of its duties by failing to repay Blom. Blom sought after two actions. The first action requested an order from the High Court to TIDC to repay the initial invested sum of $10,733,292.55. The second action also requested an order from the High Court to make TIDC pay the surplus sums that would have originally accrued from the *wakāla*'s rate of return on the investments.

The High Court held in favour of Blom over the first contention but did not grant the repayment of the surplus sums. Based on the High Court's decision, TIDC appealed on the grounds that the *wakāla* contravened *Shariah*, meaning that it was never allowed to enter the agreement due to its articles of association. TIDC's articles of association banned it from entering agreements that were *Shariah* non-compliant. The High Court allowed TIDC's appeal upon satisfying one condition. The Court believed that it was adequately debatable that no trust

other Parties that the *ṣukūk* were deemed by their advisors as *Shariah*-non-compliant. As a result, DGP sought an order recognising the *ṣukūk* as *Shariah*-non-compliant by the courts in the UAE and the UK.

The first contention put forward by DGP was that its obligation to pay was subject to the condition of having a valid agreement. The choice of English law as the governing law of the Agreement applied certain legal principles which deemed the Agreement valid *prima facie*. The High Court stated that the Agreement was enforceable under English law, even where presumed that such document was unlawful under Emirati law. The High Court illustrated that the condition precedent alleged by DGP was invalid, *in toto*, as it conflicted with the order in which the parties entered into the agreement. This was backed up by the fact that the agreement expressly stated that the *mudārabah-ṣukūk* certificate holders' rights to the *mudārabah-ṣukūk* did not affect DGP's obligation to pay, rendering the condition precedent invalid—meaning that DGP was still bound to pay

the certificate holders.

The next contention put forward by DGP claimed that the Agreement was void for mistake, by the common assumption of the parties that the *mudārabah* and the Agreement were valid. The High Court held that the doctrine of mistake could not be framed based on DGP's subjective beliefs, which led the Court to adopt an objective approach to ascertain what the parties had actually agreed upon—resorting to *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255. Thus, the agreement would only have been void for mistake where it was evident beyond reasonable doubt that the agreement was never intended to be used in the manner for which it had been used. Moreover, the agreement had expressly foreseen the probability of the *mudārabah* being unlawful under Emirati law.

Lastly, DGP argued that it would be opposing to English public policy for the High Court to enforce an agreement that is unlawful under the national law of a foreign state, in which part of that agreement's work is being carried out. The High Court found no evidence of the parties intending under the agreement to carry out work in the UAE. That also did not conflict with the fact that payment was designated to happen in London. DGP also claimed that such matter, if overlooked by the Court, induced a penalty. This argument was refuted on the ground of legal precedent from *Cavendish v Makdessi* [2016] AC 1172. The parties had agreed to separate the *mudārabah* from the agreement to assure the trustees that DGP would pay any outstanding monies.

In this case, the High Court implied that the lack of *Shariah* compliance carries no weight over the enforceability and validity of an English contract. Thus, the reputational damage caused by one being *Shariah* non-compliant carries no weight over any moral standard by which a secular court should rule. This does not seem to conflict with Islamic law either, because a Muslim cannot force a secular court to apply *Shariah* in a manner affecting that court's just decision—especially where the contending party knows that the secular court would lack understanding of *Shariah*. The conclusive remarks of Leggat J reflected a rather incredulous view of the commercial integrity and certainty of Islamic finance arrangements. Yet, at the same time, one can also argue that Leggat J's view illustrated the reality of the Islamic finance industry as epitomised in the lack of standardised documentary instruments and practices to optimise the legal enforceability and transparency of Islamic financial undertakings.

4.5. Project Blue Limited v Commissioners for Her Majesty's Revenue and Customs

The UK Supreme Court's decision in *Project Blue Limited v Commissioners for Her Majesty's Revenue and Customs* [2018] UKSC 30 is significant for the purpose of affirming the *no obstacles, but no special favours* principle. In 2007, Project Blue Limited ('PBL') purchased a former London military property from the UK Ministry of Defence ('UKMD') for £959 million. As a means of obtaining capital to purchase the property, PBL secured funds from an Islamic bank—Al Rayan Bank UK ('Al Rayan'). PBL secured its funds from Al Rayan through an *ijāra*.

Subsequently, PBL and the UKMD contracted to execute the property's purchase. In 2008, PBL sub-sold the freehold of the property to Al Rayan, which then leased the property back to PBL, as *per* the *ijāra.* Thus, the UKMD ceded the property's freehold to PBL, which was then ceded to Al Rayan, with the property finally being leased to PBL by Al Rayan. The implication of having the sub-sale arranged as such was to relieve PBL and Al Rayan from SDLT. This was based on the grounds that PBL owed no liability to pay SDLT because it was entitled to 'sub-sale relief' under the Finance Act 2003, section 45(3). Al Rayan retrospectively lodged that the sale agreement and lease between it and PBL fell under the 'alternative property finance relief', as *per* the Finance Act 2003, section 71A.

In other words, the 'Islamic' finance arrangement was structured in such a way that affixed the transaction to two SDLT-relief provisions. The function of this would result in none of the parties being subject to paying SDLT, specifically PBL. Upon the matter reaching Her Majesty's Revenue and Customs ('HMRC'), it was decided that £50 million in SDLT were due, which drove PBL to take the matter to the Upper Tribunal. PBL argued that Al Rayan was not relieved under the Finance Act 2003, section 71A because the original seller of the property was the UKMD, as *per* section 71A(2). PBL also argued that certain sections of the Finance Act 2003 discriminated against those of the Islamic faith by not considering that adherents of Islam would be expected to use Islamic finance techniques.

The Upper Tribunal ruled against PBL, holding it accountable as the seller, but it did notably acknowledge the notion that section 75B could possibly be unfair. More importantly, the Upper Tribunal emphasised the

objective of section 71A, which aims to place *ijāra* arrangements on par with conventional lending by taxing the purchaser of a property once, not multiple times, as the case would have been prior to 2003. The ruling was appealed to the Court of Appeal, which held that the UKMD was the seller and not PBL, on the grounds that the Finance Act 2003, section 45(3), negated the initial agreement between PBL and the UKMD. By doing so, PBL had escaped from paying its taxes, which pushed HMRC to appeal the matter to the UK Supreme Court.

The question at hand was whether PBL was due to pay the outstanding SDLT sum of £50 million. The Supreme Court accepted and ruled that PBL was due to pay that sum. The Supreme Court based that decision on key facts of English law but also considered PBL's arguments relating to sections 75A(5) and 75B, concerning their unfairness towards those of the Islamic faith. The Supreme Court made significant remarks, affirming the natural position of Islamic finance under English law as an alternative yet *equal* form of finance to conventional finance. Lord Briggs, who was the only dissenting judge, interpreted the principle of *riba*, stating that *Shariah* does not prohibit the taking of security but rather forbids the payment of interest, *particularly* in dealings concerning the lending of money (*PBL v HMRC,* 2018, para. 97). He then interpreted the standard *ijāra* form of a lease and applied it to the *ijāra* at hand, which was an *ad-hoc* form.

The Supreme Court ruled in favour of HMRC, restoring the Upper Tribunal's finding—ordering PBL to pay the SDLT due. The Supreme Court held that section 75A of the Finance Act 2003 was enacted by Parliament to fill the grey area that the finance arrangement procured as a vehicle for avoiding SDLT. Lord Hodge, giving the majority's judgment, stated that the finance arrangement appeared to be drafted in deliberately broad terms to catch a wide range of arrangements that would ultimately result in tax loss. The Supreme Court also held that there was no need to consider the merits of PBL's 'discrimination' challenge because PBL had not impliedly or expressly established that it had entered the *ijāra* for religious reasons. Even in that case, Islamic finance principles would have been corresponded to *lex mercatoria*, not a binding system of law governing the *ijāra* at hand.

5. Direct Application of Islamic Finance Principles under English Law

Under the Arbitration Act 1996, section 46(1)(b), parties have the freedom to choose the rules their arbitral tribunal will apply. Such freedom extends to the choice of law, which can be Islamic law *per se*. The outcomes in *Halpern v Halpern* [2007] EWCA Civ 291 and *Hashwani v Jivraj* [2011] UKSC 40 have shown that arbitral tribunals can apply religious law principles, where the parties have laid sufficient ground and scope for such application to take place. Thus, the English and Welsh courts may directly apply Islamic finance principles where the arbitration agreement clearly reflects the parties' true intentions in having such *Shariah* principles being applied and honoured; unless an exceptional context holds otherwise.*

The Muslim Arbitration Tribunal ('MAT') issues legally binding arbitration services concerning Islamic commercial issues. Established in the early 2000s, the MAT operates under the Arbitration Act 1996. The MAT issues arbitral awards and decisions that are *Shariah*-compliant, which can then be enforced in the English and Welsh courts like any ordinary arbitral award. The only conditions that must be met in ensuring that such awards will be enforced in the courts are that: –

[1] the Islamic finance arrangement is a legal contract under English law; and that

[2] it does not procure elements and activities deemed illegal or contrary to English law.

The two scenarios in which an arbitral award will not be enforced are when it undermines public policy, as *per* section 33 of the Arbitration Act 1996; and, where the matter of the arbitration is not a civil matter, as *per* section 82 of the Arbitration Act 1996. The Arbitration Act 1996, section 46, also allows the parties to have their dispute decided in accordance with considerations other than English law. This can provide leeway for the extent to which the parties want a court to honour Islamic principles.

6. Further Analysis: Findings and Discussion

6.1. Synopsis: qualifying conditions and overarching challenges found in Islamic finance arrangements

There are general circumstances under which a court will interpret *Shariah*-based principles and indirectly apply them. A qualifying condition enabling such consideration is where the matter at hand is subject to a *Shariah*-based and/or *Shariah*-influenced national law. Another qualifying condition is where the case facts raise reasonable grounds for the interpretation and application of *Shariah* principles to reach a well-rounded

* For example, the arbitrator's duty to issue an enforceable award is jeopardised by the direct application of *Shariah*.

judgment. A third qualifying condition is where the commercial- and contractual elements are not clearly divisible without carrying out an interpretation of the Islamic element of the finance arrangement—in other words, where the essence of an English contract is vested in, and intertwined with, its *Shariah*-compliant structuring. When it comes to arbitration, Islamic finance principles can be directly applied by incorporating Islamic law into the arbitration agreement. This is by virtue of the *parties in arbitration* retaining their autonomy in choosing a forum of their convenience to resolve disputes that may arise thereof, and the courts being bound to follow the *lex loci*. However, this can only work insofar as the *Shariah* substance of the arbitration agreement does not contravene English law, and where there is a genuine and express intention for *Shariah* to take effect.

The overarching challenge associated with Islamic finance arrangements, as *per* the academic literature, revolves around *Shariah* integrity. The author believes the problem is more profound because disputing parties privy to an Islamic agreement may be bound to carry out such an agreement as if *Shariah* never existed in the first place. The other challenge conveyed concerns the *ultra vires/intra vires* contention in which the English and Welsh courts will have jurisdiction over an English contract of Islamic finance. The author does not believe that to be a 'challenge' in the meaning of the word because the English and Welsh courts' jurisdiction is, *de facto*, vested in the divisibility of the financial arrangement's contractual and commercial agreements. Even if such divisibility is rendered obsolete, the courts are *ipso facto* secular rulers that are not expected to profess Islamic law. This does not contradict both English- and Islamic law.

Thus, in the eyes of the author, the overarching problem when dealing with *Shariah* principles at large under English law is satisfying what they like to call the *goldilocks principle*—that being an optimal habitable *nexus* for Islamic- and English legal principles to coexist without contravening one another. In an Islamic finance context, the *goldilocks* zone of an Islamic alternative finance arrangement is where *Shariah* principles can be honoured without breaching well-established English law. Thus, a good Islamic finance arrangement is one that satisfies the *goldilocks principle*. An excellent Islamic finance arrangement is one that protects the *Shariah* integrity of the parties even where disputes arise. This is a contract that enables the courts to resolve disputes between the parties without rendering the commercial and contractual agreements discordant with one another. The illustration of such an ideal arrangement is not a creation of fiction, but rather so, an undertaking that is achievable if precautions are considered at the outset of the Islamic finance arrangement. The question that begs to be asked is *how can this be achieved… realistically?*

The notion in the academic literature, favouring the standardisation of Islamic financial documentation and procedures, is undoubtedly a step in the right direction. The current level of standardisation is not enough on its own to achieve: [1] good enforceability of Islamic principles; and [2] the transparency of practices, which, in turn, tend to be veiled under Islamic finance. The problem lies in the fact that such standardisation processes might be outpaced by the developments in the UK Islamic finance sector. Therefore, further standardisation is needed to create an environment that is more accommodating to the use of Islamic finance products under English law in a way that minimises legal complexities. Importantly, these standardisation processes should not be one-off endeavours—instead, they should be responsively adaptable and continuously updated to keep up with the developments taking place in the UK's financial sector.

6.2. Implications for practice and further research

When parties intend on entering an Islamic finance arrangement that is governed by English law, they should consider the following points to avoid unnecessary complications. First, it is essential for such parties to clearly state and outline their intentions in entering the Islamic finance arrangement. Doing so clarifies at the outset what the parties genuinely intend to contract. It helps any potential court identify whether the paramount intentions of the parties were inspired by a common commercial view for making a profit or whether they were inspired in doing so whilst committing to their faith—if both, the court could then designate which of the two would take primacy considering the case facts at hand. Where the prime intention lies in commerce, then the approach would be tantamount to the approaches seen in the case law presented by this paper. Where the prime intention is one of religion, then the court would look to provide further consideration to the religious element of the agreement.

Second, the parties should acknowledge at the outset that the Islamic element they chose in commissioning their financial arrangement raises no ground for exceptional treatment had such element been of a conventional

nature. Doing so places emphasis on the fact that alternative finance arrangements exist under English law only to accommodate specific commercial needs that would otherwise be unavailable through conventional finance—not for the enablement of parties to secede from their contractual obligations when they choose to believe that there is an 'issue' of *Shariah* non-compliance. This acknowledgement can be satisfied by introducing 'pain gain' sharing clauses under Islamic finance agreements, whereby the *Shariah* integrity of the contract bases a moral *gain* for the parties involved, *not* a contractual one—and *Shariah* non-compliance would base a moral and ethical *loss* for the parties, again, *not* a contractual one. The parties would thereby, clearly imply an acknowledgement of the separation of *Shariah* and its commercial integrity from the contractual nature of the contract. By that, the burden of being *Shariah* compliant would fall on the remit of both parties and their joint effort, not on the contractual conduct of the parties.

Lastly, parties to an Islamic finance arrangement should understand the divisibility of the contractual element of their arrangement from that arrangement's commercial element—in other words, their arrangement's contractual agreement is justiciable by the English and Welsh courts irrespective of the *Shariah* nature of their *entire* agreement; let alone the commercial agreement. Parties should also understand that Islamic law is not recognised under English law and that 'there is no legal duty on a citizen to comply with any religious law' (Secretary of State, 2018). The Rome Convention and Rome I, as retained by the EU Exit Regulations 2019, still effect the 'law of a nation' principle. Such a stance is not targeted at Islamic law *per se*. Rather so, all religions are equally treated with no preference of one religion taking primacy over another, which is why religious law can be affected using a country's national laws. An interesting area for future research pertains to cases where the contractual and commercial agreements of an Islamic finance arrangement are indivisible. What if a future case compels dealing with both elements concurrently and thoroughly? What if a contract is formed in a way rendering the two elements inseparable?

7. Conclusion

In conclusion, Islamic finance arrangements can be interpreted through many lights. As a result, it is rational for a secular court to interpret Islamic finance and its underlying principles from the perspective of Islamic law in its common denominator form, if need be. Looking back at the case law analysed, it is conclusive that there is no one-fit-for-all approach for the English and Welsh courts when dealing with Islamic finance arrangements. However, the unanimous principle is that Islamic finance arrangements will never be treated in an exceptional manner to their conventional counterparts. Thus, when the context makes it right to do so, the English and Welsh courts will accommodate the interpretation and application of Islamic finance principles.

Principles of Islamic finance are interpretable and applicable—both directly and indirectly—under different circumstances. These mainly relate to cases where: [1] the agreement at hand is subject to the law of a nation that is influenced by *Shariah*; [2] where Islamic law is stipulated under an arbitration agreement; [3] where an interpretation aids in understanding the case facts; and [4] where an interpretation is constructive for the courts to reach a well-rounded judgment. Islamic principles are capable of being honoured insofar as: [1] they are not contravening English law; [2] they are expressly stipulated under the agreement; and [3] they are integral to the commercial purpose of the arrangement.

Finally, if the contractual agreement is governed by a *Shariah*-influenced law of a nation, Islamic principles conveyed through that law are more prone to be honoured. Where the English and Welsh courts are ruling over matters that require them to interpret and apply Islamic principles in line with well-established English law, they will separate the contractual- and commercial elements of the alternative finance arrangement. Then, the courts will rule over the contractual matter if that is what the dispute is hinged on. If the issue is of a commercial nature, the court may also interfere, subject to the nature of the dispute at hand or the breach of commerciality. The courts will also rule on areas that could, if left unresolved, conflict with English law—otherwise, the courts will not necessarily interfere with the commercial element of an Islamic finance arrangement.

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