WHAT LAW WILL GOVERN MY CONTRACT?

ISLAMIC LAW AND THE PROBLEM OF CERTAINTY AND ENFORCEABILITY OF CONTRACT

GERMAN RODRIGUEZ MORENO

INTRODUCTION

- “Choice of law is the element most commonly added to a contract” (Alan Scott Rau - leading arbitration expert(

- Choice of law “is a **procedural** stage in the litigation of a case involving the conflict of laws when it is necessary to reconcile the differences between the laws of different legal jurisdictions”…

- There is substantial case law on this issue built over a long period of time .

INTRODUCTION

- The issue in discussion here is the choice of law for contracts namely, international commercial contracts.

- More precisely, the focus is on cases where the contract is governed by the law of a European country or where the object of the contract is located in a European country but the contract is said to be governed by Sharia law

- It is not about the choice of law in Tort, Family law, Property or Trusts and Succession .

Terms and conditions may be valid and enforceable depending on the choice of law

- Beximco Pharma v Shamil Bank of Bahrain
- Musavi v R.E. International (UK) Ltd

ISSUES

1. In the event of conflict of laws, what law do we choose?

2. If Islamic law is the governing law, is there an issue of certainty/uncertainty?

3. Conflict resolution: Court or Arbitration?

4. Is there an issue of enforceability?

5. Discrimination?

6. Options

7. Final Considerations

BEXIMCO PHARMACEUTICALS LTD v SHAMIL BANK OF BAHRAIN EC

- Shamil as the claimant; Beximco as the defendant
- Before the Court of Appeal ((2004
- The case related to a single issue relating to the construction and effect of the governing law
- The clause read as follows: *“Subject to the principles of the Glorious Sharia’a, this Agreement shall be governed by and construed in accordance with the laws of England.”* *ALARM BELL!*

LEGAL ISSUES

- The principal **defence** [Beximco] advanced that: (a) *on a true construction of the governing law clause, the…Agreements…were **only** enforceable insofar as they were valid and enforceable **both** (i) in accordance with the principles of the Sharia…and (ii) in accordance with English law; (b) in fact, the agreements were unlawful, invalid and unenforceable under the principles of the Sharia in that….the transactions were in truth disguised loans at interest ”.*

LEGAL ISSUES ((2
)The claimant's position(

- Shamil's expert evidence as to the validity of the agreements under Islamic law was articulated by Dr. Lau, described as a former director of the Centre of Islamic and Middle Eastern Law, stated as follows:

A. .....“*the precise scope and content of Islamic law in general, and Islamic banking in particular, are marked by a degree of* ***controversy*** *within the Islamic world, best exemplified by the actual* ***practice*** *of Islamic banking [which]* ***differs widely*** *within the Islamic world.....*

B. .....*In the absence of any agreement on the boundaries of 'Islamic banking' or, indeed, on what ought to be the precise ingredients of a Murabaha agreement, it is <u>in practice up to individual banks to determine</u> the issue ”.*

LEGAL ISSUES ((3
)The defiance's position(

- The position of the defendants' expert, Mr Justice Khan, former chairman of the Sharia Appellate Bench of the Supreme Court of Pakistan, was as follows:

1. He acknowledged that *"…whenever a question of interpretation of the principles contained in the Qur'an and Sunnah is involved, the application of the role of Sharia'a has and will continue to give rise to disputes between different jurists".*

2. He did not contradict the assertion of Dr. Lau that most of the classical Islamic law on financial transactions was **not** to be found in the Qur'an and Sunnah.

LEGAL ISSUES ((4
)The defence's position(

.3He made clear (as Dr. Lau did not dispute) that the injunction against the payment of Riba is contained in the Qur'an and the Sunnah and that it is uncontroversial that under Islamic law interest charged on loans by banks is Riba and prohibited; making any contract unlawful, void and unenforceable .

.4He stated that certification by the Religious Supervisory Board that the operations of the Bank were according to the Sharia would **not** be a decision binding on any court dealing with the dispute under the law of Sharia.

COURT'S DISCUSSION)THE GOVERNING LAW CLAUSE(

- The central question in this appeal is one of construction in respect of the relevant 'Governing Law' clause.

- The task of construction in a commercial agreement is to ascertain the presumed **intention of the parties**.

- When the parties entered into the Murabaha Agreements, they were content "*to dress the loan transactions up as Murabaha sales (or Ijarah leases), whilst* ***taking no interest*** *in whether the proper formalities of such a sale or lease were actually complied with".*

COURT'S DISCUSSION

- The court should lean against a construction which would or might defeat the commercial purpose of the agreements

- Insofar as each of the clauses provides in clear terms that "*this agreement shall be governed by and construed in accordance with the laws of England*", the proviso that such provision shall be "*subject to the principles of the Glorious Sharia'a*" should be approached on a basis which is **reconcilable with the purpose evident**…rather than operating to defeat such purpose .

COURT'S DISCUSSION)The Rome Convention(

- The defence [Beximco] conceded that there could **not** be two governing laws in respect of the agreements.

- The governing law in this case was that of England.

- This concession was based on Article 1.1 of the Rome Convention: *"the rules of the Convention shall apply to contractual obligations in any situation involving a choice between the laws of different* ***countries****".*

- Article 3.1 (*"a contract shall be governed by the law chosen by the parties"*) and reference to *"foreign law"* in Article 3.3 make it clear that the Convention refers **only** to the choice of the law of a **country .**

COURT'S DISCUSSION)THE DOCTRINE OF INCORPORATION(

- The doctrine of incorporation (of Terms and Conditions) can only sensibly operate where the parties have by the terms of their contract sufficiently identified specific ***'black letter'*** provisions of a foreign law or an international code or set of rules apt to be incorporated *as terms of the relevant contract* such as a particular article or articles of the French Civil Code or the Hague Rules [or the IFSB and/or AAOFI Standards & Guidelines or a given fatwa[

COURT'S DISCUSSION)THE DOCTRINE OF INCORPORATION(

- The general reference to principles of Sharia in this case afford no reference to, or identification of, those aspects of Sharia law which are intended to be incorporated into the contract, let alone the terms in which they are framed.

- The door was left open to use this doctrine in future as a way of incorporating terms and conditions of Sharia law provided (i) they were sufficiently identified; and (ii) specifying that, in the event of conflict, they should prevail over any other term of the contract .

COURT'S CONCLUSION

- Both parties presented evidence regarding the *"principles of….Sharia"* that there were: (i) areas of considerable controversy and difficulty arising from the need to translate them into propositions of modern law texts, and (ii) different schools of thought [within Islamic Jurisprudence] with which the court may have to concern itself in any given case. UNCERTAINTY

- The fact that there may be general consensus upon the proscription of *Riba* and the essentials of a valid Murabaha agreement does no more than indicate that, if the Sharia law proviso ***were*** sufficient to incorporate the principles of Sharia law into the parties' agreements, the defendants would have been likely to succeed. CERTAINTY

MUSAVI v R.E.INTERNATIONAL (UK) LTD

- Before the High Court in 2007 (post Shamil(
- High Court is a lower court than Appeal Court
- Re: a number of agreements, the first of which dated from 1987, i.e. prior to the enactment of the Contracts (Applicable Law) Act 1990 which incorporates the Rome Convention into English law .
- All relevant **agreements** were **governed** in accordance with **Sharia law**.

ARBITRATION

- Dispute regarding the parties' respective interest in a Mudaraba agreement

- Any dispute to be resolved by arbitration

"*The parties to the dispute….have agreed to accept whatever judgement is issued by Sheikh Mohsen Araki as arbitrator and Islamic legal judge in settlement of the dispute according to Islamic legal standards and to accept it as a* ***final judgement*** *and* ***submit to its findings****".*

- *Section 46(1)(b) of the Arbitration Act 1996 provides: "1) The arbitral tribunal shall decide the dispute… (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal." DOOR OPEN*

ARBITRATION ((2

- The High Court made the following considerations:

1. *"It is common ground that an arbitration agreement,* ***effective in English law****, was made…ENFORCEABLE*

2. *"the applicable law for the arbitration agreement,* ***as opposed to the law or principles to be applied by the arbitrator****, was English law…*

3. *"The Rome Convention does not apply to arbitration agreements…* (Art. 2(d((

4. *"the arbitrator was required by agreement to apply to the subject matter of the dispute and its resolution to principles of Sharia law.*

5. *"This was an agreement which the parties were entitled to make under section 46(1)(b) of the Arbitration Act ".1996*

CONCLUSION

- …“the entire dispute relating to [the subject matter of the agreement] was the subject of the arbitration agreement”.
-]…“the parties are] bound by the award ”.
- Uncertainty was **not** an issue; **neither** was enforceability

DISCRIMINATION(?)

- In the case of *Petroleum Development (Trucial Coasts) Ltd v Sheikh of Abu Dhabi (1950),* Lord Asquith refused to apply the law of Abu Dhabi because according to him, "*it would be fanciful to suggest that in this very primitive region there is* ***any settled body of legal principles*** *applicable to the construction of modern commercial instruments".*

- In *The Ruler of Qatar v International Marine Oil Co. Ltd. (1953), after acknowledging that Islamic law was the proper law to apply, the court stated that "…[Islamic law] did not contain any principles which would be sufficient to interpret this particular contract".*

DISCRIMINATION(?)

- Mohamed Raffa, arbitrator and lecturer of Arbitration Law, commenting on *Shamil* said :

"*Synthetic Sharia'a contracts are known within the multifaceted so called Financial Islamic Institutions. Those contracts are neither Islamic nor truly reflecting Murabaha transactions. Maybe it is time to stop the charade and either start to operate a* (sic) *truly Islamic Financial Institutions or revert back to the normal banking methods. Hypocrisy does not win any points with God, nor does it save you from Legal Hell on Earth".*

- Rima Hadid - Al Masri, Board Secretary & General Counsel at Bahrain Mumtalakat Holding Company commented on the above:

"My thoughts have been accurately articulated by Dr. Raffa".

OPTIONS ((1

1. Contract subject to Islamic law; or

2. Contract subject to the law of a country, regardless of whether Islamic tradition prevails or not; or

3. Contract subject to the law of a jurisdiction, incorporating Islamic principles.

OPTIONS ((2

- If 1 then Arbitration;
- If 2 either Court or Arbitration ;
- If 3 then Arbitration
- Arbitration panel and expert witnesses
- Enforceability: how easy is it to enforce ?
- Importance of international instruments: (i) New York Convention membership; (ii) Local Arbitration Law based on recognised model law (UNCITRAL Model Law, etc); and specialised Enforcement Courts (Example: KSA(

FINAL CONSIDERATIONS

- Settled body of legal principles necessary - without certainty there is no valid contract

- ……but not sufficient

- England (S. Hawking(

- China (50% unenforceable(

- India (to pay counsel not to represent other - personal ties(

- Spain (political influence(