

## Dana Gas: A load of hot air?



**LAW (EUROPE)**

*By Shakeel Adli*

The highly-charged Dana Gas case has set the scene for a free-flowing debate between the courts of London and Sharjah, bringing into question the legitimacy of Shariah compliant transactions.

Whether an investor deems a transaction to be Shariah compliant is ultimately a subjective judgment decision made by that investor, and their criteria can of course change over time. At the core of Dana's argument is that while at the time of issuance the disputed US\$700 million Sukuk were declared compliant by Dar Al Sharia Legal & Financial Consultancy (DASL), given the passage of time this is no longer the case, thereby dissolving its payment obligations under the underlying agreements.

A pronouncement such as that supplied by DASL for the Dana Sukuk is generally considered not to be open to retrospective nullification. In addition, the contractual agreements, particularly the English law purchase undertaking entered into by Dana, contain contractual remedies meaning that the Sukuk should remain an enforceable fixed income instrument, regardless of Shariah compliance. Indeed, in English law Sukuk transactions, it is market practice for all agreements to express payment obligations as an independent obligation.

While ultimately it is expected that the English courts will deem Shariah compliance and legal enforceability as two separate and distinct issues,

ultimately creditors will be required to seek redress in the courts of the UAE, where it is a very real possibility that enforcement of the High Court's judgment will be refused on the grounds of public policy.

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Proceedings were originally instigated in both London and Sharjah, with interim injunctions being put in place in both jurisdictions. Dana has, however, sought to lift the injunction in place and stay proceedings in Sharjah, protecting it against claims related to the Sukuk, in response to the upholding of the original interim injunction in the High Court in London, which will hear the full case in September.

It remains to be seen how the courts of the UAE will address the issue of enforcement. It would be inappropriate

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to comment based on speculation at this point; however, the question remains: why is Dana only now bringing these issues to light when the issues raised have been present throughout the term of the Sukuk?

The byproducts of this dispute are likely to be the following: a lasting belief among investors that there should be a premium built into the pricing of Sukuk to cover 'Shariah risk', investors will move away from using UAE law in any of the underlying Sukuk documents and issuers of existing Sukuk may look to challenge the enforceability of their own obligations. ☹️

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