This book provides an overview of the practice of Islamic finance and the historical roots that define its modes of operation. The focus of the book is analytical and forward-looking. It shows that Islamic finance exists primarily today as a form of rent-seeking legal arbitrage. An alternative that emphasizes substance rather than form would serve religious and moral objectives better, through mutual and similar financial practices.

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To Father & Mother, who taught me that religious forms should continually serve their central moral substance.
Contents

List of Illustrations x
Preface xi
Glossary and Transliteration xv

1 Introduction 1
Finance without Interest? 2
1.1 Distinguishing Features of Islamic Finance 7
Prohibition-Driven Finance 8
Jurists, Shari'a Boards, and Innovation 11
Lawyers and Regulatory Arbitrage 13
1.2 Islamic Transactions Law as Common Law 15
Precedents, Analogies, and Nominate Contracts 17
Trade-off between Efficiency and Legitimacy 20
1.3 Limits and Dangers of Shari'a Arbitrage 21
Risk of Mispricing 22
Legal and Regulatory Risks 23

2 Jurisprudence and Arbitrage 26
2.1 Islamic Law and Jurisprudence 27
The Canon: Qur'an, Tradition, and Consensus 27
Jurisprudential Inference (Ijtihad) and Benefit Analysis 28
2.2 From Classical to Contemporary Jurisprudence 30
Jurisprudence, Revival, and Codification 31
Institution of Fatwa and Islamic Finance 32
2.3 Arbitraging Classical Jurisprudence 35
Shari'a-Arbitraging Classical Property Law 36
Arbitraging Classical Contract Conditions 42
Arbitrage, Ruses, and Islamic Finance 44
| Contents |
|-----------------|------------|
| **3 Two Major Prohibitions: Riba and Gharar** | 46 |
| 3.1 The Prohibition of Riba | 49 |
| Canonical Texts on Riba | 49 |
| Economic Substance of the Prohibition of Riba | 52 |
| 3.2 The Prohibition of Gharar | 58 |
| Definition of Gharar | 59 |
| Economic Substance of Prohibition | 60 |
| Insurance and Derivatives | 61 |
| 3.3 Bundled vs. Unbundled Credit and Risk | 62 |
| **4 Sale-Based Islamic Finance** | 64 |
| 4.1 Basic Rules for Sales | 65 |
| Trust Sales: Murabaha, Tawliya, Waqfa | 67 |
| Currency Exchange (Sarf) | 68 |
| 4.2 Same-Item Sale-Repurchase (‘Ina) | 70 |
| Same-Item Trading in ‘Ina and Tawarrug | 70 |
| Custody Sale (Bay’Al-‘udha) and Sukuk Al-ijara | 73 |
| 4.3 Cost of Funds: Interest-Rate Benchmarks | 74 |
| Opportunity Cost for Conventional Fund Providers | 75 |
| Viability of Islamic Benchmark Alternatives | 77 |
| **5 Derivative-Like Sales: Salam, Istimna’, and ‘Urbun** | 81 |
| 5.1 Prepaid Forward Sale (Salam) | 81 |
| Parallel Salam | 83 |
| Conventional and Synthesized Forwards | 86 |
| 5.2 Commission to Manufacture (Istimna’) | 90 |
| 5.3 Down-Payment Sale (‘Urbun) | 91 |
| ‘Urbun as Call Option | 92 |
| **6 Leasing, Securitization, and Sukuk** | 97 |
| 6.1 General Lease Conditions | 97 |
| Flexible-Rate Financing | 100 |
| Subleasing, Repairs, and Insurance Costs | 100 |
| 6.2 Asset-Backed Securities | 102 |
| Leasing and Securitization | 102 |
| Receivable Securitization and Sale of Debt | 104 |
| Bundling Asset-Based and Debt-Based Securities: A Paradox | 106 |
| 6.3 Asset-Backed Leasing Bonds (Sukuk) | 107 |
| Credit-Rating Issues | 108 |
| Reward Pledges and Gifts Revisited | 110 |
| 6.4 Usulfruct Sukuk | 113 |
| 6.5 Sukuk Al-Salam | 114 |
Contents

7 Partnerships and Equity Investment 117
  7.1 Classical Types of Partnership 117
  Silent Partnership: Theoretical Workhorse of Islamic Finance 120
  Valid and Defective Silent Partnerships 122
  7.2 Common-Stock Ownership 123
  "Islamic Screens" and Their Shortcomings 125
  Cleansing Returns 133
  Positive Screens and the Islamic Brand Name 134

8 Islamic Financial Institutions 135
  8.1 Banking and Islamic Banking 137
  Theoretical Structure: Two-Tier Silent Partnership 138
  Deposits vs. Loans: Trust and Guaranty 144
  8.2 Insurance and Takaful 147
  8.3 Two Sides of the Two Debates 151
  Shari’a Arbitrage vs. Islamic Prudential Regulation 152
  8.4 Generic Agency Characterization of Financial Institutions 153

9 Governance and Regulatory Solutions in Mutuality 162
  9.1 Rent-Seeking Shari’a Arbitrage and Absence of Mutuality 163
  Potential for Mutuality in Islamic Banking 166
  Need for Mutuality in Takaful 170
  9.2 A Call for Mutuality in Banking and Insurance 171
  Mutuality in Banking 172
  Mutuality in Insurance 173

10 Beyond Shari’a Arbitrage 175
  10.1 Shari’a Arbitrage and Criminal Finance 176
  10.2 Shari’a Arbitrage at the Limit 177
  Benchmarking ad Absurdum 178
  Hedge-Fund Instruments – Shari’a-Arbitrage Style 180
  10.3 Self-Destructiveness of Shari’a Arbitrage 181
  Declining Shari’a-Arbitrage Profit Margins 182
  Dilution of the “Islamic” Brand Name 183
  10.4 Toward a New Islamic Finance Identity 184
  Macroeconomic Substance: Privatization Sukuk 185
  Mosque-Based Network of Financial Mutuals 186
  Positive Screens, Ethical Investment 188

Conclusion 190
Notes 193
Bibliography 213
Index 219
List of Illustrations

<table>
<thead>
<tr>
<th>Illustration</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1</td>
<td>Home Mortgage Transaction</td>
<td>3</td>
</tr>
<tr>
<td>1.2</td>
<td>Juristic Characterization of Mortgage Loan</td>
<td>4</td>
</tr>
<tr>
<td>1.3</td>
<td>Murabaha Alternative for Home Finance</td>
<td>5</td>
</tr>
<tr>
<td>1.4</td>
<td>Tabreed Sukuk Structure</td>
<td>7</td>
</tr>
<tr>
<td>1.5</td>
<td>Prisoners' Dilemma</td>
<td>10</td>
</tr>
<tr>
<td>5.1</td>
<td>Forward Synthesized from Salam and Credit Sales</td>
<td>87</td>
</tr>
<tr>
<td>5.2</td>
<td>Al-Ahli Secured Fund Returns</td>
<td>94</td>
</tr>
<tr>
<td>5.3</td>
<td>Al-Rajhi Aman 1 Fund Returns</td>
<td>95</td>
</tr>
<tr>
<td>6.1</td>
<td>Structure of Qatar Global Sukuk</td>
<td>108</td>
</tr>
<tr>
<td>6.2</td>
<td>Structure of BMA Sukuk Al-Salam</td>
<td>115</td>
</tr>
</tbody>
</table>
Preface

In recent years, financial activities conducted under the banner of “Islamic finance” have grown significantly in volume and scope, attracting significant attention worldwide. Numerous books and articles have been published on the topic over the past few decades. Their genres have ranged from highly religious treatises on Islamic law and worldview to highly practical surveys of the latest Islamic financial products to reach the market. Why, one must ask, should one read – let alone write – another book on the subject?

This book provides a qualitative overview of the practice of Islamic finance and the historical roots that have defined its modes of operation. The purpose of the book is not to survey the latest developments in this fast-growing industry. In the current information age, such information is best obtained on the Internet, since it requires updating at rates far exceeding the publication cycles of books and journal articles.

The focus of this book is analytical and forward-looking. I show that, despite the good intentions of its pioneers, Islamic finance has placed excessive emphasis on contract forms, thus becoming a primary target for rent-seeking legal arbitrageurs. In every aspect of finance – from personal loans to investment banking, and from market structure to corporate governance of financial institutions – Islamic finance aims to replicate in Islamic forms the substantive functions of contemporary financial instruments, markets, and institutions.

This supposed Islamization of contemporary financial practice is accomplished by means of modified premodern financial contracts (such as sales, leases, and simple partnerships). The contracts are designed by teams of (1) financial professionals who make and cater to the market for “Islamic” products, (2) lawyers who are skilled in the art of regulatory arbitrage, and (3) jurists or religious scholars who are familiar with medieval juristic texts (mostly in Arabic) and provide certification of the Islamicity of various financial products and services.
To make the classical juristic literature (on which the industry is built) accessible to English-reading audiences, I have provided a translation of one of the most comprehensive surveys of classical Islamic jurisprudence and its contemporary understanding; see Al-Zuhayli (2003). The book in your hands contains the argument that the classical jurisprudence in that survey aimed mainly to enhance fairness and economic efficiency, subject to the legal and regulatory constraints of premodern societies. In this regard, many of the intended economic and prudential regulatory functions of classical contract conditions are currently served by other means that were made possible through advances in communication, legal structures, and information technology.

By attempting to replicate the substance of contemporary financial practice using premodern contract forms, Islamic finance has arguably failed to serve the objectives of Islamic Law (maqasid al-Shari’a): Wherever the substance of contemporary financial practice is in accordance with Islamic Law, adherence to premodern contract forms (with or without modification) leads most often to avoidable efficiency losses, thus violating one of the main legal objectives that defined classical Islamic jurisprudence. Conversely, by focusing on Islamicity of contract forms rather than substance (in part to justify efficiency losses), Islamic finance has often failed to serve the economic purpose for which certain premodern contract structures were codified in classical jurisprudence. This book provides multiple examples of both types of departure from serving Islamic legal objectives. The case is also made that form-oriented Islamic finance is not sustainable in the long term, because of (1) inherent dangers of using sophisticated structured finance methods in Islamic countries with relatively unsophisticated regulators and (2) competitive pressures that dictate convergence to efficient conventional financial modes.

I propose refocusing Islamic finance on substance rather than form. This would entail abandoning the paradigm of “Islamization” of every financial practice. It would also entail reorienting the brand name of Islamic finance to emphasize issues of community banking, microfinance, socially responsible investment, and the like. In other words, I argue that the “Islamic” in “Islamic finance” should relate to the social and economic ends of financial transactions, rather than the contract mechanics through which financial ends are achieved. I provide specific examples of areas where such reorientation of the brand name may in fact provide value to individual customers of the industry, as well as society more generally.

A Note on Terms of Reverence

It is customary in Islamic writings to use terms of reverence when significant religious figures are mentioned. For instance, mention of the Prophet is traditionally
followed by the phrase "jalla Allahu 'alayhi wa sallam" (may God bless him and give him peace), and the mention of his companions is traditionally followed by the phrase "radiya Allahu 'anhu" (may God be pleased with him). However, Western academic writings conventionally eliminate the use of such terms of reverence. Following the latter convention, I shall not use terms of reverence in this book, as non-specialists and non-Muslims may find them distracting. In the meantime, I assure pious readers that I share their respect for all religious figures. I hope that they will not be offended by omission of printed terms of reverence, which readers may nonetheless vocalize at their discretion.

Mahmoud A. El-Gamal
Houston, December 2005
Glossary and Transliteration

Allah – God.
amâna – trust, possession of.
'āqīd – contract.
bâṣil – invalid (contract).
bay‘ – sale.
bay‘ al-amâna – variation on same-item sale-repurchase (‘ina).
bay‘ al-kâlî’ bi-l-kâli’ – trading one deferred obligation for another, forbidden based on a tradition with questionable authenticity.
bay‘ al-wafâ’ – variation on same-item sale-repurchase (‘ina).
bay‘ bi-thaman ajîl – credit sale.
companion – immediate follower of the Prophet.
đamân – guaranty, possession of.
darar – harm or injury.
dayn – debt or liability for fungible property.
dînâr – Roman gold coins, adopted as currency in early Islam.
dîrham – Persian silver coins, adopted as currency in early Islam.
fā‘ida – (literally: benefit) interest, plural fawâ‘id.
fâsid – defective (contract).
fatwâ – religious edict or opinion, plural fatâwâ, anglicized plural fatwas.
fiqh – juristic understanding or inference based on Shâri‘a.
fudâlî – uncommissioned agent.
gharar – risk or uncertainty, forbidden if excessive and avoidable.
ḥadîth – report of Prophetic or other early Islamic tradition.
Ḥanâfi – belonging to the juristic school of Abû Ḥanîfa, see note 24, Chapter 2.
Ḥanbalî – belonging to the juristic school of Aḥmad ibn Ḥanbal, see note 24, Chapter 2.
Glossary and Transliteration

hiba – gift.

hijra – the Prophet’s migration from Makka to Yathrib (later called Madina).

hila – ruse, legal stratagem to circumvent various prohibitions, plural hila.

ḥukm Shar’i – Islamic legal status ruling.

idā – fiduciary deposit contract.

ijāra – lease or hire contract.

ijmā – juristic consensus.

ijtihād – juristic inference.

illa – juristic reason or grounds for analogy.

iqāla – contract revocation.

istiḥbān – juristic approbation, to overrule juristic analogy.

istiṣlah – benefit analysis, to overrule juristic analogy.

istiṣnā – commission to manufacture.

Jamā at-i-Islāmi – Islamist party founded by Pakistani writer Abu Al-A’lā Al-Mawdūdī.

jiʿāla – pledge to make payment.

jurist – faqīh, a specialist in Islamic jurisprudence.

kafala – guaranty offered on behalf of some party.

Mālikī – belonging to the juristic school of Mālik ibn Anas, see note 24, Chapter 2.

manfa’a – usufruct of a property.

maqāssa – mutual debt clearance.

maslahā – public or private benefit, plural maṣālah.

mudāraba – silent partnership.

muftī – jurist who issues fatwā.

murābaha – cost-plus sale, often combined with bay’ bi-thaman ājil.

Al-Ikhwān Al-Muslimūn – Muslim Brotherhood, Islamist group founded by Egyptian teacher Hassan Al-Banna.

qard – loan of fungible property.

qirād – silent partnership.

qiyās – juristic inference by analogy.

Qur’ān – ultimate Islamic canon, believed to be the revealed word of God.

rāhan – collateral or pawned property in lieu of debt.

ribā – major prohibition of Islam, similar but not equivalent to either usury or interest, see Chapter 3.

ribāwi – property subject to the rules of ribā.

ṣākk – bond or certificate, plural ṣukāk.

salam – forward sale with prepaid price.

sanad – bond or certificate, plural sanadāt.

ṣarf – currency exchange contract.
Glossary and Transliteration

Shafi – belonging to the juristic school of Muhammad ibn Idris Al-Shafi, see note 24, Chapter 2.
Shar – revealed divine law in Qur’an and Sunna.
Sharika – partnership, see Chapter 7 for various types.
Sukuk – bonds or certificates, plural of sakik.
Sunna – Prophetic or other early Islamic tradition.
Tabarru – voluntary contribution.
Takful – mutual guaranty or insurance, used differently in Islamic finance, see Chapter 8.
Takhriji fiqhi – juristic recharacterization of a contract or transaction (usually forbidden) in terms of another (usually permissible).
Tawarruq – three-party variation on ba’il al-‘ina.
Tawiliya – sale at cost.
‘Urbun – down payment on purchase, from which call options are routinely synthesized.
‘Urf – customary practice, appeals to which may overrule juristic analogy.
Wad’a – fiduciary deposit.
Wad’a – sale below cost.
Wakala – agency.
Waqf – trust or mortmain, plural awqaf.
Zakah – obligatory Islamic wealth tax.