



The Enforceability of the Purchase Undertaking (Wa'd) in Sukuk Structures: A Comparative Analysis of Shariah Doctrine and English Contract Law

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ABSTRACT :

Sukuk have become one of the principal instruments of cross-border Islamic capital markets, with global outstanding issuance reaching approximately US\$902.8 billion in 2024¹. Central to nearly every asset-based or equity-based sukuk structure is the purchase undertaking, a unilateral promise (– a wa'd –) by the obligor to repurchase the underlying assets from the sukuk trustee at a predetermined exercise price on maturity or upon an early dissolution event. The purchase undertaking performs the economic function that the coupon and principal repayment perform in a conventional bond, yet classical Shariah doctrine denies the ordinary bare promise the contractual status of a mutually binding agreement.

This article examines the resulting doctrinal tension. Under the majority Hanafi, Shafi'i, and Hanbali position, a bare promise generates only a moral or religious obligation and is not judicially enforceable; only the Maliki school, and then only in defined circumstances, treats a promise as judicially binding. Contemporary Shariah standard-setting bodies, principally the OIC International Islamic Fiqh Academy and the Accounting and Auditing Organization for Islamic Financial Institutions ("AAOIFI"), have resolved this by treating the unilateral wa'd as binding on the promisor, but this resolution operates entirely within the confines of Islamic jurisprudence and says nothing about how a common law court, applying the governing law the parties have actually chosen, will treat the same promise.

*The article argues that the enforceability of the purchase undertaking in practice depends almost entirely on English contract law's own doctrinal tools – principally the deed and the exercised option – and that the Shariah characterisation of the wa'd as binding is, in litigation, legally inert. It examines the Court of Appeal's decision in *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* and Leggatt J's judgment in *Dana Gas P.JSC v Dana Gas Sukuk Ltd* to demonstrate that English courts enforce the purchase undertaking as an English law contract or deed irrespective of, and indeed notwithstanding, challenges to the Shariah compliance of the wider structure. It concludes that this is not necessarily objectionable, but that the structural reliance on English doctrinal devices rather than on the Shariah characterisation of the wa'd itself exposes a gap between the instrument's religious legitimation and its legal enforcement that sukuk documentation should address explicitly rather than obscure.*

Keywords: Sukuk, Wa'd, Purchase undertaking, Islamic finance, AAOIFI, English contract law, deed, consideration

INTRODUCTION

The Purchase Undertaking as the Sukuk's Credit Anchor

The modern sukuk market has grown from a handful of Malaysian domestic issuances in the 1990s into a fixed-income asset class of global scale. Global outstanding sukuk reached approximately US\$902.8 billion at the end of 2024, with total issuance for the year of roughly US\$205 billion, of which US\$65.6 billion was cross-border international issuance². Almost every one of those instruments, whether structured as *sukuk al-ijara* (lease-based), *sukuk al-mudaraba* (silent-partnership), or *sukuk al-musharaka* (joint-venture partnership), relies on the same structural device to protect the redemption value of the certificates: the purchase undertaking.

In an *ijara* sukuk, an originator transfers beneficial ownership of identified assets to a special purpose vehicle (the "Issuer" or "Trustee"), which issues certificates representing an undivided beneficial interest in those assets to investors, using the subscription proceeds to fund the purchase. The Trustee then leases the assets back to the originator under an *ijara* agreement, and the periodic rental it collects is distributed to certificate-holders as a periodic

¹International Islamic Financial Market, IIFM Sukuk Report: A Comprehensive Study of the Global Sukuk Market (14th ed., IIFM 2025) (reporting global outstanding sukuk of US\$902.8 billion at end-2024 and total 2024 issuance of US\$205 billion, including US\$65.6 billion of international sukuk).

²International Islamic Financial Market, *supra* note 1.

distribution amount, replicating a bond coupon. On the scheduled dissolution date, or on the occurrence of an early dissolution event such as default, illegality, or delisting, the trust assets must in principle be liquidated to repay the certificate-holders their capital. Because the market value of the underlying assets on that date is inherently uncertain, and because a fluctuating redemption amount would make the instrument economically indistinguishable from an equity security, the transaction documents include a purchase undertaking granted by the originator in favour of the Trustee, under which the originator promises, unilaterally, to repurchase the Trustee's interest in the trust assets at a fixed "exercise price" – ordinarily the aggregate face value of the outstanding certificates plus any accrued but unpaid distribution amounts – once the Trustee serves an exercise notice on the relevant dissolution date. A mirror-image sale undertaking, granted by the Trustee in favour of the originator and exercisable only by the originator and only in different, non-overlapping circumstances (typically an issuer call), performs the equivalent function in reverse.

The purchase undertaking is, in other words, the mechanism by which the sukuk is transformed from what might otherwise be a genuine profit-and-loss-sharing or asset-return instrument into something that behaves, for redemption purposes, exactly like a conventional bond: a fixed sum, payable on a fixed date, regardless of the performance of the underlying assets. In equity-type *mudaraba* and *musharaka* sukuk the same device performs an even more consequential role, because it is the purchase undertaking – exercisable by the Trustee against the managing partner (the *mudarib* or managing *musharik*) – that determines whether the certificate-holders' capital is protected on liquidation notwithstanding the underlying partnership's prohibition on capital guarantees. This last point, discussed further below, is precisely what generated the most serious controversy the sukuk industry has faced since the instrument's modern revival.

The Doctrinal Problem: One Instrument, Two Systems of Obligation

The purchase undertaking is, simultaneously, two different legal things. As a matter of Shariah, it is a *wa'd* – a unilateral promise whose bindingness on the promisor is a matter of genuine and long-standing juristic dispute, resolved only by the intervention of modern fatwa-issuing bodies. As a matter of the governing law the parties have chosen to apply to the instrument – almost invariably English law, occasionally New York law – it is a document that must satisfy the ordinary requirements of contract formation, or must be executed with the formalities of a deed, before an ordinary civil court will treat it as enforceable at all. These two systems of obligation do not track one another. The same clause can be binding as a *wa'd* under AAOIFI's Shari'a Standards while being, in the hands of an English judge asking only whether the document was properly executed, either enforceable or not enforceable for reasons that have nothing to do with its status in fiqh.

This article's central claim is that the resolution of this problem in the sukuk market has proceeded almost entirely along the second track. Purchase undertakings are enforceable in London, where the great majority of international sukuk disputes are litigated or arbitrated, because they are executed as deeds or drafted as options capable of exercise, and for no other reason. The Shariah characterisation of the promise as binding is, on this account, doctrinally decorative once the parties are before an English court.

Structure of the Article

Part II sets out the function of the purchase undertaking within sukuk structures in more detail and surveys the Shariah doctrine of *wa'd*, including the classical dispute over its bindingness and its contemporary resolution by the OIC International Islamic Fiqh Academy and AAOIFI. Part III turns to English contract law's treatment of bare promises, the drafting devices – the deed and the option – that sukuk documentation uses to route around the doctrine of consideration, and the litigation, principally *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* and *Dana Gas PJSC v Dana Gas Sukuk Ltd*, that has tested these devices. Part IV asks whether the resulting accommodation between the two systems is one of genuine structural coherence or of structural fiction, using the exercise-price controversy and AAOIFI's pending Shari'a Standard No. 62 as the clearest point of continuing divergence. Part V concludes with the article's implications for documentation practice.

PART II: THE PURCHASE UNDERTAKING IN SUKUK STRUCTURE AND SHARIAH DOCTRINE

Sukuk Architecture and the Function of the Purchase Undertaking

The Arabic plural of *sakk*, meaning document, certificate, or deed, sukuk occupy a deliberately ambiguous position between debt and equity. AAOIFI's own guidance provides that a Sukuk manager or partner "can only guarantee to repay the capital to Sukukholders at face value in cases of negligence or violation", and that Sukukholders in a *mudaraba* or *musharaka*-based structure must understand that they bear some risk in these structures, since Shariah

principles encourage the sharing of risk and profit rather than its elimination³. The purchase undertaking is the instrument that reconciles this doctrinal insistence on risk-sharing with the practical market demand, from conventional and Islamic investors alike, for a fixed, bond-like redemption amount.

Two structurally distinct undertakings typically appear side by side in the transaction documents. The purchase undertaking, granted by the originator or obligor in favour of the Trustee, obliges the originator to buy the Trustee's interest in the sukuk assets at the exercise price once the Trustee has served an exercise notice, whether on the scheduled dissolution date or following an early dissolution event such as a payment default, an insolvency event, or – as became critical in the litigation discussed in Part III – an event of illegality or repudiation. The sale undertaking, granted by the Trustee in favour of the originator, is its mirror image, permitting the originator, and only the originator, to call for early redemption in defined circumstances. Because each undertaking can be exercised only by one party, and only in circumstances that do not overlap with those triggering the other, AAOIFI and the Fiqh Academy treat the pair as two independent unilateral promises rather than as a single, mutually binding bilateral undertaking (a *muwa'ada* or *tawa'ud*) of the kind that raises separate Shariah objections, discussed below.

Wa'd Defined: The Unilateral Promise in Islamic Contract Law

A *wa'd* is a unilateral expression of intention by one party to perform a specified act in the future, made without seeking or receiving a counter-performance from the promisee⁴. It is conceptually distinct from an *'aqd*, a contract properly so called, which requires offer and acceptance by two parties each assuming reciprocal obligations. It is also distinct, and more controversially so, from a *muwa'ada* or *tawa'ud*, a bilateral exchange of promises in which both parties commit in advance to conclude a future contract on agreed terms – a structure many contemporary jurists treat with far greater caution than a simple *wa'd*, because a pair of reciprocal promises to contract closely resembles a forward sale agreed today for performance at a future date, and risks replicating contracts that Shariah doctrine restricts, such as the sale of a debt for a debt or the combination of two sales in a single transaction.

The dispute over the *wa'd*'s bindingness long predates its modern use in sukuk. The majority position among the Hanafi, Shafi'i, and Hanbali schools treats the fulfilment of a promise as a matter of religious virtue and moral obligation – breach is a sin, and a persistent breaker of promises is traditionally counted among the signs of hypocrisy – but not as a matter that a *qadi* (judge) can compel: the obligation binds *diyanatan* (as a matter of conscience) but not *qada'an* (as a matter that a court will enforce), so that the promisee acquires no judicially cognisable claim if the promise is broken⁵.

The Maliki school departs from this position, though in a more qualified way than is sometimes suggested. The influential Maliki jurist Ibn al-'Arabi drew a distinction between a bare promise ("if the promise results in a specific consequence, its fulfilment is obligatory, but if it is a promise *per se*, without any significant effect, fulfilling it is not made obligatory"⁶). On the preponderant Maliki opinion, a unilateral promise becomes as binding as a contract where the underlying reason for the promise was expressly stated in it, or where the promisee has entered into an underlying arrangement, or altered its position, in reliance on the promise being kept; where the promisee has been drawn in on that basis and has thereby incurred a potential liability or detriment, fulfilment becomes judicially obligatory, and the promisor may be compelled to perform or to compensate the promisee's reliance loss⁷. Other Maliki authorities, and contemporary scholars applying the school's reasoning, add that fulfilment is obligatory in particular where non-fulfilment would cause the promisee real hardship or loss⁸.

The Contemporary Resolution: The Fiqh Academy and AAOIFI

The modern Islamic finance industry did not wait for the classical schools to converge. At its Fifth Session, held in Kuwait in December 1988, the OIC International Islamic Fiqh Academy adopted Resolutions No. 40–41 (2/5 and 3/5) on "Keeping a Promise" and "*Murabaha* to the Purchase Orderer", resolving in substance that a unilateral promise is religiously binding on the promisor and, where the promise is unconditional and the promisee has

³AAOIFI Shari'a guidance on Mudaraba and Musharaka capital protection, cited in "Sukuk Al Mudaraba: Issues Relating to Distribution of Losses Between the Issuer and Investors", Mondaq (21 Dec. 2018).

⁴See "Wa'd Based Islamic Hedging Structures", Lexology (16 Oct. 2020) (defining *wa'd* as a unilateral promise by one party, binding on the promisor, and noting that as a unilateral undertaking it should not be provided in exchange for a counter-performance requirement).

⁵See "The Enforceability of Wa'd Mulzim (Binding Promise) from a Fiqh Perspective: A Critical Analysis of Wa'd Application in Sukuk Contracts", 6 Journal of Fiqh (IIUM Press) (2018) (surveying the classical majority position and the continuing controversy over binding promise in contemporary Islamic financial products).

⁶Ibn al-'Arabi's position as summarised in "Contemporary Issues of Form and Substance: An Islamic Law Perspective", 11(1) ISRA International Journal of Islamic Finance 124 (2019), citing Ibn Bayyah (2010).

⁷See "Special Legal Features of the Islamic Wa'd or Pledge: Comparison with the Conventional Law on Promise within the Sphere of Islamic Finance", 53(3) International Journal of Law and Management 221 (2011).

⁸See "Status and Implications of Promise (Wa'd) in Contemporary Islamic Banking" (ResearchGate, 2010), summarising the four recognised views on *wa'd* bindingness and noting that fulfilment "may become judicially obligatory in the event of necessity".

incurred liabilities in reliance on it, may properly be made judicially enforceable⁹. This resolution provided the doctrinal foundation for the widespread use of a unilateral, binding promise to purchase in *murabaha* financing, and was subsequently extended by AAOIFI's Shari'a Standards to underpin the purchase undertaking in *sukuk*.

AAOIFI's standards on *murabaha*, *ijara*, and investment *sukuk* adopt a binding unilateral *wa'd* subject to several cumulative conditions. First, the promise must remain genuinely unilateral: each party may give its own separate undertaking – the purchase undertaking and the sale undertaking – but the two must not be conditioned on, or exercisable by reference to, one another in a manner that collapses them into a single reciprocal bargain of the kind that would constitute a prohibited *muwa'ada*; the Islamic Fiqh Academy's own formulation requires, among other things, that the promise relate to a specific, ascertained future performance and that its binding character not itself operate to substitute the promise for a contract that would be defective if concluded directly at that time¹⁰. Second, the promise must ordinarily be documented independently of the contract it anticipates: AAOIFI's Shari'a Standard on *Ijara* and *Ijara Muntahia Bittamleek* provides that the method of transferring the leased asset to the lessee “must be evidenced in a document separate from the *Ijara* contract documents”, precisely so that the promise retains its character as a standalone, unilateral undertaking rather than a term embedded within, and therefore contaminating, the underlying commutative contract¹¹.

This second condition explains why, as a matter of pure market coincidence discussed further in Part IV, the purchase undertaking in almost every international *sukuk* is a standalone document, physically and legally separate from the *ijara*, *mudaraba*, or *musharaka* agreement it secures.

The Exercise-Price Controversy

The most consequential dispute over the purchase undertaking's Shariah legitimacy did not concern its bindingness as a *wa'd* at all, but the price at which it is exercised. In an interview published in February 2008, Sheikh Muhammad Taqi Usmani, then chairman of AAOIFI's Shari'a Board, stated that “as many as 85 percent” of *sukuk* issued to that date might not fully comply with Shariah precepts¹². His central objection concerned equity-type *mudaraba* and *musharaka* *sukuk* in which the purchase undertaking fixed the exercise price at the face or nominal value of the outstanding certificates, irrespective of the actual value of the underlying venture or assets at the time of exercise. Because AAOIFI's own standards permit a *mudharib* or managing partner to guarantee the capital of the *Rab al-Mal* (the capital-providing partner) only in cases of proven negligence, misconduct, or breach of the terms of the partnership, a purchase undertaking that mechanically guarantees repayment of face value on maturity, regardless of the partnership's actual performance, achieves in substance precisely the capital guarantee that the underlying partnership contract is supposed to forbid. Structuring that guarantee through a formally separate *wa'd* rather than through a term of the *mudaraba* agreement itself does not, on this critique, change its economic character.

AAOIFI has never fully resolved this tension in a manner that has displaced market practice. Its long-pending exposure draft of Shari'a Standard No. 62 on *Sukuk*, first issued for industry comment in November 2023, proposes a more fundamental reform: a requirement that *sukuk* involve a genuine, legally effective transfer of ownership of the underlying assets to certificate-holders, so that certificate-holders bear real asset risk rather than holding what is, in substance, a claim on the originator's general credit dressed in asset-based clothing¹³. Rating agencies have warned that, if adopted in its more far-reaching form, Standard No. 62 could require *musharaka* *sukuk* in particular to “require genuine joint ownership and profit/loss sharing” such that “fixed returns or capital guarantees are not permissible”, materially affecting how purchase undertakings in equity-type *sukuk* can be priced and potentially cooling issuance in standard-adopting jurisdictions¹⁴. As of the time of writing, AAOIFI has not issued Standard No. 62 in final form, and the great majority of outstanding *sukuk*, issued under the existing Shari'a Standard No. 17 framework, continue to use face-value exercise prices defended, where challenged, on the footing that the originator is simply repurchasing its own assets at an agreed price rather than guaranteeing a partner's capital.

⁹International Islamic Fiqh Academy, Resolutions Nos. 40–41 (2/5, 3/5), 5th Session (Kuwait, 10–15 Dec. 1988), reprinted in Resolutions and Recommendations of the Council of the Islamic Fiqh Academy (IIFA-AIFI, official ed. 2021) 75.

¹⁰See “Wa'd Based Islamic Hedging Structures”, Lexology (16 Oct. 2020) (summarising the Islamic Fiqh Academy's four conditions for the Shariah enforceability of a unilateral *wa'd*).

¹¹AAOIFI, Shari'a Standard on *Ijara* and *Ijara Muntahia Bittamleek*, as summarised in “The Structure and Use of Wa'd”, Islamic Finance in Practice, Issue 3 (Winter 2009) 14.

¹²Sheikh Muhammad Taqi Usmani, statement reported Feb. 2008, discussed in, e.g., “Sukuk Screening: How to Check If an Islamic Bond is Shariah-Compliant”, Halal Terminal (2026).

¹³See “Draft AAOIFI Standard 62 Has Not Affected Islamic Banks, But Uncertainties Persist”, Zawya (17 Mar. 2025); AAOIFI, Announcement Extending Feedback Deadline on Exposure Draft of Shari'a Standard No. 62 “Sukuk” (deadline extended to 31 Mar. 2024).

¹⁴See “Proposed AAOIFI Shari'a Standard May Slow Sukuk Issuance: Moody's”, Muscat Daily (29 Oct. 2024); “AAOIFI Standard 62's Final Form, Adoption to Determine Impact on Sukuk”, Fitch Ratings (Zawya, 4 Dec. 2024).

PART III: THE ENFORCEABILITY GAP – SHARIAH VALIDITY VERSUS ENGLISH CONTRACT DOCTRINE

The Common Law's Approach to the Bare Promise

However AAOIFI and the Fiqh Academy resolve the internal Shariah debate, that resolution has no direct purchase on how an English court will treat the purchase undertaking, because English contract law approaches the bare, gratuitous promise from an entirely independent doctrinal tradition. The orthodox position is that consideration must move from the promisee for a promise to be contractually binding, and that a promise made without any counter-performance sought or given by the promisee is not, without more, an enforceable contract¹⁵. Even where a promisee has relied on a gratuitous promise to its detriment, the doctrine of promissory estoppel developed from *Central London Property Trust Ltd v High Trees House Ltd*¹⁶ operates, on orthodox authority, only as a shield to prevent the promisor from resiling from a promise in defence of an existing legal relationship, and not as an independent “sword” on which the promisee can found a fresh cause of action¹⁷. A *wa'd*, defined precisely as a promise that does not seek counter-performance from its promisee, therefore replicates, almost exactly, the fact pattern that English contract law has historically declined to enforce.

Structuring Around Consideration: The Deed and the Exercised Option

Sukuk documentation resolves this problem, as a matter of drafting rather than doctrine, in two overlapping ways. First, and almost universally, the purchase undertaking is executed and delivered as a deed. Under English law a promise contained in an instrument that is validly executed as a deed is enforceable without consideration, the formality of execution as a deed – signature, attestation, and delivery in accordance with section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 – substituting for consideration as the law’s chosen indicium of a seriously intended and binding commitment. It is not a coincidence, but it is also not the product of any conscious doctrinal reconciliation, that the same instrument AAOIFI requires to be documented as a standalone, unilateral undertaking separate from the underlying *ijara* or *mudaraba* contract happens to be the one English-law device – the deed – that also does not require reciprocal consideration.

Second, and often in addition, sukuk documentation frames the purchase undertaking as an irrevocable option granted by the obligor to the Trustee, exercisable by the Trustee serving a formal exercise notice on or before the relevant dissolution date, sometimes reciting a nominal consideration for the grant of the option itself. English law has long recognised that an option, once validly exercised in accordance with its terms, crystallises into a binding bilateral contract of sale enforceable by both parties, even though the option itself, before exercise, binds only the grantor. This structure gives the purchase undertaking a second, independent doctrinal foundation: even if its status as a deed were somehow impugned, its character as an option capable of unilateral exercise by the Trustee provides an alternative English-law route to enforceability that, again, has nothing to do with the promise’s status as a *wa'd*.

The Dana Gas Litigation: Wa'd Enforcement Tested

The clearest judicial illustration of the gap between Shariah bindingness and English-law enforceability arose from the near-collapse, in 2017, of Dana Gas PJSC’s US\$1 billion *mudaraba* sukuk. The sukuk, originally issued in 2007 and restructured in 2013 into approximately US\$850 million of certificates due for redemption on 31 October 2017, was structured through a *mudaraba* agreement governed by the law of the United Arab Emirates, under which Dana Gas acted as *mudarib* for a pool of *mudaraba* assets, together with a separate purchase undertaking, governed by English law, obliging Dana Gas to purchase the Trustee’s interest in those assets at the exercise price on the relevant dissolution date¹⁸. In mid-2017, with the sukuk approaching maturity and Dana Gas facing acute liquidity pressure, the company announced that it had obtained fresh legal advice that the *mudaraba* structure was, in its own revised view, not compliant with Shariah and was therefore unlawful and unenforceable as a matter of UAE law; it commenced proceedings in both the United Arab Emirates and England seeking declarations that its payment obligations were, as a consequence, unenforceable¹⁹.

The Financial List of the Commercial Court tried, as a preliminary issue, the question whether the purchase undertaking was itself valid and enforceable, assuming for that purpose – without deciding – that the underlying *mudaraba* documents were indeed unenforceable under UAE law. Leggatt J (as he then was) held that, since it was common ground that the purchase undertaking was governed by English law and that English law alone determined its validity, the assumed invalidity of the underlying Shariah-structured documents had no bearing on the separate question of whether the purchase

¹⁵Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847 (HL).

¹⁶Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130.

¹⁷Combe v Combe [1951] 2 KB 215 (CA) (Denning LJ).

¹⁸Dana Gas PJSC v Dana Gas Sukuk Ltd & Ors [2017] EWHC 2928 (Comm) (Leggatt J).

¹⁹See “English High Court Confirms that Sharia Non-Compliance Will Not Affect the Enforceability of an English Law Agreement in an Islamic Finance Structure”, Herbert Smith Freehills (13 Dec. 2017).

undertaking, as an English law contract, was valid and enforceable on its own terms: “it is English law which determines whether the Purchase Undertaking is a valid and enforceable contract”, and “it is perfectly lawful in English law to guarantee the return from an investment and to pay and receive compensation for the use of money”²⁰. Dana Gas also argued that its obligation to pay the exercise price was conditional on a valid transfer to it of the Trustee’s rights in the *mudaraba* assets under the (assumed unenforceable) UAE law documents, so that if no valid transfer could occur, no payment obligation could arise; the court rejected this argument, holding that the purchase undertaking’s own drafting – which expressly identified both “repudiation” and “illegality” as dissolution events triggering an obligation to pay the exercise price – showed that the parties had themselves allocated the risk of exactly this scenario, leaving no gap in the contractual scheme for the doctrine of common mistake to fill²¹. On a subsequent application by Dana Gas to set aside the judgment, the court adhered to its earlier reasoning and refused permission to appeal²². Dana Gas was ultimately ordered to make the payments due to its creditors under the purchase undertaking, and the sukuk was restructured on that footing²³.

Dana Gas is significant precisely because of what the court did not ask. At no point did Leggatt J examine whether the purchase undertaking satisfied the Fiqh Academy’s conditions for a binding *wa’d*, or whether AAOIFI’s standards would treat it as valid. The court asked only whether the document satisfied the ordinary requirements of English contract law – due execution, an absence of any operative mistake, and a contractual scheme that on its own terms addressed the contingency in dispute – requirements which, as shown above, sukuk documentation independently ensures are met through deed execution and carefully drafted dissolution-event provisions, regardless of how the promise is characterised under Shariah.

Golden Belt: Enforcement Turns on Documentary Formality, Not Doctrine

A different but complementary illustration is provided by *Golden Belt 1 Sukuk Co BSC(c) v BNP Paribas*²⁴, arising out of the 2007 default of Saad Trading, Contracting & Financial Services Company on a US\$650 million sukuk arranged by BNP Paribas. The primary means of enforcement available to certificate-holders was a promissory note governed by the law of Saudi Arabia and subject to the jurisdiction of the Saudi Arabian Committee for the Settlement of Negotiable Instruments Disputes; the certificate-holders’ claim succeeded not because of any finding about the Shariah compliance of the underlying structure, but because the arranger had failed to exercise reasonable care and skill to ensure that the promissory note was executed with an original, “wet-ink” signature as Saudi law required, thereby depriving certificate-holders of their principal enforcement mechanism²⁵. A separately pleaded claim that BNP Paribas was responsible for misrepresentations in a Shari’a pronouncement, or fatwa, issued by its own Shariah Supervisory Board and included in the offering circular, was abandoned by the claimants during the course of the trial and was never determined on its merits²⁶. *Golden Belt* therefore illustrates, from a different angle, the same underlying proposition as *Dana Gas*: enforcement of sukuk documentation in an English court turns on conventional questions of governing-law formality – signature requirements, execution formalities, an arranger’s ordinary duty of care – and not on an inquiry into the Shariah legitimacy of the structure, a question the claimants themselves evidently regarded as unlikely to advance their claim once put to the test.

The Governing-Law Firewall: Shamil Bank v Beximco

The doctrinal premise on which both later cases rest was established well before either arose, in *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd*²⁷. The relevant financing agreements provided that they should be governed by English law “subject to the principles of the Glorious Sharia’a”. The Court of Appeal held that this formula did not, and as a matter of the applicable conflict-of-laws rules could not, subject the agreements to two concurrent systems of law; a contract cannot simultaneously be governed by two national or religious legal systems, and Sharia, unless a specific school or codification is identified, is not a sufficiently fixed and ascertainable body of rules to constitute a “law” capable of governing a contract for private international law purposes, in the way that a defined body of rules such as the Hague Rules can be incorporated by reference into an English law contract. The reference to Sharia principles was accordingly construed as a non-binding statement of the parties’ religious motivation and ethos, rather than as a

²⁰Dana Gas PJSC v Dana Gas Sukuk Ltd & Ors [2017] EWHC 2928 (Comm) at [1]; quoted in “Sukuk Al Mudaraba: Issues Relating to Distribution of Losses Between the Issuer and Investors”, Mondaq (21 Dec. 2018).

²¹See “Islamic Finance Update: The Dana Gas Case: Sanctity of English Law Contract Upheld, Notwithstanding Claims of Shari’ah Non-Compliance”, Lexology (1 Dec. 2017).

²²Dana Gas PJSC v Dana Gas Sukuk Ltd & Ors [2018] EWHC 278 (Comm) (1 Feb. 2018).

²³See “The Purchase Undertaking (Governed by English Law) Which Lays Out Dana Gas’s Payment Rights Within the Sukuk, Was Found to Be Legal and Binding”, IIUM Journal of Islamic Finance (2022).

²⁴Golden Belt 1 Sukuk Co BSC(c) v BNP Paribas [2017] EWHC 3182 (Comm); [2018] Bus LR 816.

²⁵See “Missing Wet Ink Signature in the Golden Belt Sukuk”, Trowers & Hamlin (2018).

²⁶Golden Belt 1 Sukuk Co BSC(c) v BNP Paribas [2017] EWHC 3182 (Comm) (noting the claimants’ abandonment, before judgment, of the pleaded case that BNPP was responsible for misrepresentations contained in the Shari’a pronouncement included in the Offering Circular).

²⁷Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd [2004] EWCA Civ 19; [2004] 1 WLR 1784.

substantive legal condition capable of qualifying or displacing the chosen English governing law²⁸.

Beximco therefore erects what might usefully be called a governing-law firewall around sukuk and other Islamic finance documentation governed by English law: once English law is chosen as the governing law, however central Shariah compliance was to the commercial rationale for the instrument, an English court will not entertain a Shariah-compliance challenge as a route to displacing the chosen law's ordinary rules of contractual validity and enforcement. *Dana Gas* applies precisely this firewall to the purchase undertaking: because English law, and English law alone, governed that document, the question whether the wider *mudaraba* structure it secured was Shariah-compliant, or judicially valid under UAE law, was simply irrelevant to its enforcement.

PART IV: RECONCILING THE TWO REGIMES – STRUCTURAL COHERENCE OR STRUCTURAL FICTION?

Convergence by Coincidence: The Deed as Shared Ground

It is tempting to read the wide practice of executing purchase undertakings as deeds, kept separate from the underlying *ijara* or *mudaraba* agreement, as evidence of a deliberate reconciliation between Shariah doctrine and English contract law. The reality is more modest. AAOIFI requires that the *wa'd* be documented separately from the underlying commutative contract for a Shariah reason entirely unconnected to English law: to preserve the promise's character as a genuinely unilateral undertaking, not one that has become an embedded term of a reciprocal contract and thereby risks being recharacterised as a *muwa'ada*. English law requires deed execution for an entirely independent reason: to supply, through formality, the substitute for consideration that a gratuitous promise otherwise lacks. The two requirements happen to converge on the same drafting solution – a standalone deed, separate from the operative lease or partnership agreement – but for reasons that have nothing to do with one another. Sukuk practitioners have been able to exploit this coincidence without ever needing to reconcile the two systems conceptually, and nothing in the market practice or the case law discussed above suggests that any such reconciliation has, in fact, been attempted.

Divergence at the Margins: The Exercise Price

The exercise-price controversy discussed in Part II shows where the coincidence breaks down. Shariah doctrine, on AAOIFI's own post-2008 reasoning and more emphatically in the draft Shari'a Standard No. 62, requires – at least for equity-type *mudaraba* and *musharaka* sukuk – that the exercise price track a genuine value of the underlying assets or venture, so that the purchase undertaking does not operate as a disguised guarantee of the Rab al-Mal's capital, a guarantee the underlying partnership contract itself prohibits. English contract law imposes no equivalent constraint. A court asked to enforce a purchase undertaking that fixes the exercise price at the certificates' face value will enforce it exactly as drafted, without asking whether a face-value exercise price is, for Shariah purposes, analytically indistinguishable from a prohibited capital guarantee, because – as *Dana Gas* and *Beximco* both establish – Shariah compliance is simply not a condition of enforceability under the chosen governing law.

The consequence is that the market's continued, widespread retention of face-value exercise prices in *mudaraba* and *musharaka* sukuk, notwithstanding Sheikh Usmani's 2008 critique and AAOIFI's subsequent reform efforts, is legally insulated from that Shariah debate. Such a purchase undertaking would be equally enforceable in an English court whether or not the specific transaction's own Shariah Supervisory Board had, in fact, endorsed a face-value formula consistent with AAOIFI's evolving standards, unless the parties have made continuing Shariah compliance an express condition precedent to the payment obligation – a drafting choice that, as *Dana Gas* starkly illustrates, issuers now have every incentive to avoid, since it is precisely the kind of condition that hands a distressed obligor a colourable argument for resisting payment.

The Structural Fiction Critique

These observations support a critique that can be stated bluntly: once litigated, the “Shariah compliance” of a purchase undertaking may be revealed to be a religious label attached to an instrument whose actual legal force derives entirely, and independently, from English contract doctrine. On this view, the classification of the promise as a binding *wa'd* under AAOIFI's Shari'a Standards does no legal work whatsoever before an English court: the same document, in the same form, would be equally enforceable in that court whether AAOIFI classified the underlying promise as binding or non-binding as a matter of *fiqh*, because English law supplies its own, entirely self-sufficient, basis for enforcement in the deed or the exercised option.

This critique should not, however, be overstated into a claim that the Shariah characterisation is worthless or that the industry's reliance on it is a form of concealment. Two distinct legitimisation regimes are operating, addressed to two distinct audiences and two distinct purposes. AAOIFI approval, and the

²⁸See “English Case Law on Islamic Finance: Interpretation and Application of Shariah Principles” (ResearchGate, 2025), discussing Beximco's holding that the Sharia reference amounted to a non-binding statement of religious ethos rather than a substantive legal condition.

pronouncement of the transaction's own Shari'a Supervisory Board, matters at issuance: it is what allows Shariah-observant investors and Islamic financial institutions to participate in the instrument at all, and what gives the issuer's own board confidence that it has discharged its religious and regulatory function. The English governing-law clause and the deed structure matter for an entirely separate purpose: providing every investor, Shariah-observant or otherwise, with certainty as to how the instrument will be enforced if the obligor defaults. A dual-track legitimization of this kind is not incoherent so long as it is transparent – so long as offering documentation candidly discloses, as it generally now does in the wake of *Dana Gas*, that the enforceability of investors' principal claim rests on the chosen governing law of the purchase undertaking, and not on the continuing Shariah compliance of the wider structure it secures.

Drafting Implications

Three consequences for documentation practice follow from this analysis. First, purchase undertakings should continue to include, and increasingly do include following *Dana Gas*, express provisions identifying illegality, repudiation, and Shariah non-compliance of other transaction documents as dissolution events that themselves trigger, rather than excuse, the obligation to pay the exercise price, so that a distressed obligor cannot argue, as *Dana Gas* did, that a Shariah-compliance challenge to a different document in the structure creates a gap in the contractual scheme capable of being filled by a doctrine such as common mistake or frustration.

Second, issuers and their Shari'a advisers have good reason to move exercise-price formulae in equity-type sukuk closer to AAOIFI's post-2008 preference for a value linked to the underlying venture, and to monitor the finalisation of Shari'a Standard No. 62 closely, not because English law requires it – it plainly does not – but because the reputational and Shariah-compliance risk of a face-value structure survives even complete legal enforceability, as Sheikh Usmani's 2008 intervention itself demonstrated: a structure can be perfectly enforceable in London and still be publicly repudiated by leading Shariah scholars as non-compliant, with consequences for an issuer's standing in Islamic capital markets that no English judgment can repair.

Third, and following the pattern already visible in *Golden Belt*, transaction documents should keep any Shari'a pronouncement or fatwa entirely outside the operative payment mechanics of the purchase undertaking, so that a dispute about the accuracy or scope of a Shariah board's pronouncement cannot be litigated as a defence, or a source of misrepresentation liability, in a claim for payment under an instrument whose enforceability, as this Part has shown, does not depend on that pronouncement in the first place.

CONCLUSION

The purchase undertaking sits at the centre of nearly every sukuk issued in the international capital markets, and it does genuinely double duty. As a *wa'd*, it is the product of a centuries-old juristic debate over whether a bare promise can bind, resolved for contemporary purposes by the OIC International Islamic Fiqh Academy in 1988 and subsequently codified by AAOIFI on terms that require the promise to remain unilateral, specific, and documented separately from the contract it anticipates. As an English law instrument, it is a deed, or an option capable of exercise, whose validity depends entirely on ordinary rules of execution and contract formation that have no reference whatsoever to *fiqh*.

The case law confirms that, where the two systems might be thought to conflict, English law wins by default, not because it is intended to override Shariah doctrine, but because the parties themselves have chosen it as the governing law of the very document whose enforcement is in issue. *Beximco* establishes that a reference to Shariah principles cannot qualify a chosen national governing law; *Dana Gas* applies that principle directly to a purchase undertaking, holding it enforceable notwithstanding an assumed failure of Shariah compliance in the underlying structure it secured; and *Golden Belt* shows that, even where a claim is framed around Shariah legitimacy, litigants themselves may find that the more promising and more tractable route to recovery lies in the ordinary law of documentary execution.

The Broader Implication

This is not a reason to think the Shariah characterisation of the *wa'd* is unimportant. It is the reason the instrument exists at all, and it remains the basis on which Shariah-observant capital is willing to participate in the sukuk market in the first place. But it is a reason to be candid about what actually happens when a purchase undertaking is tested in litigation: an English court asks English-law questions, and the answers it gives are unaffected by whether AAOIFI, the Fiqh Academy, or a transaction's own Shari'a Supervisory Board would, on a purely religious analysis, characterise the underlying promise as binding, defective, or somewhere in between. The pending finalisation of AAOIFI's Shari'a Standard No. 62 may, in time, narrow the gap between what Shariah doctrine requires of the exercise price and what the market currently practises; it will not, on any plausible drafting, change the answer an English court gives to the separate question of whether the purchase undertaking, as executed, is a valid deed or a validly exercised option.

The Path Forward

The sukuk industry does not need to choose between Shariah legitimacy and English-law enforceability; the market has, in practice, already secured both, through the largely coincidental convergence of AAOIFI's documentation requirements and English law's doctrine of the deed. What the industry does need is more candour in its own documentation about which system is doing the enforcement work in any given clause, so that investors, issuers, and Shariah boards alike understand that the purchase undertaking's religious legitimacy and its legal enforceability, while they point in the same direction in the overwhelming majority of cases, are not the same thing, and rest on entirely independent foundations. *Dana Gas* made that gap visible to the market once. Careful drafting, rather than renewed litigation, should be how the industry keeps it closed.