A COMPARATIVE ANALYSIS BETWEEN SHARIAH COMPLIANT AND CONVENTIONAL CONTRACT PROVISIONS FOR CONSTRUCTION WORKS

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Introduction

- The *Muamalat* emphasizes the need for business transactions to apply concept of justice, moral obligation, accountability and equality.
- In accordance to Islamic beliefs
- Subject matter, agreement, terms, conditions and the nature of the contract or covenant in business transaction should not be contrary to the shariah.
- Hence the term ‘Shariah Compliant’.
The Shariah in Contract

• Contract or covenant between people, it’s binding on the parties etc both in personal and in business transactions outlined by Quran and Sunnah

• Must acknowledge and incorporates these aspects into its subject matter, agreement, terms and conditions thereto

• Contract – al-aqad (to tie, to knot, to conjunct)

• Al-aqad – contract or a covenant between two or more parties on a subject matter
  – Based on ijab and qabul
  – Mutual consent
  – Subject matter not contrary to shariah
  – Persons of sound mind, reached puberty, free to enter into contract and not bankrupt.
The Shariah in Contract

**Istisna’ financing contract**

- **Client** (Mustasnia) purchases a building (Masnooa).
- **Contractor** (Sania) is called for the construction of the building.
- **Bank** is involved in manufacturing and detailed specifications.
- Specified price, period, and terms of payment are determined.
- Bank and Contractor enter into a parallel contract.
Current Conventional Contract Practice

Construction contracts - Traditional

Client's advisors
- Principal Advisor
- Architect
- Quantity Surveyor
- Engineer: C&S
- Engineer: M&E
- Others

Client

Std form of contract

The primary contract

Contractor

Main Contractor
- NSC
- DSC
- LSC

Direct Contractor

Supplier
Current Conventional Contract Practice

Construction contracts – Design and Build / Turnkey

- Advisor/s
- Client
- DB/T Contractor
- Quantity Surveyor
- Engineer: C&S
- Engineer: M&E
- Others

Standard form of contract
- DSC
- LSC
- Supplier

The primary contract
Comparison between conventional contract practice and Istisna’

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<tr>
<th>Description</th>
<th>Remarks</th>
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<tbody>
<tr>
<td>1. Formation of contract</td>
<td>Broadly appears consistent Data on the basis of an ijab and qabul and the procedures they entail are currently not available</td>
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<td>• Capacity to contract</td>
<td>Broadly appears consistent</td>
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<td>• Offer and acceptance</td>
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<td>• Consideration</td>
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<td>2. Contractor’s obligations</td>
<td>Broadly appears consistent</td>
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<td>3. Insurances</td>
<td>Should include provisions making Takaful mandatory</td>
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<td>4. Third parties</td>
<td></td>
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<td>5. The works</td>
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<td>6. Payments</td>
<td>Broadly appears consistent</td>
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Comparison between conventional contract practice and Istisna’

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<th>Description</th>
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<tr>
<td>7. Damages for non-completion and Liquidated damages (L&amp;D)</td>
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<td>8. Delay and extension of time</td>
<td>Broadly appears consistent</td>
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<td>9. Alternative method of dispute resolution through arbitration</td>
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<td>10. When is contractor discharged of his liabilities</td>
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Conclusion

• A shariah compliant construction contract should embrace in its subject matter, agreement, terms and the conditions the Islamic doctrines that reiterate all of the Islamic belief, practice and value system

• Absent features:
  – The validity of a shariah compliant contract is subjected to the divine sanctions
  – The subject matter, considerations etc must be in conformity with the divine lawas
  – Business transaction that complies with the shariah is considered part and parcel of the religious belief and practice of the Muslims
Conclusion

- Based on mutual agreement
- *Istisna’* is the most appropriate model
- Brief comparison between 10 key conventional contract practice and their relation to the shariah has been identified and provided
- Initial findings suggested that most of them broadly comply with the requirements of the shariah
- The demand will grow
- Desire of muslims to apply *al-muamalat* in procuring construction works
- Shariah, legal and construction experts should prepare themselves to embrace this new challenge.
THANK YOU
&
WASSALAM

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