courts have frequently enforced the validity of agreements to arbitrate before the U.S. Institute for Christian Conciliation; these agreements typically include a clause stating that “the parties agree that any claim or dispute arising from or related to this agreement shall be settled by biblically based mediation.”144 In one case, Encore Productions sued Promise Keepers over a dispute concerning their contract to provide production services for Promise Keepers conferences.145 The contract contained a clause that stated that arbitration would be conducted “in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation;”146 these rules in turn require that the “Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process.”147 Encore Productions challenged the arbitral decision claiming that the religious dispute resolution violated the First Amendment.148 The court in that case held that the arbitration award was a secular contractual right, and that neutral, non-religious principles called for enforcement of the arbitration award because interpretation of the arbitration clause itself did not require inquiry into or a determination of religious doctrine.149

Bad publicity of Islamic law in the United States has not prevented even state courts from enforcing agreements to arbitrate before Shariah tribunals even in the controversial family law setting. In Jabri v. Qaddura, a Texas Appellate Court enforced an agreement to arbitrate on behalf of a woman in a divorce.150 The wife, Jabri, was seeking the fulfillment of what is often labeled in Islamic law as a “deferred mahr.”151 In such arrangements, a dowry is agreed upon, but a portion of it is deferred from payment unless there is a divorce.152 Jabri claimed she was owed...
one-half the value of the couple’s home and $40,000 of her dowry.\textsuperscript{153} During divorce proceedings, the parties submitted the dispute to the Texas Islamic Court, but during the arbitration, a disagreement arose as to the scope of the arbitrator’s authority.\textsuperscript{154} The wife motioned the district court to stay proceedings and compel arbitration, which the court denied.\textsuperscript{155} The Court of Appeals ruled that the district court abused its discretion by finding that the agreement was not valid, in part because the Court found that arbitration is strongly favored by state and federal law and that doubts should be resolved in favor of arbitration.\textsuperscript{156} However, the Court of Appeals did not mention any public policy concerns that would prevent it from enforcing an agreement to arbitrate issues concerning conservatorship of children, child support, division of property, and even a protective order before an Islamic tribunal.\textsuperscript{157}

Enforcement of Islamic arbitration awards has proven to be relatively uncontroversial in U.S. courts. More compelling is that the application of Islamic Law is not out of bounds for a U.S. court to apply. In National Group for Communications & Computers v. Lucent Technologies International, National Group filed suit against Lucent Technologies in a U.S. district court for breach of contract.\textsuperscript{158} National Group, a Saudi Arabia-based company, contracted Lucent Technologies to assist in a multi-million dollar project to design, engineer, and install emergency and pay telephones throughout Saudi Arabia.\textsuperscript{159} Lucent Technologies terminated its subcontract, and National Group was forced to liquidate its Project Department, which it had created specifically to implement the telecommunications contract.\textsuperscript{160} National Group then brought suit against Lucent Technologies seeking actual and expectation damages.\textsuperscript{161}

Both National Group and Lucent Technologies agreed that Saudi Arabian law governed the terms of the dispute.\textsuperscript{162} The district court acknowledged that in order to judge the case it would first have to determine how Saudi Arabian law would decide the claim for loss of the plaintiff’s Projects Department; in doing so, the court analyzed tenets of Shariah.\textsuperscript{163} In its opinion, the district court recited some rules from the “Basic Regulation of the Kingdom of Saudi Arabia,” including Article 48, which states that “[t]he courts shall apply in cases brought before them the rules of the Islamic shari’a in agreement with the indications in the Book [The Qur’an] and the Sunna and the regulations issued by the ruler that do not contradict the Book or the Sunna.”\textsuperscript{164} The district court stated its understanding that Shariah is the Islamic

\begin{footnotesize}
\begin{enumerate}
\item[153.] Jabri, 108 S.W.3d at 406–07.
\item[154.] Id. at 408.
\item[155.] Id. at 409.
\item[156.] Id. at 410, 413.
\item[157.] Id.
\item[159.] Id.
\item[160.] Id.
\item[161.] Id. at 298.
\item[162.] Id. at 293.
\item[163.] Id. at 293–94.
\item[164.] Nat’l Grp., 331 F. Supp. 2d at 294 (quoting the BASIC REGULATION OF THE KINGDOM OF SAUDI ARABIA art. 48 (1992)).
\end{enumerate}
\end{footnotesize}
“divine law” and that in deciding disputes, a Saudi Arabian judge will turn to the “Qur’an, the Sunnah, and fiqh to guide his legal determination.”

Turning to the parties' dispute, the district court began to analyze the issue of whether expectation damages would be allowable against Lucent Technologies under Saudi Arabian law. In doing so, the district court heard expert witnesses from both parties and detailed its own research concerning damages under Islamic law. The district court stated, “[s]everal historical... statements of the Prophet Muhammed... are instructive on this issue,” and then proceeded to quote the Prophet Muhammed’s prohibition of gharar transactions:

Do not buy fish in the sea, for it is gharar. The Prophet forbade sale of what is in the wombs, sales of the contents of the udders, sale of a slave when he is runaway.... The Messenger of God forbade the [sale of] the copulation of the stallion. He who purchases food shall not sell it until he weighs it.

The district court then resolved the dispute in favor of the defendants, finding that expectation damages under Saudi Arabian law, and thus Shariah, constitute a form of gharar. The district court went on to say that to award expectation damages based on the plaintiff's valuation of the Projects Department “would be equivalent to placing a value on fish in the sea, or purchasing food that has not yet been weighed.” Moreover, “book value is an accounting convention that would not produce an accurate picture of actual losses as defined under Islamic law.”

It has been argued that the judge’s use of Islamic law violated the First Amendment. Despite the window of opportunity, there was no argument on appeal to this effect.

In conclusion, the use of Shariah in U.S. arbitration has not prevented the enforcement of decisions to arbitrate, nor has it prevented the actual awards on public policy grounds. This is all the more significant because the United States maintains a rigid wall of separation between church and state. Furthermore, as demonstrated by the district court in National Group, Shariah is not so diverse or insufficiently codified as to prevent its application through the opinions of experts and learned treatises, and its application does not necessitate an unacceptable intrusion by the judge in pronouncing what is right or wrong in matters of worship.

III. ADVICE FOR SEEKING ARBITRATION IN ISLAMIC FINANCIAL DISPUTES

The choice of law clause could be a shorthand for the parties' expression of intention for all matters not in the contract. Parties to a contract should be able to

165. Id. at 295.
166. Id. at 297–300.
167. Id. at 296.
168. Id. at 297, 300.
169. Id. at 301.
171. Trumbull, supra note 44136, at 636.
completely divorce themselves from a national system. However, in Islamic financial dispute resolution, the choice of law is unique compared to other areas. Parties in Islamic financial transactions are not asking to abandon the law of a particular country, but are putting their confidence in the laws of well-established systems, such as those of the United Kingdom. Because the terms of the contract are Shariah-based, the parties must supplement the choice of law clause to address that fact and cater to the parties' preferences and the spirit of the transaction. Otherwise, the writing of the agreement may become unduly complicated by taking account of situations that may never arise and cannot be properly judged until after the fact. Shariah-compliant transactions bring about the challenge of churning abstract concepts into actual deals; a major impediment to the growth of Islamic finance is the amount of legal fees associated with the process.

Although arbitral panels with experience in adjudicating disputes arising from Shariah-compliant business transactions have both accommodated and propagated the combined-law contract, it has not been well-received in the United Kingdom. A forum that wishes to judge under a particular form of law should discover how a judge from that state would decide the question. Some judges and arbitrators find themselves unwilling to proceed in this way when asked to make a decision concerning Shariah law, whether because the forum is considered secular or because the arbitrator prefers to refer the question to an expert. For these reasons and others, some Islamic finance professionals conclude that the divergence of industry practice can only be reconciled through the creation of an Islamic ADR forum.

In the world of Shariah-compliant finance, there has never been more of an openness to settle disputes through arbitration. In previous times, and to some extent today, scholars of Islamic law considered the enforcement of the award of an arbitrator to be purely discretionary by the judge. The Medjella is considered the first attempt to codify Islamic law and represents the endeavor of the Ottoman Empire. The Medjella dedicated an entire chapter to arbitration, stating within it that “a decision validly given by the arbitrators in accordance with the rules of law is binding on all parties.” Decisions by arbitrators were not enforceable except upon confirmation by the judge, and then only if made “in accordance with law.” From the perspective of the current transnational commercial arbitration system, it is even more problematic that an agreement to arbitrate was not binding, and parties could dismiss the arbitrator any time before the award was handed down. The Medjella was highly influential throughout the Muslim world and still forms the basis of the

173. Id. at 535.
174. See Ahmad Lufti Abdullah Mutalip, Practical Legal Issues in Islamic Banking, MALAYSIAN ISLAMIC FIN. MONTHLY, Apr. 2008, at 21, 22, http://www.mifmonthly.com/pdf/2008/April.pdf (“One most noted impediment to the growth of Islamic banking is the costs involved, including legal fees . . . .”).
175. WEINTRAUB, supra note 172, at 536–37.
176. See Agha, supra note 37, at 30 (“[T]he market has reached a point where an authoritative and specialist Islamic ADR institution is need.”).
179. AL-MEDJELLA, ch. 4, art. 1848.
180. Id. ch. 4, art. 1849.
181. See generally id. ch. 4, art. 1847 (“Either of the parties may dismiss the arbitrator before he has given his decision.”).
laws of Jordan and Kuwait.\textsuperscript{182} Even in the classical period of Islamic jurisprudence, there were opinions that a freely-chosen arbitrator's decision was binding upon the parties and required judicial enforcement.\textsuperscript{183} That opinion has gained much traction in modern times, along with the statement from that particular school of classical jurists that an agreement to arbitrate is binding upon the parties and cannot be revoked.\textsuperscript{184}

Arbitration in Islamic financial disputes has improved in recent years. In 2009, for example, Malaysia passed the Bank Negara Malaysia Act 2009, which makes the decisions of the Sharia Advisory Council, a popular Islamic finance ADR forum, binding upon the courts.\textsuperscript{185} The KLRCA Rules for Islamic Banking and Finance Arbitration state specifically that the award of the arbitrator is binding, and the tribunal has the power to judge on matters concerning its own jurisdiction ("competence competence").\textsuperscript{186} The view that an agreement to arbitrate is binding is almost a consensus among states heavily involved in Islamic finance. This is reflected in Saudi Arabian Law of Arbitration\textsuperscript{187} and also in the UAE Civil Procedure Code.\textsuperscript{188}

The views of most modern Shariah commentators reflect the nearly global consensus that a valid agreement to arbitrate is binding.\textsuperscript{189} However, courts called on to refuse recognition of an arbitration award from a combined-law, Shariah-compliant contract should be wary of arguments that the procedure of the arbitration was not Shariah-compliant. There are still differing opinions concerning the validity of an agreement to arbitrate that is made before the actual dispute arises.\textsuperscript{190} Moreover, an unhappy party might opportunistically object to the religion or gender of the arbitrator.\textsuperscript{191} These problems should be cause for concern for a lawyer seeking to protect the client's interests, even though the issues have not yet presented themselves. A judge that must entertain such an argument should proceed with the understanding that Shariah law is intended only to apply to the terms of the contract which are Shariah-based and to the legal arguments which apply directly to those concepts.


\textsuperscript{183} See Kutty, supra note 21, at 597 (stating that the arbitrator's judgment could not have been a "flagrant injustice").

\textsuperscript{184} Al-Bashir & Al-Amine, supra note 46, at 36.

\textsuperscript{185} Agha, supra note 37, at 30.

\textsuperscript{186} KLRCA RULES FOR ISLAMIC BANKING AND FINANCE ARBITRATION, supra note 92, Rules 26 & 38.


\textsuperscript{188} See UAE Civil Procedure Code, Federal Law No. (11) of 1992, ch. 3, art. 203(5), available at http://www.diac.ae/idias/rules/uae/chapter3/ ("If the parties to a dispute agree to refer the dispute to arbitration, no suit may be filed before the courts [unless] the other party does not object to such filing at the first hearing.").

\textsuperscript{189} See, e.g., Lee Ann Bambach, The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent, 25 J. L. & RELIGION 379, 388 (2009) (noting that although agreements to arbitrate were historically unenforceable, by the early twentieth century, the business community had pushed such agreements into favor).

\textsuperscript{190} Al-Bashir & Al-Amine, supra note 46, at 36.

\textsuperscript{191} See Agha, supra note 37, at 31 (raising the question as to whether non-Muslims may issue binding decisions affecting Islamic parties).
A lawyer working in Islamic finance must constantly inquire as to whether Shariah applies, and this is equally important for procedural matters involving arbitration. Usually, the site of the arbitration will govern the arbitration process, and this determines the likelihood of receiving either help or interference from the local courts. Therefore, the importance of the place of arbitration should not be underestimated. A problem could foreseeably arise in jurisdictions where combined-law contracts would be repugnant to their choice of law doctrine. Nevertheless, the law of the place of arbitration can be evaded by agreeing to make a country with a favorable procedure the place of arbitration, but agreeing to meet in another country.

Enforcement can be refused if the agreement is not valid or if the composition of the arbitral tribunal is not in accordance with the chosen law. As mentioned above, there are opinions derived from Shariah that can be used to attack the arbitral awards because of faulty procedure. For example, Saudi Arabia's Law of Arbitration states that “[a]n arbitrator is required to be experienced and of good conduct and reputation and full legal capacity.” Derived from the Islamic legal opinion that an arbitrator should possess qadi-like qualities, this requirement could be mischievously employed to attack the composition of the arbitral tribunal. In fact, in Saudi Basic Industries Corporation v. Mobil Yanbu Petrochemical Company, the appellants challenged the trial court judge's qualifications to employ Shariah in order to judge under Saudi Arabian law. In denying that the trial court engaged in a standardless determination of Saudi Arabian law, the Delaware supreme court mentioned that the expert of Saudi Basic Industries Corporation (SABIC) stated that no U.S. court possesses the qualifications to engage in legal analysis under Saudi Arabian law. The court pointed out that had the expert's opinion been the true belief of SABIC, then it was quite strange that SABIC did not attack the trial court's competence until after it received an adverse jury verdict. Further highlighting the contradictory behavior of the appellants, the court stated:

It is remarkable that SABIC, having [purposefully] selected this forum instead of a Saudi Court, knowing the United States legal system is dramatically different than the Saudi legal system, comes forward after a verdict against it to claim that no American judge is qualified to interpret and apply Saudi law. This is particularly incredible in light of SABIC's vehement argument that this case should be tried by a U.S. judge.

192. See Ballantyne, supra note 57, 4–5 (stating the extent to which Shariah law would apply to a syndicated loan agreement varies by Arab state).
193. RAU ET AL., supra note 11, at 363.
194. Id. at 399–400.
195. Id. at 425.
197. Al-Bashir & Al-Amine, supra note 46, at 37 (a qadi is a judge of an Islamic court).
199. Id.
200. Id.
201. Id.
Therefore, in light of the potential for tactical use of Shariah-based procedural considerations, parties may want to specify within the contracts that the choice of law be applied only as to its substantive requirements.

Finally, the time is arriving where parties need not leave all to chance. The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) produces important publications relating to financial accounting and Shariah standards. These standards are widely acknowledged in the industry for the criteria that must be met in Islamic financial instruments. The AAOIFI has recently published an arbitration standard that is expected to assist in the development of Islamic finance ADR forums. AAOIFI guidelines cover the standards of Shariah-compliant transactions better than any national system.

One solution to the complaint that qualified arbitrators in Islamic finance are too scarce would be to specify in the contract that arbitrators should decide questions relevant to Shariah-compliance based on AAOIFI standards. However, this would not be a complete substitute for literacy in Islamic law, as the AAOIFI standards “do not provide ‘secondary rules’ for unforeseen circumstances or non-performance of either party to the transaction.”

IV. CONCLUSION

The rapid growth of Islamic finance will require the international legal system to develop an understanding of the foundations of Shariah-compliant business transactions. Judges in countries that do not have a history of dealing with Islamic law must compare the case before them to the general practice of the Islamic financial sector in order to accurately judge the commercial purpose of Shariah-compliant business.

The rules of specialized forums for Islamic finance indicate that statements that give legal effect to Islamic law are more than mere statements of purpose, and such contracts should only be enforceable insofar as they are consistent with Shariah. Reference to both Islamic and a national law together need not violate the principle that there cannot be more than one law that governs a contract. Contracts themselves contain rules other than the law to which the parties bind themselves. Reference to Shariah is similar, and it is necessary in order to codify the parties’

intentions without bargaining for every unforeseen contingency, which would be unfavorable to industry growth.

Courts in countries that are not legally influenced by Islamic law have had success in judging Shariah issues through the use of experts. Parties continue to request that Shariah-based laws be adjudicated in non-Islamic courts despite the concerns the court in Shamil Bank had expressed. Unfortunately, due to the precedent that it creates, a decision in a common law court that does not reference Islamic law risks defining for decades the extent of a Shariah-compliant product while never endeavoring to discover that transaction's basis in Shariah.

Parties who are more comfortable with U.K. or U.S. laws will find a friendlier environment in the several arbitral tribunals that specialize in Islamic finance. Arbitration is preferred in the international business world, but domestic parties may lack the means to exploit such institutions. Consequently, domestic parties may prefer to incorporate the standards published by the AAOIFI or another institution that publishes standards on Shariah-compliant transactions.