

CONTENTS

<i>List of cases</i>	xi
<i>Acknowledgements</i>	xv
<i>Preface</i>	xvii
1 ISLAMIC LAW AND THE ROLE OF INTERPRETATION	1
1.1 Form versus substance in the <i>Quran</i>	4
1.1.1 Form versus substance in Islamic finance transactions	5
1.2 The role of interpretation under the common law	8
1.3 Form versus substance under the common law: the Exfinco scenario	11
2 SCOPE, METHODOLOGY AND OBJECTIVE	14
2.1 Scope	15
2.2 Methodology	16
2.3 Objective	17
2.4 Approach	19
3 ISLAMIC FINANCE: AN INTRODUCTION	22
3.1 Principles governing contract and finance in Islam	23
3.2 Specific rules of the sharia governing contract and finance in Islam	24
3.2.1 <i>Riba</i>	24
3.2.2 Gambling (<i>maysir</i>)	25
3.2.3 Prohibited transactions/investments	26
3.2.4 Predetermined profit	26
3.2.5 <i>Gharar</i>	26
3.2.6 Hoarding	26
3.2.7 Financial assets	27

3.3	Transactions in Islamic finance	27
3.3.1	<i>Musharaka</i>	27
3.3.2	<i>Mudharaba</i>	28
3.3.3	<i>Murabaha</i>	28
3.3.4	<i>Ijara</i>	29
3.4	<i>Sukuk</i> (Islamic bonds) and the development of a <i>sukuk</i> market	30
3.5	Distinguishing <i>sukuk</i> from conventional bonds	31
3.6	The four <i>madhahibs</i> (schools) of Islamic jurisprudence	32
4	<i>GHARAR</i> IN ISLAMIC LAW	35
4.1	Origins of the prohibition	35
4.2	Defining <i>gharar</i> and the ‘ <i>gharar</i> sale’	37
4.3	The principle behind the prohibition of <i>gharar</i>	40
4.4	The effect of <i>gharar</i> and the differing opinions within Islamic jurisprudence	42
4.5	<i>Gharar</i> : conceptual or evidential?	43
4.6	Certainty under English common law: conceptual or evidential?	45
4.6.1	Curing contracts of uncertainty under the common law	56
4.7	Historical context and the rules of <i>gharar</i>	59
4.8	Present context application of Islamic law of transaction	60
5	<i>RIBA</i> : MEANING, SCOPE AND APPLICATION	62
5.1	<i>Riba</i> redefined	65
5.1.1	<i>Riba</i> according to the <i>Quran</i>	68
5.1.2	<i>Riba</i> according to Muhammad	72
5.2	The principle behind <i>riba</i> and its implications for Islamic finance	74
5.2.1	<i>Riba</i> : the what or the how?	76
5.2.2	Principles of Islamic law on matters of commerce vis-à-vis rituals	78
5.3	Social justice and implications of the redefinition for Islamic finance	80
5.4	<i>Riba</i> and the common law doctrine of consideration	83
5.4.1	Equitable transaction versus adequate consideration	85
5.4.2	<i>Raison d'être</i> behind <i>riba</i> and the doctrine of consideration	88
5.4.3	<i>Riba</i> as a vitiating factor versus consideration as a distinct element of contract formation	90
5.5	<i>Riba</i> , consideration and intention to create legal relations	90

6	THE NATURE OF DEBT AND THE LEGALITY OF ITS SALE	96
6.1	The concept of debt	98
6.2	The relationship between debt and money under Islamic law	99
6.2.1	Is debt money?	100
6.3	The relationship between debt and money under English law	103
6.3.1	Defining money	103
6.3.2	Debt	103
6.3.3	Legal characteristics of physical money	104
6.3.4	The distinction between physical money and intangible money	105
6.4	What is property?	106
6.4.1	Distinguishing personal from proprietary rights	108
6.4.2	Property: a right or a thing?	112
6.5	Debt vis-à-vis property under Islamic law	113
6.5.1	Is debt property?	114
6.5.2	Transferability of debt under Islamic law and the contextual evolution of property rights	115
6.6	Future (debt) contracts under Islamic law and practice	118
6.6.1	Future (debt) contracts and <i>gharar</i>	120
6.6.2	Deferred 'sale of debt' transactions	121
6.7	The common law attitude to sale of future debts	123
6.8	The 'asset-backed' requirement under Islamic law	124
6.9	Judicial support in acknowledging the proprietary nature of debt	126
7	SECURITISATION	129
7.1	Defining and outlining securitisation	129
7.2	Securitisation of receivables	130
7.3	Requirements of a securitised transaction	131
7.4	The benefits of securitisations	132
7.5	The drawbacks of securitisations and issues in application	134
7.6	True sale: the re-characterisation of a 'sale' as security interest	137
7.7	True sale: bankruptcy remoteness	138
8	STRUCTURING A SECURITISATION TO BE COMPATIBLE WITH BOTH THE SHARIA AND COMMON LAW	140
8.1	Issues involving <i>gharar</i> , <i>riba</i> and <i>bay al dayn</i>	141
8.2	General issues arising from dual compatibility structuring	144

8.2.1	True sale and the risk of re-characterisation	145
8.2.2	Bankruptcy remoteness	147
8.2.3	Security interest	147
8.2.4	Tax	148
8.2.5	Uncertainty regarding choice of law and enforcements of judgements	149
8.2.6	Asset selection	154
8.2.7	The use of the London inter-bank offered rate (<i>Libor</i>)	155
8.2.8	Late payment and penalty charges	155
8.2.9	The creation of a trust within a civil law framework	156
8.2.10	Interpretation of commercial laws and contracts in sharia jurisdictions	158
8.2.11	The role of the sharia committee	159
9	ISLAMIC FINANCE IN MALAYSIA: A MODEL TO EMULATE	161
9.1	Genesis and growth of Islamic finance in Malaysia	161
9.2	Malaysia's distinct structural and institutional advantages over other Islamic finance participants	165
9.2.1	A common law jurisdiction	165
9.2.2	Dual banking system	167
9.2.3	Multifaceted approach to Islamic banking	168
9.2.4	Labuan international offshore financial centre	168
9.3	Making a difference through Islamic finance	172
10	THE WAY FORWARD	175
	<i>Notes</i>	179
	<i>Bibliography</i>	203
	<i>Index</i>	209