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Third Party Arbitration Funding and Islamic Shari'a: Friends Not Foes

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THIRD PARTY ARBITRATION FUNDING AND ISLAMIC SHARI'A:

FRIENDS NOT FOES

*By Mohamed Sweify**

ABSTRACT

International arbitration exacts considerable monetary costs. In response, new mechanisms have emerged to eliminate the risks of these costs. One of these mechanisms is Third-Party Funding (TPF). Claimants may consider TPF where they cannot afford the costs of arbitration or to spread their risks and take the claim costs off their corporate balance sheets. It enables the poorly funded party to pursue its claim on an equal footing with the well-funded one. Recently, TPF has acquired great attention that made it a revolutionary development in the practice of international arbitration. The practice of TPF has moved from common law jurisdictions to civil law ones, some of which are based, even partially, on Islamic Shari'a (Shari'a); a movement that requires a response from an Islamic perspective. This Article accordingly responds to this movement, considers the legitimacy of TPF arrangements from an Islamic perspective, and advocates for an Islamic TPF funding model.

The Article is limited to discussing the rules governing TPF in the Sunni branch of Shari'a. It is also limited to TPF in arbitration because arbitration is more expensive than litigation in most Islamic-based jurisdictions which may justify the need to resort to TPF and, as will be discussed later, the rational for funding an arbitration claim may differ from funding a litigation claim. The Article proceeds with an introduction in Part I. Part II then explores arbitration as a forum for deciding disputes and financing in Shari'a. Part III discusses the foundation of the Islamic financial arrangements and their limitations, namely Riba (interest) and Gharar (uncertainty). It then addresses the forms of Islamic financial agreements. Part IV distinguishes TPF from other comparable financial arrangements in Shari'a. Part V advocates for an Islamic TPF model that brings the conventional TPF arrangements in compliance with Shari'a. Part VI finally concludes that the principles of Shari'a are capable of embracing TPF arrangements.

I. INTRODUCTION

The general attractiveness of Third-Party Funding (TPF) is a function of several factors including the amount of available capital, the number of funds and operating funders, and the jurisdictional tolerance to TPF practices.[1] TPF may find market in jurisdictions that

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are based, even partially, on Shari'a; a term that is generally used to refer to laws or principles that are derived from Islamic law.

In the Sunni branch, Shari'a comprises primary and secondary sources of authority. The primary sources of Shari'a include Qur'an and Sunnah of Prophet Muhammad. Qur'an is defined as the word of Allah (God) that was revealed to the Prophet of Islam to be communicated to the entire mankind.[2] Sunnah (or traditions) is simply the Prophet's traditions, deeds and sayings. Sunnah is divinely inspired by the constitutional rulings of the Qur'an.[3] It cannot provide a contradictory rule to any of its constituent rulings.[4] Rather, it serves as an explanatory source to either confirm, explain or clarify a ruling in the Qur'an.[5] These explanations may differ between the two major branches of Shari'a: Sunni and Shi'a. However, as mentioned above, this Article is limited only to the Sunni branch which represents around 90% of Muslims in the world.[6] Four major schools exist under the Sunni branch: Hanafi, Maliki, Shafa'i, and Hanbali. These schools adopt different approaches in interpreting the primary sources of Shari'a.

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[1] Working Grp. III: Inv'r-St. Disp. Settlement Reform, 37th Sess., A/CN.9/WG.III/WP.157 - Possible reform of ISDS - Third-party funding, U.N. COMM'N ON INT'L TRADE L. (UNCITRAL) ¶ 7 (1-5 Apr. 2019), http://undocs.org/en/A/CN.9/WG.III/WP.157. The 2015 QM survey reflected how evolving is the use of third party funding compared to other mechanisms. The respondents to this survey were asked how familiar they were with TPF in international arbitration and the answers were "39% of the respondent group have encountered third party funding in practice: 12% have used it themselves and 27% have seen it used. This data suggests that its use is relatively widespread compared to, for example, insurance products for respondents in international arbitration. Only 15% of the respondent group have encountered such insurance products in practice: 3% have used them and 12% have seen them used." Queen Mary Univ. of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitratio*n, WHITE & CASE LLP 45 (2015), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

[2] Alan J. Alexander, *Shifting Title and Risk: Islamic Project Finance with Western Partners*, 32(3) MICH. J. INT'L L. 571, 577 (2011).

[3] *Id.*

[4] Alexander, *supra* note 2, at 577–78. *See also* M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 139 (2002) ("The Qur'an is the principal source of the Shari'ah, which is supplemented by the sunnah. While the Qur'an is the controlling source, both constitute the primary sources of Islamic law"). Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 19 (1998) (The *Sunnah* "interpreted, clarified, explained, and complemented many of the principles revealed in the *Qur'an.* The *Sunnah,* which thus functions as the by-law of the *Qur'an,* enables the adherents of the new religion to translate the general principles announced in the *Qur'an* into specific rules applicable to the conduct of daily life."). Joelle Entelis, *International Human Rights: Islam's Friend or Foe? Algeria As an Example of the Compatibility of International Human Rights Regarding Women's Equality and Islamic Law*, 20 FORDHAM INT'L L.J. 1251, 1266 (1997) ("The sunnah, therefore, is only supplementary in nature to the Qur'an, and Muslims will discard it if it contradicts a verse in the Qur'an").

[5] Alexander, *supra* note 2, at 577.

[6] *Mapping the Global Muslim Population*, PEW RESEARCH CENTER (Oct. 7, 2009), https://www.pewforum.org/2009/10/07/mapping-the-global-muslim-population/ ("Of the total Muslim population, 10-13% are Shia Muslims and 87-90% are Sunni Muslims. Most Shias (between 68% and 80%) live in just four countries: Iran, Pakistan, India and Iraq."). *See also* Febe Armanios, *CRS Report for Congress on Islam: Sunnis and Shiites*, CONG. RES. SERV. 1 (Feb 23, 2004), https://www.investigativeproject.org/documents/testimony/337.pdf ("The majority of the world's Muslim population follows the Sunni branch of Islam, and approximately 10-15% of all Muslims follow the Shiite (Shi'ite, Shi'a, Shia) branch.").

The crux of Islamic jurisprudence is that it is an ever-grander body of rulings.[7] It is based primarily on the jurisprudential interpretations of the primary sources.[8] Islamic Jurisprudence (science of Usool Al Fiqh) comprises the methods of reasoning and deducing rules from the original text of the Qur'an and Sunnah on a given issue.[9] These methods are governed in general by Maqasid Al-Shari'a (objectives of Shari'a), including primarily securing benefits and preventing harm.[10] Islamic jurisprudence has created two major secondary sources, namely Ijmaa (juristic unanimous consensus) and Qiyas (analogy). Ijmaa refers to the widespread consensual opinion among the Islamic jurists on an issue which creates a binding authority even if it is not a primary source.[11] However, with the widespread of the Muslim communities, Ijmaa has become too difficult to be reached.[12] Qiyas refers to the extension of a ruling from its original case to apply analogically to a similar situation in a new case.[13] The secondary sources come into play where there is no clear ruling that may be derived from the primary sources on a new issue. Moreover, the new conventional forms of financial transactions may fall under the secondary sources, given the reality that they were not known at the time when the primary sources were revealed.

II. ARBITRATION & FINANCING IN SHARI'A

Arbitration offers its parties the autonomy to consensually agree on provisions that accommodate their procedural needs before an arbitrator who decides their dispute by a final award.[14] Similar to its "public cousin,"[15] litigation, international arbitration exacts considerable monetary costs. These costs may confer an advantage to the disputant with a greater budget rather than considering the merits of the dispute. Due to the high costs of arbitration,[16] many proposals have been introduced to aid in saving these costs.[17] TPF has

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[7] That brings it closer to the common law system. *See* Frederick V. Perry, *Shari'ah, Islamic Law and Arab Business Ethics*, 22 CONN. J. INT'L L. 357 (2007).

[8] Alexander, *supra* note 2, at 577.

[9] Umar F. Moghul, Esq. & Arshad A. Ahmed, Esq., *Contractual Forms in Islamic Finance Law and Islamic Inv. Co. of the Gulf (Bahamas) Ltd. v. Symphony Gems N.V. & Ors.: A First Impression of Islamic Finance,* 27(1) FORDHAM INT'L L. J. 150, 160 (2003).

[10] *Id.*

[11] Alexander*, supra* note 2, at 578.

[12] Ali Adnan Ibrahim, *The Rise of Customary Businesses in International Financial Markets: An Introduction to Islamic Finance and the Challenges of International Integration,* 23 AM. U. INT'L L. REV. 661, 679 (2008).

[13] Alexander, *supra* note 2, at 578. Analogy applies a textual ruling on a given case to another case that shares the same cause as the given case but has no textual ruling. Ibrahim, *supra* note 12, at 681.

[14] *See generally* Jack J. Coe Jr., *Planning for International Disputes (and What Makes Them Distinctive)*, 5(2) PEPP. DISP. RESOL. L. J. 385, 387 (2005) ("[A]rbitration has come to be the coin of the realm, first among equals").

[15] Jack J. Coe, Jr., *Pre-Hearing Techniques to Promote Speed and Cost-Effectiveness-Some Thoughts Concerning Arbitral Process Design*, 2 PEPP. DISP. RESOL. L.J. 53, 55 (2002).

[16] Recently, the high costs of arbitration have become one of the greatest disadvantages of this system. The average costs of arbitration in Investor-State Dispute Settlement ("ISDS") cases were USD 8 million. The parties in just one case involved mass claims spent almost USD 40 million in legal fees alone. Further, the average costs of legal counsels and experts constitute 82% of the total costs of the case, arbitrator fees average around 16% of the costs, and costs of the arbitration institutions in administered arbitration amount about 2% of costs. *See Government perspectives on investor-state dispute* settlement, ORG. FOR ECON. CO-OPERATION DEV. (OECD) 8 (Dec. 14, 2012), https://www.oecd.org/daf/inv/investment-policy/ISDSprogressreport.pdf. Many

been introduced as a potential solution to assure the survival of the poorly funded party in its war against the better funded party.[18] It enables the party to fund the costs of the claim, where it would not otherwise be able to, if that party was forced to internally fund that claim.[19] TPF introduces an irrelevant party, who has no prior interest in the dispute, to offer financial services to help the claimant initiating, continuing, or completing an arbitration proceeding. This irrelevant party provides monetary support to the claimant and in return receives a portion of the outcome, but the party also assumes the risk of receiving nothing if the claims are unsuccessful.[20] This section discusses arbitration in Shari'a (A), and financing in Shari'a (B).

A. Arbitration in Shari'a

Arbitration has ties to the Pre-Islamic community in the Arab Peninsula. Differences between disputants were often referred to a "hakam" (an arbitrator) who used to be a person of high-status in the community with a reputation of competence to settle disputes.[21] Arbitration continued to exist during the Islamic dawn and even after the Prophet of Islam passed away.[22] Arbitration finds roots in the primary sources. Qur'an mentions, in the context of family disputes, that "[a]nd if you fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they seek to set things right, Allah will cause their reconciliation: for Allah hath full knowledge, and is acquainted with all

arbitration institutional rules deal with the costs of arbitration. For instance, Rule 28 of the International Centre for Settlement of Investment Disputes ("ICSID") Rules provides that "[w]ithout prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide: (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre; (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties." Article 31 of the International Chamber of Commerce ("ICC") Arbitration Rules (2012) provides that "[t]he costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration."

[17] Examples include ICC, Controlling Time and Costs in Arbitration (2012); The United Nations Commission on International Trade Law ("UNCITRAL"), Notes on Organizing Arbitral Proceedings (2012); and the Australian Centre for International Commercial Arbitration ("ACICA") Expedited Arbitration Rules.

[18] Arbitration has become "wars of attrition in which the outcome may depend more upon which party is better financed than upon the merits of the dispute." Coe, *supra* note 14, at 55.

[19] The Hong Kong Law Reform Commission, *Report on Third Party Funding for Arbitration* (Oct. 12, 2016) ("a party with a good case in law should not be deprived of the financial support it needs to pursue that case by arbitration and associated proceedings under the Arbitration Ordinance, and that these reforms are necessary to enhance Hong Kong's competitive position as an international arbitration centre.").

[20] Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising From Third Party Funding in International Commercial Arbitration*, 101 GEO. L.J. 1649, 1653 (2013).

[21] For more details, *see* Arthur J. Gemmell, *Commercial Arbitration in the Islamic Middle East*, 5 SANTA CLARA J. INT'L L. 169, 173 (2006).

[22] *Id.* at 173.

things."[23] It further provides for the foundation to refer disputes to a third party for a decision by stating "and obey Allah and his messenger; and fall into no disputes, lest you lose heart; and your power depart; and be patient and persevering; for Allah is with those who patiently persevere."[24]

As such, in Islamic jurisprudence, there is a general consensus on arbitration as a method of dispute resolution.[25] The four jurisprudential schools of the Sunni branch have a general consensus on arbitration as a method of dispute resolution with nuanced differences in their foundations to the permissibility of arbitration. The Hanafi jurisprudential school emphasizes the contractual nature of arbitration that binds its parties.[26] They consider the award binding based on the binding nature of the agreement to arbitrate.[27] While the Maliki jurisprudential school requires that the arbitrator should not be removed until he issues an award, the Shafa'i jurisprudential school allows the removal of an arbitrator before issuing a decision because they consider arbitrators in less status than judges.[28] The Hanbali jurisprudential school treats arbitrators' decisions as courts' judgments.[29] Most disputes can be arbitrated in Shari'a except disputes that involve Hadd (unchanged punishment that is publicly administered) and Qisas (retaliation) and, in some schools, family cases. Moreover, virtually any financial matter involving private rights are arbitrable.[30]

B. Financing in Shari'a

Islamic finance refers to the wide range of financial arrangements that may be concluded to facilitate investment of money in compliance with Shari'a. In general, Islamic finance has arisen to respond to the global development of the financial market by the Western financial institutions.[31] Similarly, the growth of the TPF practice and the movement from the common law jurisdictions to the civil law countries, some of which are Islamic-based jurisdictions, require a response to that movement from an Islamic perspective.

Although TPF was initially a common law trend, a movement toward the countries that are based on Shari'a has become just a matter of time. Most of the civil law jurisdictions, especially in the Arab Middle East, are premised, with variant degrees, on Shari'a. For instance, Article II of the Constitution of the Arab Republic of Egypt states that "the principles of Shari'a are the primary sources of legislation."[32] Shari'a is the primary source of

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23 Qur'an, Surat Al Nisaa, Verse 35 (Circa 610). All translations of the Qur'anic verses are derived from "The Holy Qur-an English Translation of The Meanings and Commentary – King Fahd Printing Complex – Yusuf Ali Translation (Revised and edited by the Presidency of Islamic Researches 1991), unless otherwise indicated.

24 Qur'an, Surat Al Anfal, Verse 46 (Circa 610).

25 Gemmell, *supra* note 21, at 174.

26 *Id*. at 175.

27 *Id*. at 175.

28 *Id.* at 175–76.

29 *Id.* at 176.

30 *Id.* at 180.

31 Hania Masud, *Takaful: An Innovative Approach to Insurance and Islamic Finance*, 32 U. PA. J. INT'L L. 1133, 1135 (2011).

32 Under the Egyptian Advocacy Law No. 17 of 1983, legal or counsel fees may be in the form a share in the dispute (or disputed amounts).

law in the United Arab Emirates (UAE), Sudan, Yemen, Syria, Kuwait, Iraq, Pakistan, and Qatar.[33]

The doctrines of maintenance and champerty are deep-rooted in common law jurisdictions for historical reasons pertinent to the corrupt practices of third parties intermeddling in the courts of justice.[34] Shari'a does not seem to embrace a champerty equivalent, but it generally provides for a full independent and neutral court with no intermeddlement by third parties. In the abstract, the absence of the historical prohibitions of the champerty doctrine, as a primary reason for prohibiting TPF, in the Islamic-based jurisdictions may open the door for the possibility of embracing this practice if it complies with the basic rules of Shari'a. That may justify the enactment of some rules that allow the use of TPF in some Islamic-based jurisdictions such as the UAE,[35] and the nonobjection to its potential existence in others such as Egypt.[36] It is unsurprising then to find some arbitration-friendly jurisdictions promulgating some rules that permit TPF.[37] Thus, TPF continues to grow in these jurisdictions.[38]

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[33] *See* Julio C. Colón, *Choice of Law and Islamic Finance*, 46 TEX. INT'L L.J. 411, 418 (2011) ("Saudi Arabia's Basic Law of the Government states that '[t]he Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution . . .' Likewise, Oman does not have an official constitution, but its Basic Law of the Sultanate proclaims that '[t]he religion of the State is Islam and the Islamic Shariah is the basis of legislation.' Other nations incorporate Shariah into their legal systems to varying degrees. For example, in the UAE, the passage of the UAE Law of Civil Transactions of 1985 was regarded by some as a veritable 'virtual return to the Shari'a.'' *Id.* (internal citations and quotes omitted). "In other countries, such as Malaysia, Indonesia, Libya, Algeria, and Morocco, Shariah law is highly influential and remains a source of legislation. For example, the Libyan Civil Code states, 'In the absence of an applicable legal provision the judge shall decide in accordance with the principles of the Shari'a . . .' Judging from the various levels of incorporation, in the modern legal system Shariah law acts as: (1) an immutable source of constitutional law; (2) a precedential source of common actions and defenses; (3) and a source of treatise for the interpretation of civil codes. To understand this statement, one may consider the Nizam, or supplementary Saudi laws. These regulations are regarded as valid only to the extent that they are consistent with Shariah law, although in practice these laws are rarely challenged or overruled." *Id.* at 418-19.

[34] Mohamed Sweify, *Third Party Funding in the U.S. Courts: A Systematic Judicial Analysis*, 32 AM. REV. INT'L ARB. 165 (2021) ("Maintenance can be defined as officious intermeddling in a suit by maintaining or assisting a disputant with money or otherwise to prosecute or defend the action without any prior connection to the intermeddler. As a specialized form of Maintenance, Champerty involves an element of compensation for such unlawful interference by bargaining with a party for a portion of the matter involved at the champetor's own expenses. These offenses were historically considered malum in se and against the public welfare. Maintenance, as relics of the ancient ages, was considered evil because it enabled rich and powerful men to oppress the poor and weak").

[35] *See* Dubai International Financial Centre (DIFC), *Practice Direction No. 2 of 2017* (Mar. 14, 2017) (setting out the requirements for funded parties to observe in respect of their relationships, interactions, and contracts with funders in legal proceedings in the DIFC Courts).

[36] There is no express prohibition on TPF in Egypt. *See* Mohamed S Abdel Wahab et al., *Commercial Arbitration: Egypt*, GLOB. ARB. REV. (May 10, 2021), https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/egypt.

[37] *Litigation Funding Rules 2019,* ABU DHABI GLOBAL MARKET COURTS (Apr. 16, 2019), https://en.adgm.thomsonreuters.com/sites/default/files/net_file_store/ADGM1547_19839_VER2019.pdf (Abu Dhabi Global Market (ADGM) Courts enacted the *Litigation Funding Rules 2019* on April 16, 2019 to regulate the requirements of a funder as well as the conditions of an enforceable litigation funding agreement. For instance, Rule 4 provides that "(1) A Funder must satisfy the following at the time the Litigation Funding Agreement is made, and continue to satisfy the following: (a) the Funder must carry on as a principal business the funding of proceedings to which the Funder is not a party; and (b) the Funder must have qualifying assets of

III. ISLAMIC FINANCIAL ARRANGEMENTS

The modern literature treating Islamic finance focuses primarily on Islamic banking compared to the conventional banking system in the non-Islamic jurisdictions.[39] Generally, in Shari'a, there is a presumption of permissibility in contracts unless it is prohibited by an injunctive authority.[40] This section discusses contracts under Shari'a (A) and their limitations (B), including Riba and Gharar.

A. Contracts under Shari'a

The contract theory in Shari'a is governed by epistemological reasonings and constructions of the Islamic sources.[41] Islamic contracts include charitable and compensatory contracts.[42] Charitable contracts refer to arrangements that are concluded for worshipping purposes to seek a reward from Allah. Compensatory contracts refer to arrangements for the parties' personal benefit.[43] The basic elements (Anaser) of contracts in Shari'a, which are internal to the formation of contracts, are i) capacity of the parties to enter into the contract, ii) the terms of the contract, and iii) the subject matter.[44] The absence of any of these elements renders the contract void.[45] Beyond the elements of the contract, each contract must fulfill certain conditions (Shorout) to be valid. These conditions are external to the formation of the contract.[46] The parties are free to agree on any provision in their contract as long as it is not prohibited under Shari'a.[47] However, there is a good faith requirement that should exist in all contractual arrangements under Shari'a.[48]

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not less than US$5 million or the equivalent amount in foreign currency. (2) 'qualifying assets' means cash and cash equivalents including, without limitation: (a) monies and assets contracted to the Funder under a contract for fund management; and (b) in the case of an incorporated company, paid-up share capital." Rule 6 provides that "The Funder must take reasonable steps to ensure that the Funded Party has received independent legal advice in relation to the Litigation Funding Agreement and its terms prior to its execution. This obligation shall be satisfied if the Funded Party confirms in writing to the Funder that the Funded Party has taken such advice").

38 *Third-Party Funding in The Middle East: A Step-By-Step Process,* TOWNCENTER (Apr. 1, 2021), https://yourtcp.com/wordpress/?p=1273 ("The DIFC Courts have also made orders recognizing the validity of funding arrangements entered into by the parties, as seen in the case of *Vannin Capital Pcc Plc v Rafed Abdel Mohsen Bader Al Khorafi* and others where the Respondent was ordered to pay back to the funder 50% of the costs of the proceedings funded in the underlying substantive case").

39 *E.g.,* Moghul et al., *supra* note 9, at 153-54; Ibrahim*, supra* note 12, at 704.

40 Ibrahim, *supra* note 12, at 690; *see also* IMAM MOHAMED ABU ZAHRA, OWNERSHIP AND CONTRACT THEORY IN ISLAMIC SHARI'A 223-235, (Dar El Fekr Al Arabi 1996) (It must be noted that another view used to exist that applies the presumption of impermissibility unless it is allowed by a clear rule. However, this view is no longer adopted by most Sunni scholars and the presumption of permissibility seems to generally prevail).

41 Moghul et al., *supra* note 9, at 163.

42 Ibrahim*, supra* note 12, at 690.

43 *Id.*

44 *Id.* at 691.

45 Moghul et al., *supra* note 9, at 167.

46 *Id.* at 167–68.

47 Ibrahim, *supra* note 12, at 691.

48 In general, there is the requirement of good faith in contractual covenants that is derived from the Qur'an. *See e.g.,* Qur'an, Surat Al Maeda 1 ("[O] ye who believe, fulfill all [contractual] obligations . . ."); Qur'an,

Because Shari'a is not a codified body of law, it is sophisticated and broad enough to utilize complex commercial disputes. Islamic jurists may be compared to common law judges to a certain extent.[49] Islamic jurists provide developed interpretations of religious views on the day-to-day dealings,[50] including financial transactions.[51] Within the context of financial arrangements, a contract should satisfy the following requirements: a) certainty of the price, subject matter, and time of performance, b) absence of coercion or duress, c) non-ambiguous contract terms, d) non-encroachment on other's property rights, and e) no unjust benefit by one party at the expense of the other.[52] The typical Islamic financial contracts include loans, gifts, sales, sales at a mark-up (Murabaha), leases (Ijara), joint ventures and partnerships (Musharakah and Mudarabah), manufacture and construction contracts (Istisna'a), and agency contracts (Wakalah).[53] Still, contractual arrangements can be limited by Islamic principles.

B. Contractual Limitations under Shari'a

In general, Shari'a governs financial transactions through two basic principles: risk sharing and promotion of social welfare.[54] The Islamic economy seeks to balance economic growth with economic justice.[55] This may justify the prohibition of interest in Islam because lending money is considered a charitable act.[56] Relatedly, excessive and speculative transactions are prohibited because the excessive risk may divert the attention away from productive occupations.[57] Islamic finance is simply based on the theory that profit should be a reward for risk.[58] Profits and losses of the transaction must be shared.[59] Moreover, three controlling principles govern Islamic financial arrangements, namely Riba (interest), Gharar (excessive speculation), and Mayser (gambling).

1. Riba

Unlike the conventional financing contracts that permit fixed interest rates, Islamic financial transactions do not permit fixed interest rates. Shari'a mandates that all property is an exclusive ownership of Allah and humans are mere trustees of Allah's property.[60] Money does not have any intrinsic value and is neither appreciable nor depreciable. As such,

Surat Al Nahl 91 ("Fulfill the covenant of Allah when you have entered into it, and break not your oaths after you have confirmed them; indeed you have made Allah your surety; for Allah knoweth all that you do").

[49] Ibrahim, *supra* note 12, at 683.

[50] Alexander, *supra* note 2, at 574.

[51] Sulman A. Bhatti, *The Shari'ah and the Challenge and Opportunity of Embracing Finance "Without Interest"*, 2010 COLUM. BUS. L. REV. 205, 210 (2010).

[52] Ibrahim, *supra* note 12, at 691.

[53] Masud, *supra* note 31, at 1137.

[54] Alexander, *supra* note 2, at 574.

[55] *Id.* at 579.

[56] *Id.*

[57] *Id.*

[58] Mark Cammack, *Islamic Finance: Prospects and Significance*, 18 SW. J. INT'L LAW. 113, 116 (2011)

[59] Alexander, *supra* note 2, at 580.

[60] Qur'an, *supra* note 23, at 57:5.

inflation and time value concepts have no legitimacy in the Islamic economy.[61] This is the main reason for prohibiting interest in Shari'a.[62]

Riba means "increase," "excess" or "surplus" and refers to the premium that a borrower should pay to the lender in addition to the principal of the loan.[63] It is a sure return with a surplus beyond the principal amount. The strict prohibition against interests is central to Islamic finance.[64] Some scholars compare it to the doctrine of usury in the common law jurisdictions.[65] Riba was prohibited essentially to prevent the usurious practices of lending,[66] because it allows for the gain by the passage of time without any risks.[67]

2. Gharar

Gharar is the second prohibition on Islamic financial contracts. It refers to the uncertain or risky transactions at their inception.[68] Gharar means peril, risk, or hazard and may simply refer to the information asymmetry.[69] Unlike the certainty of the concept of Riba, Gharar refers etymologically to speculation, uncertainty or excessive risk of the subject matter or the return of the transaction.[70] It is meant to protect individuals from the excessive financial risks.[71] The prohibition of Gharar is based on the prophetic forbidding of a sale that involves unripe fruit on a tree, the sperm of a stallion, the fetus of a camel, grapes until they are black or grains until they are strong.[72]

The underlying premise of Gharar is similar to Riba i.e., to avoid any form of exploitation by clearly providing for sufficient information to perfect an informed transaction between both parties.[73] Any excessive speculation is treated as Gharar and is likewise prohibited.[74] Gharar may extend to any investment with a speculative nature.[75] It prohibits the sale of any uncertain or nonexistent object even with a low-risk probability.[76] However, the prohibition of Gharar may be overcome by predetermining the amount of money that

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61 Angelo L. Rosa, *Building Bridges: Understanding Islamic Legal Principles for Idaho's Transactional Attorneys*, 58 ADVOCATE (Idaho State Bar) 52, 52 (2015).

62 Qur'an, *supra* note 23, at 2:275.

63 Todd J. Schmid, *The Real Shariah Risk: Why the United States Cannot Afford to Miss the Islamic Finance Moment*, 2013 U. ILL. L. REV. 1293, 1302 (2013).

64 Alexander, *supra* note 2, at 581.

65 Rosa, *supra* note 61.

66 Nickolas C. Jenson, CPA, *Avoiding Another Subprime Mortgage Bust Through Greater Risk and Profit Sharing and Social Equity in Home Financing: An Analysis of Islamic Finance and Its Potential As A Successful Alternative to Traditional Mortgages In The United States*, 25 ARIZ. J. INT'L & COMP. L. 825, 831 (2008).

67 Alexander, *supra* note 2, at 581.

68 Kelly Holden, *Islamic Finance: "Legal Hypocrisy" Moot Point, Problematic Future Bigger Concern*, 25 B.U. INT'L L.J. 341, 346 (2007).

69 Schmid, *supra* note 63, at 1304.

70 *Id.*

71 *Id.* at 1305.

72 Jensen, *supra* note 66, at 834.

73 Holden, *supra* note 68, at 346.

74 Rosa, *supra* note 61.

75 Masud, *supra* note 31, at 1140.

76 *Id.*

should be exchanged between the parties even if it is not disbursed at the moment. This rule intersects with the prohibition of gambling (or Mayser) in contracts under Shari'a and gambling is linked to the prohibition of Gharar and can be considered one form of Gharar.[77] In order to establish gambling (Maysir) in Shari'a, there should be an extreme expectation of profit as opposed to extreme expectation of loss.

Generally, Gharar applies where there is a lack of mutual consent of the parties or there is an uncertainty on the existence, consideration, subject matter or performance of the contract.[78] Gharar is the main reason for voiding contracts with vague obligations that are based on events outside the parties' control.[79] It may as well extend to the uncertainty of the benefits of the transaction.[80] Gharar is therefore a trade of risk based on the lack of specificity in the contract.[81]

However, every contract may involve a certain degree of uncertainty.[82] The extent of Gharar is subject to a discretionary determination of a given transaction.[83] Minor Gharar may be tolerated as a "necessary evil."[84] In certain cases, the societal need to certain contracts may justify their validity despite the involvement of Gharar.[85] Although Gharar normally applies when the object of the contract does not exist at the time of concluding the contract,[86] some jurists do not consider Gharar in this case excessive or exorbitant.[87]

Gharar is profoundly found in insurance and financial derivatives.[88] Insurance contracts are considered overly speculative because they are premised on receiving large amount of money upon paying the first monthly premium as long as the losses occur to the insured.[89] In the meantime, the insured may eventually pay all premiums and the insurer does not pay anything because the injury never happens.[90] In addition, insurance cannot be traded off because it lacks definiteness. This indefiniteness may render the contract void for Gharar.[91] In addition, derivatives deal with forwards and futures which involve excessive

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[77] Qur'an, Surat Al Maeda, Verse 90 (Circa 610); ("O ye who believe! Intoxicants and gambling, sacrificing to stones, and (divination by) arrows, are an abomination – Of Satan's handiwork eschew such (abomination), that ye may prosper . . ."); Masud, *supra* note 31, at 1140. *See also* NICHOLAS HD FOSTER, ISLAMIC COMMERCIAL LAW (II): AN OVERVIEW SOME PRINCIPLES AND RULES, InDret 1/2007, at 7, https://indret.com/wp-content/uploads/2007/05/405_en.pdf.

[78] Alexander*, supra* note 2, at 581.

[79] *Id.*

[80] *Id.* at 582.

[81] Moghul et al., *supra* note 9, at 170–72.

[82] *See generally id.*

[83] Schmid, *supra* note 63, at 1304.

[84] *Id.*

[85] "This may explain why forward sale [salam] and manufacture [istisna'] contracts have traditionally been permitted under Islamic law, despite the arguable presence of gharar in these contracts." Moghul et al.*, supra* note 9 at 170–72.

[86] *Id.*

[87] *Id.*

[88] *See generally* Jensen, *supra* note 66.

[89] *Id.* at 834–35.

[90] *Id.*

[91] *Id.* at 835.

speculation and uncertainty because the subject matter of the contract does not exist at the time of concluding the contract.[92]

Similarly, Gharar may extend to different forms of Islamic financial arrangements.[93] The parties' mutual agreement is still the primary source for financial agreements.[94] Contractual agreements can involve partnerships.[95] Each agreement may have different implications on the liabilities of each partner over the assets and management of the partnership.[96] Three related Islamic financial arrangements involve different forms of partnership namely, Musharakah, Murabaha, and Mudarabah, as will be discussed below.

i. Musharakah

Musharakah (Profit-Risk Partnership) is the most authentic form of equity in Islamic finance.[97] It is essentially a partnership where both parties share the risk and the profit.[98] This partnership is based upon the joint venture structure where the financier provides the capital to the client who assumes the management of the joint venture in return for a future profit or loss based on their pre-arranged formula.[99] Both parties provide capital, manage the enterprise, and share the profit and loss as per their proportionate share.[100] The return of the joint venture is not fixed.[101] The financier and the entrepreneur do not assume distinctive roles in the joint venture.[102] While the financier provides the capital for the venture, the entrepreneur provides the remaining capital with management expertise.[103] However, the financier may retain complete or partial title in the partnership or its assets.[104]

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92 *Id.*

93 Scheherazade S. Rehman, *Globalization of Islamic Finance Law,* 25 WIS. INT'L L.J. 625, 635 (2008).

94 Umar F. Moghul, *No Pain, No Gain: The State of the Industry in Light of an American Islamic Private Equity Transaction,* 7 CHI. J. INT'L L. 469, 481 (2007).

95 The contractual partnership is defined by the Hanafis school of Islamic jurisprudence as "an agreement between two or more persons for common participation in capital and profits." Moghul, *No Pain, supra* note 94, at 481. "The Malikis defines it as a permission [granted by] each [ ] participant to the others [ ] to transact in [such granting participant's] wealth and on their own behalf, while retaining the right to transact personally (in such wealth); (iii) by the Shafi'is, as in its literal meaning [a] mixing[,] and technically . . . an established [,] undivided right in a single thing or . . . a contract implying this; and (iv) by the Hanbalis, as a participation of two or more persons in transactions." *Id.* at 481-82 (internal quotes and citations omitted).

96 The contract of amanah "requires that the jointly-owned property of a sharikah be held by each owner on behalf of the others. Consequently, if the property is destroyed (through no fault of any partner), the liability for bearing such loss is borne by the other partners on a pro rata basis. Through the contract of wakalah, each partner within a sharikah is an agent of the others. The Hanafi school distinguishes between such a contract's objective (hukm) and the means employed or the rights and obligations relating to performance (huquq) to achieve that objective." *Id.* at 482.

97 Rehman, *supra* note 93, at 636.

98 *Id.*

99 Holden, *supra* note 68, at 351.

100 Ibrahim, *supra* note 12, at 711.

101 Holden, *supra* note 68, at 351.

102 Alexander, *supra* note 2, at 595.

103 *Id.* at 595–96.

104 *Id.* at 596.

As such, Musharakah involves unsecured funding and exposes the financier to a higher risk than other forms of financing that secure the funding by an asset.[105]

ii. Murabahah

Unlike Musharakah, Murabahah agreements (Cost Plus Profit) require an intermediate step where the advanced funds are used to invest in the business venture.[106] Murabahah assumes that a financial institution purchases the asset, takes title, and resells it to the borrower at a certain profit added to the cost.[107] The profit is a non-fixed investment return.[108] The financier runs the risks associated with carrying and maintaining the asset of the venture capital.[109] There is no obligation of the borrower to buy the asset back from the financial institution.[110] As long as the profits of this transaction are based on the risk of the customer not purchasing the asset back from the financial institution,[111] it is permissible. In Murabahah, the financier assumes some risk in purchasing the commodity and there is a chance that a client may refuse that commodity which should be left for the financier without money.[112] Without that risk, the transaction may be a conventional loan arrangement.[113]

iii. Mudarabah

Mudarabah (Profit Sharing) contracts are premised on a profit-sharing between the parties.[114] Mudarabah is a complete venture capital where the transaction involves a special partnership between the financier and the client where the former provides the requisite fund, and the latter runs the management of the venture capital in return for a pre-arranged share of the expected profit or nothing if the venture fails.[115] The risk of the monetary loss is incurred by the financer.[116] In case of profit, the financier gets an agreed upon percentage of the profits.[117] Due to that high risk, Mudarabah arrangements represent no more than 5% of the Islamic banking operations.[118] The client serves as an agent for the financier for utilizing the

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105 Kimberly J. Tacy, *Islamic Finance: A Growing Industry in the United States*, 10 N.C. BANKING INST. 355, 359 (2006).

106 Jensen, *supra* note 66, at 839. It involves two steps: the first is to borrow money to purchase a land or asset, and the second is to use this asset or land to produce profit and return to the lender with periodic payments on the principal. *See also* Tacy, *supra* note 105.

107 Alexander, *supra* note 2, at 592.

108 Jensen, *supra* note 66, at 839.

109 *Id.* at 840.

110 Alexander, *Shifting Title and Risk, supra* note 2, at 592.

111 *Id.* at 592–93.

112 Holden, *Islamic Finance, supra* note 68, at 349.

113 Jason C.T. Chuah, *Islamic Principles Governing International Trade Financing Instruments: A Study of the Morabaha in English Law*, 27 NW. J. INT'L L. & BUS. 137, 164 (2006).

114 Masud, *supra* note 31, at 1138-9.

115 Holden, *supra* note 68, at 351.

116 Tacy, *supra* note 105, at 360.

117 *Id.*

118 Holden, *supra* note 68, at 351.

funds in the joint venture.[119] In Mudarabah, one party supplies the capital and the other manages in return for a profit shared between the parties where each party carries a risk.[120]

IV. TPF DISTINGUISHED IN SHARI'A

Traditionally, disputants escaped paying arbitration costs by turning to law firms for a contingency or conditional fee arrangements,[121] banks or financial institutions for loans, or insurance companies for insurance policies,[122] and more recently, specialists for litigation funding services. These sources of funding could be referred to as TPF. Paradigmatically, this funding arrangement involves the following characteristics: a) an *external* funder who remains non-party to the dispute, b) a *direct* arrangement between the funder and the party to the dispute, and c) this party remains the *original* party to the dispute. The increasing use of TPF has made it an evolving profession that should be distinctive from other similar funding models,[123] including loan arrangements (A), insurance (B), and claim transfer (C). As such, an analysis of the TPF arrangement from an Islamic perspective is a question of compliance.

A. Loan Arrangements

Loan arrangements provide the borrower with money with the expectation that, in return, the borrower pays back the borrowed money with interest in the future.[124] Loan arrangements are subject to the strict application of the Islamic rules governing Riba. In loan arrangements, the borrower should repay the loan regardless of the outcome of the case. It is a sure future repayment. In contrast, TPF is "non-recourse."[125] In other words, if the claim is unsuccessful, the funder cannot sue the funded party for the expenses nor pursue the party's other assets unrelated to arbitration. Most notably, the involvement of arbitrators who decide the dispute may contribute to the viability of the funding decision and the calculation of risk in the funding transaction. This is justified because there is no guarantee to the financial

[119] Tacy, *supra* note 105, at 360.

[120] Masud, *supra* note 31, at 1139.

[121] *See, e.g.,* Siag v. Arab Republic of Egypt, ICSID Case No. ARB/05/15 (June 1, 2009) (King & Spalding LLP law firm financed the costs of arbitration for claimants).

[122] *See e.g.,* Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Procedural Order No. 3, (April 12, 2017).

[123] It has transferred from the prototypical model, where the funder provides the party with the requisite funds in a particular case in exchange of a percentage of the outcome, into different models of funding including funding portfolio of cases through a client or a law firm, discounted payment for uncollected awards, insurance against unenforced awards, and financial tools for respondents against worse-than-expected outcomes. Christopher P. Bogart, *Third-party funding of international arbitration,* BURFORD Q., Autumn 2016, at 8, 9.

[124] The word "loan" is sometimes misleading. It has been used sometimes to refer to the practice of private companies providing litigation loans to the party to cover its necessary expenses- basically medical and living expenses- pending the outcome of a lawsuit in return of a share in the proceeds of the recovery. Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 CARDOZO J. INT'L & COMP. L. 343, 356–57 (2011) (distinguishing TPF from regular loans).

[125] However, the funder may contract for a predetermined payment if the funding arrangement is concluded with the respondent, not the claimant. *See* Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 TUL. L. REV. 405, 416 (2017).

arrangement except the probability of success of the claim. In loans, the financial institution lends money only if there are financial guarantees to secure the future repayment.

Unlike loans, TPF is not a debt financing tool because it is not based on a guaranteed return by the passage of time. Loan arrangements accrue interest until the borrower returns the principal amount to the lender. However, in TPF, the principal amount subject to the funding agreement increases over time to correspond to the costs of pursuing the legal claim and no interest accrues over time. The funder's return corresponds to the dispute outcome. The return increases if the outcome increases, decreases if the outcome decreases, or there is no return if the outcome is unsuccessful. As such, TPF is not a loan arrangement, and therefore the Islamic rules of Riba are not applicable to TPF arrangements.

B. Insurance Arrangements

Insurance arrangements require the insurer to pay the insured or his beneficials an amount of money upon the occurrence of unpredictable future events, such as death or natural disasters, that involve an impermissible hazardous component.[126] In insurance arrangements, the insured should pay premiums in advance or in installments to the insurer. Insurance arrangements may include subrogation clauses that entitle the insurer the right to sue for insured's injuries covered by the insurance policy.[127] As a subrogee, the insurer is limited to reimbursement for what it paid its insured and no more. However, the funder, unlike the insurer, is entitled to a share of the outcome if the claim is successful or gets nothing if it is unsuccessful.[128]

The agreements on forwards or futures involve objects that do not exist at the time of concluding the contract and therefore involve a high degree of uncertainty that constitutes Gharar.[129] Gharar may also extend to the consideration of the contract if the contract is not clearly determined. If either party offers an undetermined consideration for the contract, the contract will not be enforceable for Gahala (ignorance), such as paying a fixed price for a diver's catch in the following day.[130] Insurance contracts involve uncertainty because the amount of premiums that the policyholder pays is not predetermined.[131] Scholars typically use either the Wakalah (agency) or Mudarabah (joint-venture partnerships) or a mixed mode of both forms of financial arrangements to bring insurance contracts in compliance with Shari'a.[132]

Despite the similarities between TPF and insurance arrangements, they may each serve different goals. While insurance arrangements are expected to minimize liability costs, TPF arrangements are designed to maximize the expected profit from the lawsuit.[133] Third-

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126 Cammack, *supra* note 58, at 120.

127 Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1295 (2011).

128 Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 718 (N.D. Ill. 2014).

129 Bhatti, *supra* note 51, at 218.

130 Babback Sabahi, *Islamic Financial Structures As Alternatives to International Loan Agreements: Challenges for U.S. Financial Institutions*, 24 ANN. REV. BANKING L. 487, 492 (2005).

131 *Id.*

132 Masud, *supra* note 31, at 1138.

133 Further, in insurance arrangements, the insurer directly sues for recovery from the third actor who caused the damage covered by the policy, unlike the third-party funder who is still an irrelevant party to the dispute

party funders, unlike insurance liability providers, do not run the risk of loss on liability; a risk that is still run by the funded party, but just losing the money they invested in the claim. Unlike the insured who pays insurance premiums to the insurer, the funded party does not pay any advances to the funder. Insurance agreements may involve unexpected events that the parties may not be able to foresee in the future. In TPF, the procedural events are often foreseeable in arbitration. All procedural events relate to the arbitral proceedings of the claim, and costs are likely predictable. The arbitral proceedings are often determined prior to the dispute either through the institutional rules or the parties' agreement which makes the length of the proceedings foreseeable. Some arbitral institutions, such as the International Chamber of Commerce ("ICC"), mandate the arbitrator to issue the award within a specific time limit,[134] and in all cases the proceedings should be conducted expeditiously.[135] These rules make the length of the arbitral proceedings and the procedural events foreseeable. Further, the privilege of appointing the arbitrator can make the outcome less unforeseeable in arbitration, especially that the parties can appoint an arbitrator with an expertise in the dispute. In addition, the due diligence that the funders conduct on the merits of the dispute with the supporting evidence can also make the outcome less unpredictable. Further, the expected outcome, either losing, winning or settling, is based upon the facts in dispute and the applicable law. These two parameters involve calculated risks that may lessen the uncertainties of the dispute outcome. These expected options are carefully considered by the funding parties which makes the calculated risk more predictable in TPF comparing to insurance agreements. As such, despite their overlapping concepts, the Islamic rulings governing insurance agreements may not entirely apply to TPF agreements in arbitration.

C. Claim Transfer

A claimholder has indeed property rights over the claim itself and its outcome.[136] These rights enable him to transact over the claim either by transferring the claim or the proceeds of that claim. Claim transfer is a form of assignment of the claim. Assignment is an act of transferring to another all or part of one's property, interest, or rights.[137] It clearly assumes that the original claimholder sells the claim for its benefit.[138] TPF arrangements do

and still cannot step into the shoes of the funded party to pursue the claim. Furthermore, third-party funding is different from legal aid whether offered by the state or private entities. By definition, legal aids do not assume any future return from the financial support to the party in need for that aid.

[134] ICC Rules of Arbitration (2021), Art. 31(1). ("The time limit within which the arbitral tribunal must render its final award is six months").

[135] ICC Rules of Arbitration (2021), Appendix VI, Art. 4. ("The time limit within which the arbitral tribunal must render its final award is six months from the date of the case management conference. The Court may extend the time limit pursuant to Article 31(2) of the Rules").

[136] *See* Catherine Rogers, ETHICS IN INTERNATIONAL ARBITRATION (2014). This trend is consistent with the breakdown of the artificial line between practice of law and law-related business services.

[137] 6 Am. Jur. 2d Assignments § 1 (2010).

[138] A decision of the Massachusetts Supreme Court noted: "[c]ommercial paper was first made assignable to meet the necessities of commerce and trade. Courts of equity also interfered to protect assignments of various choses in action, and after a while courts of law recognized the validity of such assignments, and protected them by allowing the assignee to use the name of the assignor for enforcing the claim assigned. And at the present day claims for property and for torts done to property are generally to be regarded as assignable." *Rice v. Stone*, 83 Mass. 566, 568 (1861).

not involve any sale of claim.[139] In sale of claim, the plaintiff with whom the claim is vested is entirely replaced in the arbitration for an unconnected and profit-motivated assignee.[140] Transferring the proceeds of a claim is a form of investment in the outcome and does not negate the ownership of the assignor of the proceeds to the claim itself. Therefore, TPF is distinguished from assignment (sale) of legal claims where the original party sells the entire claim to the assignee and walks away from the dispute leaving the assignee as a party to the dispute.[141]

In conclusion, TPF arrangements are distinctive from other comparable financial transactions under Shari'a. TPF is not a debt financial tool. Accordingly, it is not a loan arrangement. TPF is an equity financial tool. Although it may involve risks, it is still not an insurance arrangement because the funded party does not pay premiums to the funder. TPF involves only a trade in the proceeds of the claim not the claim itself. Accordingly, it is not a claim transfer. As such, by excluding TPF from other overlapping funding models, TPF should be judged in light of the general principles that govern the financial arrangements in Shari'a.

V. TPF & SHARI'A: FRIENDS NOT FOES

In some views, Shari'a may fall short in addressing new practices in the legal field.[142] However, Islamic finance provides for diverse tools to accommodate the requirements of Shari'a.[143] As long as TPF is contractual in nature, one should recall the Islamic contract principles to judge the legitimacy of TPF.[144] Two challenges may unfold. First, whether a legal claim can be subject to a financial transaction. Second, whether TPF arrangements are limited by the prohibitive ruling of Gharar in Islamic financial agreements.

A. Characterization of Legal Claims in Shari'a

The first issue is whether a legal claim can be an asset or property subject to transactions. Little has been written in Shari'a addressing this issue. Nevertheless, the majority of the Sunni jurisprudential schools consider rights and usufructs as property as long

139 In a sale, the parties agree to give and pass rights of property. *Wilson v. Frederick R. Ross Inv. Co.*, 180 P.2d 226, 230 (Colo. 1947).

140 *See, e.g., In re DesignLine Corp.,* 565 B.R. 341, 342–43 (Bankr. W.D.N.C. 2017). The fact that TPF is nonrecourse does not create a security interest in the claim proceeds as defined by Article 9 of the U.C.C. However, the parties can still agree to create a security interest in the claim proceeds after the claim is successful and the funded party acquires those proceeds. In this case, Article 9 of the U.C.C. may apply based on the parties' agreement to secure the claim proceeds. Still, this security interest will be void if the claim fails.

141 In *Charlotte–Mecklenburg*, it was held that an assignment of litigation proceeds is not an assignment of the claim itself because such assignment alone does not give the assignee any control over the underlying litigation. However, an assignment of proceeds may still be considered an assignment of the claim if some other aspect of the agreement gives the assignee such control. *See Charlotte-Mecklenburg Hosp. Auth. v. First of Georgia Ins. Co.*, 340 N.C. 88, 91, 455 S.E.2d 655, 657 (1995).

142 For more details, *see* Colón, *supra* note 33, at 413.

143 Alexander, *supra* note 2, at 591-92.

144 Some argue that there is no general theory of contract law in Shari'a but general Islamic legal rules apply to contractual arrangements. Masud, *supra* note 31, at 1136.

as they have proprietary value.[145] Property can include any object that satisfies two requirements: a) the possibility of possession, and b) the potential beneficial use of that object.[146] Property includes valued or unvalued, movable or immovable, and fungible or non-fungible property.[147] Further, a property is subject to total or partial ownership.[148] In addition, an asset or property can include tangible and intangible property. The majority of the Sunni jurisprudential schools consider intangible things property based on their usefulness (manfa'a). In other words, a property or asset "can be anything that is useful or of value."[149] As such, anything can be an asset or property if it has usufructuary value that is legally permissible and has proprietary value.[150] Further, there may be a separation of the property title and the third party use. Consequently, ownership includes a bundle of rights that may be divided between a number of entities.[151] This way, the titleholder can divide the ownership and the use of the asset or the property by authorizing a third party to use the property without transferring its ownership.[152] For legal claims, there is no dispute that the legal claim is possessed by the claim owner who exercises exclusive ownership rights over it. This claim has proprietary value because the claim owner can assign it to a third party. It can be concluded then that a legal claim has a usufructuary value over a subject matter that is legally permissible, and it has a proprietary value. Accordingly, a legal claim can qualify to be an intangible asset in the Sunni jurisprudence.

However, the legal claim itself cannot be of value without the rights associated with this claim, including the right of pursuing this claim in arbitration or litigation. This should generate the question of whether the rights associated with the claim can be subject to transactions in Shari'a. A right (or haqq) can be defined as "whatever is established exclusively (in favour of the owner) and to which the law accords control and obligation to realize a specified interest."[153] A property right is a right related to a property or something of proprietary value that generates certain attributes over this property such as transferability and exclusivity.[154] The property right is capable of negotiation and transfer from one person to another and is generally capable of being a subject matter of a transaction.[155] Accordingly, due to classifying the claim as an intangible asset or property, the rights associated with the legal claim can be subject to transactions in Shari'a.

The separation of ownership and the rights associated with it has an application in Shari'a. This separation was the basis for creating Sukuk (equivalent of bonds), where the

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[145] Engku Rabiah Adawiah Engku Al, *Re-Defining Property and Property Rights in Islamic Law of Contract,* 11:2 JURNAL SYARIAH 47, 50 (2003).

[146] Ibrahim, *supra* note 12, at 689.

[147] *Id.*

[148] *See* id.

[149] Bashar H. Malkawi, *The Alliance Between Islamic Law and Intellectual Property: Structure and Practice,* 10 U. ST. THOMAS L. J. 618, 624 (2013) (additionally noting the exception of the Hanafi School, which considers heiaza (physical possession) the only acceptable criterion for money).

[150] Engku Al, *supra* note 145.

[151] *See* Ibrahim, *supra* note 12, at 689.

[152] Malkawi, *supra* note 149, at 625.

[153] Engku Al, *supra* note 145, at 51 (citing Rani Sulayman, *Isqiit al-lfuquq wa Tawrtthuha fi al-Shart'ah al-Isliimiyyah,* at 13).

[154] *See id.* at 52.

[155] *Id.*

title of the property may be transferred to a special purpose vehicle.[156] The creation of Sukuk has created a resemblance of a secondary financial market. Because Riba is prohibited in Shari'a,[157] Sukuk have to be backed by an asset. It represents a beneficial interest in that asset.[158] Sukuk includes asset-based and asset-backed.[159] Asset-based Sukuk is issued by the government or its entities in order to finance a purchase of the asset. The focus of asset-based Sukuk is on the purchasing entity not the asset purchased.[160] Asset-backed Sukuk involves an asset transfer "from an originator into a trust or similar [SPV] with sukuk issuance by that SPV and payments on the sukuk derived from the payments received in respect of those transferred assets."[161] Accordingly, the holder of asset-backed Sukuk has an undivided proportionate ownership interest in the asset which qualifies its holder to partial title of the asset. This form of financing does not guarantee the repayment of the Sukuk by the equity sponsor.[162]

Accordingly, a legal claim can satisfy the requirements for assets in Shari'a because a legal claim can be possessed by the claim owner and has proprietary value.

B. TPF Structured

As a general rule, the right to contract is limited by the prohibitions of Riba and Gharar.[163] As the preceding sections established, TPF is an equity financial tool. Accordingly, one should recall the Islamic rules governing the equity financial tools. The primary rule in this regard is partnership. Partnership refers to the collective rights held by two or more persons over a jointly owned property to share the profits (or losses) arising therefrom.[164] Normally, capital attracts the transaction that will earn the highest rate of return.[165] This return is not guaranteed. This way, the financier is taking a risk of losing the advanced funds.[166] Shari'a primarily prohibits interest in order to avoid any unduly profit from risks taken by others.[167] In TPF, the funder runs the risk of losing the advanced funds if the claim fails. However, the funder's investment in a potential profit may question the speculation of the return of that investment. Although a high risk does not necessarily reflect

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156 Ibrahim, *supra* note 12, at 689-90.

157 *See supra* Part III(B)(1).

158 Alexander, *supra* note 2, at 596-97.

159 *Id.* at 596.

160 *Id.* at 597.

161 *Id.*

162 *Id.* It is worth mentioning that the Egyptian Parliament issued a new Sukuk law No. 138/2021 that provides for the ability to buy Governmental Sukuk. In addition, there exists the law No. 10/2013 that provides for the ability of establishing companies under Egyptian law for the sole purpose of trading in Sukuk based on the Shari'a contracts. Accordingly, Egypt can be a safe harbor for the new models of TPF that should align with the Egyptian laws and Shari'a, as is argued at the conclusion of this Article. *See infra* Part V (B).

163 Masud, *supra* note 31, at 1137.

164 Moghul, *supra* note 94, at 481.

165 This philosophy aligns with the philosophy underlying the Shari'a of encouraging profit and return from investment as long as the investment is based on a calculated risk. Rehman, *supra* note 93, at 631.

166 *Cf.* Rehman, *supra* note 93, at 631.

167 Rehman, *supra* note 93, at 631.

an unacceptable risk under the Gharar prohibition,[168] TPF may be skeptical for Gharar-related reasons.

With this backdrop just considered, there is no clear ruling on TPF in Shari'a. As a threshold matter, this Article advocates for simulating TPF to Mudarabah agreements in Shari'a. Mudarabah agreements are the equivalent of the conventional joint venture partnerships. Similar to Mudarabah arrangements, TPF may borrow the structure of funding start-ups by venture capitalists.[169] Still, both structures share similarities and exhibit differences.

From an economic perspective, there might be an analogy between the venture capital and TPF. The analogy unfolds as follows: arbitration funders are akin to venture capitalists, claimants to entrepreneurs, counsels to managers, and arbitration to portfolio company. Both financial models share extreme uncertainty, information asymmetry, agency problems, and effort provisions.[170] From a financial perspective, this structure provides for the ability to accelerate and supplement the investment with a downside protection to the investor and a minimum recovery for the disputing party. In doing so, funders appear functionally equivalent to the venture capital representation on the board of directors of the portfolio company. However, venture capitalists have control over the start-up and the ability to shut down the enterprise if it seems losing proposition.[171]

The basic difference between arbitration and start-up companies is the monotonic nature of investment. While the value of arbitration is discontinuous and nonmonotonic, the value of the start-up company is generally monotonic.[172] The context of both investment markets may differ. In arbitration, the players in the market are very limited to arbitrators or judges, opposing parties, party representatives and arbitral institutions. Given the limited number of players in the arbitration market, it would be difficult to have an effect over this market. Conversely, the market of start-up companies has a broader scope where the customer base, and automatically its value, may be expanded. In arbitration, two variable components comprise that investment: facts and laws. The nucleus of operative facts may change over time because of the newly disclosed information, the parties' different readiness of facts, or the decision makers' different views of the facts. The applicable law might be less uncertain than the facts. Therefore, the extent of the transaction is determined pursuant to the given facts and the applicable laws in arbitration which may make it unlikely to have changes in the value.

C. TPF Structured under Shari'a

The real challenge of embracing TPF is finding the structured counterpart of that financial arrangement in Shari'a. Even if there is no identical counterpart, an enquiry into the characterization of the arrangement should reveal the possibility of embracing this arrangement into one of the existing structured Islamic financial arrangements.

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168 Tacy, *supra* note 105, at 357.

169 Maya Steinitz, *How Much Is That Lawsuit in the Window? Pricing Legal Claims*, 66 VAND. L. REV. 1889, 1893 (2013).

170 *Id.* at 1919–20.

171 *Id.* at 1898.

172 *Id.* at 1920.

1. TPF & Mudarabah

As intangible assets, legal claims may exist in separation from the claimholder.[173] The Islamic equity structure resembles the partnership agreement.[174] As such, TPF in general can be premised on the venture capital.[175] Within the Shari'a context, TPF can rely on Mudarabah as a representative example of the venture capital model.[176] In this analogy, a third-party funder is similar to venture capitalist and the funded party is similar to entrepreneur, and the arbitration proceeding is similar to the start-up company. Capital owners and investment managers enter into arrangements to share profits and risks.[177] The profit will be distributed according to the pre-agreed proportion where the capital owner's bear the risk of loss.[178] Mudarabah assumes that the funder provides financial support to an entrepreneur who will manage the enterprise.[179] The funder runs the risk of losing the capital and the entrepreneur runs the opportunity cost of his efforts.[180]

Similar to Mudarabah agreements, the funder is the capital provider of the advanced funds,[181] and the funded party is the investment manager.[182] Similar to the venture capital, the funder provides the funds, and the client conducts the dispute.[183] Funders in venture capital run the risk of monetary loss and get an agreed upon percentage of the expected profits.[184] The only difference is that the client who manages the venture capital may be considered an agent for the financiers,[185] but in TPF, the funded party is an owner in the venture capital not just a mere agent for the funder. TPF involves a risk element that runs for the funder at the expense of losing the money advanced for funding the claim. That risk constitutes the non-recourse nature of TPF.

2. Limitations of TPF Model under Shari'a

The challenge for the structured TPF model is the uncertainties. Given the fact that absolute certainty may not be possible, Shari'a tolerates uncertainty if it is not "excessive."[186] Excessive uncertainty includes insufficient information, inherent risks, or ambiguity on the

[173] Claim incorporation may have two structures. First, loose incorporation in which the value of the litigation is embodied in a security that derives value solely from the expected value of litigation. Second, strict incorporation in which the claim is embodied in a Special Purpose Vehicles (SPVs) which may issue securities. Maya Steinitz, *Incorporating Legal Claims*, 90 NOTRE DAME L. REV. 1155, 1162 (2015).
[174] Alexander, *supra* note 2, at 595.
[175] Steinitz, *supra* note 169, at 1919.
[176] *See supra* Part III (B)(2)(iii).
[177] Ibrahim, *supra* note 12, at 709.
[178] *Id.*
[179] Alexander, *supra* note 2, at 595.
[180] *Id.*
[181] Ibrahim, *supra* note 12, at 710.
[182] *Id.*
[183] Tacy, *supra* note 105, at 359–60.
[184] *Id.* at 360.
[185] *Id.*
[186] Ibrahim, *supra* note 12, at 701.

subject matter of the contract.[187] TPF involves a degree of uncertainty because the expected return in unpredictable. However, the funds advanced are relatively predictable after a canvass study by the funder. In addition, the expected outcome is based on "calculated risks." Funders conduct due diligence before making the funding decision.[188] The calculated risk and due diligence mechanisms may justify the low number of cases funders approve for funding. Out of ten cases seeking funding, funders fund only one case.[189] Similarly, Mudarabah arrangements represent no more than 5% of the Islamic banking operations.[190] The only risk calculus that may not be predictable is the outcome of the dispute. However, this risk may not be excessive for two reasons. First, this risk is shared between both funding parties not just by only one party. Second, many factors contribute to determining the ultimate outcome of the dispute, including all evidence presented by the parties which have been carefully considered by the funders in deciding to fund the case. These reasons should contribute to considering the risk not excessive, even if the outcome is still unpredictable.

Under the Mudarabah arrangement, the financier is not supposed to assume any controlling or managerial role in the conduct of the venture capital. Similarly, in TPF, the funder does not control the conduct of the claim. The funder's contribution may differ from that of the capitalists in venture capitals. While venture capitalists may discontinue throughout the life of the venture, funders should promote the parties' expectations and avoid any uncertainties during the dispute. If the funder cuts off the funding during the dispute, this may create excessive uncertainties to the funded party and invite the application of Gharar. Accordingly, funders in TPF under Shari'a should continue funding the dispute until it is decided. Allowing the funders to terminate the arrangement during the proceeding undermines the justice objective upon which the TPF is premised under Shari'a.

This model should allow the disputing party to take advantage of the economic and financial expertise of the funders into the dispute according to the Islamic principles. This TPF model considers risk in the process and risk in the outcome which should align with the philosophy of sharing risks in Shari'a. This way, TPF would respond to the requirement of sharing risks in Shari'a and also provide a stable environment through which the funding relationship should operate.

Additionally, because of the prohibition of gambling in Shari'a, one party cannot exploit the other for lack of knowledge or for getting benefit without exerting any effort in the contract. Still, funders cannot be considered gamblers in Shari'a. Although the funder may share the claim proceeds if the claim is successful or share nothing if the claim fails, this risk is shared between both funding parties. The funded party still exerts efforts in pursuing the dispute and the funder contributes with monetary funds to fund this dispute. Further, there is still one other variable that should be added to the parties' consideration i.e., settlement. Funders do not expect a future share only if the claim is successful but also if the claim is settled. Potential settlement is a significant variable for the funders in studying the claim before making the decision to fund that claim. In settlement, there is often no profit/loss variable but a win-win situation where both parties often forego some rights to settle the case.

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[187] *Id.* at 702.

[188] Mohamed Sweify, *Negotiating Funding Arrangements: Trick or Treat*, AM. REV. INT'L ARB. (Dec. 3, 2020), http://blogs2.law.columbia.edu/aria/negotiating-funding-arrangements-trick-or-treat/.

[189] Rogers, *Ethics, supra* note 136 ¶ 5.28.

[190] Holden, *supra* note 68, at 351.

With that variable, the funder may be said to often expect a profit as long as there is a potential for settling the funded dispute. Accordingly, it is facile to connect gambling to funding as long as there is always a possibility of settling the case and come up with a win-win situation.

Despite some reasons of optimism, caution should drive this development by following the clear guidelines in concluding and performing the funding agreements under Shari'a. By borrowing from the best of both Islamic financial arrangements and TPF arrangements, an Islamic TPF model thinks of TPF contextually to align with the core principles of Islamic finance and the benefits of TPF in Islamic-based jurisdictions.

D. Testing Legitimacy

A central distinction between equity and debt financial tools is the source of legitimacy for TPF arrangements in Shari'a. For any given case, a debt financial arrangement that involves a future fixed interest is void because of Riba. Absent a fixed interest, the legitimacy of the TPF arrangement is ultimately governed by Gharar. Funders generally have different methods of vetting the claim and lessen the uncertainties that may generate from the conduct of that claim. Well-structured financial arrangements, with less uncertainties, lend legitimacy to that arrangement.

The question of legitimacy of TPF tests the boundary between the structure and subject matter of the TPF arrangement as a tool of access to justice. The Islamic TPF model suggests that that boundary may be shifting to Mudarabah agreements to establish a partnership over the claim similar to that of venture capital which is defined by the line between advanced funds provided by the funder and management of the claim by the funded party, while sharing the expected profit or the risk of losing between both.

Although the main challenge for the TPF under Shari'a is the prohibition of Gharar, the funding parties can employ some mechanisms that lessen the excessiveness of the uncertainty. Funding parties should observe a transparent process in negotiating the TPF arrangement in order to lessen the asymmetric information traveling between the parties. The due diligence conducted by the funder is instrumental in lessening the uncertainty of the funded claim and predicting its outcome, although it is not guaranteed. Funders should be transparent about the rules they use for pricing legal claims in order to lessen the uncertainties for both parties. The parties also should limit their return to be contingent on a future event of deciding or settling the dispute. The expenses and costs of pursuing the claim should be cut off before distributing the outcome of that claim.[191] More importantly, funders follow high standards in international disputes especially in assuring that the funded party gets a legal advice from an independent counsel. In fact, some rules oblige the funders to take reasonable steps in ensuring that the funded party receives an independent advice on the terms of the TPF arrangement.[192] Further, funders often get around 1/3 of the expected outcome if the claim is

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[191] Ibrahim, *supra* note 12, at 709–10.

[192] Code of Conduct for Litigation Funders 2018, ALF, art. 9.1 (Eng. & Wales) ("A Funder will take reasonable steps to ensure that the Funded Party shall have received independent advice on the terms of the LFA prior to its execution, which obligation shall be satisfied if the Funded Party confirms in writing to the Funder that the Funded Party has taken advice from the solicitor or barrister instructed in the dispute"), https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf.

successful.[193] Following these practices should respond to the Gharar concerns in Shari'a and the possibility that a funder may exploit the funded party. The mechanisms followed by the funders in taking the funding decision reflect the efforts exerted by the funding parties in reducing the uncertainties surrounding the claim and foreseeing any potential procedural paths that the disputing parties may pursue. This should contribute to foreseeing the procedural framework of the arbitral process, even with the possibility of changing this procedural framework.

VI. CONCLUSION

Central to the vitality of Islamic financial arrangement is the non-fixed return where the parties to the financial agreement should share profit and loss. Shari'a and conventional funding practice recognize the benefits of having a venture capital to structure the TPF arrangement. This structure is part of a new legal development that may become home to a synergistic interaction between TPF and Shari'a. This Article clears the way for a new Islamic TPF model that may represent the fruits of a positive kind of funding and conventional rules of Shari'a. Notably, Shari'a embraces arbitration as a forum of dispute resolution and TPF arrangements that are based on sharing the risk of profit and loss. They seem to recognize the complementarity between arbitration and TPF arrangements to structure TPF from an Islamic perspective. This should operate in practice through the partnership between the funding parties based on the Mudarabah financial arrangements. Under this arrangement, the funder should enter into a partnership agreement with the funded party by providing capital to the funded party in order to conduct the proceeding as a subject investment of the venture capital. The partnership should own the claim under the management of the funded party. The funder should receive a share in the partnership in proportion of its contribution as agreed upon in the funding agreement.

The use of the partnership arrangement in combination with the Mudarabah arrangement may open the door for TPF and Shari'a to be friends, rather than foes, and for the funder's capital to flow into the Islamic-based jurisdictions. As such, funders would be able to diversify their portfolio of disputes subject to investment and open new markets. Funded parties would avail of new sources of funding to their disputes with less associated risks. The Article is a starting point to embrace the TPF practice into Shari'a. The application of this new model should show its practical compatibility with Shari'a and should suggest a better understanding for applying TPF from an Islamic perspective. In conclusion, this Article presents that the regime built around the Shari'a of profit and loss sharing seems efficiently functionable and properly serviceable for embracing an Islamic TPF model.

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[193] Joseph J. Stroble & Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, 87 DEF. COUNS. J. 1 (2020), https://www.iadclaw.org/defensecounseljournal/third-party-litigation-funding-a-review-of-recent-industry-developments/?b=dVWYaLjZMGKY3U9rKlWc3IGxDZGZ8yId%2FM5KTCtnvcMEKxw%2BRxalTWEzBpYpzbzR.