

***Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd* [2004] 1 Lloyd's Rep 1 28
January 2004**

Where Reported

[2004] EWCA Civ 19, [\[2004\] 1 W.L.R. 1784](#), [2004] 4 All E.R. 1072, [2004] 2 All E.R. (Comm) 312, [\[2004\] 2 Lloyd's Rep. 1](#), [2004] 1 C.L.C. 216, (2004) 101(8) L.S.G. 29 Times, February 3, 2004, [2004 WL 62027](#)

Summary

Subject: Conflict of laws

Keywords: Agreements; Choice of law; Contract terms; Intention; Jurisdiction; Shari'a law

Catchphrases: choice of law; jurisdiction; agreement stated to be governed by English law and principles of Shari'a; determination of governing law; role of Shari'a principles

Abstract: B appealed against a decision ([2003] EWHC 2118, [2003] 2 All E.R. (Comm) 849) giving summary judgment to S, a bank. S claimed against B as principal debtors in respect of monies advanced to them by S under various Islamic financing agreements and as guarantors of some of those agreements. The governing law clause contained in the financing agreements provided that "subject to the principles of the glorious Shari'a" the agreements would be governed by and construed in accordance with the laws of England. S claimed amounts outstanding under the agreements when B failed to make payments. B's defence was, inter alia, that on the proper construction of the governing law clause, the agreements were only enforceable in so far as they were recognised by Shari'a law and English law, and that the agreements were in fact contrary to Shari'a law.

The judge held that English law was the governing law because there could not be two separate systems of law governing the contracts. The words used were intended to reflect the Islamic religious principles according to which S held itself out as doing business, rather than a system of law. The parties had not chosen Shari'a law as the governing law because it was not the law of a country and there was no provision for the application of a non national system of law such as Shari'a law. Further, it was highly improbable that the parties had intended that an English secular court should determine any dispute as to the nature or application of such controversial religious principles. B submitted that (1) whilst it was accepted that the sole governing law was English law, this should not preclude the possibility of the application of Shari'a principles, and (2) it was not improbable that the parties should intend the English court to determine and apply Shari'a, assisted where necessary by expert evidence; the judge's reasoning was influenced by the erroneous view that the principles of Shari'a constituted a body of controversial religious principles, as opposed to legal principles.

Summary: Held, dismissing the appeal, that (1) the judge had been correct in his determination. In interpreting the governing law clauses, the court should lean against a

construction which would defeat the commercial purpose of the agreements. There could not be two governing laws in respect of the agreements. The Rome Convention 1980, scheduled to the Contracts (Applicable Law) Act 1990, only contemplated and sanctioned the choice of the law of a country; (2) although it was possible to incorporate provisions of foreign law as terms of a contract, the general reference in the agreements to principles of Shari'a law did not identify any specific aspects of Shari'a law intended to be incorporated into the contracts. The reference to Shari'a law was repugnant to the choice of English law and could not sensibly be given effect to. The judge was right that the words were to be read as a reference to the fact that S held itself out as conducting its affairs according to the Shari'a principles. The judge was also correct that a common mistake as to the legal consequences of the agreements would not give rise to a defence to the claims on the guarantees, because B's sole interest was to obtain advances of funds and they were indifferent to the form of the agreements required by the bank or the impact of Shari'a law on their validity.

Judge: Potter, L.J.; Laws, L.J.; Arden, L.J.

Counsel: For S: Brian Doctor Q.C. and Sara Partington. For B: Richard Hacker Q.C. and Mark Arnold

Solicitor: For S: Norton Rose. For B: Jaswal Johnston

[Contracts \(Applicable Law\) Act 1990 s. 2\(1\)](#)

[Contracts \(Applicable Law\) Act 1990 Sch. 1](#)

[Civil Procedure Rules 1998 \(SI 1998 3132\) Part 24](#)

[Rome Convention on the law applicable to contractual obligations 1980](#)

History of the Case

Direct History

[Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd \(No.1\), \[2003\] EWHC 2118; \[2003\] 2 All E.R. \(Comm\) 849; 2003 WL 22187542 \(QBD \(Comm\)\)](#)

Affirmed by

[Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd \(No.1\), \[2004\] EWCA Civ 19; \[2004\] 1 W.L.R. 1784; \[2004\] 4 All E.R. 1072; \[2004\] 2 All E.R. \(Comm\) 312; \[2004\] 2 Lloyd's Rep. 1; \[2004\] 1 C.L.C. 216; \(2004\) 101\(8\) L.S.G. 29; Times, February 3, 2004; 2004 WL 62027 \(CA \(Civ Div\)\)](#)

Case Comments

Administrators powers and duties; Arbitration clauses; Choice of law; Corporate insolvency; Floating charges; Jurisdiction; Set off; Subordination agreements; Transactions at an undervalue. A review of developments in English case law during 2004 - Part 2. [J.I.B.L.R. 2005, 20\(4\), 151-164.](#)

Choice of law; Contracts; Sharia law; Title to goods; Void contracts. UK: recent decisions on Islamic finance transactions. F.R.I. 2004, Jun, 14-15. Banks; Choice of law; Commercial arbitration; Contracts; Loan agreements; Sharia law. Interpreting "choice of law" clauses. C.J. 2004, Dec 8, 30 Arbitration; Banks; Choice of law; Commercial arbitration; Loan agreements; Sharia law. Choice of law: validity of choice. Arb. L.M. 2004, Oct, 10-12. Choice of law; Contracts; Enforcement; Financial services; Islamic law. Shari'a law as governing law for financial transactions. F. & C.L. 2004, Mar, 6-7. Choice of law; Contracts; Enforcement; Islamic law. Contract: Islamic agreements - applicable law. Q.A. 2004, 72(Sum), 22. Choice of law; Finance; Jurisdiction clauses; Sharia law. Private international law - choice of law - Islamic law. J.I.M.L. 2004, 10(2), 125-127. Contracts; Enforcement; Food safety; Homelessness; Interest; Islamic law; Jurisdiction; Loans; Public sector tenancies. Consumer law (April). I.H.L. 2004, 119(Apr), 39-40. Appointments; Banks; Contracts; Disclaimers; Duty of care; Freezing injunctions; Insolvency; Islamic law; Jurisdiction. Banking and insolvency law (April). B.J.I.B. & F.L. 2004, 19(4), 150-158. Contracts; Enforcement; Islamic law; Jurisdiction; Loans. Lenders' casebook: Islamic finance. M.F.G. 2004, 135(1658), 23. Choice of law; Incorporation; Sharia law. Private international law: proper law of contract - choice of law clause - construction - doctrine. J.I.M.L. 2004, 10(1), 10-11. Contracts; Enforcement; Islamic law; Jurisdiction; Loans. Islamic finance. P.L.C. 2004, 15(2),53.