الجامعة الإسلامية العالمية ماليزيا
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

THE ISSUE OF CHOICE OF LAW IN INTERNATIONAL COMMERCIAL DISPUTE SETTLEMENT: AN ANALYSIS WITH SPECIAL REFERENCE TO THE ISLAMIC LAW PERSPECTIVE

BY

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A dissertation submitted in partial fulfilment of the requirements for the degree of Master of Comparative Law

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ABSTRACT

This study is to examine the issue of choice of law in international commercial dispute settlement. It will also look at the rules of conflict of laws in determining the applicable law of the contract; this study will be based on the common law and the development of the Rome convention on the law applicable to contractual obligation 1980. It will also look at the Islamic conflict of law amongst the four Islamic Schools of Jurisprudence, couple with the issue of conflict between Sunnah and Shi'ah laws, the study will look whether there is any mechanism to resolve disputes between Shi'ah and Sunnah laws. The study will then examine the applicability of the International Commercial Conventions in the Islamic States by analyzing the stand of Islamic Shari'ah law. It is also the purpose of this research to see the possibility of reducing commercial disputes amongst the Islamic States and their counterparts from the West, and how to protect the settlement process of International commercial disputes without interference of domestic or national courts by looking at the past and the future anticipations.

ملخص البحث

هذه الرسالة ستبحث عن قضية اختيار القانون في تسوية المنازعات التجارية العالمية. وسوف تنظر أيضا إلى قواعد تنازع القوانين في تحديد القانون الواجب التطبيق من العقد؛ هذه الدراسة ستكون على أساس قانون عام، ثم النظر في اتفاقية روما بشأن القانون المنطبق على التزام تعاقدي ١٩٨٠. وسوف تنظر الرسالة أيضا إلى الصراع الواقع بين أربع مدارس الفقه الاسلامي، مع قضية الصراع بين السنة والشيعة في القوانين، وستبحث الدراسة ما إذا كانت هناك أية آلية لحل النزاعات بين الشيعة والسنة في القوانين. ومن ثم النظر في تطبيق الاتفاقيات التجارية الدولية في الدول الإسلامية من خلال تحليل موقف الشريعة الاسلامية. وسيتطرق البحث أيضا لمعرفة إمكانية الحد للنزاعات التجارية بين الدول الإسلامية ونظرائهم من الغرب، وكيف نحمي عملية تسوية المنازعات التجارية الدولية من دون تدخل من المحاكم الوطنية أو المحلية من خلال النظر إلى الماضي وتوقعات المستقبل.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion; it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Law.

……..……..……..…

Abdul Ghafur Hamid
Supervisor

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Law.

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Mohd. Altaf Hussein
Examiner

This dissertation was submitted to Department of Islamic Law and is accepted as a partial fulfilment of the requirements for the degree of Master of Comparative Law.

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DECLARATION PAGE

I here declare that this dissertation is the results of own investigation, except where otherwise stated. I also declare that is has not been previously or concurrently submitted as a whole for my other degree at IIUM or other institutions.

Auwal Adam Sa'ad

Signature…… Date……..

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Affirmed by Auwal Adam Sa'ad

…… ……..

Signature Date

This dissertation is dedicated to my Mother Balkisu Harun whom I admire her patience for missing me for a long time during this study, and also to my Father Alhaji Adam Sa'ad, whom I enjoyed his support toward my Education. And to my wife Aishatu Aliyu, who accompany me and continue to take care of me until today. And also to my children Fatima and Abdur-Rahman whom I ask the Almighty Allah to reward them all in this life and in the hereafter.

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE RESEARCH

The choice of law clause is one of the most significant issues in the International Commercial dispute resolution. In modern history, dispute settlement is considered one of the most important means, particularly in the area of international trade and investment.

In common law the resolution of any dispute between two parties will be within the province of private international law. Private international law is a part of internal law of a country that deals with the international cases. It is obvious that each and every country has its own legal system, so if any dispute arises between two parties from different countries, the private international law will determine which country's court has jurisdiction and which law will be applied to judge the case. There are several Conventions organized by some European and common law countries in order to minimize the obstacles of the issue of choice of law.

Within the Islamic law boundaries, there is no issue of selection the law to solve a dispute between Muslim parties, the Muslim parties are obliged to summit there disputes to the Islamic law principles. However, there are some differences of opinion between four Islamic schools of law Hanafi, Maliki, Shafi'i and Hanbali. But such differences can be minimized by referring to the Qur'an and Sunnah (the acts and sayings of the Prophet Mohammad (peace be upon him)); the Shari'ah legal system (Islamic law) is a divine law and it is a unique legal system that each and every

Islamic state should follow. Therefore, the Islamic law will be governing the disputes as a whole.

There are several Islamic states that make it clear that the Islamic law is their primary legal system, but they are also parties to some International Commercial Conventions. For example: Saudi Arabia had acceded to the New York Convention; it had also ratified the ICSID Convention.[1] Furthermore, all of the Gulf Cooperation Council (GCC) states had acceded to the New York Convention 1958; and that all GCC states except Qatar had acceded to the ICSID Convention 1965.[2]

1.2 STATEMENT OF PROBLEM

The questions to be answered by this research are as follows:

- Which law will be governing the contract in International Commercial Dispute Resolution, where there is a conflict of laws?
- Why do some Islamic states have become parties to the International Commercial Conventions governed by the non Shari'ah countries?
- What is the position of Islamic law on the issue of choice of law?

1.3 HYPOTHESIS

This research will be looking at the applicable law in the international commercial dispute settlement particularly in a dispute between two parties from different jurisdiction. Several Muslim countries that acceded Shari'ah as their primary legal system became parties to some of the international commercial Conventions. The

[1] Abdul hamid El-Ahdab, *Arbitration with the Arab countries,* (Hague the Netherlands kluwer law international, 1999) p.606
[2] The European & Middle Eastern Arbitration review 2008, (Global Arbitration Review.mht)

research will analyze the issue according to the perspective of Islamic law, Muslim countries as an example.

1.4 LITERATURE REVIEW

Numerous books, articles, thesis and papers have been written on this area. Some of these materials are pertinent to this research, while some of them are not directly connected to it. But it can be useful to support some part of it.

Abdul Hamid El-Ahdab, "Arbitration with the Arab countries", discusses many issues regarding the Arbitration in the Islamic law. His discussion includes the Arbitration system in the Arab countries in terms of the Arbitrators, the proceedings, choice of law, the award and enforcement of the Arbitration award. This book is considered to be one of the most important references to this research, especially when discussing the issues of dispute settlement related to the Arab countries.

Samir Saleh, "Commercial Arbitration in the Arab Middle East", the writer gives emphasis on describing the legal structure and operation of domestic commercial arbitration mainly in the private sector in the Arab Middle East in the light of (Shari'ah) the Islamic law, statutes, judicial precedents, legal doctrine and local customs. He also describes the matter of application of the foreign law and the respective national approaches to the enforcement of foreign awards.[3]

Jason Chuah, “Law of International Trade”, retained the original focus on the need to present the law of International trade "as a whole" in its private law context and its emphasis on giving the student reader a wide perspective of the subject.[4] The author discussed the issue of choice of law, which is germane to my research.

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[3] Samir Saleh, *Commercial Arbitration in the Arab Middle East a study in Shari’ah and statute law,* (United Kingdom: London Graham & Trotman Limited 1984,) p1

[4] Jason Chuah, *Law of International Trade,* (London Sweet & Maxwell limited 2005),

Ademuni-Odeke, "Law of International Trade", dealt with export of International trade; goods and services supplied for reward to persons in other countries for which payment is generally due in the currency of the supplier. This book is only relevant to my research in the issue of choice of law and procedure.

Mark S.W. Hoyle, "The Law of International Trade", my concern in this book is the issue of conflict of laws and procedure.

Jason Chuah, "Q & A Series International Trade Law", this book has given more emphasis especially in the matters related to the Elements of conflict of laws and procedure.

Faisal M. Kutty, "The Shari'ah factor in International Commercial arbitration", in this article the writer has explored the development and acceptance of international commercial arbitration in the Middle East and analyzed the issues and areas which create tension between international commercial arbitration and the *Shari' a*.[5] the writer touched the issue of choice of law but he gave emphasis on the common law basis. My research will be looking at the issue of choice of law only by giving emphasis to the Shari'ah law basis and in a different sort of format.

Chindy G. Buys, "The Arbitration duty to respect the parties' choice of law in Commercial Arbitration", in his article, the writer tried to demonstrate that there is no valid reason to disregard the mutually agreed-upon choice of law made by the parties to an arbitration agreement arising out by the commercial arbitration.[6] The study is under the basis of common law.

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[5] Faisal M. Kutty, "*The Shari'ah factor in International Commercial Arbitration" (*LLM, dissertation, Osgood Hall, York University 2005), 6

[6] Chindy G. Buys, *The Arbitration duty' to respect the parties' choice of law in Commercial Arbitration,* St. John's Law Review; Winter2005, Vol. 79 Issue 1. p.60

Finally, there are many other writings and articles that discussed the issue of choice of law in International Commercial Dispute Resolution which may be used in the course of the research.

1.5 SCOPE AND LIMITATIONS OF THE RESEARCH

The issue of conflict of law is not a small one in the field of international commercial dispute resolution; this research will be concentrating on the applicable law in the international commercial dispute settlement. Other matters, such as: the appointment and powers of arbitrators, qualification, Arbitration proceedings, Award and enforcement of the Awards are not accommodated in this research. Furthermore, the mater of conflict of laws under the element of Jurisdiction is also excluded.

The research does not attempt to provide a comprehensive study, but rather a basic study on the applicable law in the international commercial dispute resolution, which will hopefully contribute to a better understanding of some of the unique concerns of Islamic law, when it comes to the practice, and procedure of International commercial disputes settlement.

1.6 OBJECTIVES AND AIMS OF THE RESEARCH

My aim in this research is to analyze the basic idea of choice of law in the Islamic law and international commercial dispute resolution. This will provide the practitioners in this area with fundamental instrument to adjudicate between the two parties from different jurisdictions. And also to chase away the common Western notion that the Shari'ah is an unsophisticated, obscure and defective system.

1.7 METHODOLOGY

The method implemented in preparing this research was analytical; it was conducted by putting side by side the international commercial dispute resolution and Islamic law perspective, and also the understanding of the senior Islamic scholars. This is apart from the reliance on statutes, books, articles, unpublished thesis and papers, journals, reported cases, decided cases, and encyclopedias.

CHAPTER TWO

CHOICE OF LAW UNDER THE COMMON LAW AND THE ROME CONVENTION

2.1 INTRODUCTION

The purpose of private international law is to determine the appropriate system of law that governs a dispute involving a foreign element. It is also known as rules of "conflict of law". Each and every state has its own rules of Private International law. Local private international law comes into operation whenever the court is faced with a prima facie case that contains a foreign element or contact with some system of law other than the local law. Local Private international law provides choice of law rules to determine the most appropriate legal system to govern the international case.

However, private international law does not provide a direct or final answer to the dispute.[1] For example, an English court adjudicates a dispute over a contract drafted in Nigeria and one party sues for breach of contract. If the opposing party, in its defense, contends that the contract is invalid under the Nigerian Statute of Frauds laws, for example, private international law will determine which country's laws the English court should apply in deciding the case. Private international law will not provide the English court with the actual substantive law. In this example, private international law stipulates that Nigerian law should determine the enforceability of the contract but it does not tell the English court the details of the relevant Nigerian law. The English court will invite experts to prove the relevant Nigerian law.

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[1] Gina M. McGuiness, "The Rome Convention: the contracting party's' choice" *San Diego International Law Journal* vol.1, no,127 (2000): 2

The main focus, therefore of Private international law is to determine the issue of 'choice of law': The choice between the local law (Lex fori) and the relevant foreign law. The present chapter will be looking at the question of choice of law under the common law and the Rome Convention on the law applicable to contractual obligations 1980.

2.2 THE HISTORICAL DEVELOPMENT OF RULES OF CONFLICT OF LAWS

The first instances of conflict of laws in the Western legal tradition can be traced to the Greek law. Ancient Greeks dealt straightforwardly with multi-state problems, and did not create choice-of-law rules. Leading solutions varied between the creation of courts for international cases, and application of local law, on the grounds that it was equally available to citizens of all states.[2] But more significant developments can be traced to Roman law where parties from foreign countries would go before a *praetor perigrinus* in Rome to plead their case. The *praetor perigrinus* would often choose to apply the law applicable to non-Roman citizens (*jus gentium*) rather than Roman law *per se* (*jus civile*).[3] PM North and JJ Fawcett added that, the existence of conflicting territorial laws was due to the fact that after the close of the Republic, the Rome Empire was broken up into a number of urban communities, each of which had its own magistrates, its own jurisdiction and to a certain extent, its own system of internal law[4].

The birth of the modern conflict of laws is generally considered to have occurred in Northern Italy during the late Middle Ages and in particular in trading

[2] Wikipedia the free encyclopedia <http://en.wikipedia.org/wiki/choice of law>, (accessed13 November 2008), "choice of laws".
[3] Ibid.
[4] North and JJ Fawcett, *Private International Law*, (Butterworth London, 1992):15

cities such as Genoa, Piza, and Venice. The need to adjudicate issues involving commercial transactions between traders belonging to different cities led to the development of the theory of (*statute)*, whereby certain city laws would be considered as (*statuta personalia)* "following" the person whereby it may act, and other city laws would be considered as (*statuta realia)*, resulting in application of the law of the city where e.g. the *res* would be located (cf. *lex rei sitae*).

The modern field of conflicts emerged in the United States during the 19th century with the publishing of Joseph Story's treatise on the Conflict of Laws in 1834. Story's work had a great influence on the subsequent development of the field in England such as those written by A.V. Dicey. Much of the English law then became the basis for conflict of laws for most commonwealth countries.[5]

In the later development, the growth of the British Empire inevitably led to greater intercourse between British subjects owing obedience to a variety of laws, and consequently to an increase in the number of disputes that required, if justice were to be done, a reference to something more than the common law of England. Yet the emergence of anything approaching a connected system of private international law proved to be a slow and laborious process. First hesitant steps were seen in *Robinson v Bland* in 1790.[6] Here the question whether a contract valid by the law of France where it was made, thought void by English law, could be sued on in England was discussed but not decided.

The plaintiff had lent £300 to X in Paris, which X immediately lost to the plaintiff by gaming, together with an additional £372. X gave plaintiff a bill of exchange payable in England for the whole amount. It was found that in France

[5] *Wikipedia the free encyclopedia,* <http://www.answers.com/topic/conflict-of-laws> (accessed13 November 2008) "Conflict of laws"
[6] 1760 2 Burr.1977

"Money lost at play between gentlemen may be recovered as a debt of honor before the marshals of France, who can enforce obedience to their sentences by imprisonment" After the death of X the plaintiff brought assumpsit against his administrator on three Courts: on the bill of exchange, for money lent, and for money had and received. It was held that the bill of exchange was void and that no action lay for the recovery of the money won at play. The plaintiff, however, was held entitled to recover on the loan.[7]

The decision given by two of the three judges was that the law of France and of England were the same on all these points, and that therefore it was unnecessary to consider which law would apply had there been a difference between them. But Denison J felt that English law would govern, since the plaintiff had chosen an England forum.[8]

In the earlier development, Private international law can also be found in the Islamic law and jurisprudence as a result of the vast Muslim conquests and maritime explorations during the early Middle Ages giving rise to various conflicts of laws. A will, for example, was "not enforced even if its provisions accorded with Islamic law if it violated the law of the testator." Islamic jurists also developed and elaborated on the rules of private international law regarding issues such as contracts and property, family relations and child custody, legal procedure and jurisdiction, religious conversion, and the return of aliens to an enemy country from the Muslim world.[9]

In the twentieth century, the development of private international law was still further accelerated by the mass movement of populations, stipulated by wars and their aftermath, and by technical advances in the fields of transport and communications. It

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[7] North and JJ Fawcett, p .25
[8] Ibid.
[9] Wikipedia the free encyclopedia, <http://en.wikipedia.org/wiki/> (accessed 15 November,2008)

has not been easy for the conflict of laws to adapt itself to the changes in social and commercial life that the last century has witnessed.[10] A lot of its rules were first laid down in the nineteenth century and were suited to nineteenth century situations.

In twenty first century, many areas of the subject have been modernized by the intervention of statutes, often giving effect to international Conventions such as those emanating from the European community or those negotiated by the specialist international agency in this field.[11] In the past, the subject title was known as Conflict of law, but now "private international law" has become popular than the conflict of law. The Private international law has continued to be looked upon by the international community until today.

2.3 THE NATURE AND IMPORTANT ROLE OF CHOICE OF LAW

There are two major streams of legal thought on the nature of conflict of laws. One group of researchers regards conflict of laws as a part of international law, claiming that its norms are uniform, universal and obligatory for all states. This stream of legal thought in conflict of laws is called "universalism". However, other researchers hold the opinion that each State stipulates its own unique norms of conflict of laws pursuing its own policy. This theory is called "particularism" in conflict of laws.[12] The English conflict of laws is a body of rules whose purpose is to assist an English court in deciding a case which contains a foreign element; if the case contains no foreign element, the conflict of laws is irrelevant.[13]

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[10] J.H.C Morris, *The conflict of laws,* Sweet & Maxwell Ltd London 2000 p.7
[11] Ibid.
[12] *Weeramantry, Judge Christopher G. (1997),* Justice Without Frontiers: Furthering Human Rights, Brill Publishers, *p. 138*
[13] J.G. Collier, *Conflict of laws,* (Cambridge university press 1987):.3

For instance, where two English men in England make a contract for the sale and purchase of goods to be delivered from Oxford to Cambridge with payment in sterling in London, and the seller later sues the buyer and serves him with a writ in England. But if the seller is English man who agrees to sell goods in England to a French buyer in France, to be delivered in France and paid for in starling into an English bank in Paris, the question arises as to whether the seller can invoke the jurisdiction of the English court against the buyer, who is still in France, if he intends to sue him for breach of contact or failure to pay the price.[14]

Private international law consists of three main issues: the jurisdiction of an English court in the sense of its competence to hear and determine a case. Then the selection of the appropriate rules of a system of law, English or foreign, which should be applied in deciding a case over which it has jurisdiction, the rules governing this selection are known as "choice of law rules" These rules can be applied to determine the parties' rights and obligations. The issues of jurisdiction and choice of law may both be involved in a particular case. But they can arise independently; our main focus here is the former, where the court may clearly have the jurisdiction but it has to answer the choice of law question. If the choice was not a genuine choice, or there may be no question as to what law to apply, as in the contract where the parties had stipulated the specific law that will govern their agreement, the next question is the recognition and enforcement of judgments rendered by foreign courts or awards of foreign arbitrations.

A choice of law problem can arise in any civil action. The conflict of laws is concern with the civil and commercial legal aspects of a case with foreign element. It covers the law of obligations, contract and tort, and the law of property both

[14] Ibid. p.4