

Doing Business in the Middle-East: Reflections on the issue of Islamic Law as a Choice of Law in a Commercial Contract

By:

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Issues

- Does Islamic law qualify as a choice of law for a commercial contract?
- In what fashions can Islamic law apply?
- What implications may it have on Australian courts?
- What implications may it have on Middle-Eastern Courts?
- Conclusion

Islamic law as a choice

- *Shari'ah* is one of the oldest and main legal systems, which is transnational by nature.
- It applies to Muslims by default across the borders and to non-Muslim parties by choice:

“ Islamic law will apply automatically to international trade contracts between Muslim parties, and can apply where one party is Muslim if the other party agrees.”

: MICHELLE SANSON, ESSENTIAL INTERNATIONAL TRADE LAW (2nd ed., NSW, Australia, Cavendish ,2005), p.

Fashions of application

- ✓ As a singular choice of law
- ✓ As a mixed choice of law
- ✓ By conflict of law principle

Islamic law as a single choice

National Group for Communications & Computers v. Lucent Technologies International, 331 F. Supp. 2d 290, 292 (D.N.J. 2004)

National Group, a Saudi Arabia-based company, contracted Lucent Technologies to assist in a multi-million dollar project to design, engineer, and install emergency and pay telephones throughout Saudi Arabia. Lucent Technologies terminated its subcontract, and National Group was forced to liquidate its Project Department, which it had created specifically to implement the telecommunications contract. National Group then brought suit against Lucent Technologies seeking actual and **expectation damages. Applicable law was Saudi Law.**

Held: Saudi law is Islamic law, which does not approve of uncertainty (*gharar*) in transactions. Expectation damages is a matter of *gharar*. So, the plaintiff (Saudi National Group) cannot claim it.

Islamic law as a Mixed Choice

Libyan American Oil Company (LIAMCO) vs Libya,
YCA 1981, at 89 et seq.

The concession contract was submitted to **international law friendly with Libyan law, which includes Islamic law.** LIAMCO property was nationalized. The Libyan Government refused to go to arbitration.

Held: Arbitration is approved by Islamic law. And payment of compensation is also required by Islamic law. So, Government cannot avoid the liability.

Implications of Islamic law on Australian courts or arbitral tribunals

- The forum may decline to apply because Islamic law is not a state law, which will breach the principle of party autonomy.

Shamil Bank of Bahrain vs Beximco Pharmaceuticals Ltd.
[2004] Part 12, Case 9 [CAEW].

- Islamic law may conflict with the law of the forum state in which case the latter may prevail under the mandatory rule principle or public policy/order ground.

Fern Computer Consultancy Ltd vs Intergraph Cadworx & Analysis Solutions Inc [2014] EWHC 2908 (Ch)

Implication on Middle-Eastern courts

- If the chosen law is the Islamic law, the difference of *Madhhabs* (schools of Islamic law) may be an issue the reconciliation of which is possible by agreement between the parties or by the closest connection test.
- If a non-Islamic law (domestic or international) is chosen singly or combined with Islamic law or it applies by conflict of law principle, Islamic law will restrict its application unless it is a secular state that does not recognize the primacy of Islamic law (Primacy of Islamic law implies that if any chosen law (national or international law) conflicts with Islamic law, the latter shall prevail).

Conclusion

- Islamic law qualifies as an express or implied choice or by conflict of law principle
- Its application in Australia is subject to the mandatory rule and public policy
- Its application in the Middle-Eastern states may give rise to a *madhhab* conflict, which may be reconciled by agreement or closest connect test.
- Where non-Islamic law applies by choice or conflict of law principle, its application in a Middle-Eastern country is subject to the primacy of Islamic law principle unless it is a secular state.