Original Article

Regulating the governing law clauses in Sukuk transactions

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ABSTRACT The crystallization of the Islamic capital markets (ICM) in the last decade has led to increased acceptance of Islamic financial products in the global market. However, a fundamental question that lies at the intersection of law and ICM that has a far-reaching impact on market practices is the extent to which the governing law clause in a typical Sukuk prospectus protects the interest of the parties and meets the ends of justice. An analogous clause within the governing law provision is the dispute resolution clause, which either makes or mars the whole transaction depending on how it is structured. This article argues that as part of Islamic finance documentation involved in the process of structuring a Sukuk transaction, one important aspect the parties must get right from the beginning is the governing law clause. With the increasing provision of English law as the governing law, a question that readily comes to one's mind is whether it is possible to have an alternative governing law while retaining the choice of jurisdiction clause. In order to create a regulatory environment that is conducive to the prevailing trends in the modern world, this study critically ploughs through the governing law clauses of 10 selected Sukuk prospectuses and makes interesting findings regarding the attitude of draftsmen and their clients. A preliminary finding of this study is the paradigm shift to arbitration as an alternative or precondition to litigation in some of the Sukuk prospectuses reviewed. As there are regional and international arbitral institutions set up exclusively for Islamic finance disputes, it may be more appropriate to resolve any dispute arising from a Sukuk transaction under *shari'a*-compliant rules and supervised by experts in Islamic law. The interviews conducted for this research with 10 prominent *shari'a* scholars who have been involved in the certification of Sukuk structures prove this hypothesis, and the qualitative data are consistent with it, albeit with some dissenting views.

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INTRODUCTION

From Ireland to Indonesia and Singapore to Saudi Arabia, there is an increasing interest in Sukuk as a means of solving liquidity problems of governments and corporate entities. With regard to the regulation of Islamic capital markets (ICM), a fundamental question that lies at the intersection of law and ICM is the governing law of Sukuk transactions. It is beyond any iota of doubt that the identification of the needs for market regulations is a *sine qua non* for the development of the ICM. This study does not seek to discuss all the issues involved in the regulation of the ICM; rather, it focuses on just the *Sukuk* market component of the ICM, which generally involves *shari'a*-compliant debt securities. The *Sukuk* market component of ICM has catapulted Islamic finance into the global limelight, as a competitive industry to be reckoned with.

It is against the foregoing backdrop that this study examines an often-neglected aspect of Sukuk transactions – the governing law clause. Although it is conceded that it is the primary duty of the legal practitioners or the law firms that they represent to draft the governing law clause apart from the other aspects of the base prospectus, due diligence is required to ensure *shari'a* compliance. More often than not, *shari'a* scholars do not necessarily concern themselves with the nitty-gritty of the governing law clause once the transaction is generally free from all prohibited elements of *shari'a*. Over the years, *shari'a* scholars have played a significant role in resolving the enormous challenges of *shari'a*-compliant securities in a cosmopolitan global market sphere.

This empirical research adopts a qualitative approach through focused interviews of *shari'a* scholars and detailed content analysis with the analysis of the different patterns that emerge from the data collection. The responses of the interviewees are broadly classified into two categories– English law as the governing law and *shari'a* as the governing law. The patterns and connections between the two major views are identified for further analysis and future directions in terms of proposing sustainable practices in the Islamic finance industry. Most of the interviewees have been directly involved in signing off on Sukuk transactions that have hit the global Sukuk market. After the data collection, there was no need to transcribe the interviews as the majority of the respondents sent their written responses through email, which made immediate classification, decoding, analysis and interpretation of the data convenient.

To this end, this study is divided into five major parts. The next section examines the significance of the governing law clause in a Sukuk transaction and the need for proper legal documentation. The section after that gives a general overview of the legislations on Sukuk in a number of jurisdictions where either enabling or subsidiary legislations have been enacted to specifically regulate the issuance of Sukuk. The subsequent section gives a general overview of legislations on Sukuk in five selected jurisdictions. Following this is the section, which examines the governing law clauses of selected Sukuk transactions representing Sukuk issued in different jurisdictions but classified into five different categories. This dissection of the governing law clauses is important in establishing the prevailing practices in the global Islamic finance industry. Subsequently, the penultimate section examines the justification for stipulating English law and/or the English court as the governing law or forum for the resolution of any dispute that arises from the transaction, while also discussing the position of the other group of experts who contend that *shari'a* should be the governing law on issues that relate to both the substantive law and the procedural law applicable to Sukuk transactions. The final section summarizes the results and findings and concludes.

GOVERNING LAW CLAUSE AND PROPER LEGAL DOCUMENTATION

In legal documentation of commercial transactions leading to standard contracts, one important

aspect of the contract, which is considered the nucleus of the transaction, is the governing law clause. The 'governing law clause' is synonymous with the 'choice of law clause'. This provision in the contract is an agreement between the contractual parties as to the law of the jurisdiction applicable to the contract. It is this law that would be reckoned with in the interpretation of the contract. Generally, the governing law clauses contain the forum clauses that identify the particular jurisdiction that can hear and determine any issue arising from the contract. A properly drafted governing law clause that has an express choice of law and jurisdiction helps to avoid instances of conflict of laws where the applicable rules apply – a situation that may be contrary to the original intention of the parties.[1]

Importance of legal documentation in Islamic finance contracts

The importance of drafting a clear governing law clause cannot be overemphasized in Islamic finance contracts, considering the binding imperativeness of legal documentation of transactions in the Qur'an and Sunnah. Regardless of the in-depth examination of Islamic finance contracts carried out by the *shari'a* scholars before certification, the legal draftspersons play a crucial role that may make or mar a contract. As observed in another study, 'One important aspect of the *shari'a* process, when structuring Islamic financial products, is knowledge of legal drafting … Islamic finance contracts are drafted by finance experts or legal practitioners and they are couched in terms that may prove difficult for interpretation when such contracts come before the *shari'a* board for approval. Thus, it may be unfair to criticize *shari'a* scholars who certify certain products that may not necessarily satisfy the *shari'a* requirements. Drafting legal documentation for Islamic finance can be very confusing owing to the nature of Islamic finance transactions' (pp. 7–8).[2] Having said this, it is heartening to mention the growing trend among *shari'a* scholars to have in-depth knowledge of legal and regulatory dynamics of Islamic finance transactions. In fact, the new breed of emerging scholars includes those who have a thorough background in *fiqh al-mu'amalat* (Islamic law of transactions) and are at the same time attorneys in advanced jurisdictions. It is hoped that this new trend will breathe new life into *shari'a* advisory services. This is not to undermine the good work many *shari'a* scholars are doing in guiding the industry towards *shari'a*-complaint practices and services.

In a complex transaction involving multifarious parties of diverse backgrounds such as lead arrangers, lawyers, originators, issuers (or special purpose vehicles (SPV)), primary investors, service providers, credit enhancers, rating agencies, trustees, auditors, regulators and the *shari'a* Board, a high level of due diligence is required at all stages of the transaction. Although most *shari'a*-complaint transactions are targeted at the religious leanings and convictions of the investors, which in most cases lead to the exploitation of the faith premium, it is argued that all hands must be on deck to avoid hidden, untoward and non-*shari'a*-compliant practices in the investment chain. This whole process begins with proper drafting of the underlying and auxiliary contracts in clear and unambiguous terms.

Governing law clauses and the law applicable to the Sukuk issuer

Although we will examine the governing laws of a number of Sukuk transactions in the section 'Governing law and exclusive jurisdiction of the English courts' of this study, it is, however, important to pre-empt such analysis by briefly examining the governing law clauses and the law applicable to the Sukuk issuer. Different Sukuk prospectuses have revealed a diverse array of practices. One may not be wrong to contend that most of the existing Sukuk transactions in the global Islamic market today are pure replicas of conventional prospectuses with an attempt to make them *shari'a*-compliant. Although Islamic finance is not averse to profit

maximization through strategic policies to woo investors, it is also proper to do the right thing by ensuring total compliance of the process.

Despite the fact that the governing law of a Sukuk prospectus governs the contractual terms of the Sukuk as well as the interpretation of the same, there is another dimension to the puzzle. The Sukuk issuer, as a separate legal entity, has its own unique corporate law, which is the force that gives life to it. In modern practice, it is common to see the SPV as the issuer. The laws of the jurisdiction where such SPV was incorporated are also applicable to its corporate transactions. This has complicated issues relating to governing law of Sukuk in most prospectuses. For instance, the Qatar Islamic Bank (QIB) Sukuk, which is due in 2015, provides for three different jurisdictions for specific issues in the complex Sukuk transaction. Although the Declaration of Trust, the Agency Agreement, the Costs Undertaking, the Management Agreement, the Purchase Undertaking, the Sale Undertaking and the Certificates are all governed by English law, the laws of Qatar govern the Purchase Agreement, and the laws of the Cayman Islands govern the Corporate Services Agreement.[3]

Essentially, the choice of legal rules for Sukuk depends on the jurisdiction where the issuer is incorporated. In private international law of corporations, this capacity of the issuer to issue Sukuk is generally determined according to either the law of the seat (*lex situs*) or the law of incorporation. In Continental Europe, the choice of legal rules is determined by *lex situs*, whereas the law of incorporation is preferred in the United Kingdom and United States (p. 41).[4] For instance, in GE Sukuk Capital Limited, the Islamic certificates were issued by a company incorporated under the laws of Bermuda. All the underlying and auxiliary contracts are governed by English law, which also has jurisdiction in hearing and determining any issue arising out of the contracts. This choice of law is premised on the fact that the private international law of corporation governing the Sukuk transaction points to the law of incorporation, that is, English law. It should, however, be borne in mind that a different law may be applicable to other stakeholders.

Sukuk defaults and the challenge of legal documentation

For the past two decades, regulators of the ICM have been trying to put in place sound regulatory systems across the Gulf Cooperation Council (GCC) and Southeast Asia to spur the development of the sector. However, despite these laudable efforts of regulators with the required backing of the *shari'a* scholars, there have been instances of Sukuk defaults. Although the number of Sukuk defaults at the global level is still in the single digits, progressively aggressive jurisdictions of Islamic finance such as Malaysia have recorded double-digit defaults and downgrades in the past two decades.[5] Table 1 presents some Sukuk defaults and near-defaults with their immediate causes, as well as the exit strategies or remedial measures taken to right the wrongs. Although one may want to probe into the underlying causes of such defaults, it suffices to observe that apart from the supervisory and risk management issues, a major part of the transaction that is often neglected is necessary post-default safeguards to secure the interests of all the stakeholders in a fair and equitable manner. This conundrum boils down to the initial drafting of the prospectus including all the underlying contracts between all the stakeholders. Without probing into other causes, it is pertinent to emphasize that the unregulated imitation of conventional bonds without any effort towards adopting *shari'a*-based processes for post-default cases has dealt a severe blow to the ICM, and this has negatively impacted the confidence in the global *Sukuk* market.

Nevertheless, one must concede that no matter what the initial drafters do in terms of due diligence and proper legal drafting, instances of defaults cannot be ruled out since this is the general nature of commercial transactions, be they Islamic or conventional. However, the

Table 1: Sukuk defaults and near-defaults

Name of Sukuk	*Immediate cause of default or near-default*	*Exit strategy/remedial measure*	*Year of default*
The Investment Dar	Default on a $100 million debt repayment	Debt restructuring to revive the *Sukuk* sales	2009
Golden Belt 1 (Saad Group)	Default in repayment of $650 million to Citicorp Trustee Co. Ltd.	Dissolution of the Trust	2009
East Cameron Partners	Filing of one of the parties (East Cameron Partners) for bankruptcy	Bankruptcy proceedings	2008
Nakheel	Delay in repayments of $4 billion Sukuk	Default narrowly averted with the rescue of Abu Dhabi	2009
IIG Funding Limited	Inability to make periodic distribution to Sukuk holders	Looming debt restructuring plan	2012
Dana Gas	Inability to repay outstanding $920 million of the Sukuk, issued in 2007, on time and in full	Presently seeking consensual deal on Sukuk by weighing options of repayment	2012

impact of the post-default legal battles and stakeholders' tantrums can be minimized through proper legal documentation that takes into consideration key aspects of *shari'a*-based procedures of liquidation, debt-restructuring and dispute resolution. Given the fact that different jurisdictions have been coming up with legislations and regulations on issuance of Sukuk, much is left to be desired, especially when one considers the scanty references to post-default liquidation and dispute resolution processes that are originally *shari'a*-based.

The challenge of legal documentation has been a recurring issue in *Sukuk* transactions. Solicitors who draft the *Sukuk* prospectuses have adopted different approaches based on what the stakeholders in the issue want or the prevailing legal regulations in their jurisdictions. McMillen[6] aptly captures the prevailing practices in secular jurisdictions while praparing the legal documentations for *Sukuk* transactions:

> In a Secular Jurisdiction … the governing law, of itself, will not include any of the *shari'a*. However, the transactional participants may incorporate the *shari'a* into the contracts (the 'law') governing their relationships. Incorporation may be by referencing the *shari'a*, generally or specifically. Alternatively, incorporation may be effected by drafting the substantive terms of the contracts in accordance with the *shari'a* as determined by the *shari'a* Board involved in the transaction but without any express reference to the *shari'a*. Of course, contractual incorporation will be subject to legal limitations and requirements, such as those pertaining to illegal acts or acts contrary to public policy, those pertaining to contravention of a paramount law, such as a constitution or, in certain Incorporated Jurisdictions, the *shari'a* itself, and those pertaining to unwaivable and mandatory legal provisions, such as certain consumer protection, environmental protection, landlord–tenant and public policy laws that may not be altered or waived by contract (pp. 156–157).

Shari'a has the scope for the adoption and possible adaptation of mandatory legal provisions that are meant to enhance the contract based on the principle of *maslahah mursalah* (public interest). This flexibility in Islamic jurisprudence, particularly on issues involving civil transactions, is the hallmark of *shari'a*. In situations where there are legal restrictions on the application of certain overarching principles of *shari'a*, some concessions may be granted in *shari'a*.

It is pertinent to note that a number of Sukuk-related cases involving issues with ambiguities in legal documentation have gone before the English court. In *The Investment Dar*

Company KSCC v. Blom Developments Bank SAL (2009) EWHC 3545 (Ch), the claimant (Blom) made various deposits with The Investment Dar Company (TID) in two individual contracts performed under a master wakalah agreement. When the payments due were not made pursuant to the master wakalah agreement, Blom brought two claims: one was for the default in payment, whereas the other was premised on trust created under the same master wakalah agreement. The court of first instance held that 'there was an arguable defence to the contractual claim but not to the trust claim', and hence TID was to repay only the principal sums advanced without the profit or interest. To this end, TID appealed against this order where the English High Court had the opportunity to dissect the bone of contention, which primarily rests upon 'Sharia law' matters. Although it is *prima facie* clear that the master wakalah contract as well as all incidental contracts made pursuant thereto are governed by English law, Article 5 of the memorandum of association of TID which is incorporated in Kuwait provides:

> The objectives for which the company is established shall be Sharia compliant. None of the objectives shall be construed and interpreted as permitting the company to practice directly or indirectly any usury or non-Sharia compliant activities.(Para 3)

Accordingly, TID was contractually required to invest the capital sum in a *shari'a*-compliant business, despite the fact that the governing law of the master wakalah agreement is English law. As each transaction had its own tenor, TID was expected to pay Blom the capital sum and anticipated profit. When TID became financially distressed and defaulted on these terms, Blom commenced proceedings in the English court by way of an application for summary judgement. Interestingly, TID brought a *shari'a* defence arguing that the master wakalah agreement did not comply with applicable *shari'a* principles; hence, the memorandum of association of TID forbids it from entering into such non-*shari'a*-compliant transactions. In addition, TID is not allowed to practice any activities relating to banking such as accepting deposits. The implication of this argument brought forward is that the master wakalah agreement was void *ab initio* since it involves taking deposits at interest. Blom considered such a claim a lawyer's construct and argued that 'the court should approach it with appropriate scepticism for that reason, especially as the Sharia committee [of TID] apparently approved of this transaction' (Para 17). Although this *shari'a* issue was not clearly resolved by the court, as there was conflicting expert evidence on the matter, the court allowed the appeal, subject to the interim payment of the judgement sum to Blom.

Furthermore, in the more recent case of *Dar Al Arkan Real Estate Development Company (DAAR) and Bank Alkhair B.S.C. v. Mr Majid Al-Sayed Bader Hashim Al Refai & Ors.* (2012) EWHC 3539 (Comm), the English court, for the first time, had the opportunity to discuss issues partly related to Sukuk, though the matter primarily involves breach of duties. The case involved a successful discharge of a £100 million freezing interim order made pursuant to *ex parte* applications because of non-disclosure by the claimants. The first to third defendants applied to the court to set aside orders made on *ex parte* applications on two grounds: first, non-disclosure of full and frank information in their evidence and submission, which misled the court; and second, non-compliance of the claimants with an associated undertaking to the order of the court (which related to the handling of some relevant hard drives). Although the claimants disputed the defendants' claims, they cross-claimed by asking the court whether, in the event that the court arrives at setting aside the orders, it would consider replacing them with similar orders with the same effect against the defendants. The claimants added a proviso in their prayer before the court to the effect that there should not be any increase in the amount of the freezing interim order made against Mr Al Refai. (Para 1). It is pertinent to note an important aspect of the whole matter. There

were allegations and counter-allegations of breaches of regulations and misrepresentations on one hand and breach of confidence, conspiracy, defamation and malicious falsehood among other claims on the other. Interestingly, the case involved *shari'a*-compliant companies. For all intents and purpose, it may not be rewarding to detail the facts of the case. Nevertheless, it is clear that the difficulties faced by the first claimant, Dar Al-Arkan Real Estate Development Company (DAAR), in obtaining finance led to the issuance of Sukuk in the international markets (listed on the London Stock Exchange (LSE)). To the dismay of the claimants, the defendants' publication online through a dedicated website platform where confidential information was disclosed and damaging and untrue allegations were spread has smeared the image of the claimants in their drive towards raising long-term funds through Sukuk in the international markets. According to Para 8(ii) of the judgement, a restatement of the claimants' evidence, 'financial institutions in Saudi Arabia typically only lend on a short-term basis, in order to raise longer-term funds DAAR issues sukuk (which, in effect, are bonds compliant with Islamic law) in the international markets. When the *ex parte* applications were made DAAR had three sukuk programmes in place, namely the so-called sukuk III, under which $1 billion was due for repayment on 16 July 2012 and sukuk IV, under which $450 million will be due for repayment in July 2015'. In fact, shortly after the Website was launched by the first defendant, Standard & Poor's reduced the credit rating of DAAR from BB− to B+ on 7 March 2012 while wholly relying on the Website's revelations. Consequently, DAAR was placed under 'CreditWatch' (later removed from this on 12 June 2012), which was highly demeaning in the eyes of prospective investors. For the *ex parte* applications made, Popplewell J. was convinced that the claimants had suffered damage in England and as such their relief should ordinarily be granted. Consequently, he made the following orders: non-disclosure orders against all the defendants, document delivery orders against all the defendants with specific requirement for the delivery of some documents by Mr Al Refai; disclosure orders against all the defendants, which requires them to give information about disclosures they have previously made to third parties; orders for service of court processes outside the jurisdiction on Mr Al Refai and Mr Richardson; and a worldwide £100 million worth asset freezing order against Mr Al Refai with an additional order to provide all necessary information about those assets. Popplewell J.'s orders were set aside, whereas the defendants' applications were largely granted. Specifically, the orders discharged by the court are: the non-disclosure orders, the document delivery orders, the disclosure orders and the freezing order. The basis of the decision is the breach of duty on the *ex parte* applications on the part of the claimants. Subsequently, in *Dar Al Arkan Real Estate Development Company and Bank Alkhair B.S.C. v. Mr Majid Al-Sayed Bader Hashim Al Refai & Ors.* (2013) EWHC 1630 (Comm), the fourth defendants, FTI Consulting Limited, applied to the court to strike out part of the case brought against them for summary judgement on some issues raised by the claimants, which the court refused to do in its judgement on 12 June 2013.

Furthermore, *Standard Bank Plc v. Sheikh Mohamed Bin Issa Al Jaber* (2011) EWHC 2866 (Comm) involved two agreements: first, 'Islamic financing Proposal: Sukuk Proposal for Jadawel Compounds', and second, 'Sukuk Financing for Jadawel Compounds' – a *shari'a*-compliant financing facility that is 'governed by and should be construed in accordance with English law.' In this case, there were two *shari'a*-complaint facility agreements between Standard Bank Plc and companies in the MBI Group where the defendant is the controlling shareholder. Hence, when the agreements were concluded, the defendant gave the guarantees. When the Bank became concerned about the redemption of the loans under the facility agreements, it proposed a form of refinancing through the securitization of some of the group's assets through the Sukuk facility. Even though the bank was appointed as

the lead manager for the refinancing facility proposed for an exclusivity period of three and a half months, the due diligence process was not successful, and hence, the bank could not proceed. Moreover, as such, the bank applied for summary judgement against the defendant who was the guarantor for about US$150 million. This application for summary judgement was opposed by the defendant on three major grounds: first, that the bank was estopped from enforcing the guarantees since it had earlier promised that it would provide the bridging finance if appointed as the lead manager to the refinancing agreement; second, there was conflict of interest in the duties of the consultant retained by the group of companies, who unbeknown to the defendant had an introducing agreement with the claimant; and third, the need to put into effect a partial set-off of losses under Forex.

Burton J. considered the three grounds of argument relied upon by the defendant and held that the claim of estoppel had failed, as it was not arguable since it contradicted contemporaneous evidence. On the breach of the implied term by the claimant, the court held that the introducing agreement in question, which allegedly breached the implied terms of the contracts, was executed only after 10 months; hence, the loss and damage claimed were merely speculative. Finally, the Forex losses could not be set off under the guarantees since the defendant has failed to present an arguable case to that effect. In conclusion, the application for summary judgement against the defendant succeeded to the tune of €137 million.

LEGISLATIONS ON SUKUK: AN OVERVIEW OF SELECTED JURISDICTIONS

As part of the drive to ensure proper regulation of the ICM with particular reference to *Sukuk* transactions, different jurisdictions have been coming up with relevant enabling or subsidiary legislations. The phenomenal growth of the ICM has triggered renewed interest in the products it offers. The unprecedented interest in Sukuk as a new alternative method for financing projects and businesses has led to the strengthening and adaptation of relevant legislations on capital markets around the world. In this section, a brief overview of selected Sukuk legislations is provided with a view to identifying the existing dispute resolution framework, which is mostly used while drafting a typical *Sukuk* transaction. Table 2 presents the legal framework for Sukuk transactions in the ICM, with particular reference to the regulatory bodies and the dispute resolution frameworks. For the purpose of this study, the following five countries are selected: the Cayman Islands, Malaysia, Saudi Arabia, the United Arab Emirates and the United Kingdom. Although there are other vibrant jurisdictions, these selected jurisdictions represent major hubs of Islamic finance.

Cayman Islands

It is interesting to observe that most SPV for Sukuk transactions are registered far away in Cayman Islands as a result of its friendly regulatory environment. It has developed itself as a reputable jurisdiction for Islamic financial products and transactions over the past few years. As an offshore jurisdiction for Islamic securities, it has made itself a leading jurisdiction as a result of the glaring advantages it has over others, such as absence of tax of any kind, absence of exchange control in the transfer of funds, speedy and minimal cost of incorporating entities and bringing transactions to the market, and relative political and economic stability. Apart from regulatory concession by the government to allow for the incorporation of companies under Arabic names, the Cayman Islands has also introduced a new legal framework to clarify the regulation of Sukuk transactions.[7] In 2009, the Cayman Islands introduced new amendments in the Mutual Funds Law and the Banks and Trust Companies Law,[8] which excluded Sukuk

Table 2: Legal frameworks for Sukuk transactions in five jurisdictions

	Cayman islands	*Malaysia*	*Saudi Arabia*	*United Arab Emirates*	*United Kingdom*
Main legislation	AFIR, 2008	Islamic Securities Guidelines (Sukuk Guidelines) 2011 and Capital Markets and Services (Dispute Resolution) Regulations 2010 made pursuant to CMSA 2007 (as amended in 2011)	CML, CMA Listing Rules, and the CMA Offers of Securities Regulations	Federal Law No 8 of 2004, Federal Decree No 35 of 2004, Dubai Law No 9 of 2004 (as amended by Dubai Law No 7 of 2011), Dubai Law (DIFC Law No 12 of 2004), and ESCA Resolution No. 93/2005 concerning listing of Islamic Sukuk	Finance Act 2009, Financial Services and Markets Act 2000, Financial Services Act 2010 (amending certain provisions of Financial Services and Markets Act 2000), Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 and the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2006.
Scope	Alternative financial instruments exempted from Banks and Trust Companies Law (2009 Revision)	Regulates the issue, offer or invitation of Sukuk which are offered by local or foreign entities, denominated in ringgit or in foreign currencies, and listed, convertible, exchangeable, redeemable or otherwise	All activities involving the offer of securities in the capital market, and enabling law for the establishment of the CMA	Financial free zone of UAE, establishing DIFC as a financial free zone, establishment of DIFC courts, and the jurisdiction and functions of the DIFC	Providing the regulatory framework for Islamic financial products, including the tax treatment of Sukuk.
Regulatory Body	Cayman Islands Monetary Authority (CIMA)	Securities Commission Malaysia	TheCMA	DFSA and ESCA	Financial Services Authority
Dispute Resolution framework	English court	SIDRC or civil court	CRSD and the Appeal Panel, and Saudi courts	DIFC Court or Financial Markets Arbitration Tribunal	English Court

transactions from those laws. These amendments gave a new regulatory status to Sukuk by considering them as alternative financial instruments when compared with the conventional instruments.

In structuring *Sukuk* transactions, they are usually considered trust instruments governed by English law. To this end, apart from other subsidiary legislations that relate to incorporation of the issuing company (SPV), tax exemptions and other related legislations, the main legislation governing Sukuk transactions is the Alternative Financial Instruments Regulations 2008 (AFIR). This short but significantly important subsidiary legislation gives a new regulatory status to Sukuk transactions. Section 2 of AFIR defines an 'alternative financial instrument' as 'a transferable financial instrument that is or would be treated under international accounting standards as a financial liability of the issuer'. Therefore, Sukuk as alternative financial instruments are exempted from the licensing requirements under the Mutual Funds Law (2009 Revision) and Banks and Trust Companies Law (2009 Revision). As the status of Sukuk in the Cayman Islands is statutorily trust instruments regulated by AFIR, there will not be any requirement for licensing in such a trust business if the issuer of Sukuk is acting as a trustee and the beneficiaries who are entitled to periodic distributions are the Sukuk holders.[9] Even though there is no mention of the dispute resolution framework, the English courts seize jurisdiction on all matters relating to financial securities. Therefore, the usual practice is to stipulate in the Sukuk prospectus that the transaction will be governed by English law and subject to the jurisdiction of the English courts.

Malaysia

As one of the most advanced jurisdictions in the modern practice of Islamic finance, Malaysia has a sound and robust legal and regulatory infrastructure for the issuance of Sukuk for both onshore and offshore purposes. The harmonized regulatory framework for the capital markets in Malaysia is governed by the Capital Markets and Services Act 2007 (as amended in 2011) (CMSA). This legislation regulates both the conventional capital markets and the ICM. Specifically, CMSA regulates activities, markets and intermediaries in the capital markets in Malaysia, which statutorily includes the ICM. The Act is administered by the Securities Commission, Malaysia, with a standing *shari'a* Advisory Council for the ICM.[10]

Specifically, the issuance of *Sukuk* is regulated by the Islamic Securities Guidelines (Sukuk Guidelines) 2011.[11] The Sukuk Guidelines regulate the issues, offers or invitations of Sukuk that are offered by local or foreign entities; denominated in ringgit or in foreign currencies; and listed, convertible, exchangeable, redeemable or otherwise.[12] Although the Sukuk Guidelines do not provide for a dispute resolution framework, the enabling legislation has a standard infrastructure for the resolution of securities disputes in the capital markets in Malaysia.[10] This includes the requirements for *shari'a* advisory roles in signing off on Sukuk transactions, which serves as a dispute avoidance process.[13] According to Zainal Abidin, the Executive Director of the ICM in Malaysia, '[t]he Shariah Advisory Council of the Securities Commission has been empowered to make rulings on any Shariah matter relating to the Islamic capital market referred to it by the courts. The binding effect of such rulings addresses the issue of uncertainty in respect of dispute resolution on contracts and transactions based on *shari'a*'.[14]

The newly established Securities Industry Dispute Resolution Centre (SIDRC) is meant for the resolution of disputes between investors and their capital market intermediaries. Although the option of litigation is still available to parties to enforce their claims, SIDRC provides free, fast and friendly cost-effective mediation for small claims in the capital markets, which is primarily meant to enhance investor protection. With this, Sukuk holders do not need to resort to expensive and protracted litigation in the courts. The SIDRC was established under the

Capital Markets and Services (Dispute Resolution) Regulations 2010.

Saudi Arabia

The framework for dispute resolution in Islamic finance in Saudi Arabia relates to the securities disputes in the capital market. The Capital Market Authority (CMA), which was established by Article 4 of the Capital Market Law (CML), regulates the ICM.[15] The CML provides for the regulatory framework for dispute resolution and conflict avoidance with the establishment of the Committee for the Resolution of Securities Disputes (CRSD). The CRSD has 'jurisdiction over disputes falling under the provisions of this Law, its Implementing Regulations, and the regulations, rules and instructions issued by the Authority and the Exchange, with respect to the public and private actions. The Committee shall have all necessary powers to investigate and settle complaints and suits, including the power to issue subpoenas, issue decisions, impose sanctions and order the production of evidence and documents.'[16] This provides a good framework for the settlement of securities disputes outside the traditional court system.

The subject matter jurisdiction of CRSD is summarized thus: (1) Review of claims against decisions taken and procedures adopted by CMA or the Exchange Market; these are known as *Administrative Suits*. (2) Review of complaints arising between investors relating to the CML and its implementing regulations, as well as CMA and the Exchange Market regulations, rules and instructions in terms of public and private actions; these are known as *Civil Suits*. (3) Consideration of suits brought by CMA – as a general prosecutor – against violators of the CML and its implementing regulations; these are known as *Penal Suits*.[17] In addition, the powers of CRSD include: (1) powers to investigate and settle complaints and suits, (2) power to issue subpoenas, (3) power to issue necessary decisions to resolve a suit, (4) power to impose sanctions where necessary, (5) power to order the presentation of evidence and documents, (6) power to issue a decision awarding damages and (7) power to request reverting to the original status, or issue another decision as appropriate that would guarantee the rights of the aggrieved (ibid.).

The dispute resolution process provided for under the CML is two-tiered. In accordance with the provisions of the CML, two committees are established to settle securities disputes – CRSD and the Appeal Committee for the Resolution of Securities Disputes (ACRSD).[18] The ACRSD is constituted by the Council of Ministers. It comprises three experts with a representative each from the Ministry of Finance, Ministry of Commerce and Industry, and Bureau of Experts of the Council of Ministers. On the other hand, while the law did not provide for a fixed number for the members of the CRSD, they are appointed by the resolution of the CMA Board for a renewable 3-year term. An appeal from the CRSD must be filed at the ACRSD within 30 days of notification of decision. The decision of ACRSD is final and is not subject to further appeal or reversal by any competent court. The majority of the cases heard and determined by the CRSD in 2010 were civil disputes. Out of a total of 131 decisions, 97 were civil cases, 33 were penal cases and 6 were administrative cases.

The good thing about this CRSD is its fast, efficient and seamless procedure in the resolution of securities disputes. Apart from these two main bodies, the CMA Board has a unique mechanism for the enforcement of its decisions. An Enforcement Department is the authority entrusted with the enforcement of all the decisions. It enforces the decisions as an ombudsman body.[10] From the foregoing, it seems the CRSD and ACRSD represent an amalgam of the classical *mazalim* (special administrative) tribunal and *muhtasib* (ombudsman). In line with the foregoing dispute resolution framework, the prospectus of Saudi Electricity Sukuk Company provides that the laws of Saudi Arabia shall govern the Sukuk Document and all related

issues. In explicit terms, the governing law provides that:

> The Committee for the Resolution of Securities Disputes and the Appeal Panel (the 'Committee') shall have exclusive jurisdiction to hear and determine any suit, action or proceedings, and to settle any disputes, which may arise out of or in connection with the Sukuk or the Sukuk Documents and, for such purposes, all relevant parties (including, the Issuer and the Sukukholders) irrevocably submit to the jurisdiction of the Committee.[19]

This is a welcome development, as one can rest assured that from the contract stage to the post-contractual issues, the whole process is *shari'a*-complaint. Moreover, an alternative dispute resolution (ADR) process through expert determination is used, which makes Saudi Arabia stand out among other jurisdictions.

United Arab Emirates

The two main regulators involved in the governance of securities and commodities, including Sukuk transactions, are the UAE Securities and Commodities Authority (ESCA) and the Dubai Financial Services Authority (DFSA) operating within the Dubai International Financial Centre (DIFC).[10] There are two main financial regulatory jurisdictions in the United Arab Emirates (UAE). The DIFC is a financial free zone, which has its unique financial regulatory system, while the rest of the UAE has its own separate system. The DFSA regulates the DIFC, while the ESCA regulates the rest of the UAE.[20]

The dispute resolution frameworks of the two separate financial regimes in the UAE are different. For the DIFC, there are English courts in Dubai established with wide jurisdiction to hear and determine civil and commercial disputes among DIFC-registered entities and any other party. The DIFC also has arbitration tribunals for securities disputes. The Securities and Commodities Authority is empowered under the law to make regulations. To this end, Decision No. 1 of 2001 concerning the regulations as to the Arbitration of Disputes Arising from the Trading of Securities and Commodities was introduced in Abu Dhabi. This regulation contains fast-track arbitration for securities disputes. This fully *shari'a*-compliant procedure provides for timely settlement of the dispute through arbitration (pp. 104–105).[10]

United Kingdom

As part of its bid to remain the top Islamic finance hub in the West, the United Kingdom introduced legislative reforms to the extant laws to allow for *shari'a*-compliant transactions with all the attendant incentives. The main legislation governing *shari'a*-compliant financial services is the Financial Services Act 2010 (amending the Financial Services and Markets Act 2000). The fiscal and regulatory environment, which is conducive, has made London the choice of many investors from the GCC and Southeast Asian countries.[21] According to Omar Shaikh, '[a] key change to the fiscal and regulatory framework in 2003 was the removal of double taxation on Islamic mortgages and an extension of tax relief on Islamic mortgages to companies and individuals, making investing in real estate more attractive. This has helped broaden the market for Islamic products for both *shari'a*-compliant institutions and firms with "Islamic windows" '.[22] A number of Sukuk have been listed on the LSE. As at January 2012, a total of 42 Sukuk transactions have been listed on the LSE.

There exist UK legislations relating to Islamic finance ranging from removal of stamp duty, land tax for *murabahah* and *ijarah* (Finance Act 2003), to clarification of tax treatment of payments made under *murababah* and *mudarabah* (Finance Act 2005), to payments made under diminishing partnership and *wakalah* (Finance Act 2006), to regulation of diminishing partnership and *ijarah* by the Financial Services Authority (Financial Services and Markets Act 2000

(Regulated Activities) (Amendment) (No.2) Order 2006), to clarification of tax treatment for *Sukuk* (Finance Act 2009). It goes without saying that the proper law of Sukuk transactions issued in London is English law and the English courts are charged with the jurisdiction of hearing and determining any matter arising from the transaction.

Nevertheless, the use of expert opinions in cases that involve *shari'a*-compliant instruments in the English courts is a good development. However, it is expected that the stakeholders will come up with a more sustainable procedure such as an Islamic Finance Arbitration Tribunal established under the English Arbitration Act of 1996 with the attendant binding and enforceability infrastructures. This would allow the use of *shari'a* and finance experts as arbitrators. It is worth noting that the newly established Oxford Institute of Islamic Banking and Finance (OIIBF) has arbitration services on offer for Islamic finance disputes, including those arising from Sukuk transactions. However, not much is presently known about the success rate of the arbitration services at OIIBF.

GOVERNING LAW CLAUSES OF SELECTED SUKUK TRANSACTIONS

This section presents and analyses the governing law clauses of a select 10 Sukuk transactions as contained in their prospectuses. Although it may not be possible to review each of the Sukuk transactions, for research convenience they have been classified into four main categories based on the manner in which they were drafted: first, the Sukuk transactions that choose English law and the exclusive jurisdiction of the English courts; second, Sukuk transactions that partly provide for English law and jurisdiction; third, Sukuk transactions that provide for *shari'a* as the exclusive law for the interpretation of the underlying agreements; and fourth, Sukuk transactions that provide for arbitration as an alternative form of dispute resolution (see Appendix B for a comparative table on the governing law of 10 Sukuk prospectuses).

English law and exclusive jurisdiction of the English courts

When Sukuk financing made its debut on the global scene, there was a general trend towards choosing English law as the governing law in Sukuk prospectuses, and the English courts had exclusive jurisdiction to hear and determine any dispute, claim or action arising from such transactions. Even though this general trend still subsists, there are now new approaches to the drafting of the governing law clauses of Sukuk transactions. The reason for the preference of English jurisdiction and English law is not farfetched. Most of the leading law firms drafting Sukuk prospectuses are English or western firms with offices across the Southeast Asian and GCC countries. As some of the *shari'a* scholars interviewed argued, this is what the stakeholders want and it does not necessarily violate the fundamentals of Islamic commercial law. Some practitioners have also argued that for the sake of certainty in large investments such as Sukuk, there is a need for a more formal forum for dispute resolution. Otherwise, the investors will not want their major investments to go down the drain because of weak regulatory and legal infrastructure. Consideration of a leading English case would provide a more practical angle and help to support the case that choice of law is of great significance in the drafting of Sukuk contracts. A number of English court decisions have explored the extent of application of *shari'a* in transactions involving Islamic financial products. One common denominator of most of the cases is the *shari'a* defence often pleaded by the defaulting party or the defendant to persuade the court about the inapplicability of *shari'a* rules since a contract in question is void *ab initio* in the eyes of *shari'a*. The first instance where the English court ruled on an Islamic financial transaction was *Islamic*

Investment Company of the Gulf (Bahamas) Ltd v. Symphony Gems NV & Ors (2002) WL 346969 (QB Comm. Ct 13 February 2002). In this case involving a *murabahah* facility, the parties had agreed on the choice of law and jurisdiction as being English law. After examining the nature and terms of the contract and listening to expert opinion, the court held that English law principles of contract must apply to the purported *murabahah* contract, despite the fact that the expert opinion revealed that the agreement at issue did not have the essential characteristics of a *murabahah* contract. This is premised on Clause 25 of the agreement, which provides that '[t]his Agreement and each Purchase Agreement shall be governed by, and shall be construed in accordance with, English law …'. With this clause, the parties have agreed that the transaction as well as any purchase agreement made pursuant thereto shall be governed and construed in accordance with English law. In addition, Clause 26 of the underlying agreement provides for an irrevocable submission to the jurisdiction of the English court. It is important to observe that party autonomy is of paramount importance in the choice of law and jurisdiction. Therefore, the court construed the agreement as an English law contract, which validated the seemingly invalid *murabahah* contract. This case 'illuminates the challenges and tensions within the industrial complex of Islamic finance as it seeks to exist and thrive in a commercial reality where the regulatory framework and its associated assumptions (both theoretical as well as those of commercial practice) differ markedly from those of Islamic law and the contemporary Islamic financial industry' (p. 155).[23]

In the prospectus of GE Capital Sukuk Ltd., it is provided that all the underlying contracts except the Guarantee will be construed in accordance with English law. The guarantee contract is governed by New York State law. All the parties in the Sukuk transaction agreed that they would submit to the exclusive jurisdiction of the English courts, and any judgement obtained in any proceedings before such courts would be binding and enforceable in any other jurisdiction. A similar provision was inserted in the controversial Goldman Sachs Sukuk where the underlying contracts are to be construed in accordance with English law, New York law and the laws of the Cayman Islands, respectively. This totally excludes *shari'a* as the governing law. *Shari'a* can only be invoked during the proceedings through the call for expert opinions from *shari'a* scholars, which are not necessarily binding on the courts.

English law and non-exclusive jurisdiction of the English courts

While maintaining a middle course, there are Sukuk prospectuses that provide for a mixed legal and regulatory regime owing to the fact that the stakeholders in the transaction are in different jurisdictions. Therefore, this category partly provides for English law as the governing law, while emphasizing the non-exclusivity of the jurisdiction of English courts in determining any claim or action under the prospectus. That is, while some underlying contracts are construed under English law, others are construed under the laws of other jurisdictions. In addition, any of the parties in the transaction can bring an action in other jurisdictions, though the English courts are preferred. This seems to be the most complex category because other related issues/might crop up such as recognition and enforcement of foreign judgements. To this end, it is pertinent to observe that some of the countries in the GCC are not signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention). Worse still, many of those countries in the GCC region do not have bilateral treaties on the enforcement of foreign judgements , which makes it difficult to enforce an English judgement in jurisdictions such as the UAE, Abu Dhabi, Kuwait, Qatar and Saudi Arabia.

Examples of Sukuk prospectuses, which fall under this category, include the QIB Sukuk, Nakheel Sukuk and 1Malaysia Sukuk Global.

For instance, in QIB Sukuk, it is clearly provided that potential investors must be put on notice:

> If the judgment were to be enforced in Qatar, under current Qatari law, due to the lack of reciprocity of enforcement of judgments between Qatar and England the Qatari courts would be unlikely to enforce such judgment without re-examining the merits of the claim and may not observe the choice by the parties of English law as the governing law of such Transaction Documents. In addition, even if English law is accepted as the governing law, this will only be applied to the extent that it is compatible with mandatory provisions of Qatari law and public policy and morals in Qatar. This may mean that the Qatari courts may seek to interpret English law governed documents in accordance with Qatari law principles and there can, therefore, be no certainty that in those circumstances the Qatari courts would give effect to such documents in the same manner as the parties may intend (p. 15).[24]

This has led to problems of uncertainty of some jurisdictions, which amounts to a legal risk in the transaction. As will be seen in the recommendations of this study, a different view is presented because most of these so-called jurisdictions with uncertain legal frameworks could effectively utilize binding arbitration where experts constitute the arbitral tribunal for the resolution of the securities disputes.

Shari'a as the exclusive governing law

Despite the prevailing practices in the global Sukuk market, there are still some jurisdictions that insist on the stipulation of *shari'a*-compliant dispute resolution processes and that the governing law shall be *shari'a*. Although this is a new approach to the drafting of Sukuk prospectuses, it represents the proper style. Among the 10 Sukuk transactions reviewed in this study, it is only the Saudi Electricity Company Sukuk Prospectus (SE Sukuk) that provides for mandatory application of *shari'a* as well as the Laws of the Kingdom of Saudi Arabia, which by virtue of Article 1 of its Constitution is an Islamic state governed by *shari'a*.[25] According to the SE Sukuk, the Sukuk documents are to be construed in accordance with the laws and regulations of Saudi Arabia. Apart from this governing law, the jurisdiction that can hear and determine any matter arising from the transaction lies with the CRSD and the Appeal Panel. The CRSD and its Appeal Panel has exclusive jurisdiction to hear any suit, action or proceedings arising from the Sukuk transaction. This ousts the jurisdiction of foreign courts in any claim or action relating to the transaction. In the SE Sukuk, it is clarified that:

> Prospective Sukukholders should note that to the best of SEC's knowledge, no securities of a similar nature to the Sukuk have previously been the subject of adjudicatory interpretation or enforcement in the Kingdom of Saudi Arabia. Accordingly, it is uncertain exactly how and to what extent the Sukuk, the Conditions and/or the Sukuk Documents (as defined below) would be enforced by a Saudi Arabian court or the Committee for the Resolution of Securities Disputes, the Appeal Panel or any other Saudi Arabian adjudicatory authority (p. 9).[19]

It is clear from the foregoing provision in the prospectus that the SE Sukuk, in the event of any claim, action or suit, will be the litmus test for the certainty of the proceedings and enforceability of the award of the panel in Saudi Arabia. This is expected to serve as a model for other jurisdictions such as Malaysia and the UAE, which both have similar panels in their respective ICM.

However, there are cases where the choice of law clause is ambiguously drafted. This was

the case in *Beximco Pharmaceuticals Ltd & Ors v. Shamil Bank of Bahrain E.C.* (2004) EWCA Civ 19. In this leading case that has largely presented *shari'a* as being in conflict with English law, the appellant brought an appeal against the claimant Shamil Bank of Bahrain in relation to a single issue, which is incidentally related to the subject matter of this article. In this case, the lender, Shamil Bank of Bahrain, agreed to provide a financing facility to the borrowers, Beximco Pharmaceutical Ltd and others in 1995. The financing scheme was a *murabahah* (mark-up sale contract), which is an interest-free working capital facility. In the event of default, there were a number of termination events under the *murabahah* agreements. This triggered formal court proceedings in the form of an application for summary judgement. The borrowers argued that since *shari'a* prohibits interest on loans, the *murabahah* agreements were disguised loans involving interest, and as such were invalid and unenforceable. The High Court granted summary judgement to Shamil Bank of Bahrain while concluding that *shari'a* principles did not apply, as *shari'a* cannot trump the application of English law. Although the borrowers were initially refused permission to appeal in the decision of Moris J., they were granted permission to file an appeal 'relating to the construction and effect of the form of the governing law clause contained in the financing agreements' by Clarke L.J. The aforementioned governing law clause of the *murabahah* financing agreements provides that:

> Subject to the principles of the *Glorious Sharia'a*, this Agreement shall be governed by and *construed in accordance with the laws of England*.

This was a litmus test for the English courts to hand down their position on which law applies – 'the Glorious Sharia'a' or the Laws of England. This was fundamental in construing the applicable law in the financing agreement, which will invariably clear the way for the determination of the substantive suit. In summary, the appellants raised the usual *shari'a* defence, which is now generally considered *a lawyer's construct* in Islamic finance litigation. The main issue before the Court of Appeal was whether the *murabahah* arrangement fell foul of relevant principles of *shari'a* regulating such transaction that would lead to freedom from liability on the part of the borrowers under the financing facility. After considering the diverse positions of expert witnesses and applying relevant English principles, the court came to the conclusion that *shari'a* principles do not apply, which makes the financing scheme enforceable.

As two systems of law cannot be applied to one contract, the issue boils down to the construction of the governing law clause. As indicated by the court, the borrowers would have been successful if they had validly incorporated the relevant *shari'a* principles applicable to the contract:

> The fact that there may be general consensus upon the proscription of Riba and the essentials of a valid Morabaha agreement does no more than indicate that, if the Sharia law proviso *were* sufficient to incorporate the principles of Sharia law into the parties' agreements, the defendants would have been likely to succeed. (Para 55)

In *Sayyed Mohammed Musawi v. R. E. International (UK) Ltd. & Ors* (2007) EWHC 2981 (Ch), involving the applicability of 'Shia Sharia law' similar to the 'principles of the *Glorious Sharia'a*' mentioned in the above case, the issue of choice of law was brought to the fore. Although the parties agreed that Shia Sharia law is applicable to the contract, which was not a contentious issue in the case, the judge held that 'at common law the proper law of a contract had to be either English law or the law of another country, and the courts would not apply any other system to a contract'. (Para 19). Hence, the court concluded that the applicable law in this case was English law.

The above cases reflect the polemics of the governing law clause in Islamic finance

transactions. Such polemics are also present in Sukuk transactions, which require some immediate solutions. The interaction between *shari'a* and English law and the seeming convergence of laws happening in some jurisdictions call for a way forward.

Provisions for arbitration in Sukuk transactions

The paradigm shift to ADR processes in civil and commercial transactions has largely influenced the dispute resolution agreement in the governing clauses of Sukuk prospectuses. The Saad Sukuk Prospectus partly provides for the likelihood of arbitration in the settlement of disputes between the company and any other party. However, in more emphatic terms, the DanaGas Sukuk Limited Prospectus provides that '[a]ny disputes which may arise out of or in connection with the Transaction Documents may be finally settled under the Rules of the London Court of International Arbitration' (p. 38).[26] Adopting such rules does not preclude the applicability of *shari'a* in the arbitration proceedings. It depends on how the parties expressly provide for the applicable substantive law for such proceedings. Essentially, arbitration serves as a preventive and remedial measure for protecting the Sukuk holders.[27] This will be more effective when the arbitration proceedings are conducted based on the Islamic arbitration principles, which are not as restrictive as the conventional rules of arbitration.

The use of friendlier and less formal procedures for resolving securities disputes such as arbitration and conciliation will allow for expert arbitration panels where parties can clearly stipulate in their dispute resolution agreement that any dispute arising from the Sukuk transaction shall be resolved by an arbitration panel duly constituted by the triad of a lawyer, *shari'a* scholar and finance expert. There is no doubt that this three-man panel will be more appropriate for disputes involving Sukuk transactions since the arbitrators are experts in all aspects of the transaction being disputed. Even if the arbitration tribunal is mandatorily required to use *lex arbitri* (the law of the seat of arbitration) under the relevant laws, the mere fact that they are experts in all required aspects is an added value to the proceedings. It goes without saying that there are now regional and international institutions that have calibrated their arbitration rules to accommodate Islamic finance disputes, including disputes arising from Sukuk transactions. Examples of such institutions are the Kuala Lumpur Regional Centre for Arbitration (KLRCA) and the International Islamic Centre for Reconciliation and Commercial Arbitration (IICRA).

An attempt to explore ADR in a summary judgement that was set aside involving an Islamic finance facility was made in *Gulf International Bank BSC v. Ekttitab Holding Company KSCC and Al Madina* (2010) EWHC B30 (Comm). Although the summary judgement was obtained by the claimant, the court set it aside on technical grounds. One striking direction of the court, which is rare in Islamic finance litigation, is the directive from Simon J., to the parties to explore ADR in accordance with the rules of the court: 'I also propose to allow the parties time to engage in neutral evaluation in alternative dispute resolution of this matter. It seems to me that relevant time should be set aside for that purpose and it is likely to bear fruit in this case' (Para 16). From the record of court proceedings, it was crystal clear that the parties were willing to explore ADR with a view to considering out-of-court settlement as an alternative to summary judgement.

During a recent seminar, Stilt critically asked about 'what the appropriate tribunals for dispute resolution of such bankruptcy or other cases of insolvency would be' when it comes to Sukuk defaults. She quickly added, 'Regular courts are not always that helpful or knowledgeable as we found out, and often arbitration bodies are chosen by parties involved'.[28] This points to the often-repeated fact that dispute resolution in any Sukuk prospectus is at the centre of the whole transaction.

Table 3: Governing law and dispute resolution in Sukuk transactions

Question	*Number of affirmative responses*	*Percentage of total*
1. While approving a Sukuk prospectus, do you go through the governing law issues to ascertain whether it is *shari'a*-compliant or not?	2	20
2. Is there anything wrong in English Law as Governing Law?	5	50
3. Any *shari'a* basis for choice for English Law?	9	90
4. Any causal link between the terms of Sukuk prospectus and Sukuk defaults?	2	20
5. Are the civil courts better placed to handle cases of Sukuk default?	4	40
6. Any room for *shari'a*-based dispute resolution methods?	8	80
7. Does the AAOIFI have a role to play in ensuring a *shari'a*-compliant dispute resolution framework for Sukuk transactions?	1	10
8. Would you prefer *shari'a* as the governing law of a Sukuk transaction?	6	60
9. Can Sukuk disputes be referred to IICRA[a] or KLRCA[b] that has the *shari'a* arbitration rules?	8	80
10. Where a governing law is not Islamic, can Islamic values play a role in ensuring justice among the parties?	10	100
11. Do we need to prevent future defaults in global Sukuk through the proper drafting of the governing law clause?	10	100
Total	65	650

[a]IICRA is the International Islamic Centre for Reconciliation and Arbitration in Dubai.
[b]KLRCA is the Kuala Lumpur Regional Centre for Arbitration in Malaysia.

BETWEEN ENGLISH LAW AND *Shari'a*: THE GOVERNING LAW OF SUKUK TRANSACTIONS

Given the above background on the dynamics of the governing law of Sukuk, this part examines the arguments for and against the stipulation of *shari'a* as a viable governing law in such transactions. Efforts have been made to refrain from using any identifiable attribute that would reveal the identity of the 10 *shari'a* scholars interviewed. It is important to emphasize that the views expressed by *shari'a* scholars who are practically involved in signing off on most of the Sukuk transactions in the market are borne out of sincere and practical realities. Nevertheless, there are bound to be differences of opinions on issues like this. The structured interview questions contain both open-ended and closed questions, totalling 11 questions in all. When the responses were received via email, they were synthetized, coded and classified into major themes as represented below. The results of the study are presented in the section as summarized in Table 3. The details and samples of some of the important responses received are discussed below. In order to comply with the ethical concerns raised during the interviews, the personal details of the interviewees have been redacted from the sample responses discussed below.

Table 3 gives an indication of the position of some of the leading scholars on key issues relating to the governing law of Sukuk. For example, in two instances there was a unanimous opinion among the scholars. The first instance relates to the significance of Islamic values in ensuring justice among disputing parties in Islamic finance transactions even in situations where the governing law of, for instance, a Sukuk transaction, is not originally *shari'a*-based. Moreover, the second instance where there was a unanimous opinion was the need to prevent future defaults in the global Sukuk market through the proper drafting of the governing law clause. In addition, one cardinal issue raised during the interview is the procedure the scholars follow in signing off on Sukuk transactions brought before them. On this issue, they were asked whether they go through the governing law in Sukuk prospectuses brought before them to ascertain whether it is *shari'a*-compliant or not. Only 20 per cent

Table 4: Summary of governing law and dispute resolution in Sukuk transactions

Total number of respondents	10
Total number of questions	11
Average of affirmative answers	7.9
Maximum affirmative answers	7
Minimum affirmative answers	4
Standard deviation	3.17

of the scholars explained that they consider such issues while evaluating the *shari'a* compliance of a Sukuk prospectus, whereas the remaining 80 per cent contend that they 'do not take time to go through the governing law issues to ascertain whether it is *shari'a*-compliant or not. But, we do try to ensure that the contract is *shari'a*-compliant'. Most of the scholars believe the governing law issues relate to the practical enforcement of the Sukuk contract, which is outside their terms of reference.

The results reported in Table 3 represent the outcome of the structured interviews conducted on 11 issues relating to the governing law, jurisdiction and dispute resolution in Sukuk transactions. Table 3 shows the number of affirmative responses to the questions raised as well as the percentage of total number of respondents. It is, however, important to add that the questions were not structured in a close-ended manner but rather open-ended. However, for the sake of proper presentation of the results, they have been restructured in a close-ended form. Table 4 summarizes the results of the governing law and dispute resolution issues in Sukuk transactions. From Table 4, it is clear that with the total number of respondents being 10, the total number of affirmative responses to the 11 questions is 7.9. While the number of maximum affirmative answers is 7, that of the minimum affirmative answers is 4. More importantly, it is observed that the standard deviation is 3.17, which gives a clear indication that the dispersion in the responses from the *shari'a* scholars in the sample is quite wide. The views expressed by the *shari'a* scholars, who are of diverse backgrounds, represent their individual opinions. Many demographic factors influence the opinions expressed on issues highlighted apart from the overriding *shari'a* consideration. While some of the scholars were chosen from Southeast Asia, others represent the GCC countries, Europe and North America.

English law as the governing law of Sukuk transactions

While acknowledging the need to consider the *shari'a* option in the governing laws of Sukuk transactions as an ultimate aim, a good number of the *shari'a* scholars believe the Sukuk transactions should be construed in accordance with English law because this is what the stakeholders generally prefer. Hence, this does not necessarily affect the *shari'a* compliance of the transaction. It is considered an inevitable necessity (*darurah*) to opt for the English jurisdiction because most of the Muslim-majority countries do not have the requisite legal and regulatory framework for Sukuk with particular reference to dispute resolution.

The complexities and transnational nature of most Sukuk transactions

It has been argued that the complexities of modern Sukuk transactions require certainty in the legal and regulatory framework. Transnational Sukuk issues involve stakeholders from different jurisdictions around the world and this has triggered another complexity where the problem of choice of laws sets in. The *shari'a* scholars never envisaged these developments but there are internal mechanisms in the principles of *shari'a* that allow for the adaptation of foreign frameworks to facilitate the *shari'a* process. In fact, one of the interviewees observed that 'Sharia recognizes universal sense of fairness and justice as well as customary practices and agreements of a market or domain. Therefore as long as these values are not in contradiction to basic Sharia maxim, Scholars have no major issues with it as the history of litigation has demonstrated in the past'. Another scholar agreed with this

submission and added that since the nature of Sukuk is more of an international transaction, even though preference should be given to *shari'a* principles while drafting the relevant contracts, justice and fairness should be the overriding principles, especially in situations where the law of the land excludes the application of any foreign law such as *shari'a*.

Lack of regulatory and legal framework for Sukuk in Muslim countries

As a rider to the above argument, the legal and regulatory infrastructure is inadequate to cater for transnational Sukuk issuance. This is an important element in commercial transactions, even under the classical Islamic commercial contracts. All the elements of a contract must be certain and unambiguous throughout the whole process. It is therefore believed that if the Islamic principles on aspects such as dispute resolution, bankruptcy and liquidation have not been adapted and institutionalized in the modern context, *shari'a* allows the use of conventional legal and regulatory infrastructure to enhance the Islamic financial transactions. According to one of the interviewees,

> In a cross-border transaction, first, it is natural for parties to look for a neutral jurisdiction to be the jurisdiction of choice. Secondly, in making the choice they would look for a country that provides a sound, developed and efficient legal system, including the laws to be made applicable and the lawyers to do the documentation and, may be later, to do the litigation. Then they would look for an efficient, independent and internationally respected judiciary. England, at present, does have an edge in all these factors. In addition, common law lawyers are the ones involved in these transactions all over the world using English as the language in the documentation. In the circumstances, it is natural for parties to choose English law as the governing law and English court as the forum for settlement of disputes. The parties cannot be criticised for it.

The above assertion is true because party autonomy is an overarching principle in international transactions, and this has found its way into Sukuk transactions. Parties often prefer neutral jurisdictions. On top of that, some of the neutral jurisdictions have very sound and robust legal and regulatory frameworks that suit the needs of virtually all the stakeholders in any Sukuk transaction.

Shari'a as a non-nationalistic legal system

As *shari'a* is generally considered a non-nationalistic legal system with different legal interpretations of certain rules, it leads to uncertainty when parties provide for *shari'a* as the governing law in a Sukuk transaction. There has been great concern over this issue in other Islamic finance contracts, particularly when related cases come before the English courts for hearing. Although *shari'a* transcends the law of just one jurisdiction, it is a global legal system, which is applicable to the lives of Muslims around the world. Maududi[29] clarifies this where he describes *shari'a* in the following terms:

> Islam is not just a mere collection of dogmas and rituals but it is a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial. This way of ordering the life with all the precepts and moral standards is based on divine guidance through His prophets and the last of such guidance is the Quran and the last messenger is Mohammad SAW, whose conduct and utterances are revered.[30]

Most of the religio-legal norms have been codified in various ways. From the commercial perspective, the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) has issued a number of standards to regulate

Islamic financial transactions, and other bodies such as the Islamic Financial Services Board have come up with guidelines that bring to the fore key Islamic principles. It is therefore possible for the courts and arbitral tribunals to validly refer to these international standards in proceedings involving Islamic financial products. This agrees with the conclusion of Oba,[31] where he argued that globally, 'Islamic law should be considered a legal tradition or legal system rather than a religious law'.

'Friendly' or 'favourable' jurisdictions

The complexities and transnational nature of most Sukuk transactions coupled with the weak legal and regulatory frameworks in most Muslim countries suggest the need to opt for other 'favourable' or 'friendly' jurisdictions such as London and the Cayman Islands. Numerous incentives are provided in these jurisdictions, which allow the investors to receive their returns on investments without the usual challenges of double taxation and stamp duties. The global Sukuk market cannot just remain idle and confine itself within weak jurisdictions. It should extend its tentacles to friendly jurisdictions, which will invariably enhance the popularity and significance of Islamic finance in the global financial system.

Better credit ratings from western jurisdictions

There are requirements that financial instruments such as bonds and stocks must meet before they are rated high for the patronage of potential investors. Potential investors consider the ratings of Sukuk important before investing to ensure that no form of risk affects their returns. Such rating agencies are mostly available in western jurisdictions and they have their unique standards for ratings. Failure to provide for a certain and unambiguous choice of law clause in Sukuk transaction may lead to the degrading of the credit ratings of Sukuk, and hence the need to utilize the available system in western jurisdictions. However, Shaykh Taqi Usmani explicitly addressed this concern in his popular 2008 pronouncement on the *shari'a* compliance of Sukuk where he observed:

> The answer to this objection is that if we are to continue to run behind the international ratings agencies, agencies that do not distinguish between halal and haram, it will never be possible for us to move forward with authentic Islamic products which actually serve the purposes of Islamic economics. This is because these agencies have matured in an interest-based atmosphere that is unable to acknowledge the quality of an investment unless its capital is guaranteed and its returns are distributed on the basis of interest. At the same time, the quality of a product from a Shariah perspective depends upon the sharing of risk and the equitable distribution of profits between investors. Thus, the Islamic mentality is diametrically opposed to the mentality of those institutions (pp. 13–14).[32]

There is no doubt that standard-setting bodies such as the AAOIFI and rating agencies have continued to compete for authority, particularly on issues involving Sukuk. The two groups have their distinct relevance within the global Islamic finance industry, but they are both significant in protecting the investors and consumers of Islamic finance products.[33]

Shari'a as the governing law of Sukuk transactions

Even though about 60 per cent of the scholars interviewed, as shown in Table 3, would ordinarily prefer *shari'a* as the governing law of Sukuk, it appears that the current regulatory and legal frameworks in most Muslim countries, with the exception of a few, do not evince much confidence from the investors. It is important to acknowledge the challenges of applying *shari'a*, namely, that it is not a fixed and immutable system of law but is the subject of differing opinions among scholars. This poses

challenges for the use of *shari'a* as the governing law for transactions in the financial markets, where investors like to have a degree of legal certainty. Despite this, the second group of *shari'a* scholars who are in the minority contend that *shari'a* should always be the governing law of Sukuk transactions. They argued that if any other law is chosen as the governing law and the forum for dispute resolution is also an English court, then the transaction cannot be said to be fully *shari'a*-compliant. The basis of their argument is summarized below.

Relevance of AAOIFI Arbitration Standard

It was argued that the mere fact that the AAOIFI has gone to extra lengths to introduce the *shari'a* Standard on Arbitration calls for *shari'a*-based dispute resolution in all Islamic financial transactions, including Sukuk. Even in simple financial contracts, most Islamic financial institutions across the world are reluctant to incorporate AAOIFI Arbitration Standard as the basic rule. There could be a sort of harmonization between the AAOIFI Arbitration Standard and the prevailing arbitration rules in a jurisdiction to ensure certainty and enforceability. When these are well structured by experts and incorporated in Sukuk transactions, the Islamic finance industry will have reached the next level in its continuous transformation.

Friendly jurisdictions

It has been suggested that the use of new friendly jurisdictions that posses every requisite legal and regulatory infrastructure for the issuance of Sukuk and its attendant issues such as a post-default dispute resolution process is preferable. A leading example of an emerging jurisdiction with a state-of-the-art regulatory and legal framework is Malaysia. As a hub of Islamic finance, it has been suggested that the laws of Malaysia could be provided for in the Sukuk documents as the governing law of the underlying contracts. Moreover, the Malaysian courts and arbitral institutions could be used as a forum for settlement of Islamic securities disputes. In fact, one of the objectives of the Law Harmonization Committee set up by Bank Negara Malaysia in 2010 is for Malaysian laws to be the governing laws, and Malaysia the forum for settlement of disputes for cross-border Islamic financial transactions.[34] Apart from Malaysia, Dubai and Qatar may also improve their legal and regulatory infrastructures, which are already in place for the purpose of the governing law and jurisdiction in Sukuk transactions.

International and regional Islamic finance arbitration centres

The mere presence and the emergence of more international and regional arbitration institutions exclusively established for Islamic financial disputes or others that have calibrated their arbitral rules to introduce unique *shari'a* arbitration rules introduces a new regime in dispute resolution over Islamic finance products. Those who hold this view among the *shari'a* scholars contend that these are appropriate forums for dispute resolution, which can be validly incorporated into the Sukuk transactions. The question of *shari'a* being a non-nationalistic legal system does not arise here. The arbitration rules are based on the Islamic law of arbitration (*tahkim*) and the tribunals are constituted by Islamic finance experts who sit with *shari'a* scholars and legal practitioners.

The challenge of enforcing foreign judgements and arbitral awards

As observed earlier in this study, there is the challenge of enforcing foreign judgements and arbitral awards in certain countries in the GCC. This has led some of the *shari'a* scholars to suggest inward reflection within the Islamic finance industry through the development of original *shari'a*-based processes of dispute resolution whose decisions are enforceable under the laws of the state. There are numerous examples of this problem and the need to

address it in the Sukuk prospectuses analysed in this study. For example, the QIB Sukuk Funding Limited Prospectus introduces the uncertainty created by this challenge. Qatar and Dubai and some other GCC countries are not parties to the New York Convention (p. 15).[24]

The need for a holistic approach to Islamic finance transactions

The trajectory track of Islamic finance transactions such as Sukuk contains numerous steps from the contract stage to the post-execution issues such as dispute resolution. As suggested in the 2008 AAOIFI Statement on Sukuk, the entire life cycle of an investment from the certification stage through the execution stage requires close monitoring to ensure *shari'a* compliance (p. 117).[35] Although scholars such as Naik[36] believe the whole process should be 100 per cent *shari'a*-compliant, many other scholars suggest a gradual process, particularly in a global financial system where the Muslim world has integrated into other systems – a modern phenomenon that is unprecedented in recorded history. Although we resist the temptation of being dragged to the arena of controversy among the *shari'a* scholars on form versus substance in the modern practice of Islamic finance, it suffices to observe that what is important is to structure Sukuk transactions in a manner that is reflective of the original value proposition of Islamic financial intermediation, taking into consideration the modern realities and expediencies of the securities market.

It is believed that most of the *shari'a* scholars who are actively involved in *shari'a* advisory on issues relating to Islamic financial services apply the principles of *makharij*, which are used as exit strategies to legally achieve the objective of Islamic finance. A good example of the application of *makharij*, which is relevant in the modern discourse of Islamic finance, is the pricing of Islamic finance products, including Sukuk transactions. Although we do not intend to deviate from the scope of this study, it is pertinent to observe that Sukuk pricing has far-reaching effects on the informed decisions of prospective investors. For the past few decades, the Islamic finance industry has consistently utilized the London Interbank Offered Rate (LIBOR) in the pricing of products. Fixing the incentives of Sukuk and other Islamic finance products on the interest rate benchmark of LIBOR has been the practice in the Islamic finance industry for the past three decades. Despite the glaring interest element in LIBOR, the *shari'a* scholars have allowed this since there has been no standard *shari'a* pricing benchmark for Islamic finance products. With the introduction of the Islamic Interbank Benchmark Rate (IIBR), it is expected that the scholars will issue *fatawa* prohibiting LIBOR as the benchmark for pricing Islamic finance products.[2]

The above argument represents the kind of holistic approach of *shari'a* advisory. The same rule may be applicable to dispute resolution where the principle of *darurah* may no longer be applicable in the presence of standard frameworks for dispute resolution. As the leading standard-setting body, the AAOIFI has continued to enjoin the *shari'a* Boards to avoid limiting their roles, as they occupy an important position in the Islamic finance industry. In its pronouncement on Sukuk in 2008, the AAOIFI recommends a holistic approach to *shari'a* advisory services, particularly in the certification of Sukuk transactions:

> *shari'a* Supervisory Boards should not limit their role to the issuance of fatwa on the permissibility of the structure of Sukuk. All relevant contracts and documents related to the actual transaction must be carefully reviewed [by them], and then they should oversee the actual means of implementation, and then make sure that the operation complies, at every stage, with shari'a guidelines and requirements as specified in the *shari'a* Standards.[37]

Such a holistic approach should be extended to issues that relate to the governing law clauses of Sukuk transactions. Considering the

far-reaching implications of governing law in a contract, the Islamic finance industry should not continue to grope in the darkness of non-*shari'a*-compliant procedures. The *shari'a* scholars have a major role to play in this regard. Shaykh Taqi Usmani has consistently encouraged the *shari'a* Supervisory Boards to be more pragmatic in their approach and strive to abide by *shari'a* as much as they can, particularly on issues involving Sukuk that are commercially viable.[32]

SUMMARY OF FINDINGS AND CONCLUSION

From the above analysis, it has been established that it is important to provide for extra-contractual disputes or post-default processes to avoid being caught unawares when an issue eventually crops up. As one of the *shari'a* scholars clearly observed in his response to the interview questions, they tend to focus on the *shari'a* compliance of the Sukuk structures rather than the whole transaction. It is believed that with the increasing challenges occasioned as consequences of Sukuk defaults, the *shari'a* scholars will no longer limit their roles while signing off on Sukuk prospectuses.

Just as the Islamic finance industry is witnessing a transition from LIBOR to IIBR in pricing of products, it is expected that the industry will witness a paradigm shift from English law and courts being the governing law and jurisdiction, respectively, to *shari'a*-based ADR mechanisms. However, it is important to emphasize that before any jurisdiction adopts the Islamic finance system, which may involve issuing Sukuk, a robust regulatory system has to be put in place, which necessarily involves all the elements of typical Sukuk transactions.

In broad terms, the Islamic finance industry should avoid the copy-and-paste approach to legal drafting of Islamic finance contracts. Although there may not be anything wrong in doing this for new issues that will add value to the contracts, it may be counterproductive in areas where Islamic law has standard rules on those issues. Even though most law firms that draft these Sukuk transactions do not have basic knowledge about the position of *shari'a* on issues such as liquidation and dispute resolution, the *shari'a* scholars should guide them to do the right thing. One of the interviewees, who also has a sound background in common law, cautioned that 'sukuk, as a product, is a *shari'a*-compliant product. English law may not be 100 per cent *shari'a*-compliant. So, if English law is chosen as the governing law, then the documentation and the settlement of disputes that follows may be contrary to *shari'a*. That compromises the *shari'a*-compliant character of the sukuk'.

As there exist structures for Islamic finance arbitration, the short-term solution to the challenge is to begin to incorporate arbitration procedures in the Sukuk transactions. Al-Amine observes that 'the immediate solution resides on the adoption of arbitration as an alternative method of dispute resolution in Islamic finance. Parties looking to enter into agreements incorporating *shari'a* principles shall include provisions to the effect that disputes about *shari'a* and its applicability shall be submitted to selected arbitrators who enjoy the confidence of the parties and possess the experience and capability in settling complicated commercial disputes' (p. 20).[38]

Finally, this seems to be the most important period for proper regulation of the ICM globally. The rate at which *Sukuk* financing has been accepted in different jurisdictions outside the usual Muslim-majority countries is unprecedented. This seemingly great feat comes with much responsibility and a proactive role on the part of the *shari'a* scholars and regulators. This article has attempted to examine prevailing practices in the market and the need to enhance the *shari'a* compliance of the processes through the adoption of proper governing law for *Sukuk* transactions. *Shari'a* scholars can only give some concessions based on *darurah* in cases where there is a need to issue *Sukuk* under some unfavourable mandatory legal provisions of a jurisdiction. According to McMillen[6], '[i]t

is apparent that many of the critical factors influencing the growth of the Islamic capital markets are firmly within the field of law'. However, in the absence of such requirements in most jurisdictions around the world with the viability of an array of options, the solicitors who draft the *Sukuk* contracts as well as the *shari'a* scholars who sign off on such contracts should give more importance to the mandatory provisions of *shari'a* rather than relying on what the stakeholders or parties want. This directly relates to the dispute resolution processes for post-default *Sukuk* processes. In the presence of regional and international arbitration institutions whose awards are enforceable coupled with AAOIFI *shari'a* Standard No. 32 on Arbitration, a new era has been ushered in for dispute resolution matters in *Sukuk* transactions. As the *shari'a* scholars have constantly guided the global Islamic finance industry towards the *shari'a* requirements, it is expected that dispute resolution being a crucial part of any transaction will be considered in the evaluation of the *shari'a* compliance of any *Sukuk* transaction.

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APPENDIX A

Table A1: Sukuk defaults in Malaysia from 1997 to 2011

Date of issuance	*Rating agency*	*Issuer*	*Type of Sukuk*	*Amount (RM in million)*	*Date of default*
17 April 1997	RAM ratings	Hualon Corporation (M) Sdn Bhd	*Bai' Bithaman Ajil* Islamic Debt Securities (BaIDS)	150	21 November 2003
25 January 1999	RAM ratings	Johor Corporation	*Murabahah* Islamic Debt Securities	500	27 June 2002
21 September 2000	MARC	Europlus Corporation Sdn Bhd	BaIDs	250	10 March 2006
11 December 2000	RAM ratings	Moccis Trading Sdn Bhd	BaIDS	50	3 June 2003
22 February 2001	MARC	Maxisegar Sdn Bhd	BaIDS	300	10 March 2006
24 July 2003	MARC	Perspektif Perkasa Sdn Bhd	*Murabahah* Underwritten Notes Issuance Facility (MUNIF)	188	10 March 2006
19 September 2003	MARC	Stenta Films (M) Sdn Bhd	MUNIF	90	20 September 2007
28 November 2003	MARC	Malaysian Merchant Marine Berhad	BaIDS	120	2 April 2010
30 December 2003	MARC	Evermaster Berhad	BaIDS & *Murabahah* Multi-Option Notes Issuance Facility	50 and 40	31 December 2008
1 April 2004	MARC	Pesaka Astana (M) Sdn Bhd	BaIDS	200	30 September 2005
9 July 2004	MARC	Ingress Sukuk Berhad	*Sukuk Ijarah*	160	13 July 2009
7 October 2004	MARC	Oilcorp Berhad	*Murabahah* Islamic Medium Term Notes (IMTN) Program/MUNIF	70	7 October 2009
19 October 2004	RAM ratings	BSA international Berhad	*Murabahah* CP/Medium Term Notes (MTN) Program	150	28 May 2008
4 November 2004	MARC	Jana Niaga Sdn Bhd	MUNIF	100	15 November 2007
12 November 2004	RAM ratings	The royal Mint of Malaysia Sdn Bhd	*Murabahah* Multi-Option Notes Issuance Facility	55	8 June 2007
15 December 2004	MARC	PSSB Ship Management Sdn Bhd	BaIDS	40	15 December 2009
28 January 2005	MARC	Tracoma Holdings Berhad	BaIDS	100	29 January 2009
8 March 2005	MARC	M-Trex Corporation Sdn Bhd	*Murabahah* ICP	60	21 May 2009
29 April 2005	RAM ratings	Oxbridge Height Sdn Bhd	*Murabahah* IMTN/MUNIF	104/50	6 April 2009
26 September 2005	MARC	Englotechs Holding Bhd	*Murabahah* MTN	50	27 March 2009
28 October 2005	RAM ratings	Memory Tech Sdn Bhd	BaIDS	320	7 June 2007
31 January 2006	MARC	Nam Fatt Corporation Berhad	*Murabahah* ICP/IMTN	250	6 April 2010
13 April 2007	MARC	Straight A's Portfolio Sdn Bhd	MUNIF	200	11 December 2009
17 May 2007	MARC	Malaysian International Tuna Port Sdn Bhd	BaIDS	240	18 November 2009
23 December 2005	MARC	Vastalux Capital Sdn Bhd	*Sukuk Musharakah (Musharakah Mutanaqisah)* IMTN Program	100	23 December 2010
27 April 2009	MARC	Dawama Sdn Bhd	*Sukuk Musharakah* MTN Program	120	3 October 2011

Source: [39] and other sources.

APPENDIX B

Table B1: Comparison of governing law and jurisdiction clauses of Sukuk prospectuses

Prospectus	*GS Sukuk*	*QIB Sukuk*	*ADCB-GMTN Sukuk*	*Nakheel Sukuk*	*Saudi electricity Sukuk company*
Governing law clause	The Certificates and any non-contractual obligations arising out of or in connection with the Certificates will be governed by, and construed in accordance with English law. Each of the Master Declaration of Trust, each Supplemental Declaration of Trust, the Agency Agreement, the Programme Agreement, the Master Murabaha Agreement, the Buying Agency Agreement and any non-contractual obligations arising out of or in connection with the same will be governed by, and construed in accordance with English law and subject to the exclusive jurisdiction of the English courts. The Guarantee will be governed by, and construed in accordance with the laws of the State of New York, USA and subject to the exclusive jurisdiction of the courts of New York, USA. The Corporate Services Agreement and the Registered Office Agreement will be governed by the laws of the Cayman Islands and subject to the non-exclusive	The Declaration of Trust, the Agency Agreement, the Costs Undertaking, the Management Agreement, the Purchase Undertaking, the Sale Undertaking and the Certificates will be governed by English law. The Purchase Agreement will be governed by the laws of Qatar. The Corporate Services Agreement will be governed by the laws of the Cayman Islands	The Notes and any non-contractual obligations arising out of or in connection with the Notes will be governed by, and shall be construed in accordance with English law	The Declaration of Trust, the Transaction Administration Deed, the Agency Agreement, the Certificates, the Co-Obligor Guarantee and the Dubai World Guarantee will be governed by English law and subject to the non-exclusive jurisdiction of the English Courts. The Purchase Agreement, the Lease Agreement, the Servicing Agency Agreement, the Sukuk Assets Sale Undertaking, the Purchase Undertaking, the Subscription Rights Sale Undertaking, the Agency Declaration, the Security Agency Agreement, the Mortgages and the Share Pledge will be governed by the laws of the UAE as applied by the Dubai courts. The courts of Dubai have non-exclusive jurisdiction to hear all disputes relating to each of those documents	*Governing law:* The Sukuk Documents are governed by, and are to be construed in accordance with the laws and regulations of the Kingdom of Saudi Arabia. *Jurisdiction:* The CRSD and the Appeal Panel (the 'Committee') shall have exclusive jurisdiction to hear and determine any suit, action or proceedings, and to settle any disputes, which may arise out of or in connection with the Sukuk or the Sukuk Documents and, for such purposes, all relevant parties (including, the Issuer and the Sukuk holders) irrevocably submit to the jurisdiction of the Committee. No suit, action or proceedings which may arise out of or in connection with the Sukuk or the Sukuk Documents may be filed or brought outside the Kingdom of Saudi Arabia and no court or any judicial authority outside the Kingdom of Saudi Arabia shall have jurisdiction to hear any such claim

Table B1 *continued*

	jurisdiction of the courts of the Cayman Islands.				
List of applicable laws	English Law, New York State Laws and Laws of the Cayman Islands	English Law, Laws of Qatar and Laws of Cayman Islands	English Law	English Law and the Laws of the UAE	Laws of the Kingdom of Saudi Arabia
Enforcement of foreign judgements and awards	Not applicable	Where an English judgement has been obtained, there is no assurance that QIB has, or would at the relevant time have, assets in the United Kingdom against which such judgement could be enforced. If the judgement were to be enforced in Qatar, under current Qatari law, because of the lack of reciprocity of enforcement of judgements between Qatar and England the Qatari courts would be unlikely to enforce such judgement without re-examining the merits of the claim and may not observe the choice by the parties of English law as the governing law of such Transaction Documents	Abu Dhabi courts are unlikely to enforce an English judgement without re-examining the merits of the claim and may not observe the choice by the parties of English law as the governing law of the Notes and the Guarantee. Investors may have difficulties in enforcing any English judgements or arbitration awards against the Obligors in the courts of Abu Dhabi	Under current Dubai law, the courts are unlikely to enforce an English judgement without re-examining the merits of the claim and may not observe the choice by the parties of English law as the governing law of the transaction. Judicial precedents in Dubai have no binding effect on subsequent decisions. In addition, court decisions in Dubai are generally not recorded	Not Applicable

Prospectus	*1Malaysia Sukuk global*	*Dana gas Sukuk*	*GE capital Sukuk*	*Investment dar Sukuk*	*Golden belt 1 (saad group)*
Governing law clause	The Sale and Purchase Agreement, the Lease Agreement, the Servicing Agency Agreement, the Substitution Undertaking and the Redemption Undertaking, will be governed by, and construed in accordance with the laws of Malaysia. The Purchase Undertaking, the Declaration of Trust, the Agency Agreement and the Subscription Agreement and any non-contractual obligations	The Declaration of Trust, the Agency Agreement, the Purchase Undertaking, the Sale Undertaking, the Security Agreement, the Security Agency Agreement and the Certificates will be governed by English law and subject to the non-exclusive jurisdiction of the English Courts. The Mudarabah Agreement and the Pledges will be governed by the laws of the UAE. The courts of the UAE have non-	The Acquisition Agreements, the Lease Delegation Agreements, the Servicing Agency Agreement, the Master Murabaha Agreement, each Murabaha Contract, the Purchase Undertaking, the Sale Undertaking, the Substitution Undertakings, the Declaration of Trust, the Agency Agreement, the Insurance Undertaking and the Certificates will be governed by English law.	All of the Transaction Documents (except as otherwise noted herein) and the Certificates will be governed by English law and subject to the jurisdiction of the English Courts	The Notes and the Deed of Guarantee and all matters arising from or connected with the Notes and the Deed of Guarantee are governed by, and shall be construed in accordance with English law. The courts of England have exclusive jurisdiction to settle any dispute (a 'Dispute') arising from or connected with the Notes or the Deed of Guarantee. All Disputes or any specific Dispute

	arising out of or in connection with the same, will be governed by, and construed in accordance with English law	exclusive jurisdiction to hear all disputes relating to each of those documents	The Guarantee will be governed by New York law		in relation to the Deed of Guarantee to be resolved by the Saudi Arabian Committee for the Resolution of Banking Disputes, under the Guarantee.
List of applicable laws	English Law and Malaysian Law	English Law and Laws of the UAE	English Law, and New York Law	English law and the laws of Kuwait	
Enforcement of foreign judgements and awards	Judgements obtained for a fixed sum against the Government of Malaysia in a court of a foreign jurisdiction with which Malaysia has no arrangement for reciprocal enforcement of judgements may, after due service of process, at the discretion of the courts of Malaysia be actionable in the courts of Malaysia by way of a suit on a debt if such judgement is final and conclusive	However, in respect of foreign court judgements, the UAE courts are unlikely to enforce an English judgement without re-examining the merits of the claim and may not observe the choice by the parties of English law as the governing law of the transaction. Judicial precedent in the UAE has no binding effect on subsequent decisions. In addition, there is no formal system of reporting court decisions in the UAE. These factors create greater judicial uncertainty	Regulated by the New York Convention	Not applicable	There is no statutory enforcement in the Cayman Islands of judgements obtained in England. However, the courts of the Cayman Islands will recognize a foreign judgement as the basis for a claim at common law in the Cayman Islands provided such judgement is (i) rendered by a competent foreign court, (ii) imposes on the judgement debtor a liability to pay a liquidated sum for which the judgement has been rendered, (iii) is final, (iv) is not in respect of taxes, a fine or a penalty and (v) was not obtained in a manner and is not of a kind the enforcement of which is contrary to the public policy of the Cayman Islands