

Party autonomy over jurisdiction clause in Islamic Finance

Hakimah Yaacob*

International Shariah Research Academy for Islamic Finance (ISRA), Kuala Lumpur, Malaysia

Abstract

The principle of party autonomy is recognized internationally when it comes to the conflict of laws. The parties are free to insert the governing law clause in their respective contract. *Shamil Bank of Bahrain v. Beximco Pharmaceuticals* sent repercussion to the Islamic finance industry when the court of England applied English law instead of what has been written in the contract i.e. "Subject to the principles of the Glorious Shariah, this Agreement shall be governed by and construed in accordance with the laws of England." Under the party autonomy rule, it is clear that the contracting parties are allowed to nominate one legal system to govern the contract and to specify that another system be used to interpret it and in *Re Helbert Wagg* it was held that 'the parties may well contemplate that different parts of their contract shall be governed by different law'. Is there any justification to exclude the intended terms of the agreeing parties in the contract and merely apply English law for the execution of the contract and to be considered as valid and name it as a proper law. In the absence of any specific laws governing Shariah laws in Islamic finance for international contract, the proper law is the law which is more convenient to both parties and adherence of Shariah principles. The purpose of this short article is to determine whether the concept of party autonomy rule is being upheld seriously by the English court. It also examines if the parties are free to choose a system of law unconnected with the transaction in the light of the Rome Convention and whether it is proper for the court to apply English law when the parties have consensus ad idem agreed to the terms of the contract. In addition to this, there is no generally applicable connecting factor that can be used in English law to determine the proper law of the contract. It conceptualizes the reality of the challenge when it reaches the Islamic finance business fraternity across borders.

Keywords: Party autonomy, Governing clause, Rome convention, Proper law Lex loci solutionis, Lex loci contractus, Valid contract, Consensus ad idem

1. Introduction

Party autonomy rule is the theory of freedom of contract known as "*autonomie de la volonte*" or "party autonomy". In the absence of comprehensive legislation in governing

* Corresponding author. Mobile: 0192033260
E-mail address: hakimah@isra.my

Islamic Finance across the globe, the parties should be given a freedom to enter into a contract with their own choice of law. It means they may opt for the best of the contract for the best of their interest and position. Thus, where the parties have an agreement extracting out the manner of which they have chosen to resolve their disputes, it should be respected in every way possible. It is common to see in any agreement the governing law clause written as "The Contract shall be governed by the law of England and any dispute, question or remedy however-so arising determined exclusively by the Courts of England". The parties may include "it is understood and agreed that all questions of interpretation, construction, and adjudication arising out of this contract shall be governed by the laws of Malaysia. Case law relating to this issue in Malaysia and Singapore is sparse in this area. The legal system under which a contract is created and by which it is governed is known as the proper law of the contract. *Shamil Bank of Bahrain v. Beximco Pharmaceuticals* [2004] EWCA Civ 19 sent shockwaves to the industry when the court of England refused to apply Islamic law as written in the governing clause of the contract. The essential thought which determines the proper law of contract, in private International law, is that the two parties to the international contract are subject to the jurisdiction of their two countries and municipal laws and Courts of the two countries. In *Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society Ltd* [1938] AC 224, 240; [1937] 4 All ER 206, 214 (PC), the proper law of contract was defined as the law which the English or other Court is to apply in determining the obligation under the contract. In *Amin Rasheed Shipping Corp. v Kuwait Insurance C.* [1983] AC 50, Lord Diplock described the proper law of a contract as "*the substantive law of the country which the parties have chosen as that by which their mutually legally enforceable rights are to be ascertained*" The purpose of the law is to assist in the formation, performance and enforcement of rights and obligations under the contract – defined the proper law of contract to govern, not as the law intended by the parties, but as the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connexion (*Simmonds in Bonython v. Commonwealth of Australia* [1951] AC 201, 219 (PC)). Nevertheless, as emphasised by Lord Atkin that 'the proper law of the contract ... is the law which the parties intended to apply' (*R. v. International Trustee for the Protection of Bondholders A/G.* [1936] 3 All E.R. 407 (C.A.); [1937] A.C 500 (H.L.)). This would appear to be a manifestation of consensus ad idem, a subjectivist approach. Generally, there are two factors in determining the proper law for a contract i.e., *Lex loci contractus* (law of the place where the contract was made); and *Lex loci solutionis* (law of the place where performance of the contract was due.) It is argued that *lex loci contractus* may not be suitable for the contracting parties from different countries (let say one from China and the other from Indonesia) making an agreement in London to sell property situated in Malaysia. There is no closest connection to say that English law is to prevail. To apply *Lex loci solutionis* may not be appropriate when the parties' respective obligations may take place in different countries and to have their respective obligations governed by different laws. Lord Wilberforce in the *Amin Rasheed*'s case held that "in the absence of a choice of law it is necessary to seek the system of law with which the contract has its closest and most

real connection, opposed to the decision in *Amer Rashid* that English law prevailed. It is submitted that the term 'closest and most real connection' of the 'transaction' should be determined by a "system of the chosen law" chosen by the parties and not by the law of the country where the case is being heard.

2. Objectives

The main objective of the paper is to highlight the position of Islamic finance in English court. The paper also serves to determine whether the concept of party autonomy rule being upheld seriously by the English court. It also examines if the parties are free to choose a system of law unconnected with the transaction in the light of the Rome Convention and whether it is proper for the court to apply English law when the parties have consensus ad idem agreed to the terms of the contract. In addition to this, there is no generally applicable connecting factor that can be used in English law to determine the proper law of the contract. It conceptualizes the reality of the challenge when it reaches the Islamic finance business fraternity across the border.

3. Methodology

The methodology used in this research is based on qualitative research. It is based on document analysis and critical review. In particular court case findings have been reviewed, compared and contrasted and critically evaluated. Statutory provisions have also been reviewed and interpreted for the use of this research. The primary data is collected from decisions of the English court in Islamic finance cases. The reason of using this methodology is because the English court decision is the only source available in deriving cases pertaining to international Islamic finance contract.

4. Rationale behind the doctrine

There are rationales behind these expediencies. The rationale to choose the unconnected law is perhaps for commercial convenience. Perhaps the laws chosen are more convenient to both parties, or may be the law on the subject matter of the contract are more secured and organized and the parties are more convenient to opt for one. The idea on requirement of *consensus ad idem* could never be denied in order to form a valid contract. In addition to that, the purpose of the Rome Convention is to grant a free right for both parties to contract and determine their liability under specific laws which they are convenient to. The party autonomy rule is closely related to international commercial law which involves at least four distinct areas of laws. The first is the law of contract which provides the rules for interpreting the intention of both parties to the contract and fills in any gaps that the parties might have left out. Secondly, in the

second area of concern is related to the payment system. By providing an alternative payment mechanism, the law in this area provides the parties involved choices on how to manage and minimize the risk of non performance. The third area of concern is the security of the transaction. The fourth concern in the international law is the bankruptcy law. It sets out various rights of conflicting investors when there is a fall out or financial distress that undermines the future deployment of the sets traded.

5 The 1980 Rome Convention on the Law Applicable to Contractual Obligations (the Rome Convention)

Under the Rome Convention, the proper law of a contract or party autonomy to determine the governing clause is primarily determined by reference to any express agreement on choice of law concluded by the parties in the contract. Thus Art 3(1) of the Rome Convention specifies that a contract should be governed by the law chosen by the parties expressed by the terms in contract. In full, Art 3(1) provides “A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract”. The convention requires the express choice of law to be respected even if the chosen law has no connection with the contract.

Art 3(2) expressly permits variation of the terms of contract after the contract has been concluded provided it is agreed by both parties. Art 3(2) reads “The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Art 1(2) of the Rome Convention reads “The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries. They shall not apply to:

- a) *questions involving the status or legal capacity of natural persons, without prejudice to Article 11;*
- b) *contractual obligations relating to:*
 - *wills and succession,*
 - *rights in property arising out of a matrimonial relationship,*
 - *rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate;*
- c) *obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;*
- d) *Arbitration agreements and agreements on the choice of court;*

- e) *questions governed by the law of companies and other bodies corporate or unincorporated such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;*
- f) *the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party;*
- g) *The constitution of trusts and the relationship between settlors, trustees and beneficiaries;*
- h) *Evidence and procedure, without prejudice to Article 14.*

Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties". Thus, in *Caterpillar Financial Services v SNC Passion*, [2004] EWHC 569 (Comm) the judge held that the terms in Art 3(1) give a clear indication that the parties are free to choose the law in the contract. However, this is subject to Art 3(3) which provides in case where the contract is entirely domestic. In full Art 3(3) reads The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".

The rules of this Convention do not apply to contracts of insurance which cover risks situated in the territories of the Member States of the European Economic Community. In order to determine whether a risk is situated in these territories the court shall apply its internal law. In dealing with the views of the judges as to the rights of the parties to contract and designate the clause of their own choice of law, there are two different views.

In *Vita Food Products Inc. v Unus Shipping Co. Ltd* [1939] A.C. 277 (P.C.) Lord Wright took the view that the subjective intention of the parties was not only of paramount significance, but also conclusive. In that case a choice of English law pertaining to an exemption clause in the contract was upheld, even though the contract had no connecting factor with England. Although the *Vita Food* case has been subjected to adverse criticism, it still represents strong authority for the proposition that the parties to a contract are free to submit the validity of their contract to any law of their own choosing. Lord Wright said "... where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy.

As long as the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on grounds of public policy, the intention of the parties as to the choice of law prevails. That the parties to the contract are entitled to make

such an agreement' was also confirmed by Lord Reid in *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners. Ltd* [1970] A.C. 583. According to the case, the parties are allowed to choose a law which has no obvious connection with the contract and still be bona fide and legal. If the choice of law was made for the 'specific purpose of avoiding the consequence of the illegality' ... then it is not bona fide and legal. In *Amin Rasheed's* case, P, a Liberian company resident in Dubai, insured a ship with D, the Kuwait Insurance Company. When a claim made by P under this policy was rejected by D, P sought an order to serve a writ on D under Rules of Supreme Court (RSC) O.11. There was no express choice of English law, nor was it clear as to what was the implied law: both Kuwaiti law and English law had claims to being the proper law of the contract. Favouring Kuwaiti Law, we may argue that the policy was issued in Kuwait; Insurers were Kuwaitis and payment of claims to be made in Kuwait. However, in errand of English Law one may argue that English language used in the contract; Premiums to be made in Sterling and Contract made in English form. However, the surrounding circumstances as well as the terms of the contract itself pointed ineluctably to the conclusion that the intention of the parties was that their mutual rights and obligations under the policy should be determined in accordance with the English law of marine insurance. A significant factor in reaching this conclusion was that at the time of making the contract, Kuwait had no law of marine insurance.

Despite the above, there are opposite views as to party autonomy in the freedom of contract. In *Boissevain v. Weil* [1949] 1 KB 482, 491, Denning LJ (as he then was) held "I do not believe that parties are free to stipulate by what law the validity of their contract is to be determined. Their intention is only one of the factors to be taken into account". While in *Re Herbert Wagg & Co. Ltd.* [1956] Ch 323 it was held that "This Court will not necessarily regard the parties' choice of law as being the governing consideration where a system of law is chosen which has no real or substantial connection with the contract looked as a whole". The views concluded that the courts should have residual power to strike off, for good reason, choice of law clauses totally unconnected with the contract.

6 Justifications or Rationale for giving a due recognition on party autonomy rule in particular Islamic Finance

Why do we need a proper recognition on party autonomy rule? Obviously, nowadays the legal and judicial framework of Islamic finance lies within the Conventional Civil structure. Quite a number of cases appeared before the courts of England for adjudication of the disputes concerning Islamic finance matters. This section will analytically discuss each of these cases. The first three cases analysed are those that were decided in the English court. This is continued by comparing the cases decided in the US court of law pertaining to sukuk default and other cases decided in various jurisdictions. Due to limited avenues among the traders, the merchants opt for the English court to hear their disputes. This can be seen in the case of *Shamil v Beximco*.

In 1995 Shamil bank entered into a *Murabaha* agreement with the defendants whereby the bank as a seller was to sell goods to the Beximco, the first defendant. A payment schedule forming part of the *Murabaha* agreement was also agreed upon and identified the number of instalments and their amounts. This case was an application by Shamil bank as claimants for a summary judgment against Beximco and another defendant both of which were companies incorporated in Bangladesh and involved in the manufacture of pharmaceuticals. The parties contracted that any dispute 'arising out of or in connection with agreement' would be decided in the court of England, and added a choice of law clause stating that 'Subject to the principles of Glorious Sharia'a, this agreement shall be governed by and construed in accordance with the laws of England.' A second *Murabaha* agreement was entered into on similar terms by Shamil bank, the claimant and the second defendant. Both defendants defaulted on their instalments, and following discussions, new arrangements were entered into by Shamil bank and the defendants. The new arrangement (exchange contract) agreed upon was that the bank would discharge the outstanding amount in consideration of the first and second defendants transferring to the bank certain identified assets, which the defendants were entitled to use and were required to pay a user fee. This agreement had the same clauses as the *murabaha* contracts.

The user fees were not paid by the defendants, and the proceedings were commenced by the claimant, i.e. Shamil bank. It should be noted that Shamil bank had a Shariah supervisory board that approved the *Murabaha* and *Ijara* lease transactions. The defendants argued the following points (only the points relevant to Islamic finance are mentioned here): As the wording of the governing law clause stated that 'Subject to the principles of Glorious Shariah, this agreement shall be governed by and construed in accordance with the laws of England', therefore the contractual obligations were only enforceable if they were applied under both Shariah and the law of England. The defendants claimed that the transactions provided for the payment of 'interest' and thus 'riba' and were therefore not enforceable under Shariah law. Furthermore, the defendants argued that the loans were a 'mere disguise for interest bearing loans'.

The defendants claimed that by the principles of *Murabaha*, the transaction is apt only to fund the purchase of specific goods and not for general working capital. In this case the evidence showed that the moneys were never intended to be used for the purpose of purchase of specific goods, to which the bank obtained title.

Further the defendant claimed that the accrued compensation payments, the rolling-over or rescheduling process and the accelerated payments in the exchange contract offended the Sharia law. The defendants also claimed this was because the relation in the exchange agreements constituted a loan agreement and not *Ijara* financing because in substance, the bank did not take title, or the right of usufruct, to the goods purportedly leased. Claimant's (Shamil Bank) counter arguments was that the bank's commercial activities were supervised by the religious supervisory board. According to the Bank's

Articles of Association the supervisory board was to ascertain that the Bank's activities conform to the principles and provisions of Sharia. Further at the end of each year, the supervisory board certified that they were satisfied that the transactions of the bank are in compliance with Sharia principles.

The decision is of importance to financial institutions that provide cross-border Islamic financing products and claim to be *shari'ah* compliant, for the following reasons Anthony Dutton (June, 2008, retrieved from <http://www.gtreview.com/global-trade-review-magazine/2008/June/> LEGAL-ISSUES-Clarifying - Islamic -law_ 6011/ Norton Rose's *Antony Dutton*):

- a) The decisions reconfirm the problem faced in *IICG v Symphony Gems*, the refusal by the English court to apply or be bound by Shariah or Islamic law in deciding the validity and enforceability of Islamic finance transaction in question. Such refusal are understandable since English courts are based on common law and are not expected to apply Islamic law, which is a foreign legal system in the country.
- b) The English courts will not allow a debtor to avoid or delay payment simply by claiming that the relevant contractual provisions are not *shari'ah* compliant.
- c) The governing law clauses in contracts should be very carefully and appropriately drafted.
- d) There is no general reference to the principles of Syariah to ensure the validity of the products. No certain standard given in the contract such as AAIOfII or Majma' Fiqh standard.
- e) Furthermore, financial institutions may consider requiring representations and warranties from customers regarding *shari'ah* compliance.
- f) The decision gives a legal uncertainty to parties who choose an English law in their contract.
- g) The decision has implications for the parties' choice of the appropriate law clause in agreements documenting all areas of international trade in which Islamic finance products exist.

This case was decided on the construction of the governing law clause which incorporated English law and the Court did not need to consider and apply *Shari'ah*. However, the Court said that had the relevant *Shari'ah* principles been validly incorporated in this case, *Beximco* might have succeeded in their application. According to the art 3(1) of the Rome Convention on the Law Applicable to Contractual Obligations 1980, the parties chose English law to be the governing law of agreement because Shariah is a non-national system of law. In any event the convention will not permit a situation where two laws simultaneously govern the question of the enforceability of a contract. Firstly the judge remarked that the defences were methods used by the defendants to get out of paying what was due from them. On deeper analysis the judge Morison J, stated (*obiter dicta*) that if the court were concerned with the application of Sharia law

and its impact on the lawfulness of the agreements, then the judge would require further investigation. There was an arguable case as to whether in a contract in conflict with Sharia law, there could be any recovery of any sum at all. The judge held that there cannot be two governing laws. A contract governed by English law may incorporate rules of another law, but clear words would have to be used. It could not have been the intention of the parties that it would ask a secular court to determine principles of law derived from religious writings of matters of great controversies. This especially so when the bank has its own religious board to monitor the compliance of the bank with the board's own perception of Islamic principles of law in an International banking context.

One of the earliest cases is the case of *Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems N.V. and others* [2002] All ER (D) 171. Being heard in the English High Court in 2002 before Tomlinson J, it is a landmark decision because it is the first case to be brought before the English High Court concerning a *Murabahah* financing dispute. In this case, Islamic Investment Company of the Gulf (Bahamas) Ltd ("IICG") entered into a *Murabahah* financing agreement with the first defendant, Symphony Gems N.V. ("Symphony Gems"), who were diamond traders. The *Murabahah* financing agreement contained an English law choice of law and jurisdiction clause. Following an event of default, IICG commenced claim proceedings for 'summary judgment' i.e. a judgment on the basis that the defendants had no arguable defence. In order for a defendant to successfully defend an application for summary judgment, the defendant need only to convince the court that there is an arguable defence. If indeed there is any arguable defence, it is not necessary to establish that the argument would succeed if argued in detail.

A number of arguments were put forward by Symphony Gems, but not a single defence was accepted by the court. The court eventually ordered summary judgment be entered against the defendants for a sum of just over \$10 million.

It appears that had the English court ruled against IICG, it might have resulted in the Islamic banking and finance fraternity to reconsider the way they do business under a *Murabahah* transaction. This case confirms that the English court interprets a *Murabahah* agreement along the lines of English rules of interpretation, and would enforce a properly drafted agreement if it is governed by the English law. Although the end result is in favour of IICG who conducts Islamic finance based on the rules of *Shari'ah*, it is saddening to see how the court totally dismissed the arguments of *Shari'ah* law following the parties' choice of English law and jurisdiction. The brief summary of the case can be seen from the table below:

The court discussed several issues including the validity of the agreement and the illegality of the contract executed. It is very interesting to note that most of the cases in Islamic finance will delve into the defense of non-compliance when the party or the defendant fails to comply with the contract or in other words fails to pay! Two experts

were called to testify the ingredients and the validity of a *murabaha* contract. After a deliberation, the experts said that the underlying contract is not based on a *murabaha* transaction. In the end, the court ignored their expert views and considered a contract as valid from English law point of view. This is due to the express terms in the contract saying that even without delivery of the goods, the seller is still entitled to claim the price (refer to the Clause 4.3, 4.4, 5.1, 5.2 and 5.6 of the agreement executed between the parties stating that delivery of goods is not a prerequisite for the seller to recover the sale price from the purchaser). As a result, the court judged in favour of the plaintiff (*Murabaha Agreement between Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems NV & Ors* [2008] EWCA Civ 389 (11 March 2008), ([2008] EWCA Civ 389, From England and Wales Court of Appeal (Civil Division) Decisions; 31 KB))

Regardless of the fact that the experts called held that the contract was not a *murabahah* transaction and therefore void, the judge superseded by saying that the contract was valid based on the law of contract.

As a comparative analysis, it appears relevant to share the stand of the United State's courts in dealing with Islamic Finance cases. This comparative analysis aims to show if the courts in the United States would take the same approach or otherwise. The decision by the court of the United States in 2006 was a landmark case on *Sukuk* issuance. Following the sub prime crisis in the United States which burst into a full-blown financial crisis affecting the rest of the world in 2008, the risk of defaults is just unfolding and it is believed that investors and market players will become more aware of the issue of credit risks attached to *Sukuk*, as seen in the case of *Re East Cameron Partners L.P.* [2008] Bankr, LEXIS 3918. The East Cameron L.P. *Sukuk* ("the ECP *Sukuk*") was launched in July 2006 in US to raise USD165.67 million, using the *Musharakah* structure. It was a multiple-award winning *Sukuk* which was once the spotlight of the media. It was not until October 2008 that East Cameron Gas Co. ("East Cameron") pled for bankruptcy protection after its offshore Louisiana oil and gas wells failed to yield the expected returns. Hurricane partly contributed to the damage thus affecting the yield returns. The issue in this case was whether the *Sukuk* holders actually own a portion of the company's oil and gas, or in other words if there was indeed true sale from the SPV to the *Sukuk* holders. In this relation, East Cameron argued that there had been no real transfer of ownership of production revenues, known as royalties, into the special-purpose vehicle ("SPV") formed to issue the *Sukuk*. Instead, the company claimed the transaction was merely a loan secured on those royalties, implying that *Sukuk* holders would have to share the royalties with other creditors in the event of liquidation.

The bankruptcy judge, Robert Summerhays J. took the approach to reject the company's contention and ruled that the *Sukuk* holders "*invested in the Sukuk certificates in reliance*

of the characterisation of the transfer of the royalty interest as a true sale". The judge then gave East Cameron leave to Pnd further arguments to support its case.

It is overwhelming to find that the US courts respect the arrangement of Islamic *Sukuk*, and refused to approach the issue in the line of US laws. The court was not inclined towards its own set of rules and laws, but instead delved into the legal commitment of the parties to the *Sukuk* arrangement and upheld the intentions of the parties in entering into the contract and implications thereof.

Party autonomy rule must be subjected to the wills of the contracting parties. The court need to emphasise the glorious *syariah* law in the light of the England law. Should the wider interpretation used, the decision on Shamil might be seen as a different side of the law of England context. It works in procedural but not the system as the common law does recognize the willingness of the parties as the main rudiments to a valid contract. Variation on the terms of the contract must be solely agreed by both parties.

It is submitted that party autonomy as to the governing clause is primarily important. In absence of any decisive framework in Islamic finance and mostly dealing with parties involving European countries, the governing clause may save the day. This is vital due to the fact that it allows contracting parties to arrive at a mutually agreed governing law, normally, of some well-developed system of law apposite to the performance of the contract in accordance with the intention of the parties. The rationale is obvious. Both parties are willing to accept the laws which are more convenient and resilient to realise the contract.

7 Conclusion

In conclusion, it is time for the industry to leverage on freedom of contract in the governing clause. The proper law means the law that is suitable and most relied by the contracting parties. More specifically, as highlighted above we can see the trend of English courts to allow the parties to choose the applicable law but to some extent have restricted the application in similar ways. The paper has also reasoned that the principle of party autonomy is an efficient approach in the private international law of contracts, in particular Islamic finance contract. In realising the growth of Islamic finance towards *laissez faire*, the parties should be given a free exercise of their rights in the contract.

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