

SOAS WORKSHOP ON ISLAMIC FINANCE

Challenging the Shari'ah Compliance of Islamic Finance Products

PROGRAMME OF EVENTS

Thursday, 22 February 2018

8:30 AM - 5:00 PM

SOAS University of London
22 Russell Square WC1H 0XG

Rooms: T101, T102

Workshop on

**CHALLENGING the *SHARI'AH*
COMPLIANCE OF ISLAMIC
FINANCE PRODUCTS**

**Thursday, February 22, 2018
8:30a.m--5:00p.m.**

SOAS University of London
22 Russell Square, London, WC1H 0XG; Rooms T101-02
Directions: <https://www.soas.ac.uk/soas-life/location/maps/>

OVERVIEW

This year, the organisers of the 12th annual workshop on Islamic finance are proud to be hosted by the School of African & Oriental Studies (SOAS) at the University of London. At SOAS, we are very fortunate to be aligned with enthusiastic and talented individuals in the field, led by Dr. Jonathan Ercanbrack, Deputy Director, Centre of Islamic and Middle Eastern Law, SOAS.

In the final London School of Economics and Hamad Bin Khalifa University workshop in 2017, the 11th in the series of these workshops, participants discussed Fintech and Islamic Finance: Applying *Hiyal* & *Makharij* and other Islamic Principles.

To continue to enhance the ongoing discussions between Islamic economists, practitioners, lawyers and *Shari'ah* experts and scholars, this year participants chose to focus the 2018 SOAS Workshop around the topic of “Challenging the *Shari'ah* Compliance of Islamic Finance Products”. This topic represents a combination of the most preferred options selected by our participants. Within this context, the focus of the workshop is aided with the use of a case study, the recent Dana Gas Sukuk case. This will help us to understand and to review what we actually mean when using the term ‘*Shari'ah* compliance’; when *Shari'ah* opinions and certified *Shari'ah* compliant financial products can be challenged (or even improved); and most importantly, by whom.

As in previous years, participants come to the Workshop having sent their comments on the topic in advance. This allows participants to start the Workshop at an advanced stage and to maximise the use of workshop time. A detailed programme of events is prepared from the participants’ comments. Therefore, participants are kindly requested to have read in advance all of the circulated papers and comments, as they become the basis of most of the day long discussions on the Workshop theme.

Running for 12 years now, this is a unique annual event with no parallel in the Islamic finance industry. This series of annual workshops allows a select group of established *Shari'ah* scholars, economists, legal luminaries, bankers and top industry professionals to gather together for a day long closed-door discussion on an important contemporary theme within the field of Islamic finance. The topic is always pre-selected by these leading decision makers in the industry.

INTRODUCTION

This year, through the use of a workshop case study, namely, the recent Dana Gas Sukuk in (actual or potential) default, participants are encouraged to reflect on what is actually meant by *Shari'ah* compliance and certification, and when can *Shari'ah* opinions and certified *Shari'ah* compliant financial products be challenged (or even improved), and most importantly, by whom. Participants are encouraged to reflect on what lessons can be learned to prevent such scenarios from being repeated, or rather, should we be encouraging more such retrospective challenges (if deemed beneficial to the industry).

Should an issuer of a certified compliant financial product, like that of a sukuk, be prevented from raising a challenge to its *Shari'ah*-compliance after it has been issued, invested or offered to a customer/creditor/investor? How do we balance between protecting Creditors, Issuers and *Shari'ah* advisors and certifiers from differences of opinion and new *Shari'ah* views, especially if Islamic Finance continues to grapple with widespread scepticism concerning the *Shari'ah* authenticity of its products. How can concerns regarding the *Shari'ah* compliance of Islamic financial products be better managed? Is having the ability to challenge *Shari'ah* legal thinking in the overall *Maslaha* of the Islamic finance industry? On the other hand, is the *Maslaha* of creating confidence in an emerging, growing industry more important? Finally, should *Shari'ah* scholars have the freedom to amend or revoke their advice with new developments/thinking, without subjecting their prior decisions to critical review?

We also encourage participants to look deeper into the meaning of compliance and certification. Is *Shari'ah* compliance a matter of adhering to the rules of *fiqh* or is *Shari'ah* compliance a matter of adhering to principles such as those of the maqasid al-*Shari'ah*? Islamic finance is frequently required to choose between the application and enforcement of *Shari'ah* legal principles, or, to justify new exceptions, all in order to overcome contemporary regulatory, compliance, credit risks, investor appetite, and market challenges. But what is the ethical basis of sharia compliance? Does it reside in adhering to *fiqh* or should the law be developed so that it adheres to agreed Islamic principles? The practice of Islamic financial markets indicates that an adherence to *fiqh* is more important even if this adherence can only be made possible with legal principles such as *maslaha*. Is this a sustainable or commercially viable option for the mid- to long-term? Perhaps most importantly, will this *modus operandi* allow Islamic finance the space to differentiate itself from conventional finance in relation to its ethical principles?

This workshop is not meant to be a review of all forms of contemporary *Shari'ah* compliant products and processes. Yet a primary purpose of this workshop is to go back to the original unresolved debate on whether to use and apply the *akham fiqhiyya*, and/or, *hiyal*, *makharij* or other exception based Islamic principles, to achieve a specific *masalah* or *masalih*, within a contemporary financial product.

This day long roundtable workshop also aims to foster dialogue among the diverse professions represented by the participants, and to initiate collaborative efforts in solving some of the most urgent unresolved challenges of Islamic finance.

In order to maximise the benefit of this workshop for all participants, workshop attendees are kindly requested to avoid some of the repetitive discussions tackled in previous workshops. Rather, stress should be laid on developing the ideas highlighted above as well novel considerations. We hope that our collaboration will help us to agree on a realistic way forward.

OBJECTIVES

In this workshop, we would like to examine the workshop theme from the following angles:

- *Shari'ah Compliance* - Should *Shari'ah*-compliance mean a financial product is compliant with the principles of the *Shari'ah*, or rather, compliant with the strict interpretation of the rules (*ahkam*) and of the *fiqh*. In other words, should a principle-based approach be adopted or is the rules based sufficient?
- *Challenging Certification* – On what basis and when can a fatwa be recalled, amended or disregarded once issued in relation to Islamic financial products. How we can create certainty in the market if such opinions can be challenged, amended or recalled?
- *Shari'ah Authenticity* – How do we maintain the authenticity of Islamic financial products if they are prone to non-standardization and frequent or unexpected change due to varied opinions. Is the sharia authenticity of Islamic finance products sufficient and why. In relation to standardization, is standardization beneficial when the underlying legal structures are seen as less than Islamic.
- *Value Proposition and Distinctiveness* - What is the value proposition of *Shari'ah* Compliant financial products, especially if they result in the same economic outcome as conventional products? What is fixed and what principles are open to interpretation? How can the industry maintain the distinctiveness of Islamic finance?
- *Qualification* - Who is qualified to challenge sharia compliance and on what basis can such objections be raised. Should sharia compliance be left to sharia scholars or should its determination involve a wider group of learned market participants? Or should it be open public challenge, or perhaps a combination of the above. Is there currently a proper mechanism – other than public criticism – by which such a challenge can be made?
- *Maslahah Determination* – As with all of our workshops, we continue to discuss the application of *maqāṣid al-Shari'ah* and how and whether an 'ideal' *maslahah* for new Islamic financial products can be developed, which may challenge existing structures and methodologies for deriving sharia. How can disagreements in relation to maslaha be dealt with? Should a "*maqasidic* or ethical index" be developed for Islamic financial products?

WORKSHOP AGENDA

8:30 a.m.	Reception and Coffee
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9:00 a.m. Welcome Remarks by Dr Nazim Ali

9:05 a.m. Opening Remarks on behalf of SOAS, Dr Jonathan Ercanbrack

9:15 a.m. Introduction by Workshop Moderator, Professor Frank E. Vogel

Part 1: <i>Shari'ah</i> Compliance Case Study: Dana Gas Sukuk
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9:25 a.m. **Presentation:** A quick overview of the legal, financial and moral issues faced in the recent Dana Gas sukuk trials and how challenging *Shari'ah* compliance has become of focus.

9:40 a.m. **Participants' Views – Open Floor Discussion**

Opportunity for each participant to explain briefly their views on the following. Do you agree/disagree with the following statements and questions:

- ***Who is Responsible for this Disarray*** - Is it Dana Gas, or rather, the Sukuk certificate holders/creditors who are the risk takers (*Rab Al Mal*)? Or, perhaps the advisors who advised the company at issuance, or even post-issuance when it was advised as being no longer *Shari'ah* compliant? Or was it due to the inherent structural problems within the product itself, for example, the use of purchase undertakings in *mudarabahs*, or utilizing multiple conflicting laws and regulations (i.e., UAE law and English law on top of *Shari'ah* Law)?
- ***Challenging Shari'ah Based on its Evolution*** - Should one be able to challenge compliance for changes to the "evolution and continual development of Islamic financial instruments and their interpretation"?
- ***Moral Obligation to Pay vs Complying with Local Law*** - Should complying with changes or even the discovery of a 'common mistake' in the validity of an agreement in the underlying law over-ride any moral or ethical obligation under *Shari'ah* to pay creditors?
- ***Challenging Product Compliance*** – Can (or should) the issuer (or even an investor/creditor) of a sukuk be prevented from challenging the *Shari'ah*-compliance of its own sukuk after it is issued?

- **Purchase Undertakings** – Given what we now know, can they still be used or should they be avoided altogether? Should it be the end of the road for Purchase Undertakings in Islamic finance products?
- **Mudarabah Sukuk** – Any future use or are its days numbered?
- **Conflicts of Law** – Does Islamic finance suffer, or is its growth being inhibited, because *Shari'ah* law does not take precedence over local or transactional laws (such as English law)? Or rather, has local law helped promote the growth of Islamic financial products, and in effect provided the much needed level of certainty and standardization missing from the current application of the *Shari'ah* rules? To what extent does English law allow sharia arbitrage?
- **Prevention** - What in your opinion can be done to prevent scenarios such as the Dana Gas Sukuk legal challenge from happening again? Or rather, should this type of action be encouraged?

11:00 a.m.

Tea/Coffee Break

11:15 a.m. **Summary** – Moderator to provide a summary of all the points of view and frame questions. (10 mins.)

Part 2: Challenging *Shari'ah* Compliance – Certification

11:25 a.m. **Participants' Views – Open Floor Discussion**

Opportunity for each participant to explain briefly their views on the following issues with *Shari'ah* compliance. Do you agree/disagree with the following questions and statements:

- **What Makes a Product *Shari'ah* Compliant** –
 - is it its certification, or
 - its intrinsic adherence to the rules, or
 - its adherence to the principles, or just the absence of non-compliant elements (i.e., like interest, riba and gharar, etc)?
 - is it because it fits within a defined structure (i.e., ijara, mudaraba, murabaha, etc), or
 - is it because of the intention of the parties to be Islamic compliant that makes it compliant?
- **Lack of Certification** – Does the lack of certification make it non-compliant?

- ***Shari'ah Auditing*** - Who is responsible if an auditor finds non-compliant elements in an audited IFI? In a product? In operations?
- ***Ignorance of Shari'ah*** - Is ignorance of *Shari'ah* rules an excuse if an offered product or service is discovered to be non-compliant?
- **Who is Authorized to Review and to Audit Certified Financial Products -**
 - The public or only skilled scholars or professionals?
 - If the public – are there any limits?
 - If just professionals or scholars – what can the public rely on for certainty of opinions?
 - What if the scholars get it wrong, what recourse do the affected parties have?
 - What qualification should the issuer and the reviewer (if different) have?
 - Who is authorized to critique certified compliance – (i.e., the advisors to Dana Gas who advised the company that the sukuk is no longer compliant.)

1:00 p.m.

Lunch

1.45 p.m.

Summary - Moderator to provide a summary of all the main points of view.

Part 3: Ensuring Compliance – Shifting Opinions

3:00 p.m.

Participants' Views - Open Floor Discussion

Opportunity for each participant to explain briefly their views on the following issues with *Shari'ah* compliance. Do you agree/disagree with the following statements:

When can opinions be modified, replaced or rescinded -

- ***Changing Retrospective Opinions*** - Should *Shari'ah* scholars have the freedom to amend their previous advice (i.e., with new developments/thinking), without subjecting their old decisions to critical review?
- ***Clash of Fatwas*** - Do differences of opinion or conflicting views on a product make that product non-compliant? Is it sufficient that

one scholar/board opine in favour of a product/structure, even if all others do not agree? How many opinions are required?

- ***Rescinding a Fatwa*** - When should an old fatwa become null and void?
- ***Fatwa Revocation*** - If a fatwa can be revoked, is there a transition period or period allowed to revoke opinions?
- ***Fatwa Development*** – Can new, more developed opinions override an old opinion even if used in a product currently in use?
- ***Discovering Non Compliance*** - If a product is certified compliant but in an subsequent audit is found to contain non-compliant elements, does this make it automatically non-compliant?
- ***Compliance Rectification*** - Is there any timing permitted for rectification of non-compliant parts of a product? Or is it automatically deemed non-*Shari'ah* compliant and void?
- ***Amending or Replacing Opinions*** - Can the certifier have room to change his or her opinion – if so, under what conditions? What is the method for amending opinions under *Shari'ah*, if any?
- ***Reduced Risks but not Removed***. Risks of non-compliance can only be reduced / minimized but not removed entirely. Do you agree with this?
- ***Conflict of Opinions - SSB opinions***. Which takes precedence, the resolutions of a SSB centralised *Shari'ah* advisory council (SAC) or that of an internal *Shari'ah* Committee?
- ***Source of the Opinion***: Do the above answers differ depending on what form the fatwa underpinning the respective financial product is predominately derived from: *Hiyal* and *Maqasid*, or *Akham* derived and driven?
- ***Conditional Fatwas*** - When using legal exceptions and legal stratagems to authorize the permissibility of potentially controversial *Shari'ah* products, should there be time limits or other specific conditions placed on their widespread use?

Part 4: Exploring the Way Forward for *Shari'ah* Compliance

3:30 p.m. Summary and Open Floor Discussion

Participants to discuss—and, where possible, reach consensus on—points or issues within areas to be raised by the Moderator.

4:30 p.m. Discussion on Future Workshop and Action Plan – Participants to assist the Moderator in drafting the workshop summary including suggested solutions.

5:00 p.m. End of Workshop

