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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

## The Path of Eastern Arbitration to Take Islamic Finance Disputes from the Hands of English Litigation

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### Abstract

Over the last decades the exponential growth in Islamic finance and the globalization of the industry has resulted in the disputes amongst international entities arising out of Sharia-compliant agreements to be more commonplace. It has been a common practice amongst the parties of Islamic finance transactions to choose English law as the governing law. This paper, after examining the limitations in the applicability of Islamic law in English courts, focuses on the critics that the current practice of choosing English law as the governing law faces and discusses the potential of arbitration to provide a more advantageous dispute resolution method for the parties that agree on resolving their issues compliant with Islamic law. Finally, this paper explains the adventure of Eastern arbitration to take Islamic Finance disputes from the hands of English courts by examining the initiatives taken by the arbitral institutions so far, as well as the ideas that came from scholars to create better solutions for the parties of Islamic finance transactions in their disputes.

### Keywords

Arbitration • English courts • Islamic finance • Islamic law • Sharia

### Doğu Tahkiminin İslami Finans Uyuşmazlıklarını İngiliz Mahkemelerinin Elinden Alma Yolundaki Süreci

### Öz

İslami finansa son yıllarda gözlenen büyüme, endüstrideki küreselleşme ile birlikte, şeriat uyumlu anlaşmalardan kaynaklanan uyuşmazlıkların uluslararası boyutta yaygınlaşması ile sonuçlanmıştır. İslami finans işlemlerinin tarafları arasında uygulanacak hukuk olarak İngiliz hukukunun seçilmesi yaygın bir uygulama olmuştur. Bu makalede, İslam hukukunun İngiliz mahkemelerinde uygulanabilirliği konusundaki sınırlamalar incelendikten sonra İslami finans uyuşmazlıklarında uygulanacak hukuk olarak İngiliz hukukunun seçilmesi pratiğine yönelen eleştiriler üzerinde yoğunlaşmış ve sorunlarını İslam hukukuna uygun olarak çözme konusunda uzlaşan taraflar için tahkim yolunun daha avantajlı bir uyuşmazlık çözüm yöntemi sağlama konusundaki potansiyeli tartışılmıştır. Son olarak, tahkim kurumları tarafından başlatılan girişimler incelenerek, Doğu tahkiminin İslami Finans uyuşmazlıklarını İngiliz mahkemelerinin elinden alma yolundaki sürecinden ve İslami finans uyuşmazlıklarında taraflara daha iyi çözümler üretebilmek için yazarlarca ileri sürülmüş fikirlerden bahsedilmiştir.

### Anahtar Kelimeler

Tahkim • İngiliz mahkemeleri • İslami finans • İslam hukuku • Şeriat

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“when you judge between men, you  
judge with justice”.<sup>1</sup>

## The Path of Eastern Arbitration to Take Islamic Finance Disputes from the Hands of English Litigation

### Introduction

Since the peaceful nature of human beings intervened in finding pacific solutions for conflicts rather than using force for settling disputes through the passage of time, people started to refer their disputes to the third parties that had been chosen by them.<sup>2</sup> Though it would be nothing but exaggeration to claim that it has been identical to the contemporary practice since the very beginning, as a deeply-rooted historical means used to settle different disputes, arbitration predates the state judiciary or even the state itself.<sup>3</sup> In addition to several other ancient communities, the Arabs knew and used arbitration as a method for settling their disputes in the Pre-Islamic period.<sup>4</sup> Arbitration was the only publicly-sanctioned system of disputes-resolution in the Pre-Islamic Arab community, and was the alternative to self-help remedies.<sup>5</sup> If the parties failed to resolve their conflicts over matters such as rights of property, succession, or torts through negotiations, these disputes were often referred to a trustworthy individual, an arbitrator (Hakam), rather than an organized judicial justice for decision.<sup>6</sup> The Hakam was a special personality chosen for his personal qualities, his reputation -because he belonged to a family famous for its competence in deciding disputes- and most importantly because of the community’s belief about his supernatural powers which were often tested by the parties beforehand. Since these supernatural powers were frequently believed to belong to soothsayers (Kahins), these last were most commonly chosen to decide on the disputes.<sup>7</sup> Although the decision of the Hakam was final, it was not an enforceable judgement but rather a

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1 Qur’an, 4:58.

2 Abdulrahman Yahya Baamir, ‘Saudi Law and Judicial Practice in Commercial and Banking Arbitration’ (Dphil thesis, Brunel University 2008) 24.

3 Zeyad Alqurashi, ‘Arbitration under the Islamic Sharia’ (2003) 1(2) Oil, Gas and Energy Law Intelligence <<https://www.ogel.org/article.asp?key=149>> accessed 4 October 2018; It is worth mentioning that the ancient dispute resolution method which will be explained in the introduction, differed in many aspects such as its subject matter and procedure from today’s modern arbitration. For instance, the enforcement process which nevertheless leaves place for court intervention and constitutes a crucial part of today’s arbitration did not exist in ancient dispute resolution. Also, subjects such as certain criminal matters which are considered to be beyond the power of modern arbitrators were able to be decided in ancient dispute resolution methods. However, notwithstanding the differences, the word “arbitration” will be used to describe the -in the author’s opinion- “arbitration-like” ancient dispute settlement method which will be further explained in the introduction.

4 *ibid*; Abdelsattar Khouildi, ‘L’Arbitrage en Droit Financier Musulman Moderne’ (2016) 8(1) *Etudes en Economie Islamique* 37, 37.

5 Sayed Hassan Amin, *Remedies for Breach of Contract in Islamic and Iranian Law*, (Royston 1984), 24-27.

6 Vincent Powell-Smith, ‘Settlement Of Disputes By Arbitration Under Shari’ah And At Common Law’ (1995) 34(1) *Islamic Studies* 5, 6; Arthur J Gemmell, ‘Commercial Arbitration in the Islamic Middle East’ (2006) 5(1) *Santa Clara Journal of International Law* 169, 173.

7 Joseph Schacht, *An Introduction to Islamic Law*, (rev edn Clarendon Press 1964), 7.

statement of right on a disputed point, a statement as to what the customary law was or should be.<sup>8</sup> The arbitrator's respectability and stature within society were the sole determinants as to the enforcement of an arbitral award.<sup>9</sup> Although these proceedings were simple and rudimentary, the Hakam during the hearings had to abide by certain principles such as the obligation to hear the parties on equal bases and the respect of the customary rules when examining the proofs presented by the parties.<sup>10</sup>

In addition to the famous dispute related to the Hacer-ül Esved stone<sup>11</sup> where arbitration was used for dispute settlement in the pre-Islamic era, there are also a number of cases for which it is mentioned that the Prophet (pbuh) supported the use of arbitration after the revelation came to him.<sup>12</sup>

Arbitration continued as a dispute resolution practice in the post-Muhammad era, as well.<sup>13</sup> Under Islamic law, arbitration is known as *al-Tahkīm*, a verbal noun of the Arabic word *hakkama* which primarily means the turning of someone back from wrongdoing.<sup>14</sup> The primary sources of Sharia law which are the Qur'an and the Hadith, as well as the custom and the practices of the transactions of the earlier Muslims establish the platform for the institution of *al-Tahkīm* as a means of dispute

8 Gemmell (n 7) 173.

9 Aseel Al-Ramahi, 'Sulh: A Crucial Part of Islamic Arbitration' (2008) LSE Law, Society and Economy Working Paper 12/2008, 5 <[www.lse.ac.uk/collections/law/wps/wps.htm](http://www.lse.ac.uk/collections/law/wps/wps.htm)> accessed 4 October 2018.

10 Alqurashi (n 4).

11 A dispute arised between various tribes of Quraysh during reinsertion of the Black Stone in the Kaaba following its renovation since no clan chief wanted to relinquish this great honour to any other clan. This almost led to war between the leaders of Quraysh in the area of the Kaaba. However, a couple of days later, intervention came at the right moment by Abu Umayyah bin Al-Mughirah bin 'Abdullah bin 'Amr bin Makhzum, the oldest man from Quraysh. He suggested that the first man to enter the Sacred House from its entrance should be appointed to settle the dispute between the leaders. That first man entered through the gate was Muhammad (pbuh), the future Prophet of Islam. Since the people of Quraysh used to call the Messenger of Allah (cc) as "Al-Amin" (the honest one) even before the revelation came to him, seeing him as their arbitrator they spontaneously gave their consent with his verdict. Informed about their dispute, the future Prophet (pbuh) asked the leaders to bring a garment and place it on the ground. He placed the Black Stone on it and asked each leader to hold the garment from one side; thus, participate in bringing the Black Stone to its designated area. Then after, the Prophet (pbuh) by himself placed the Black Stone in its position. Thus, a potential war amongst the Quraysh tribes was prevented through the successful arbitration of the dispute by the Prophet Muhammad (pbuh) Saud Al-Ammari and Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30 Arbitration International, 387, 388; Sadık Kirazlı, 'Conflict and Conflict Resolution in the pre-Islamic Arab Society' (2011) 50(1) Islamic Studies 25, 49-52; Mustafa Monjur, 'An Analysis on the Practices of Prophet Muhammad (Pbuh) in Resolving Conflicts', (2011) 1(1) Journal of the Bangladesh Association of Young Researchers 109, 115.

12 Gemmell (n 7) 173-174; Abu-Nimer mentions such a case when the Prophet (pbuh), in a dispute between himself and the Banu Qurayza (a Jewish tribe) agreed to submit their dispute to a third party chosen by them notwithstanding his prominence. He also points out to another conflict between Arab and Jewish tribes where the Prophet (pbuh) was selected by the disputants as arbitrator. Mohammed Abu-Nimer, 'A Framework for Nonviolence and Peacebuilding in Islam' (2001) 15 Journal of Law & Religion 217, 247; See also, Majid Khadduri, *War and Peace in the Law of Islam* (Oxford University Press 1955) 231ff; The commitment and participation of the Prophet (pbuh) in the arbitral proceedings caused scholars to refer to Muhammad (pbuh) as an exemplary standard for the independence of arbitrators. Nudrat Majeed, 'Investor-State Disputes And International Law: From The Far Side' (2004) 98 Proceedings of the ASIL Annual Meeting 30, 32.

13 Mehmet Nar, 'Tahkimin Kamu Hizmetlerine Uygulama Sorunsalı ve Olası Sonuçları' (2012) 103, Türkiye Barolar Birliği Dergisi 112, 114; Yusuf Şen, 'İslam Hukuku'nda Arabuluculuk', (2012) 11(22), Hitit Üniversitesi İlahiyat Fakültesi Dergisi 105, 108.

14 Mahdi Zahraa and Nora A Hak, 'Tahkīm (Arbitration) in Islamic Law within the Context of Family Disputes' (2006) 20(1) Arab Law Quarterly 2, 3; Edward William Lane, *Arabic-English Lexicon*, vol 1 (The Islamic Texts Society) 616; See, Ensari Yücel, 'İslam Hukukunda Tahkim ve Katılım Bankalarında Uyuşmazlıkların Tahkim Yoluyla Çözümü' (2017) 3(2) Journal of Islamic Economics and Finance 137, 140.

resolution under Islamic law.<sup>15</sup> For matrimonial disputes the holy Qur'an provides as follows

If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from her's; if they both wish for peace, Allah will cause their reconciliation. Indeed, Allah is Ever All-Knower, Well-Acquainted with all things<sup>16</sup>

The Qur'an further states in another verse

...nay, by your Lord, they can never be believers, until they appoint you the arbitrator in all the disputes between them, and find in themselves no resistance against your decisions, and accept (them) with full submission.<sup>17</sup>

It further provides

Verily! Allah commands that you should render back the trusts to those, to whom they are due; and that when you judge between men, you judge with justice. Verily, how excellent is the teaching which He (Allah) gives you! Truly, Allah is Ever All-Hearer, All-Seer.<sup>18</sup>

The above verses of Qur'an show that the availability of arbitration, under Islamic law, is not limited to family disputes, instead, it includes commercial and other civil and financial matters.<sup>19</sup> Treaty of Medina in AD 622 was the first treaty signed by the Muslim community, provided for arbitration to resolve disputes. Since then, with its permissibility unquestioned by the Islamic jurisprudence, the major schools of Islamic thought have supported and used arbitration for centuries.<sup>20</sup>

## I. Islamic Finance Disputes

Today it is undoubted that the subject of arbitration in Islamic disputes is both materially and morally of great importance. Over the past 25 years, the considerable contribution of economic, social and political changes to the wealth held by Muslims, leveraged their need to make the most of this wealth in compliance with the Islamic principles.<sup>21</sup> The exponential growth in Islamic finance has resulted in an increase

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15 Abdul Azeez Maruf Olayemi and Bandar Khalid Al-Zabyani, 'Arbitration Clause in Islamic Banking Contracts: A Contractual Necessity' (2014) 1(7) *International Journal of Interdisciplinary and Multidisciplinary Studies* 1, 1; Arif A Jamal, 'ADR and Islamic law: the cases of the UK and Singapore' (2015) National University of Singapore Faculty of Law Working Paper 2015/004, 4ff <<http://law.nus.edu.sg/wps/>> accessed 4 October 2018; See, Muharrem Balci, *İhtilâfların Çözüm Yolları ve Tahkim* (Seçkin Press 1999) 72ff; Yücel (n 15) 142ff.

16 Qur'an, 4:35.

17 Qur'an, 4:65.

18 Qur'an, 4:58.

19 Farouq Saber Al-Shibli, 'The Role of Arbitration in Settling the Disputes of Islamic Banking' (2017) 1(2) *Journal of Humanities, Language, Culture and Business* 221, 226; Olayemi and Al-Zabyani (n 16) 2; For the perspectives of different Islamic doctrines on the availability of arbitration for different types of disputes see, Yücel (n 15) 145ff.

20 Al-Ammari and Martin (n 12) 388; Alqurashi (n 4).

21 Ștefana Maria Dima and others, 'A discussion over IFRS' adoption in Islamic countries' (2014) 13(1) *Accounting and Management Information Systems* 35, 36.

in the breadth and sophistication of product offerings in international finance.<sup>22</sup> However, although arbitration is a concept that is favoured to adjudication in Islamic jurisprudence, international arbitration is still far-away from fulfilling its potential in the area of Islamic finance transactions and dealings.<sup>23</sup>

With its origin dating back to the dawn of Islam 1,400 years ago, Islamic finance can be described as financial intermediation accomplished in a way that is rooted in fundamental principles of Islam.<sup>24</sup> The compliance with these principles that are articulated in the Sharia must be maintained throughout the lifecycle of the transaction.<sup>25</sup>

In addition to the Sharia-compliance, Islamic finance must offer financial products that are compliant with the requirements of operations in global financial markets.<sup>26</sup> The best description of this task was perhaps given by ElWaleed M. Ahmed, a legal consultant in Kuwait, when he compared Islamic finance to conventional finance: ‘Conventional finance bows to one master, “profit”. Islamic finance however, has two masters, “profit” as well as “Sharia’s principles”. In parallel with the ancient Latin saying “*Nemo potest duobus dominis servire*”<sup>27</sup>, obedience to two masters is no easy task.<sup>28</sup>

Result of attempting to please two masters simultaneously can result in unique challenges not only for capital adequacy, corporate governance, risk management, transparency and disclosure, but also for dispute resolution.<sup>29</sup> Notwithstanding the fact that compliance to Islamic principles is verified upfront by Sharia boards, problems may still occur, as in any dispute resolution process.<sup>30</sup>

In order to preserve Sharia-compliance and the Islamic component of the financial transaction Islamic finance dispute resolution must resort to Sharia.<sup>31</sup> Though secular

22 ICC Commission on Arbitration and ADR Task Force, *Report of the ICC Commission on Arbitration and ADR Task Force on Financial Institutions and International Arbitration* (International Chamber of Commerce March 2018) para 108 <<https://cdn.iccwbo.org/content/uploads/sites/3/2016/11/icc-financial-institutions-and-international-arbitration-icc-arbitration-adr-commission-report.pdf>> accessed 4 October 2018.

23 *ibid*; Al-Ramahi (n 10) 1.

24 Abdelkader Chachi, ‘Origin and development of commercial and Islamic banking operations’ (2005) 18(2) *Journal of King Abdulaziz University* 3, 4; Ahmad Alhabri, ‘Development of Islamic Finance in Europe and North America: Opportunities and Challenges’ (2016) 2(3) *International Journal of Islamic Economics and Finance Studies* 109, 110; Mabid Ali Al-Jarhi, ‘An economic theory of Islamic finance’ (2017) 9(2) *ISRA International Journal of Islamic Finance* 117, 117.

25 ICC Commission on Arbitration and ADR Task Force (n 23) para 109.

26 *ibid* para 110.

27 Book of Matthew 6:24.

28 ElWaleed M. Ahmed, ‘Challenges facing sector’s growth; Global Islamic finance’ *Arab Times* (Kuwait, 17 April 2007) <<https://sudaneseonline.com/cgi-bin/sdb/2bb.cgi?seq=msg&board=100&msg=1176828078&rm=1>> accessed 4 October 2018; Aida Maita, ‘Arbitration of Islamic Financial Disputes’ (2014) 20(1) *Annual Survey of International and Comparative Law* 35, 63-64.

29 ICC Commission on Arbitration and ADR Task Force (n 23) para 110.

30 *ibid*.

31 Camille Paldi, ‘The Dubai World Islamic Finance Arbitration Center and the Dubai World Islamic Finance Arbitration Center Jurisprudence Office as the Dispute Resolution Center and Mechanism for the Islamic Finance Industry: Issues and a Proposed Framework’ (Submitted as partial fulfillment of the requirements of the degree of MA in Islamic Finance, Durham University 2013) 7.

dispute resolution is also a choice for Islamic finance transactions,<sup>32</sup> this paper focuses on the disputes where the parties agree on resolving their issues in compliance with the Islamic principles.

### A. The Common Practice: English Litigation

With the globalization of the industry, disputes amongst international entities arising out of Sharia-compliant agreements have become more commonplace.<sup>33</sup> This has brought one unwanted side effect: The emergence of Islamic finance litigation. As Bälz states “Once Islamic finance was no longer confined to a small like-minded community, borrowers defaulted and banks sued and enforced”.<sup>34</sup>

English law is the preferred legal jurisdiction in most Islamic finance agreements, especially those involving cross-border transactions.<sup>35</sup> Moreover, the transaction documents including the declaration of trust are also subject to the decision of the English judges indicating that the courts of England have exclusive jurisdiction to settle any Islamic finance disputes under such arrangements.<sup>36</sup>

Since *Investment Company of The Gulf v Symphony Gems*<sup>37</sup> the first case pertaining to this field in the UK courts was decided on 13 February 2002, the English judges ruled on landmark Islamic finance cases.

### 1. The Issues Arising in UK Courts

Perhaps the most ground-breaking decision of the English courts related to Islamic finance was the case *Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd. and the Others*.<sup>38</sup>

32 In this case, the parties to an Islamic finance transaction provide in their agreement that any dispute will be referred to arbitration, however they require the arbitrators to apply only the selected law to the exclusion of sharia. Such a dispute resolution clause may even contain a “waiver of Shariah defense” which means that the parties are agree to waive any claim that the agreement is invalid under Islamic law in case of a dispute. In 2010, ISDA and the International Islamic Financial Market (IIFM) endorsed the secular arbitration option following the launch of ISDA/IIFM Tahawwut (Hedging) Master Agreement. Section 13(c) of the agreement offers the parties the option of choosing ICC arbitration with London or New York as the seat, and English or New York law as the governing law. Also, in order not to cause any doubts section 1(d) particularly notes that the governing law does not include Sharia; ICC Commission on Arbitration and ADR Task Force (n 23) paras 121-122.

33 Maita (n 29) 40.

34 Kilian Bälz, *How Islamic Finance Has Transformed Islamic Contract Law* (Islamic Legal Studies Program Harvard Law School 2009), 21.

35 Michael Ainley and others, ‘Islamic Finance in the UK: Regulation and Challenges, Financial Services Authority’ (2007), 17 <[https://www.isfin.net/sites/isfin.com/files/islamic\\_finance\\_in\\_the\\_uk.pdf](https://www.isfin.net/sites/isfin.com/files/islamic_finance_in_the_uk.pdf)> accessed 4 October 2018; Kilian Bälz, *How Islamic Finance Has Transformed Islamic Contract Law* (n 35) 13; ‘Special report on Islamic finance’ *Financial Times*, (London 1 July 2010); Paldi (n 32) 7.

36 Zulkifli Hasan and Mehmet Asutay, ‘An Analysis of the Courts’ Decisions on Islamic Finance Disputes’, (2011) 3(2) ISRA International Journal of Islamic Finance 41, 54.

37 *Investment Company Of The Gulf (Bahamas) Limited v Symphony Gems N.V. and Ors* [2002] West Law 346969, QBD (Comm. Ct.).

38 *Beximco Pharmaceuticals Ltd. v. Shamil Bank of Bahrain*, [2004] EWCA Civ.

In the case, Beximco and the other borrowers entered into a *murabaha*<sup>39</sup> agreement in 1995 resulting in the acquisition of nearly forty-seven million US dollars in assets with the plaintiff, Shamil Bank of Bahrain.<sup>40</sup> The agreement included a choice of law clause stating that “Subject to the principles of the Glorious Sharia’a, this agreement shall be governed by and construed in accordance with the laws of England”.<sup>41</sup> The plaintiff brought the case to the English court and made an application for summary judgment claiming the amount outstanding under the agreement, following the default of Beximco and after numerous termination events under the agreements. On the other hand, Beximco objected and claimed that the agreement was unenforceable due to Sharia non-compliance as it contained a hidden form of *riba*.<sup>42</sup>

Interpreting the governing law clause, the English court found the provision “Subject to the principles of the Glorious Sharia’a” to be inadequate for the purpose of incorporating the Islamic law principles into the agreement, and thus, the English law, rather than Sharia, governed the transaction.<sup>43</sup> The judge, Morison J, declined to apply Sharia law to the substance of the dispute for the following reasons.

First, since the Article 3(1) of the Rome Convention on the Law Applicable to Contractual Obligations (Rome Convention) 1980<sup>44</sup>, which had the force of law in the United Kingdom, states that “a contract shall be governed by the law chosen by the parties” the judge held that it would be non-justiciable, and therefore impossible for contracts, to be subject to two separate systems of law.<sup>45</sup> Moreover, the wording of the Article 1(1) of the Convention which contemplates that “the rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries” and the reference to choice of a “foreign law” in Article 3(3) make it clear that the Convention as a whole only contemplates and sanctions the choice

39 Murabaha is a type of contract frequently used in Islamic transactions. Instead of lending money at interest to a client wishing to purchase goods in return for the grant of a security interest on those goods, the bank first buys the goods itself and subsequently sells them to the client with the addition of a pre-agreed profit. That is why it is also known as the “cost-plus-profit” contract. From the Sharia-compliance point of view, the bank must acquire ownership of the asset together with the temporary risks of ownership Jason CT Chuah, ‘Islamic Principles Governing International Trade Financing Instruments: A Study of the Morabaha in English Law’, (2006), 27(1) Northwestern Journal of International Law & Business 137, 140; For the concepts *riba* and *murabaha* see, Kilian Bälz, ‘Islamic Law as Governing Law under the Rome Convention Universalist Lex Mercatoria v. Regional Unification of Law’ (2001) 6(1) Uniform Law Review 37, 38ff.

40 Beximco Pharmaceuticals Ltd. v. Shamil Bank of Bahrain, [2004] EWCA Civ [55ff].

41 Beximco Pharmaceuticals Ltd. v. Shamil Bank of Bahrain, [2004] EWCA Civ [54].

42 *Riba* roughly corresponds to unlawful gain which Islamic finance transactions are designed to avoid. Although there is no universally agreed definition for the term, the nature of *riba* is clearly prohibited by the Qur’an. There is a general agreement among jurists that interest constitutes *riba*, however interest and *riba* are not the same since the ambit of *riba* is considerably wider than that of interest. Sale is permitted, though. In this context, a well-known verse (2:275) of the Qur’an is frequently quoted: ‘They said that sale is like *riba* whereas Allah has allowed sale and has banned *riba*’. Nicholas HD Foster, ‘Encounters between legal systems: recent cases concerning Islamic commercial law in secular courts’ (2006) (68) *Amicus Curiae* 2, 3; Fazlur Rahman, ‘Riba and Interest’ (1964) 3(1) *Islamic Studies* 1, 2ff; Hasan and Asutay (n 37) 56.

43 Chuah (n 40) 141; ICC Commission on Arbitration and ADR Task Force (n 23) para 111.

44 80/934/EEC: Convention on the law applicable to contractual obligations [1980] OJ L 266/1.

45 Beximco Pharmaceuticals Ltd. v. Shamil Bank of Bahrain, [2004] EWCA Civ [48].

of the law of a country. Morison J, concluded that there was no provision allowing the choice or application of a non-national system of rules such as Sharia.<sup>46</sup> Furthermore, in any event, the principles of the Sharia were not simply principles of law but principles which applied to other aspects of life and behaviour.<sup>47</sup> In the Judge's opinion, even treating the principles of Sharia as principles of law, the application of such principles in matters of commerce and banking were plainly matters of controversy. In particular, there was controversy as to the strictness with which principles of Islamic law will be interpreted or applied.<sup>48</sup> Consequently, the Judge found it highly improbable that the intention of the parties to the agreement was the determination of an English court for any dispute concerning the nature or application of such controversial religious principles which would involve it in the task of choosing between contrasting views which themselves might be based on geopolitical and particular religious beliefs.<sup>49</sup> Dismissing the arguments put forward by the defendants, the High Court dismissed granted summary judgment in favour of the plaintiff.

The ruling was upheld by the Court of Appeal, which confirmed Morison J in his conclusion, broadly for the reasons which he gave.<sup>50</sup> Although Lord Justice Potter recognized the definition of Sharia law made by the defendants' expert,<sup>51</sup> he noted that in his point of view Sharia law was more of a religion than law, and could not be valid for the banking and finance transactions in the UK.<sup>52</sup> For the Court, the reference to the Glorious Sharia in the choice of law clause was merely a result of the intention to reflect the plaintiff's nature of business rather than replacing the English law as the governing law.<sup>53</sup>

"[...] the words [of the provision] are intended simply to reflect the Islamic religious principles according to which the Bank holds itself out as doing business rather than a system of law intended to "trump" the application of English law as the law to be applied in ascertaining the liability of the parties under the terms of the agreement".<sup>54</sup>

There are a couple of points that are worth highlighting in the judgment of the English courts. First, despite the appellant's argument that the reference to Shariah should be treated as an inclusion of the *lex mercatoria* of Islamic finance and that the

46 *Beximco Pharmaceuticals Ltd. v. Shamil Bank of Bahrain*, [2004] EWCA Civ [39] [48] [51].

47 *Beximco Pharmaceuticals Ltd. v. Shamil Bank of Bahrain*, [2004] EWCA Civ [53].

48 *Beximco Pharmaceuticals Ltd. v. Shamil Bank of Bahrain*, [2004] EWCA Civ [49]-[53].

49 *Beximco Pharmaceuticals Ltd. v. Shamil Bank of Bahrain*, [2004] EWCA Civ [49]-[54].

50 *Beximco Pharmaceuticals Ltd. v. Shamil Bank of Bahrain* EC [2004] APPL.R. 01/28 [61]-[63].

51 "...the law laid down by the Qu'ran, which is the Holy Book of Islam and the Sunnah (the sayings, teachings and actions of Prophet Mohammad (pbuh). These are the principal sources of the Shari'ah. The Sunnah is the most important source of the Islamic faith after the Qu'ran and refers essentially to the Prophet's example as indicated by the practice of the faith. The only way to know the Sunnah is through the collection of hadith, which consist of reports about the sayings, deeds, and reactions of the Prophet." *Beximco Pharmaceuticals Ltd. v. Shamil Bank of Bahrain* EC [2004] APPL.R. 01/28, [2].

52 *Beximco Pharmaceuticals Ltd. v. Shamil Bank of Bahrain* EC [2004] APPL.R. 01/28, [40].

53 *Beximco Pharmaceuticals Ltd. v. Shamil Bank of Bahrain* EC [2004] APPL.R. 01/28, [41].

54 *Beximco Pharmaceuticals Ltd. v. Shamil Bank of Bahrain* EC [2004] APPL.R. 01/28, [54].



appellate court should apply those principles which relate to murabaha contracts, the use of a combined-law clause was rejected by the court taking into account the principle that a contract cannot be governed by two systems of law and the wording in the Rome Convention stating that a “contract shall be governed by the law chosen by the parties”. Second, for the court, the reference to Sharia in the governing law clause of the contract was nothing more than a statement of intent reflecting the nature of the business, and thus, non-binding. Third, under the Rome Convention 1980 only the choice of state laws is contemplated, not of a non-state legal system such as Sharia. Fourth, the reference was ambiguous since the parties did not clearly state which specific principles were to be applied; and finally, even though Muslim scholars have diversifying views as to the application of Sharia, it was quite improbable that the parties desire was to confer the decision on the principles of Islamic law to a secular UK court.

Although, since then the Rome Convention has been replaced by Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)<sup>55</sup> and the correlating articles in Rome I have been revised, the doubts still remain as to the future of governing law clauses in Islamic financial contracts involving Islamic principles in English litigation.<sup>56</sup>

The following wording of an early draft resolution contemplates the application of a non-state law, so long as it is precise enough

“To further boost the impact of the parties’ will, a key principle of the Convention, [draft Article 3] paragraph 2 authorizes the parties to choose as the applicable law a non-State body of law. The form of words used would authorize the choice of the UNIDROIT principles, the Principles of European Contract Law or a possible future optional Community instrument, while excluding the *lex mercatoria*, which is not precise enough, or private codifications not adequately recognized by the international community. Like Article 7(2) of the Vienna Convention on the international sale of goods, the text shows what action should be taken when certain aspects of the law of contract are not expressly settled by the relevant body of non-State law”.<sup>57</sup>

Furthermore, draft Article 3, paragraph 2 reads as follows

“The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognized internationally or in the Community. However, questions relating to matters governed by such principles or rules which are not expressly settled by them

55 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

56 On the contrary, see Abdullah Abdul Rahman, ‘Shariah as the governing law of Islamic finance contracts in the UK: The impact of Rome I Regulation and the position in arbitration’ (*Young ICCA Blog*, 24 November 2014) <<http://www.youngicca-blog.com/shariah-as-the-governing-law-of-islamic-finance-contracts-in-the-uk-the-impact-of-rome-i-regulation-and-the-position-in-arbitration/>> accessed 4 October 2018.

57 Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I) Brussels, 15.12.2005 COM(2005) 650 final 2005/0261 (COD), 5.

shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation”.<sup>58</sup>

Similar to the wording of the draft resolution, the final session of regulation explicitly offers parties the means to incorporate non-state law or international standards by reference into their contract. Recital 13 of the preamble to Roma I provides that the regulation does not preclude parties from incorporating by reference into their contract a non-state body of law or an international convention.<sup>59</sup>

However, even if the same issue had to be decided in accordance with the new wording, commentators mention that the problems of certainty and the impossibility of such a combined-law clause would persist.<sup>60</sup> Despite the fact that the reference to the “laws of different countries” does no longer exist in Article 1(1), the wording of Article 3(3) of Rome I is still open for the same reasoning in *Shamil Bank*, as it currently provides as follows<sup>61</sup>

Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

Furthermore, Article 3(1) remains the same and still provides that “a contract shall be governed by the law chosen by the parties”. Should the reasoning of the court in *Shamil Bank* be followed, in accordance with the rule stipulating that only one system of law may govern a contract, combined clauses that refer to a national law subject to the principles of Islamic finance will not be available for the parties since they will be seen as in tension with the continued use of the singular form of “law”.<sup>62</sup> In conclusion, the revision of Rome Convention did not solve the problems convincing an English court that the Sharia is a body that can be incorporated into the agreements as applicable law.<sup>63</sup>

The Court’s approach in *Shamil Bank v. Beximco* established the English courts’ precedent on governing law in Islamic finance cases, and was followed by subsequent cases such as *Dar v. Blom*<sup>64</sup> which was rendered in 2009 concerning a different type of Islamic finance contract.<sup>65</sup>

58 Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I) Brussels, 15.12.2005 COM(2005) 650 final 2005/0261 (COD), 15.

59 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, Recital 13; Jonathan Ercanbrack, *The Transformation of Islamic Law in Global Financial Markets*, (Cambridge University Press 2015), 230.

60 Foster (n 43) 3.

61 Julio C. Colón, ‘Choice of Law and Islamic Finance’ (2011) 46 *Texas International Law Journal* 411, 425.

62 *ibid* 425ff.

63 Ercanbrack (n 60) 230-231.

64 *The Investment Dar Co KSSC v Bloom Developments Bank Sal* [2009] All ER (D) 145.

65 Maita (n 29) 40; Hasan and Asutay (n 37) 58.

The current practice of choosing English law as the governing law is criticized by scholars. It is proposed that the choice of parties to be adjudicated in a non-Islamic jurisdiction by a non-Islamic court is a sign that due recognition is not given to the validity and the principles of Islamic law.<sup>66</sup> Since it is up to the common law judges to make the final interpretation and determine the governing law and how it is applied, regardless of the way in which the contract is drafted, there is no guarantee for the preservation of the Islamicity of the agreement.<sup>67</sup> Also, the possibility that the refusal of the application of Sharia by English courts may turn an Islamic finance transaction into a conventional dispute based on English law and make it possible to enforce it even if the contract is deemed as being non-compliant with the Sharia, is seen as “detrimental to the survival of the Islamic finance industry” since this will have a negative impact on the industry’s growth by putting to inconvenience its customers who become increasingly sceptical about the compliance of their contracts with Sharia.<sup>68</sup>

Furthermore, the civil court judges have been facing slings and arrows because of their alleged lack of knowledge regarding Islamic law.<sup>69</sup> For instance, Al-Shibli noted that since the experience of civil court judges is very limited in field of Islamic banking as they rarely study Sharia law or Islamic finance at university or even at judicial institutions, they generally need to rely on other experts who have knowledge of the transactions of Islamic banks.<sup>70</sup> This was underlined by Justice Suriyadi in the case of *Arab Malaysian Merchant Bank v Silver Concept*<sup>71</sup> where he observed that

“in the event any litigation is commenced, it must be appreciated that not every presiding judge is a Muslim, and even if so, may not be sufficiently equipped to deal with the matters, which ulamaks [Islamic scholars] take years to comprehend”.

## B. The Wise Choice of Arbitration

While the industry historically has preferred litigation over alternative dispute resolution mechanisms, and non-Islamic jurisdictions to decide on disputes, there have been calls by legal and financial experts for those who want to settle their disputes in accordance with Sharia to refer their disputes to ADR methods, especially arbitration, and provide custom arbitration clauses, procedures and practices more in

<sup>66</sup> *ibid* 63.

<sup>67</sup> Paldi (n 32) 8.

<sup>68</sup> Hasan and Asutay (n 37) 63; Paldi (n 32) 6; ICC Commission on Arbitration and ADR Task Force (n 23) para 118.

<sup>69</sup> See Kamilah Wati binti Mohd and others, ‘Sustainability of Islamic Finance Industry: Arbitration as Forum for Dispute Resolution’, 2014 (5) *Shariah and Law Discourse* 58; Umar A Oseni, ‘Dispute Resolution in Islamic Banking and Finance: Current Trends and Future Perspectives’ (International Conference on Islamic Financial Services: Emerging Opportunities for Law/Economic Reforms of the Developing Nations, Saudi Arabia 6-8 October 2009); Olayemi and Al-Zabyani (n 16) 1; Maita (n 29); Hasan and Asutay, (n 37); Paldi (n 32).

<sup>70</sup> Al-Shibli (n 20) 223.

<sup>71</sup> *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210.

line with Sharia Law.<sup>72</sup> With regard to the criticism mentioned above, arbitration may provide a more beneficial way of dispute settlement in various aspects for Islamic finance disputes.

First of all, compared to other areas, one big particularity of Islamic financial dispute resolution is the uniqueness of choice of law clauses. In theory, the parties willing to resolve such disputes by means of Shariah-compliant ways have three options as to the governing law:

The contract may be:

- (1) subject exclusively to Islamic law by means of a complete denationalization;
- (2) subject exclusively to a national Islamic legal system, whether or not said system be based on Sharia law; or
- 3) subject to a combined system which uses Islamic principles to limit the application of a national law.<sup>73</sup>

Although the applicable law in classical Islamic law can only be the Sharia without any exception, with Khouildi's definition, "un assouplissement considérable (a considerable relaxation)" has occurred in the concept of Islamic finance.<sup>74</sup> Most arbitration in Islamic finance is governed by combined-law clauses that subject national laws to the principles of Islamic law. In other words, rather than denationalizing their contract in a very straightforward way by asking to abandon the law of a particular country and submitting the contract directly to Islamic law, parties in Islamic financial transactions predominantly put their confidence in national laws -such as those of the United Kingdom- to the extent that they do not contradict the rules of Sharia.<sup>75</sup> As the Standart 32 Article 9/4 of the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) mentions "if the arbitrator is obliged to apply a certain law, he should still not violate the rulings of Shari'ah". This results in governing law clauses such as the following: "This dispute shall be governed by the Laws of (state name) except to the extent it may conflict with Islamic Sharia, which shall prevail."<sup>76</sup>

At this point the very important question arises: is it possible for the parties of an arbitration to select non-national rules, namely Sharia as the governing law alongside the national law that they choose?

Regarding the applicability of Sharia as the governing law, some cases from mid-1900's demonstrate that arbitrators refused the idea that Islamic law was sophisticated

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72 "This is similar to what has been established for arbitration of other industries such as Intellectual Property, Construction and Sports, and many others." Maita (n 29) 36.

73 Colón (n 62) 431.

74 Khouildi (n 5) 55.

75 Colón (n 62) 431.

76 Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) Sharia Standarts, <<http://aaofii.com/shariaa-standards/?lang=en>> accessed 4 October 2018.

enough to be applied in complex commercial disputes. In year 1952, for instance, Lord Asquith acted as the arbitrator in the case *Petroleum Development Ltd. v. Sheikh of Abu Dhabi*<sup>77</sup> which related to a dispute arising out of a contract executed in Abu Dhabi. Notwithstanding the fact that he acknowledged that the applicable law was that of Abu Dhabi's, which was based on Islamic law, Lord Asquith subsequently went to undermine the validity of the latter on the grounds that, 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."<sup>78</sup> After describing the Sheikh of Abu Dhabi as an absolute monarch who controls a "purely discretionary form of justice with some assistance from the Koran"<sup>79</sup> the arbitrator relied on principles of English law instead of applying Abu Dhabi law to the dispute.

Four years later, the arbitrator in the case *Ruler of Qatar v. International Marine Oil Co. Ltd.*<sup>80</sup> arrived at a very similar conclusion with a parallel reasoning. After acknowledging that Islamic law was the proper law, the arbitrator made a clear statement as to his belief concerning the inadequacy of Islamic law.<sup>81</sup> For him Islamic Law did not "contain any principles which would be sufficient to interpret this particular contract."<sup>82</sup> Colón mentions that the arbitrators' opinions in both cases confined to very general statements that disdain the ability of Islamic law, rather than putting forward a particular principle due to which they came to the decision not to apply it.<sup>83</sup>

In another case named *State of Saudi Arabia v. Arabian American Oil Co.*<sup>84</sup>, Aristotle Socrates Onassis, a leading shipping tycoon of the era, concluded a contract with the Saudi Arabian Government and given a quasi-monopoly to transport oil from out of the country. This was protested by *Arabian American Oil Company* (ARAMCO) claiming that in light of its concession agreement made on May 29, 1933 it had the right to choose its own method of transporting oil. Despite acknowledging the applicability of Saudi Arabian law due to existence of the clear mandate, during the arbitration proceedings in Geneva, the arbitrator decided that the rights of ARAMCO could not be "secured in an unquestionable manner by the law in force in Saudi Arabia ... [and that Saudi laws] must be interpreted or supplemented by the general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence."<sup>85</sup>

77 *Sheikh Abu Dhabi v Petroleum Development Ltd.* [1952] ICLQ 247.

78 *Sheikh Abu Dhabi v Petroleum Development Ltd.* [1952] ICLQ 247.

79 *Sheikh Abu Dhabi v Petroleum Development Ltd.* [1952] ICLQ 251.

80 *Ruler of Qatar v. International Marine Oil Co. Ltd.* (1956) 20 Int L Rep 534.

81 Colón (n 62) 414.

82 *Ruler of Qatar v. International Marine Oil Co. Ltd.* (1953) 20 ILR 534.

83 Colón (n 62) 414.

84 *State of Saudi Arabia v. Arabian American Oil Co.* (1963) 27 Int L Rep 117.

85 *Saudi Arabia v. Arabian American Oil Co. (ARAMCO)* (1963) 27 ILR 117,169.

Despite the fact that “the landscape was clouded”<sup>86</sup> by these three mid-1900s awards questioning the ability of Islamic law, it is worth mentioning that today, it is not that easy to prove that the cloud-break has not even begun. Although there might be variations amongst different schools of Sharia and differences from jurisdiction to jurisdiction due to the fact that some states are relatively more open to Western influences, Islamic law, traditions, and language give these states a common heritage.<sup>87</sup> Similar to international commerce, Islamic banking has also established certain unified standards. For instance, a Model Islamic Banking Act with the goal of setting forth unified rules for Islamic finance was established by the International Association of Islamic Banks.<sup>88</sup> As Bälz states, “notwithstanding manifold divergences on individual points, there exists a set of general rules and principles which may serve as a basis for an arbitral decision”.<sup>89</sup>

Contrary to the above mentioned cases, Islamic Law, especially with a combined system that pairs a national legal system with Islamic principles, may work like a charm in arbitration to resolve financial disputes in accordance with the parties’ wish to comply with Sharia. Juxtaposing the outcome of the case Sanghi Polyester Ltd. V International Investor KCSC<sup>90</sup> serves to highlight the ability of such a clause in resolving finance disputes in accordance with Sharia, contrary to the limitations in the applicability of Islamic law in English courts.<sup>91</sup>

The case pertained to an *istisna’a* financing arrangement<sup>92</sup>, arbitration was the dispute resolution mechanism of choice, the place of arbitration was London, and applicable substantive law was provided as follows in the contract “This dispute shall be governed by the Laws of England except to the extent it may conflict with Islamic Shari’ah, which shall prevail”.<sup>93</sup>

Gave effect to the parties’ will, the arbitrator, who was an expert in Islamic law

86 Ibrahim Fadlallah, ‘Arbitration Facing Conflicts of Culture - The 2008 Annual School of International Arbitration Lecture sponsored by Freshfields Bruckhaus Deringer LLP’ (2009) 25(3) *Arbitration International* 303, 305; Nigel Blackaby and others, *Redfern & Hunter on International Commercial Arbitration* (6th edn Oxford University Press 2015) 215.

87 *Ibid.*, 215.

88 Bälz, ‘Islamic Law as Governing Law under the Rome Convention Universalist Lex Mercatoria v. Regional Unification of Law’ (n 40) 44.

89 *ibid.* 44. Bälz also notes that, in contrast to the ambiguous and disputed character of the *lex mercatoria*, it is hard to deny that the provisions of the Islamic Sharia constitute law.

90 *Sanghi Polyesters Ltd. (India) v The International Investor KCSC (Kuwait)* [2001] C.L.C.

91 Aisha Nadar, ‘Islamic Finance and Dispute Resolution: Part 1’ (2009) (23) *Arab Law Quarterly* 1, 4.

92 *Istisna’a* is a contract whereby a party agrees to produce specific goods and services, made in accordance with certain agreed-upon specifications at a determined price and for a fixed delivery date. This undertaking of production includes any process of manufacturing, construction, assembling or packaging. Since the work in *Istisna’a* is not conditioned to be accomplished by the undertaking party alone, the work or part of it can be done by others under his control and responsibility. Contrary to *murabaha* which is an order to buy goods or commodities which are in existence in hand or possible to be found in the market, *Istisna’a* is a contract where the deal can be referred to something not in existence at the time of concluding the contract; Abdul Rashid Khairuddin, ‘Shari’ah Compliant Contract: A New Paradigm in Multi-National Joint Venture for Construction Works’ in Kiyoshi Kobayashi (ed), *Joint Ventures in Construction*, (ICE Publishing, 2009) 103, 112.

93 *Sanghi Polyesters Ltd. (India) v The International Investor KCSC (Kuwait)* [2001] C.L.C., p. 750.

issued a monetary award of both principal and profit, however did not allow claims for additional damages since although such claims were in compliance with English law, they would have been in conflict with Sharia principles.<sup>94</sup>

Furthermore, in the realm of arbitration, the scope of party autonomy is often broader when it comes to the parties' ability to choose non-state law to govern their contract.<sup>95</sup> In other words the choice of non-state law is widely accepted. This possibility is expressly recognized in numerous state arbitration laws and most arbitration rules adopted by international bodies such as the United Nations Commission on International Trade Law (UNCITRAL) or outstanding arbitral institutions such as the International Chamber of Commerce (ICC) or the American Arbitration Association (AAA).<sup>96</sup>

Providing that "the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute", the article 28(1) of the UNCITRAL Model Law, for instance, speaks of the choice of "rules of law" rather than using the single word "law".<sup>97</sup> From this it may be concluded that the parties' autonomy as to the choice of law is not restricted to a certain national legal order. Instead, a body of non-national rules or principles such as provisions of an international convention or even the provisions of an old version of an international document may also be determined as the proper law of the contract.<sup>98</sup>

However, one should keep in mind that even though the scope of party autonomy is often broader in arbitration, the validity of the choice of non-state law depends on the law to which the arbitration is subject. This means that if the relevant provision refers to the parties' ability to designate "law" to govern their contract rather than using the expression "rules of law" the parties will not be able to benefit from the choice of non-national set of rules.<sup>99</sup>

A brief look at different state laws may be useful to understand the varying positions of different jurisdictions towards the choice of non-national rules.

For instance, Article 46 of the Arbitration Act 1996 which regulates arbitration proceedings within the jurisdiction of England and Wales and Northern Ireland states that

94 Sanghi Polyesters Ltd. (India) v The International Investor KCSC (Kuwait) [2001] C.L.C., p. 749; ICC Commission on Arbitration and ADR Task Force (n 23) para 114.

95 Nuray Ekşi, *Roma Konvansiyonu* (Legal Yayıncılık 2004) 97.

96 Doug Jones, 'Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties' (2014) 26 Singapore Academy of Law Journal 911, 916-917.

97 UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. Available at: <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2010Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html)>

98 Sibel Özel, *Milletlerarası Ticari Tahkimde Kanunlar İhtilafı Meseleleri*, (Legal Yayıncılık 2008) 124; İrfan Sönmez and Gencyay Karakaya, 'Milletlerarası Tahkimde Esasa Uygulanacak Hukuk' (2015) 23 Selçuk Üniversitesi Hukuk Fakültesi Dergisi 203, 216.

99 Özel (n 99) 125.

“the arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute, or if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.” As mentioned above, by using of the word “law”, Arbitration Act 1996 empowers the parties to choose non-national rules as applicable to the substance of dispute.<sup>100</sup>

In this regard, the applicability of Sharia in the field of arbitration as a non-national set of rules in the UK was confirmed by the High Court of Justice in the case of *Musawi v R E International Ltd. and others*<sup>101</sup> where an Iraqi citizen and an Iranian family concluded a series of agreements to jointly acquire, develop and own a land adjoining the Wembley Stadium in London. Due to disagreements as to their respective rights, case became subject to arbitration and all relevant agreements were governed by Shia Sharia law. An Ayatollah (a religious leader among Shiite Muslims) was hired as arbitrator and “Islamic legal judge”.<sup>102</sup> At the enforcement process of the award issued in favour of the Iraqi party, High Court made it clear that the Article 46 of the UK 1996 Arbitration Act “allows parties the freedom to apply a set of rules or principles which do not in themselves constitute a legal system”<sup>103</sup> and that “such a choice may include a non-national set of legal principles (such as the 1994 UNIDROIT Principles of International Commercial Contracts) or, more broadly, general principles of commercial law or the *lex mercatoria*.”<sup>104</sup> Consequently, the Court affirmed that the arbitration agreement validly chose Shia Sharia law as the proper law and ruled in favour of the enforcement of the award.

In parallel with the Arbitration Act 1996, the Turkish International Arbitration Law (*Milletlerarası Tahkim Kanunu*) also allows the use of non-national set of rules by stating that “the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.”<sup>105</sup> To cite another example, the Decree No. 2011-48 of France reforming the law governing arbitration mentions in its Article 1511 that the arbitral tribunal shall decide the dispute in accordance with the “rules of law” chosen by the parties. The parties are able to choose non-national rules as well as general principles of law or *lex mercatoria*.<sup>106</sup>

On the other hand, in addition to the existence of jurisdictions that only grant the parties the opportunity to choose national laws by solely using the word “law”

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<sup>100</sup> *ibid.*

<sup>101</sup> *Musawi v RE International (UK) Ltd.* [2007] APP.L.R. 12/14

<sup>102</sup> *Musawi v RE International (UK) Ltd.* [2007] APP.L.R. 12/14 [74].

<sup>103</sup> *Musawi v RE International (UK) Ltd.* [2007] APP.L.R. 12/14 [22].

<sup>104</sup> *Musawi v RE International (UK) Ltd.* [2007] APP.L.R. 12/14 [22].

<sup>105</sup> See also, Ziya Akıncı, *Milletlerarası Tahkim* (4th edn Vedat Yayıncılık 2016) 229ff; Armağan Ebru Bozkurt Yüksel, ‘UNCITRAL ve UNCITRAL Model Kanunu’na Genel Bir Bakış’ (2011) 2(4) Türkiye Adalet Akademisi Dergisi, 135, 160.

<sup>106</sup> For a detailed catalogue of arbitration laws of different jurisdictions see, Jones (n 97) 932ff; See also, Koray Güven, ‘Lex Mercatoria ve Milletlerarası Tahkim’ 34(2) Public and Private International Law Bulletin, 1, 1ff.



instead of “rules of law” in their pertinent laws (such as Sweden)<sup>107</sup>, it is also possible that the adoption of Rome Convention may result in discussions related to the proper law at a certain jurisdiction, notwithstanding the existence of a provision providing that the tribunal shall decide the dispute in accordance with the rules of law chosen by the parties.

For instance, the choice of non-national rules is permitted under the Article 1051(1) of the German *Zivilprozessordnung* (ZPO) which uses the expression “rules of law”. The parties may designate the Convention on International Sales of Goods (GISG) or UNIDROIT principles as the applicable law. However, since the Rome Convention is based on national law while the UNCITRAL Model Law allows the choice of non-state law, Özel notes that different opinions are put forward in the German doctrine related to the scope of party autonomy in the context of the governing law.<sup>108</sup>

Moreover, where an arbitral tribunal may be entitled to rule *ex aequo et bono* as opposed to rules of law, *a maiore ad minus*, an arbitral tribunal may also base its decision on a set of general principles such as the *lex mercatoria*.<sup>109</sup> Bälz claims that this argument likewise applies to the case in which the parties have chosen the principles of the Islamic Sharia rather than some set of predominantly Europe-based legal principles such as the *lex mercatoria*.<sup>110</sup> Similarly, according to Yücel<sup>111</sup>, there is nothing preventing an arbitral tribunal from applying Sharia as the proper law of the dispute in a situation where the parties have expressly authorized the tribunal to rule *ex aequo et bono*.

Therefore, notwithstanding the existence of some jurisdictions that evidently confine the choice of applicable law to state laws, preferring arbitration to English litigation and choosing the right seat may serve to the parties of Islamic finance disputes as a better method in the concept of applicability of the principles of Sharia by means of a combined clause.<sup>112</sup>

107 See, Özel (n 99) 125ff.

108 Özel (n 99) 126; See also, Hatice Özdemir Kocasakal, ‘Sözleşmelerde Uygulanacak Hukukun MÖHUK m. 24 Çerçevesinde Tespiti ve Üçüncü Devletin Doğrudan Uygulanan Kuralları’ 33(1) Public and Private International Law Bulletin 27, 38ff; See İnci Ataman Fıganmeşe, ‘Milletlerarası Ticari Tahkim ile Yatırım Tahkimi Arasındaki Farklar’ (2010) 30(1-2) Public and Private International Law Bulletin 91, 117; Burcu Yüksel, ‘The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union’ (2011) 7(1) 149, 157ff; Paul Lagarde, ‘Le nouveau droit international privé des contrats après l’entrée en vigueur de la Convention de Rome du 19 juin 1980’ (1991) 2 *Revue Critique de Droit International Privé* 287, 301; Davor Babić, D ‘Rome I Regulation: binding authority for arbitral tribunals in the European Union?’ (2017) 13(1) *Journal of Private International Law*, 70, 79ff.; AJ Bělohávek, ‘Law Applicable to the Merits of International Arbitration and Current Developments in European Private International Law: Conflict of laws rules and applicability of the Rome Convention, Rome I Regulation and other EU law standards in international arbitration’ (2010) *Czech Yearbook of International Law* 25, 40.

109 Bälz, ‘Islamic Law as Governing Law under the Rome Convention Universalist *Lex Mercatoria* v. Regional Unification of Law’ (n 40) 44; See, Zeynep Özgenç, ‘Milletlerarası Ticari Tahkimde Hakemin veya Hakem Kurulunun *Ex Aequo et Bono* Karar Verme Yetkisi’, (2014) 34(1) *Public and Private International Law Bulletin* 31, 32-33.

110 Bälz, ‘Islamic Law as Governing Law under the Rome Convention Universalist *Lex Mercatoria* v. Regional Unification of Law’ (n 40) 44.

111 Yücel (n 15) 155-156.

112 Kocasakal (n 109) 40.

A further important benefit of arbitration is the ability of the parties to select arbitrators with qualifications tailored to the needs of the dispute in question.<sup>113</sup> Autonomy to select arbitrators is of particular interest for the parties in Islamic finance disputes since they can select arbitrators with relevant experience, knowledge, and training which are not available in judges for complex topics of Islamic finance.<sup>114</sup> The arbitrator can be amongst scholars in Islamic banking and finance matter.<sup>115</sup> In some Islamic finance cases, the disputing parties may choose arbitrator with Islamic financial experience over those with legal knowledge; or choose a mixed group, such as one arbitrator who has banking background, and another with a legal background.<sup>116</sup> Particular to characteristics of each case, parties can create the best combination in order to achieve the most effective process, for instance three arbitrators; a banker, a lawyer, and a third one with a degree in Islamic banking or in Sharia law.<sup>117</sup>

Additionally, the advantageous features that have enabled arbitration to become the preferred dispute resolution method over the past thirty years such as finality, speed, confidentiality, cost-effectiveness, and flexibility are also available to Islamic finance disputes.<sup>118</sup> For instance, an arbitration can be conducted in venues close to home while maintaining the applicable substantive law abroad. Maita states that this will particularly benefit the parties of Islamic finance disputes because the seat is London while most of them are in Muslim States.<sup>119</sup> Legal scholars have also advocated the use of arbitration in the Islamic finance given that the quick and amicable means of dispute settlement through arbitration align more closely with the spirit of Islam than traditional litigation.<sup>120</sup> Also, the parties of an Islamic transactions may well want to preserve confidentiality as to Sharia compliance disputes as it may present a very sensitive issue for the reputation of the company and its clients for whom their religion is the primary driving force.<sup>121</sup>

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113 Al-Shibli (n 20) 225.

114 *ibid* 225; Wati binti Mohd K and others (n 70) 62.

115 *ibid*.

116 Al-Shibli (n 20) 225.

117 *ibid*.

118 Maita (n 29) 36.

119 *ibid* 53.

120 Alison Wirtz, 'Resolving Islamic Finance Disputes Through International Commercial Arbitration in the Gulf Region' (2016) University of Chicago Law School International Immersion Program Papers 24/2016, 2 <[https://chicagounbound.uchicago.edu/international\\_immersion\\_program\\_papers/](https://chicagounbound.uchicago.edu/international_immersion_program_papers/)> accessed 4 October 2018.

121 Bälz, 'Islamic Law as Governing Law under the Rome Convention Universalist Lex Mercatoria v. Regional Unification of Law' (n 40) 37; Olayemi and Al-Zabyani states that the divergent of opinions between the Islamic schools of law is also a clear indication for the necessity of arbitration clauses in the Islamic commercial contracts since even in the situation where there is a competent Sharia court to decide on the disputes that arise from Islamic finance, the problem of appropriate court forum will arise in the event that the parties belongs to different jurisdiction of the Islamic schools of law; Olayemi and Al-Zabyani (n 16) 5; For the issue of the broad spectrum of legal opinion in Islamic arbitration agreements see, Jamal (n 16).

### C. Initiatives from the East

Parallel to the growth of Islamic finance industry to unprecedented levels, the lack of modern arbitration laws in many Muslim states has been fading away, leaving its place to an up-to-date approach to arbitration with the purpose of competing in the alternative dispute resolution scene. Oman, in 1997, passed legislation implementing the UNCITRAL Model Law on International Commercial Arbitration.<sup>122</sup> Bahrain recently adopted a new arbitration law in 2015, also based on the Model Law.<sup>123</sup> Qatar passed Law No. 2 of 2017 on rules of arbitration on March 13, 2017. The new Law is largely based on the UNCITRAL Model Law, though with some variations, particularly in relation to timelines.<sup>124</sup> The UAE and Qatar recently established arbitration centres affiliated with the key arbitral institutions in the world.<sup>125</sup> The DIFC-LCIA was established to combine the international best practices with the unique understanding of the local and regional legal and business cultures in the Gulf and wider MENA region.<sup>126</sup> Saudi Arabia modernized its arbitration law by enacting a new arbitration law as an improvement over the thirty-year old arbitration law that it replaced. The new arbitration law is largely based on the UNCITRAL Model Arbitration Law with amendments as adopted in 2006 but with modifications to ensure that the arbitration process does not violate Sharia as practiced in the Kingdom.<sup>127</sup> Recently during a regional arbitration conference<sup>128</sup> funded by The U.S.-Middle East Partnership Initiative (MEPI), the case law on the interpretation of Sharia in the context of arbitration was presented by a delegation of Saudi judges. The delegation claimed that Islamic law would not vitiate the enforcement of foreign arbitral awards any more than the public policy exception for enforcement refusal that New York Convention allows. Following the discussions, and further consultations, Saudi Arabia was added by UNCITRAL to its map of countries. Furthermore, just before the first international arbitration institution in the Kingdom of Saudi Arabia, the Saudi Centre for Commercial Arbitration (SCCA), was officially inaugurated in October 2016<sup>129</sup>, a new era in the history of Saudi women began on May 10, 2016, when the Saudi administrative Court of Appeal did not object to the appointment of

122 Mutasim Ahmad Alqudah, 'The Impact of Sharia on the Acceptance of International Commercial Arbitration in the Countries of the GULF Cooperation Council', (2017) 20(1) *Journal of Legal, Ethical and Regulatory Issues* 1, 1.

123 In 2010, the Bahrain Chamber for Dispute Resolution (BCDR) and American Arbitration Association (AAA), launched BCDR-AAA to conduct arbitrations according to the AAA rules; Alqudah (n 123) 1.

124 Qatar: New Arbitration Law Passed, 5 June 2017, <<http://www.loc.gov/law/foreign-news/article/qatar-new-arbitration-law-passed/>> accessed 4 October 2018.

125 Alqudah (n 123) 1.

126 See, DIFC-LCIA Arbitration Center <<http://www.difc-lcia.org>> accessed 4 October 2018.

127 Al-Ammari and Martin (n 12) 387ff.

128 'The U.S.-Middle East Partnership Initiative, Saudi Arabia Adapts UNCITRAL Arbitration Law, 18 January 2018' <<https://mepi.state.gov/arbitration-law/1>> accessed 4 October 2018; Saudi Centre for Commercial Arbitration (SCCA) <<https://www.sadr.org/about-scca?lang=en>> accessed 4 October 2018.

129 See, Saudi Centre for Commercial Arbitration (SCCA) <<https://www.sadr.org/>> accessed 4 October 2018.

Ms. Shaima Aljubran, the first Saudi female arbitrator, in the field of commercial disputes.<sup>130</sup>

Based on the wide criticism over the attitude of the English courts, notable Islamic countries came up with initiatives striving to create platforms specialized in the arbitration of Islamic finance disputes for the purpose of changing the convention of leaving Islamic finance disputes to the hands of English courts.<sup>131</sup>

Malaysia takes the lead in this regard as part of its broader goal to establish itself as an Islamic finance hub.<sup>132</sup> With the purpose of solving the problem of civil court jurisdiction over the Islamic commercial contract, Asian International Arbitration Centre (formerly known as Kuala Lumpur Regional Centre for Arbitration [KLRCA]) provides a specific mechanism, i-Arbitration, to resolve the disputes that arise from the Islamic finance transactions.<sup>133</sup>

Before the i-Arbitration Rules, KLRCA had the Rules for Arbitration of Kuala Lumpur Regional Centre for Arbitration – Islamic Banking and Financial Services 2007 (2007 Rules).<sup>134</sup> The Rules included a model clause that stated as follows

*“Any dispute, controversy or claim arising from Islamic banking business, Takaful Business, Islamic financial business, Islamic development financial business, Islamic capital market products or services or any other transaction or business which is based on Shari’ah principles out of this agreement/contract shall be decided by arbitration in accordance with the Rules for Arbitration of Kuala Lumpur Regional Centre for Arbitration (Islamic banking and Financial Services)”*.<sup>135</sup>

Although applauded by many practitioners in the field as it represents a significant innovation in the drive towards creating better ways of settling disputes in the industry by making it possible to obtain rulings by Islamic finance experts conforming legally and substantively to the provisions of Islamic Law, Oseni and Ahmad find

130 The New Saudi Arbitration Law neither stipulate any gender requirements for arbitrators, nor contain any language that prohibits a woman from acting as an arbitrator. According to the wording of Article 14 an arbitrator must only fulfil three conditions: 1) being legally competent, 2) being of good conduct and behavior and 3) holding a degree in Islamic or legal studies. Also, in the event that the arbitral tribunal is composed of more than one arbitrator, the last condition is considered met as long as the Chairman holds the specified degree; Mulhim Hamad Almulhim, ‘The First Female Arbitrator in Saudi Arabia’ (*Kluwer Arbitration Blog*) <<http://arbitrationblog.kluwerarbitration.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/>> accessed 4 October 2018.

131 See generally, George Khoukazz, ‘Sharia Law and International Commercial Arbitration: The Need for an Intra-Islamic Arbitral Institution’ (2017) 1 *Journal of Dispute Resolution*, Article 14.

132 See generally, Mohammad Noorzuddin Bin Nooh and Joni Tamkin Bin Borhan, ‘The Global Hub Process: Malaysia’s Vision towards Becoming the Islamic Finance Global Hub Country’ (2014) 5(8(1)) *International Journal of Business and Social Science* 206.

133 See, Asian International Arbitration Centre (AIAC) <<https://www.aiac.world/Arbitration-i-Arbitration>> accessed 4 October 2018; Olayemi and Al-Zabyani (n 16) 3.

134 Rules for Arbitration Islamic Banking and Financial Services 2007, Kuala Lumpur Regional Centre for Arbitration, 2007, <[https://arbitrationlaw.com/sites/default/files/free\\_pdfs/KLRCA%20Arbitration%20Rules%20%28Banking%20%26%20Financial%20Services%29.pdf](https://arbitrationlaw.com/sites/default/files/free_pdfs/KLRCA%20Arbitration%20Rules%20%28Banking%20%26%20Financial%20Services%29.pdf)> accessed on 8 October 2018.

135 Rules for Arbitration Islamic Banking and Financial Services 2007, Kuala Lumpur Regional Centre for Arbitration, 2007, 4 <[https://arbitrationlaw.com/sites/default/files/free\\_pdfs/KLRCA%20Arbitration%20Rules%20%28Banking%20%26%20Financial%20Services%29.pdf](https://arbitrationlaw.com/sites/default/files/free_pdfs/KLRCA%20Arbitration%20Rules%20%28Banking%20%26%20Financial%20Services%29.pdf)> accessed on 8 October 2018.

it discouraging that during an informal discussion with one of the arbitrators, she revealed that not up to two arbitrations were conducted under the 2007 Rules.<sup>136</sup>

This led to a total overhaul of the procedural aspects of Islamic finance arbitration at KLRCA and resulted in the creation of the new rules called the KLRCA i-Arbitration Rules in 2012.<sup>137</sup> The Rules were revised in 2018 after KLRCA became AIAC.<sup>138</sup> Datuk Sundra Rajoo, director of the AIAC, defines the role and the purpose of the i-Arbitration Rules with the following words

*“i-Arbitration Rules is the first of its kind in the world, and it should appeal to local and international parties that deal in sharia-based transactions. In its efforts to revolutionise arbitration by integrating sharia-based laws in its rules, the KLRCA aims to familiarise different jurisdictions with how this new system would work and would demystify the complexity of sharia law as perceived internationally”.*<sup>139</sup>

The i-Arbitration Rules have two parts. Part I is largely based on the AIAC Arbitration Rules with some modifications related to Sharia-compliant transactions. One important article is Rule 11 stating that whenever the arbitral tribunal has to form an opinion on a point related to Sharia principles and decide on a dispute arising from the Sharia aspect of the contract; the arbitral tribunal may refer the matter to the relevant Council or Sharia expert for its ruling.<sup>140</sup> Part II of the i-Arbitration Rules is the UNCITRAL Arbitration Rules 2013 which is also applicable in Sharia-related disputes. However, in the event of a conflict between Part I and Part II of the i-Arbitration Rules, the provisions in Part I prevails.<sup>141</sup> Although under i-Arbitration the parties are allowed to designate any country as the seat of the arbitration, this remains a challenge in practice since the rules have not met with remarkable uptake outside South East Asia.<sup>142</sup>

Another arbitral institution that promoted itself as delicately suited to Islamic finance disputes is International Islamic Centre for Reconciliation and Arbitration

136 Umar A Oseni, ‘Islamic Finance Arbitration: Integrating the Classical and Modern Legal Frameworks’, in Adnan Trakic and Hanifah Haydar Ali Tajuddin (eds), *Islamic Banking and Finance: Principles, Instruments and Operations* (2nd edn The Malaysian Current Law Journal Sdn Bhd 2012) 549, 563; Umar A Oseni and AUF Ahmad, ‘Dispute Resolution in Islamic Finance: A Case Analysis of Malaysia’ (8<sup>th</sup> International Conference on Islamic Economics and Finance, Qatar 19-21 December 2011), 11 <[http://www.oja.coj.go.th/doc/data/oja/oja\\_1526456975.pdf](http://www.oja.coj.go.th/doc/data/oja/oja_1526456975.pdf)> accessed 8 October 2018; Jasri Jamal and others, ‘Alternative Dispute Resolution in Islamic Finance: Recent Development in Malaysia’ (2011) 3(1) *International Journal of Social Sciences and Humanity Studies* 185; Paldi (n 32) 24.

137 Oseni (n 137) 563; Thomas R. Klötzel, ‘KLRCA Rules’, in Rolf A Schütze (ed), *Institutional Arbitration: A Commentary* (Beck/Hart, 2013) 671, 683.

138 Asian International Arbitration Center i-Arbitration Rules (Effective as of 9th March 2018), <<https://www.aiac.world/Arbitration-i-Arbitration>> accessed 4 October 2018.

139 See “Q&A with Datuk Sundra Rajoo, Director of the Kuala Lumpur Regional Centre for Arbitration (KLRCA)” in Kanishk Verghese, ‘Arbitration in Asia: The next generation?’ (*Legal Business Online* 1 July 2014) <<http://www.legalbusinessonline.com/reports/arbitration-asia-next-generation>> accessed on 4 October 2018.

140 Rule 11, Asian International Arbitration Center i-Arbitration Rules (Effective as of 9th March 2018), <<https://www.aiac.world/Arbitration-i-Arbitration>> accessed 4 October 2018.

141 Rule 1(3), Asian International Arbitration Center i-Arbitration Rules (Effective as of 9th March 2018), <<https://www.aiac.world/Arbitration-i-Arbitration>> accessed 4 October 2018.

142 ICC Commission on Arbitration and ADR Task Force (n 23) para 117; Maita (n 29) 59.

(IICRA) which is based in Dubai, UAE. Established as a representative of the Islamic finance industry by an agreement between the UAE and the General Council of Islamic Banks and Financial Institutions, IICRA became operational in January of 2007.<sup>143</sup> The centre applies the procedural and substantive laws selected by the parties, and its rules explicitly declare that it will not apply laws which it judges to be “incompatible with the Sharia”.<sup>144</sup> This compliance is determined by the arbitration panel which may invoke for the disputed issue whatever it deems appropriate from amongst the viewpoints of various schools of Islamic thought, rulings of Islamic Fiqh academies, and opinions of Sharia supervisory boards at Islamic financial institutions.<sup>145</sup>

IICRA claims that it is the only accredited institution for obtaining Sharia compliant provisions by the Islamic finance industry and is undoubtedly one of the supporting infrastructure organizations for Islamic finance. However, the centre does not provide any published record for its case load.<sup>146</sup> Although it mentions a significant increase in the number of Islamic finance cases submitted to the centre in its semi-annual publication of January 2012<sup>147</sup>, Maita rightfully states that without knowing the its case load and the involved parties, it is not an easy task to evaluate the effectiveness of these rules.<sup>148</sup> In its recent report, Financial Institutions and International Arbitration, the ICC Commission states that IICRA has reportedly administered a “small number of cases but has not gained common acceptance in the Islamic financial community.”<sup>149</sup>

Camille Paldi, CEO of the Franco-American Alliance for Islamic Finance (FAAIF), made a presentation about her proposal for the Dubai World Islamic Finance Arbitration Centre (DWIFAC) and Jurisprudence Office (DWIFACJO) in the International Congress on Banking, Economics, Finance, and Business, on June 24-26 2016 in Sapporo, Japan.<sup>150</sup> Paldi explained that the Islamic finance industry is in need of a solid regulation and a dispute resolution mechanism in order to survive as a viable industry.<sup>151</sup> According to the proposal, DWIFAC may offer a globally recognized arbitration centre complete with the DWIFAC jurisprudence office, which may issue a uniform Islamic banking law and a standardized DWIFAC dispute resolution contract that would result in harmony, legal certainty, and investor

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143 *ibid* 59.

144 Colón (n 62) 422.

145 See, IICRA Arbitration and Reconciliation Procedures, Article 28 <<http://www.iicra.com/iicra/>> accessed 4 October 2018.

146 Maita (n 29) 60.

147 ‘TAHKEEM’ an IICRA semi-annual publication (2012) (7).

148 Maita states that the fact that it is possible to trace not a single case to this center from external resources could mean that most cases handled by this center are either local or insignificant. Maita (n 29) 59.

149 ICC Commission on Arbitration and ADR Task Force (n 23) para 117.

150 See, Islamic Finance Portal, ‘Camille Paldi (FAAIF) Participates in Sapporo 2016 International Congress on Banking, Economics, Finance, and Business’ <<http://www.islamicfinancialportal.com/2016/07/13/camille-paldi-faaif-participates-insapporo-2016-international-congress-on-banking-economics-finance-and-business-june-2426-2016>> accessed 4 October 2018

151 *ibid*.

confidence in and across the Islamic finance industry.<sup>152</sup> The DWIFAC standardized dispute resolution contract contains a built-in dispute resolution mechanism similar to FIDIC designating DWIFAC as the arbitration centre, facilitating early dispute settlement and completion of contract.<sup>153</sup> This contract may be included to all Islamic finance transactions in the world, making DWIFAC the central dispute resolution authority for the industry.<sup>154</sup>

Another scholar, Colón, suggests that<sup>155</sup> the Dubai International Arbitration Centre (DIAC) appears to be tailored to provide services specialized for the resolution of Islamic finance disputes. Located in the Jebel Ali Free Zone, and in the same city as the Dubai International Financial Centre, Islamic banking hubs and outstanding free trade zones, the DIAC does not purport to specialize in the Islamic finance dispute settlement, although it routinely hears disputes related to matters of Islamic finance and the centre is staffed with legal scholars known with their numerous publications in the fields of Islamic finance and Sharia.<sup>156</sup> According to Colón, these specialties plus the centre's status of being the busiest arbitration centre in the region indicate that the centre would interpret a provision stipulating the arbitration be governed under "the laws of so-and-so nation, subject to the principles of the Shariah as a binding choice of law".<sup>157</sup>

### Conclusion

With its roots predating the state judiciary, or even the state itself, arbitration has been known and used as a method of alternative dispute resolution in the Muslim countries, as a concept favoured to adjudication in Islamic jurisprudence given that its quick and amicable means that align more closely with the spirit of Islam than traditional litigation. Over the last decades the exponential growth in Islamic finance and the globalization of the industry have resulted in the disputes amongst international entities arising out of Sharia-compliant agreements to be more commonplace. Choosing English law as the governing law for these disputes has been the common practice amongst the parties in most Islamic finance agreements.

Since *Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd. and the Others* made clear that the English courts may disregard the parties' choice of Sharia to govern their contract, the conventional choice of parties to be adjudicated in a non-Islamic jurisdiction by a non-Islamic court has been a target of criticism by scholars

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152 Paldi (n 32) 38.

153 *ibid* 5 & 38.

154 *ibid* 38.

155 Colón (n 62) 422.

156 *ibid*.

157 *ibid*.

and seen detrimental to the survival of the Islamic finance industry. The possibility of the English courts to validate the transaction based on English law and enforce it even if the contract is deemed as being non-compliant with the Sharia, is said to leave no guarantee for the preservation of the Islamicity of the agreement while the experience of civil court judges is claimed to be very limited in the field of Islamic banking as they rarely study Sharia law or Islamic finance at university or even at judicial institutions.

While the industry historically has preferred litigation over alternative dispute resolution mechanisms, there have been calls by legal and financial experts for those who want to settle their disputes in accordance with Sharia to refer their disputes to ADR methods, especially arbitration. In addition to its well-known advantages such as finality, speed, confidentiality, cost-effectiveness, and flexibility, with a right choice of seat arbitration makes possible for a choice of law clause to be in favour of Islamic law contrary to the English litigation and also allows the parties of the dispute to select arbitrators with relevant experience, knowledge, and training which may be not available in judges for complex topics of Islamic finance.

With this regard, many scholars and arbitral institutions from the East have been coming up with ideas over the past few years to provide better solutions to the participants of Islamic finance transactions in their disputes such as creating platforms specialized in the arbitration of Islamic finance disputes. Notwithstanding the fact that the outcomes of the steps taken still could not reach the desired level and the potential risk that English courts may disregard the parties' choice of Sharia to govern their dispute will not cause all participants in Islamic finance transactions to reject the benefits of submitting their disputes to the English courts, these initiatives may be useful to promote arbitration as a forum that could prove more conducive to furthering the commercial purpose of Islamic finance and to create models for other jurisdictions of Islamic banking and finance to borrow a leaf from.

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