

Adjudication and Resolution of Islamic Finance Disputes in Non-Muslim States: An Analysis of Islamic Law With Reference to International Law

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Abstract: An Analysis of the growth of multi trillion Islamic finance industry shows its huge importance and attraction for the stake holders but the lack of serious narrative and attitude towards resolution of disputes in Islamic financial contracts is degrading its rapid growth and failing to maintain trust of Muslims as well as non-Muslim stake holders. Immediate attention is needed from the scholars of Islamic as well as International law to provide a route map and code of resolution and litigation towards adjudication of Islamic finance disputes. This qualitative work analyzes the legal framework for Islamic finance law in Non-Muslim jurisdictions in the light of teachings of Muslim jurists and international law with reference to selected legal systems. This research finds that there is an immediate need of a structured code for the resolution of Islamic finance disputes and suggests that ADR and other legal remedies available in Islamic context as well as international conventions shall be implemented immediately to resolve prevailing issues and disputes.

Keywords: Islamic finance, Islamic law, International law, Adjudication, Non-Muslim states.

INTRODUCTION

The rapid development of Islamic banking and finance in Muslim and non-Muslim countries give rise to legal disputes between the parties involved. Islamic finance has the potential to become an important financial sector in Non-Muslim regions, to facilitate further innovation and competition in the wholesale and retail finance and banking market and to support credit market diversification. Islamic finance is making roads into the Global financial market by targeting the Muslim community, estimated to be more than a billion, a large proportion of which has shown a keen interest in Islamic financial services. The growth of this industry not only increases the variety of financial products offered in Global financial markets but also helps to bridge the gap between Non-Muslim and the Muslim world politically. However there is a problem of adjudication of financial disputes when the financial contracts are made in non-Muslim states. The legal systems of non-Muslim states do not consider Islamic Finance law while deciding financial disputes that arise in an Islamic financial contract and the choice of law to be applied here shall be Islamic financial law that governs the contract¹, however the legal system hardly acknowledges these facts and decides the matter as per the land legal system. This paper analyzes the importance and application of law of the contract (Islamic finance law) as a choice of law in Islamic and international law.

Islamic finance as an alternative to conventional banking and finance has grown exponentially over

the past three decades. The Islamic finance market measures multiple trillions of USD today. It offers crisis-proof investment products that appeal to both Muslims and non-Muslims alike and have a significant non-Muslim take-up. Some jurisdictions have been trying to attract Islamic finance investments on a grander scale, through adaptation of their banking facilities and by advertising themselves as global or regional centers for Islamic finance. The Problem appears when the contract is violated and the parties have no option but to approach the court. The contract made in an Islamic state under Islamic law is easy to settle but the actual problem arises when the contract is made under Islamic finance law with a non-Muslim party of non-Muslim jurisdiction or even if the parties are Muslim but they are approaching court in a non-Muslim jurisdiction where the applicable is other than the Islamic law. Western jurisdictions in particular have been trying to extend their existing dominance as a jurisdiction of choice for conventional banking disputes to disputes arising from Islamic finance products, English and New York law being the preferred governing law of international banking and finance contracts.²

The Islamic Finance cases in Non-Muslim Jurisdictions like UK, USA easily reaches a conclusion that Courts are not prepared to enforce the Islamic aspects of Islamic Finance agreements

¹ Rome I Regulation, Art 3(3)

² Blanke, G. "Islamic banking and finance disputes: the case for semi-secular arbitration, practical law, Arbitration blog, Thomson Reuters." (2019).

and most often takes those aspects for granted thereby deciding the cases as per their own choice, sometimes as per the Islamic law but mostly as per the national law completely neglecting the Islamic Law. These Courts don't have any option but to convert those cases in to convention finance disputes. However to decide the dispute as per the law which governs the contract, there are two options that can be utilized to settle the dispute, one is the application of international law and the other is Islamic law. International law provides guidelines³ and also applicable regulations⁴ for a choice of law and directs to decide the dispute as per the Islamic law under which the contract is made. Islamic law explains such situations where an Islamic finance dispute arises in non-Muslim jurisdiction and mentions to be addressed as per the sharia law, these disputes can be resolved through arbitration where the Islamic law can be adopted as a governing law and may not compromise any national law.⁵

Internationally, the courts of a few regionally and globally leading jurisdictions have been the common forum for dispute resolution for conventional banking and by extension for Islamic finance disputes. Courts in non-Muslim jurisdiction like UK and USA are inexperienced and not learned in Islamic law, however the law still has a remedy to it and recommends to consult an expert of Islamic law⁶ and these courts has applied the this principle in number of cases of family disputes.⁷ Historically, the English and US courts

have developed a reputation as neutral forum of conventional finance litigation, having built considerable expertise in the application of English and US law to banking and finance disputes, but other than that, being Islamic law inexperienced.⁸ However in such cases an expert of Islamic law was consulted who expressed their opinions as per the Islamic law and the court adopted those opinions as persuasive and applicable guidelines as they met the principles of land laws.⁹

To preserve their compatibility with the Islamic law, Islamic finance products must comply with the basic Islamic law requirements and hence remain Islamic law-compliant over their entire life-cycle. To ensure compliance at the beginning of an investment cycle, Islamic finance contracts are routinely examined and approved as Islamic law-compliant by a corporate Islamic law board. The compliance requirement extends to any dispute resolution process that ensues from a dispute arising from an Islamic finance agreement in that both the process itself and the outcome must be Islamic law-compliant.¹⁰ The concept of Islamic banking & finance in Non-Muslim countries will make a strong impact on the efficiency of functioning and emerging financial system in their economy, the opening of new window for Islamic banking and finance will improve the structure, resiliency & soundness of financial sector in the country and it will be a support for the growth and productivity of economy.¹¹

The adjudication of Islamic banking and finance cases in Malaysian parallel legal systems has thus revealed some of the contentious jurisdiction between the civil and Islamic courts of law. The way forward so it seems to have the legal cases of IBF are adjudicated at Islamic law courts appropriately from the lowest to the highest levels. While this is an ongoing work in progress for Islamic law in Malaysia, the present reliance on the civil courts to settle the IBF disputation may thus be gradually weaned off where and when

³ The Hague Principles on Choice of Law in International Commercial Contracts were formally approved on 19

March 2015, by the Members of the Hague Conference on Private International Law.

⁴ Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 "On the law applicable to contractual obligations" (Rome I) OJEU L 177/6, (2008).

⁵Trakic, A., Benson, J. and Ahmed, P.K. "Dispute Resolution in Islamic Finance: Alternatives to Litigation?." *Routledge Islamic studies series*, Routledge (2018).

⁶ Lozard Bros. & Co. v. Midland Bank, [1933] A.C. 289; Dicey, Morris & Collins, *The Conflict of Laws* (14th edition, Sweet & Maxwell, London 2006) 261-262.

⁷ Al-Bassam v Al-Bassam (2002) EWHC 228(law of succession), Mohammed v Knot (1969) 1 QB 1(family law) Ismail v Choudhry (2016) EWCA Civ 17 law of Talaq (iddah); Al Midani and Another v Al Midani and Others (1999) 1 Lloyd's Rep 923 (law of succession).

⁸ Ibid

⁹ Ibid

¹⁰ Ibid

¹¹ Gincy, C. "A Study on the Challenges and Opportunity of Islamic Finance in India." (2021). https://www.researchgate.net/publication/348116012_A_Study_on_the_Challenges_and_Opportunity_of_Islamic_Finance_in_India.

appropriate.¹² The civil courts are separate from the Shari'a courts and judges lack knowledge or specialism in the application of the Islamic Law. Therefore, court litigation is unlikely to assist in managing the Shari'a risk responsibly: both the English and the Malaysian courts have relied on English law and more specifically conventional banking practice in the interpretation of Islamic finance contracts (for example, *BKRM Bhd v Emcee Corporation*)¹³. The English courts, in particular, have refused to give full effect to the enforcement of governing law clauses providing for the application of English law subject to the Islamic Shari'a.¹⁴

Islamic scholars have several opinions about settlement of a dispute that arises among Muslims in a non-Muslim jurisdiction.¹⁵ Some of these opinions are explained here to be considered as landmarks for the contemporary issues that arises in matters of financial disputes in contracts made under Islamic law in a non-Muslim jurisdiction. According to a prominent jurist, a judge shall be appointed by three influential persons of the community with dedicated powers to decide the matter and implement his decisions.¹⁶ The doctrine of necessity to be acknowledged and well considered for the delegation of power to an appointed judge and for the appointment of judge it is important that he shall have competence and knowledge but it is not mandatory for him to be highly qualified.¹⁷

Another very important contribution mentions that the leaders of community can appoint a judge for themselves who can look in to financial matters and who in the course of these actions is not answerable to non-Muslims leaders.¹⁸ This closely links to the modern world as communities are found around the world with each having their own customs and norms that applicable within those communities upon each and every member. Other than Muslim communities we have Indian,

Sikh, Chinese communities where the leaders are not among them example Sikh or Hindus living in Europe or USA applies their own religious and cultural rules within the community. Same can be applied to the Muslim communities living in non-Muslim countries too.

Most of Islamic scholars on the other hand suggest resolving disputes while in a non-muslim jurisdiction through Alternate Dispute Resolution and it was recommended that an arbitrator shall be appointed whose decisions shall be binding upon all members of community and this appointment could be even made permanent who shall settle all disputes in the situation when non-Muslims are living in non-Muslim jurisdictions or in the event when there is no ruler or law of the land.¹⁹ A jurist or a leader who has the knowledge of law can enforce his decisions over the community on behalf of sovereign who is either unjust or non-Muslim²⁰ and such can be applied by the Muslim communities in the course of resolution of all matters including financial matters. Another Maliki Jurist, Abu Umran Al Fasi (d.1039) mentions that all judgments in all matters are valid from the leader who is responsible for his people in the absence of a Muslim sovereign.²¹

Muslim jurists also suggested appointing a Muslim judge who would actually act on behalf of Muslim sovereign for the settlement of disputes among Muslims when Muslims lost control of Sicily and the Normans took over its control.²² This has been centuries long practice of Muslims living as minorities in non-Muslim countries under non-Muslim leaders to have their own Muslim leader on behalf of the non-Muslim ruler to settle their disputes despite their limited number in that community.²³ Same was the practice of the Mudegars known as the Muslims minorities after the Christians took over control of Spain; they enjoyed their own limited autonomy and settled

¹² Markom, R., Pitchay, S.A., Zainol, Z.A., Rahim, A.A. and Merican, R.M.A.R. "Adjudication of Islamic banking and finance cases in the civil courts of Malaysia." *Eur J Law Econ* (2011).

¹³ Malaysia Law Journal (MLJ), (2003): 403

¹⁴ Ibid

¹⁵ Al-Juwayni, A.M. and al-Ghiyathi, ed., 'Abd al-'Azim al-Dib, Cairo: Matba'at Nahdat Misr (1979).

¹⁶ Ahmad Ibn Hajar Al-Haytami, al-Fatawa al-Kubra al-Fiqhiyya. "The Copious Collection of Islamic Legal Statements." *Beirut: Dar al-Kutub al-'Ilmiyya* 4 (1997).

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Ibid

²⁰ Abu al-'Abbas Ahmad Ibn Yahya Al-Wansharisi, al-Mi'yar al-Mu'rib wa al-Jami' al-Mughrib 'an Fatawa Ahl Afriqiya wa al-Andalus wa al-Maghrib (A Unique Collection of Islamic Legal Statements of the Scholars of Africa, mainly North Africa, and Andalusia), 13 Vols, al-Ribat: al-Awqaf wa al-shi'un al-Islamiyya, 1981–1983.

²¹ Ibid

²² Ibid

²³ Hamidullah. "Muslim Conduct of State." *Hyderabad-Deccan: The Government Central Press* (1941): 70–75.

their issues according to Islamic law.²⁴ This mostly resembles the situation Muslim minorities in modern world faces who are living in non-Muslim states but have autonomous status and can apply Islamic law within the community and settle all forms of disputes including financial disputes.

CONCLUSION

There are certain problems that the application of Islamic finance law faces in non-Muslim courts and among them is the status of law where some considers it and applies it, some takes it as persuasive law and partially take it as guideline and some do not consider it all for it over rules and set asides the local law especially in cases of interest or it being not attracting the principles of land laws. Though the countries are bound to apply the principles of international law however they consider the alternate guidelines. This reaction to Islamic finance law is decreasing and it is getting a certain status with time as the Islamic Finance is more feasible and risk free than the conventional finance system, however until and unless the courts does not apply Islamic law while deciding a contract made under Islamic law, Muslims living in non-Muslim jurisdiction can adopt the system of dispute resolution without approaching the court and recommended by Muslim jurists. However in the event of a dispute with a non-Muslim in a non-Muslim jurisdiction, the principles of international law shall be applied while making any form of contract under Islamic finance law, as the choice of law specifically outlined in the contract is the only legal remedy available and recognized by courts of non-Muslim jurisdictions and the International itself.

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²⁴ Harvey, L. P. "Islamic Spain 1250 to 1500." *Chicago, IL and London: University of Chicago Press* (1990): 12.

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Source of support: Nil; **Conflict of interest:** Nil.

Cite this article as:

Amjad, S. and Riaz, N. "Adjudication and Resolution of Islamic Finance Disputes in Non-Muslim States: An Analysis of Islamic Law With Reference to International Law." *Sarcouncil journal of Arts humanities and social sciences* 2.3 (2023): pp 7-11.