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IMPLICATIONS OF THE SELECTION OF ISLAMIC LAW IN EUROPEAN PRIVATE INTERNATIONAL LAW

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ABSTRACT

The English Court of Appeal in Beximco v. Shamil Bank chose to apply only English law in a breach of contract case, even though the choice of law clause in the contract at issue also selected Islamic law. The court cited three main reasons for this decision. First, article 3(1) of the Rome I Convention "contemplates" that a contract can be governed only by the "law of a country," and there is no mention of the application of a "non-national system of law such as Sharia law." Second, Islamic law does not consist of "principles of law" but instead a system of principles which "apply to other aspects of life and behaviour." Third, even if Islamic law was interpreted to include principles of law, there is no consensus among the Islamic legal community as to what they would be when applied to a financial transaction.

As this note will demonstrate, none of these arguments should hold weight in a contemporary European Member State court. For one thing, the court's ruling is not consistent with the implications of the 2008 Rome I Regulation ("the Regulation" or "the Rome I Regulation"), which updates the Rome I Convention ("the Convention" or "the Rome I Convention"), both of which regulate choice of law issues in the European Union ("EU"). Although the Rome I Regulation was passed four years after the Shamil Bank decision, the content and legislative history of the Regulation suggest that it should be understood to support the validity of non-state sources of law like Islamic law.

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For another, the Shamil Bank decision misconstrued the nature of Islamic law. Islamic law's approach to financial issues is demonstrably specific enough to enforce, as is evidenced by the fact that international arbitration proceedings have no difficulty enforcing choice of law clauses which select Islamic law.

The weaknesses of the court's arguments are not the only reason that future European Member State courts should not follow the reasoning of the Shamil Bank decision. In a global system that is trending toward prioritizing party autonomy, as evidenced by the Rome I Regulation and The Hague Principles on Choice of Law in International Contracts ("the Hague Principles"), European Member State court systems should be more open-minded about enforcing the legal systems that parties choose to rely upon in negotiating and drafting their contracts. This is especially true when the contract at issue selects both state law and non-state law, as was the case in Shamil Bank. If parties choose, as they did in that contract, to apply English law "in the spirit" of Islamic law, it would be disrespectful of their autonomy—and would materially alter the nature of the bargain they have entered into—for the court to choose to apply only English law, as the English Court of Appeal did. This is not to say that courts should be forced to apply parties' selection of all types of non-state law, only those systems that are demonstrably specific enough to administer, as Islamic law is.

This note will contend that even though no European Member State court has dealt with the application of Islamic law directly since the 2004 Shamil Bank decision, to the best of this author's knowledge, if the issue were to arise again, courts should not follow the reasoning of the Shamil Bank decision.

INTRODUCTION

The English Court of Appeal in *Beximco v. Shamil Bank* chose to apply only English law in a breach of contract case, even though the choice of law clause in the contract at issue also selected Islamic law.[1] The court cited three main reasons for this decision. First, article 3(1) of the Rome I Convention "contemplates" that a contract can be governed only by the "law of

1. The focus of this note is on the choice of law issues that arise when parties select Islamic law in their contracts, and does not discuss the very real ways that the application of Islamic law is politicized in the Western world, especially in the United States. *See, e.g.*, Andrea Elliot, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES (July 30, 2011), http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all.

a country," and there is no mention of the application of a "non-national system of law such as Sharia law."[2] Second, Islamic law does not consist of "principles of law" but instead a system of principles which "apply to other aspects of life and behaviour."[3] Third, even if Islamic law was interpreted to include principles of law, there is no consensus among the Islamic legal community as to what they would be when applied to a financial transaction.[4]

As this note will demonstrate, none of these arguments should hold weight in a contemporary European Member State court. For one thing, the court's ruling is not consistent with the implications of the 2008 Rome I Regulation ("the Regulation" or "the Rome I Regulation"), which updates the Rome I Convention ("the Convention" or "the Rome I Convention"), both of which regulate choice of law issues in the European Union ("EU").[5] Although the Rome I Regulation was passed four years after the *Shamil Bank* decision, the content and legislative history of the Regulation suggest that it should be understood to support the validity of non-state sources of law like Islamic law.

For another, the *Shamil Bank* decision misconstrued the nature of Islamic law. Islamic law's approach to financial issues is demonstrably specific enough to enforce, as is evidenced by the fact that international arbitration proceedings have no difficulty enforcing choice of law clauses which select Islamic law.

The weaknesses of the court's arguments are not the only reason that future European Member State courts should not follow the reasoning of the *Shamil Bank* decision. In a global system that is trending toward prioritizing party autonomy, as evidenced by the Rome I Regulation and The Hague Principles on Choice of Law in International Contracts ("the Hague Principles," discussed at length *infra*), European Member State court systems should be more open-minded about enforcing the legal systems that parties choose to rely upon in negotiating and drafting their contracts. This is especially true when the contract at issue selects both state law and non-state law, as was the case in *Shamil Bank*. If parties choose, as they did in that contract, to apply English law "in the spirit" of Islamic law, it would be disrespectful of their autonomy—and would materially alter the nature of the bargain they have entered into—for the court to choose to apply only English law, as the English Court of Appeal did. This is not to say that courts should be forced to apply parties' selection of all types of non-state law, on-

2. Beximco Pharm. Ltd. v. Shamil Bank of Bahrain [2004] EWCA (Civ) 19 [40] (Lord Justice Potter) (Eng.).

3. *Id.*

4. *Id.*

5. Commission Regulation 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations, 2008 O.J. (L 177) 6 (EC) [hereinafter Rome I Regulation].

ly those systems that are demonstrably specific enough to administer, as Islamic law is.

I have focused this note on Islamic law as my primary example of non-state law for several reasons. First, due to the rise of Islamic Finance, as discussed *infra*, Islamic law is the most likely type of religious law to be selected in a contract that would give rise to this kind of dispute.[6] Additionally, European society in general has expressed a great deal of focus on Islam as of late, although that focus has been predominantly negative.[7] In February 2020, nine people were killed in Hanau, Germany, in what has widely been described as an Islamophobic attack.[8] According to statistics reported by *The Independent* in 2019*,* forty-four percent of British citizens believe that Islam is a serious threat to Western civilization (although that figure had decreased slightly from fifty-two percent who held that opinion in 2017).[9] I do not mean to imply that Islamophobia was the reason for the English Court of Appeal's decision, but the Islamophobic atmosphere of contemporary Europe adds important context for why I have chosen to focus on Islamic law as opposed to other kinds of non-state law in this note.

This note will contend that even though no European Member State court has dealt with the application of Islamic law directly since the 2004 *Shamil Bank* decision, [10] to the best of this author's knowledge, if the issue were to arise again, courts should not follow the reasoning of the *Shamil Bank* decision. Part II of this note will discuss the details of the *Shamil Bank* decision. In Part III, I rely on the legislative history of the Rome I regulation to argue that the European Parliament contemplated that European Member State courts could respect the validity of agreements that selected non-state

6. *See* discussion *infra* Part IV(B).

7. *See* Patrycja Sasna & Yasemin El Menouar, *There's a Social Pandemic Poisoning Europe: Hatred of Muslims*, GUARDIAN (Sept. 28, 2020), http://www.theguardian.com /commentisfree/2020/sep/28/europe-social-pandemic-hatred-muslims-blm.

8. *See Germany Shooting: What We Know About the Hanau Attack*, BBC (Feb. 20, 2020), http://www.bbc.com/news/world-europe-51571649.

9. Rosie Carter, *New Statistics Confirm What We Already Knew- Islamophobia is Thriving in All Parts of British Society*, THE INDEPENDENT (July 16, 2019) http:// www.independent.co.uk/voices/islamophobia-new-statistics-hope-but-hate-british-muslims-society-a9006516.html.

10. A related issue was addressed in *Engel v Adelaide Hebrew Congregation Inc.*, an Australian case in which the contract at issue selected Jewish Rabbinic law. In that case, the court found that "[when] the parties to a contract are governed generally by Australian law, or of which Australian law is the proper law, [they] can agree to incorporate provisions of another system of law as provisions of the contract" and that "the incorporated law can apply only to, and operate only as part of, that part of the contract into which it is incorporated." [2007] 98 SASR 402, 409 (Austl.). Scholars have interpreted this holding as permitting parties to incorporate non-state law, including religious law. However, Australia is not a member of the European Union. Saloni Khanderia & Sagi Peari, *Party Autonomy in the Choice of Law Under Indian and Australian Private International Law: Some Reciprocal Lessons*, 46 COMMW. L. BULL. 711, 723–24 (2020).

law.[11] Part IV of this note will introduce Islamic law and discuss its approach to business transactions, and demonstrate its high level of specificity in this area. Part V of this note will discuss how this issue has been approached in the international arbitration context as evidence that it is possible to apply a choice of law provision that selects Islamic law. Finally, Part VI of this note will discuss the broader context of the selection of non-state law in choice of law disputes, positing that even though the preceding parts of this note demonstrate the fallacy of the English court's arguments, it is unlikely that this will be enough to cause a national court to actually apply non-state law, even if it should. Part VI of this note also introduces The Hague Principles as an example of an instrument that states could adopt that would be more respectful of parties' choice of non-state law.

II. BEXIMCO V. SHAMIL BANK

The English Court of Appeal heard the *Shamil Bank of Bahrain EC v. Beximco Pharmaceutical Ltd.* case in 2004.[12] Shamil Bank is a Bahraini Islamic bank.[13] The Bank claims that it applies Islamic principles to its business and has a Religious Supervisory Board "which shall comprise at least three persons who are recognized specialists and qualified in Islamic jurisprudence, religious provisions and Islamic economy."[14] Beximco Pharmaceuticals is a Bangladeshi company involved in the manufacture, export and import of pharmaceuticals.[15] In 1995, Beximco wanted to raise capital, but in a manner that respected Islamic precepts, so it entered into a *murabaha* Financing Agreement with Shamil Bank.[16] By December 1999, Beximco had not paid the amount due according to the agreement, so Shamil Bank sued for breach of contract.[17]

Beximco claimed that the *murabaha* agreement was only enforceable as long as it was in accordance with Islamic and English law, but that it did not

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11. Since Brexit, the United Kingdom ("UK") is technically not party to the Rome I Regulation any longer, but the main thrust of this note is not disrupted by this fact since the Rome I Regulation continues to have implications for the rest of the European Union. Additionally, due to the apparent desire of the UK government to "preserve legal certainty," it is likely that English law will continue to follow the Rome I Regulation. Finally, English common law's approach to choice of law issues already closely follows the provisions of the Rome I Regulation. *See* Adam Sanitt, *Impact of Brexit on Choice of Law, Jurisdiction and Enforcement*, NORTON ROSE FULBRIGHT (Feb. 2021), http://www.nortonrosefulbright.com/en/knowledge/publications/a6ec9370/impact-of-brexit-on-choice-of-law-jurisdiction-and-enforcement.

12. *See* Beximco Pharm. Ltd. v. Shamil Bank of Bahrain [2004] EWCA (Civ) 19 (Eng.).

13. *Id.* ¶ 4.

14. *Id.* ¶ 6.

15. *Id.* ¶ 11.

16. *Id.* ¶ 14. A *murabaha* is a type of Islamic financial instrument intended to circumvent the Islamic prohibition on *riba* (interest). *See infra* Part IV(B) for further discussion.

17. *Id.* ¶ 18.

comply with Islamic legal precepts and was thus unenforceable.[18] Specifically, Beximico claimed that "despite their form as Morabaha Agreements . . . the transactions were in truth disguised loans of interest. As such, they amounted to unlawful agreements to pay *Riba* (interest) and were thus void and/or unenforceable."[19]

However, Shamil Bank's Religious Supervisory Board had cleared the transaction at its outset and declared that all transactions from that year complied with Islamic law.[20] As the bank's expert in the case, Dr. Lau, the former director of the Centre of Islamic and Middle Eastern Law explained, "if a bank's Religious Supervisory Board is satisfied that the bank's activities are in accordance with Sharia law, that concludes the matter, there being no provision in Bahrain law, or Islamic law generally, for an appeal by a customer of the bank against the Board's rulings and certifications."[21]

Since the case turned on whether the agreement itself complied with Islamic law, the court was tasked with interpreting the choice of law clause which stated 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."[22] If the court "were obliged" to construe this clause as necessitating the application of the principles of Islamic law, and Beximco was correct that the contract violated those principles, then Beximco would not be obligated to pay.[23] Thus, the issue before the English Court of Appeal was determining "the construction and effect" of this choice of law clause.[24]

Mr. Hacker, attorney for Beximco, suggested that the choice of law clause was meant to "incorporate into English law for the purposes of its application to the contract" and thus should be read "as incorporating simply those rules of Sharia which relate to interest and to the nature of Murabaha and Ijarah contracts, thus qualifying the choice of law as the governing law only to that extent."[25]

The court disagreed with this assessment. It found that incorporation of foreign law in a contract is only permitted when it is in reference to "black letter" provisions of the selected law, and that Islamic law is too vague to operate in this way.[26] This vagueness was especially a problem in this context, the court argued, because the contract made only a "general reference" to "Sharia'a" and did not specify which aspects were to be incorporated.[27]

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18. *Id.* ¶ 27.
19. *Id* ¶ 27. *See infra* Part IV(A) for further elaboration on the definition of *riba*.
20. *Id.* ¶¶ 31–32.
21. *Id.* ¶ 30.
22. *Id.* ¶ 1.
23. *Id.* ¶¶ 54–55.
24. *Id.* ¶ 1.
25. *Id.* ¶ 49.
26. *Id.* ¶ 51.
27. *Id.* ¶ 52.

Instead, the phrase "subject to the principles of Glorious Sharia'a" was "no more than a reference to the fact that the Bank purported to conduct all its affairs according to the principles of Sharia."[28] Thus, the court declared, "it is plainly insufficient for the defendants to contend that the basic rules of the Sharia applicable in this case are not controversial" since there were none identified.[29]

The court determined that these considerations meant that it should not apply the Islamic law aspect of the choice of law clause.[30] This determination was primarily due to three reasons. First, article 3(1) of the Convention did not "contemplate" that a contract can be governed by a "non-national system of law such as Sharia law."[31] Second, Islamic law does not consist of "principles of law" but instead of a system of principles which "apply to other aspects of life and behavior."[32] Third, even if Islamic law was interpreted to include principles of law, there is no consensus among the Islamic legal community as to what they would consist of when applied to a financial transaction.[33] As this note will demonstrate, these arguments conflict with both the current EU conflict of law regulatory framework (the Rome I Regulation), and the nature of Islamic law.

Nonetheless, based on this determination, the court concluded that the contract and the defendants' obligations should be considered according to English law alone, and according to English law, the defendants were liable to the bank.[34]

III. THE ROME I REGULATION

Shamil Bank v. Beximco was decided in 2004, and it is fair to say that the decision was in keeping with the EU's regulatory framework for conflict of law disputes in place at the time, the Rome I Convention. However, in 2008, the European Parliament passed an update to that framework known as the Rome I Regulation.[35] Recital 13 of the new Rome I Regulation states that "this Regulation does not preclude parties from incorporating into their contract a non-State body of law or an international convention."[36]

Some scholars have argued that this provision has limited effect and would not cause a case like *Shamil Bank* to come out any differently. For

28. *Id.* ¶ 41.

29. *Id.* ¶ 52.

30. *Id.* ¶¶ 53–54.

31. *Id.* ¶ 48.

32. *Id.* ¶ 49. This final argument is particularly flawed since many aspects of western state law also apply to "other aspects of life and behaviour," for example most principles that derive from equity.

33. *Id.* ¶ 55.

34. *Id.* ¶ 61.

35. *See* Rome I Regulation, *supra* note 5.

36. *Id.* ¶ 13.

example, Jason Chuah has suggested that this addition is simply a recital, and not a full article, and thus lacks legislative force.[37] However, recitals are generally intended to aid in interpretation and thus do still carry weight in that sense.[38]

Additionally, Chuah argues, the lawmakers who drafted the document were primarily contemplating the International Institute for the Unification of Private Law ("UNIDROIT") and the United Nations Convention on Contracts for the International Sale of Goods ("CISG") in their reference to "non-State body of law" and did not intend to include bodies of jurisprudence like Islamic law.[39] Thus, he argues, the 2008 version of the Rome I Regulation would have no impact on a court's decision whether or not to enforce a choice of law provision that includes a reference to Islamic law.[40] This led Symeon C. Symeonides to conclude that "non-state norms, which play such a prominent role in the arena of international commercial arbitration, continue to encounter skepticism outside of that arena."[41]

However, even if these arguments were true, they would not justify a contemporary court following the Court of Appeal's decision, which was primarily based on the fact that the Rome I Convention (as it was then) did not "contemplate" the validity of non-state law at all.[42] The addition of Recital 13, at a minimum, makes that argument untenable.

Specifically, the plain language and the legislative history of Recital 13 do not support the conclusion that the Regulation drafters did not contemplate the enforcement of non-state bodies of law beyond the UNIDROIT and the CISG, either. For one thing, Recital 13's statement that "this Regulation does not preclude parties from incorporating into their contract a non-State body of law or an international convention" is not limited to the accommodation of any particular body of non-State law, and specifically speaks to both "non-State bod[ies] of law" and "international convention[s]."[43] Thus, the suggestion that the Recital is limited to international conventions like UNIDROIT and the CISG is at least facially at odds with the Recital's plain language.

Beyond this, the legislative history of the Recital seems to demonstrate that the Legislature intended a broader reading. From the origins of the EU, regulation of conflict of law and choice of law issues were clearly consid-

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37. Jason Chuah, *Impact of Islamic Law on Commercial Sale Contracts- A Private International Law Dimension in Europe*, 2 EUR. J. COM. CONT. L. 191, 195 (2010).

38. *See Recital (EU)*, U.K. PRAC. L., http://uk.practicallaw.thomsonreuters.com/w-009-6368?transitionType=Default&contextData=(sc.Default) (last visited Mar. 9, 2022).

39. Chuah, *supra* note 37, at 195.

40. *Id.*

41. Symeon C. Symeonides, *Party Autonomy in Rome I and II From a Comparative Perspective, in* CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW 513, 540 (Katharina Boele-Woelki, Talia Einhorn, Daniel Girsberger, Symeon Symeonides eds., 2010).

42. Beximco Pharm. Ltd. v. Shamil Bank of Bahrain [2004] EWCA (Civ) 19 [48] (Eng.).

43. Rome I Regulation, *supra* note 5, ¶ 13.

ered a priority. The first attempt at such regulation was the 1968 Brussels Convention, which allowed applicants to choose between courts and thus created the risk of forum shopping and the likelihood that a party would choose the most favorable court.[44] The Rome I Convention was passed with the intention of reducing this risk, and also dealing with broader conflict of law issues that the Brussels Convention did not discuss.[45]

The purpose of the Rome I Regulation was to replace and modernize the earlier Rome I Convention.[46] The 1980 instrument took the form of a convention because, at that time, the European Community Treaty ("EEC Treaty," which establishes and regulates the EU) did not "provide a legal basis for the adoption of an appropriate legal instrument by the Community."[47] However, with the adoption of articles 61(c) and 65(b), the Treaty establishing the European Community ("TEC") came to include a legal basis for action in this area.[48] Specifically, these articles empowered the Commission to act where "necessary for the smooth operation of the internal market."[49] One significant consequence of the 2008 decision to address these issues in the form of a regulation, instead of a convention, is that it did not need to be implemented in conformity with each Member State's constitutional requirements,[50] which restricted the ability of the Member States to maneuver in any way their implementation, which could result in legal uncertainty.[51]

The Regulation was adopted on June 17, 2008 and entered into force on December 17, 2009.[52] It applies to all civil and commercial matters that involve a conflict of law issue in contractual obligations, but excludes matters related to the legal capacity of natural persons, family obligations, trusts and estates, etc.[53] The goal of the Regulation was to harmonize the conflict of law rules of the Member States concerning contractual obligations, such that even if the substantive law at issue was different, all Member State courts

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44. *See Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I)*, § 1.1, COM (2005) 650 final (Dec. 15, 2005).

45. *See id.* ¶ 2.

46. Council of the European Union Press Release C/07/275, Justice and Home Affairs, Contractual Obligations 24 (Dec. 6–7 2007) [hereinafter Justice and Home Affairs Press Release].

47. *Opinion of the European Economic and Social Committee ["EESC"] on the Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I)*, § 2.1.1, COM (2005) 650 final (Dec. 23, 2006) [hereinafter *Opinion of the EESC*].

48. *Id.*

49. *Id.* § 2.3.1.

50. *See* Ole Lando & Peter Arnt Nielsen, *The Rome I Regulation*, 45 COMMON MKT. L. REV. 1687, 1688 (2008).

51. *Opinion of the EESC*, *supra* note 47, § 2.3.

52. Lando & Nielsen, *supra* note 50, at 1687.

53. See *id.* at 1691 for a full list of excluded categories.

would apply the same law to the contract in question.[54] This harmonization of conflict of law rules would "help to ensure equal treatment of economic operators in the Community in cross-border cases, increase legal certainty, simplify application of the law and thus promote willingness to enter into cross-border business."[55] It was also intended to promote mutual recognition of laws, which would make it easier for nationals of different Member States to ensure that the interpretation of their contractual obligations would be more predictable and transparent.[56] The Regulation is based on the principles of party autonomy and the freedom to contract, but in the absence of a choice by the parties, sets forth clear principles of what law should be applied.[57] As the Regulation states, "the parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations."[58]

The drafters of the Regulation were extremely clear that they did not want anything in the document to suggest a preference for Member State law as opposed to any other system of law.[59] The Regulation specifically "prohibits discrimination against other systems of law" which the European Economic and Social Committee endorsed as ensuring that "if the circumstances of a case require that a system of law be applied, it makes no difference whether or not it is that of a Member State."[60] This is further emphasized by the fact that although there was originally a sentence in the Regulation which stated that the choice of law was presumed to be the law of the Member State in which the adjudicating court is situated (if no choice was stipulated in the contract), the Committee was concerned that this would be too strict and suggested rewording to "in particular, the choice should take account of the court chosen by the parties."[61] This, in addition to what follows, indicates an openness to non-European legal systems, as well as a general emphasis on party autonomy.

Not only did the Commission have a clear concern about avoiding a preference for Member State law, they also wanted to respect parties' ability to choose non-state law in their contracts—a significant change from the original 1980 text. The Commission, in a 2007 Green Paper, queried whether parties should be permitted to directly reference non-state bodies of law, including international conventions, in their contracts.[62] They cited as the origin of their inquiry the prevalence of parties referring to documents like

54. Justice and Home Affairs Press Release, *supra* note 46, at 24.

55. *Opinion of the EESC*, *supra* note 47, § 2.3.1.

56. *Id.*

57. Justice and Home Affairs Press Release, *supra* note 46, at 24.

58. Rome I Regulation, *supra* note 5, at 1.

59. *See Opinion of the EESC*, *supra* note 47, § 3.1.8.

60. *Id.*

61. *Id.* § 3.2.2.

62. MICHAEL MCPARLAND, THE ROME I REGULATION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS 143–44 (2015).

the UNIDROIT principles in their contracts.[63] International trade and finance was going through a process of globalization which led to an "upsurge in conventions in different aspects of private law governing commercial transactions" like the UNIDROIT and the CISG.[64] The Commission stated in the Green Paper that some scholars considered the choice of non-state law already valid under the 1980 Rome I Convention since there had been cases holding that parties could consider the CISG as applicable in their contracts and it had "already been admitted before arbitrators."[65]

Based on the Green Paper, the Commission proposed an additional article to the Rome I Regulation (the "Draft Article") that would have formalized this respect for non-state law.[66] The Draft Article stated that "the parties may also choose as the applicable law the principles and rules of the substantive law of contract recognized internationally and in the Community."[67] An included explanatory memorandum stated that the point of the article was to "emphasize parties' choices."[68] The response to the article was mostly negative, but not due to its non-state law content.[69] Most of the criticism was regarding the vague phrase "recognized internationally or in the Community."[70] Many delegations expressed doubts about the wording, and concerns about the "legal certainty" of the phrase.[71] Of the delegations that voted in favor, Latvia approved because it expanded the freedom of choice, Lithuania approved but was concerned about the wording being "difficult," and Sweden and Germany were most in favor but still made recommendations to change the wording.[72]

Because of these concerns, the Parliament scrapped the article, but not the concept of ensuring freedom to choose non-state law.[73] Instead, they presented the text that would become the current Recital 13—which states that "this Regulation does not preclude parties from incorporating into their contract a non-State body of law or an international convention."[74] Thus, it is clear from this choice that the Parliament's intention was to preserve parties' ability to choose non-state bodies of law in their contracts, despite removing the Draft Article.[75] The Commission also maintained an emphasis

63. *Id.* at 144.

64. *Id.*

65. *Id.* at 145.

66. *Id.* at 149.

67. *Id.*

68. *Id.*

69. *See id.* at 150.

70. *Id.*

71. MCPARLAND, *supra* note 62, at 150 (citing Eur. Council, *Meeting of the Council's Rome I Committee of 3–4 July 2006*, Doc. No. 111451/06 (2006)).

72. *Id.*

73. MCPARLAND, *supra* note 62, at 151.

74. Rome I Regulation, *supra* note 5, at 1.

75. MCPARLAND, *supra* note 62, at 154.

on party autonomy throughout the drafting process and in the document that became the Rome I Regulation.[76] Additionally, contrary to the characterization of the English Court of Appeal, it is clear that the 2008 Rome I Regulation now contemplates non-state law,[77] and even if the examples the drafters cited were restricted to the CISG and the UNIDROIT, the text itself is unlimited, as is the overarching principle of contractual autonomy. This leaves open the door for the application of choice of law provisions that select bodies of law, such as Islamic law, which fall outside the realm of international conventions.

IV. ISLAMIC LAW AND FINANCE

As the prior section demonstrated, the first aspect of the *Shamil Bank* opinion's argument is legally flawed according to the current EU conflict of law framework. The additional aspects of the opinion regarding the nature of Islamic law are also untenable. Specifically, the English Court of Appeal's description of Islamic law as vague and without consensus when it comes to financial matters is difficult to reconcile with the actual doctrines of Islamic law in the financial realm and with its widespread application. To the contrary, Islamic law's approach to financial issues is demonstrably specific enough to enforce, which is emphasized by the fact that international arbitration proceedings routinely enforce choice of law clauses selecting Islamic law.[78] It is important, however, to clarify that it is not the case that Islamic law has a one-size fits-all answer for financial questions, but rather a standard approach and set of governing constraints for financial issues—similar to most other jurisprudential systems throughout the world which courts have no problem applying.

A. *What is Islamic Law*

This note has consistently referred to Islamic law and not *shari'a* (unless quoting a source which does so). This is because Islamic law is comprised of both *shari'a* and what is known as *fiqh*. *Shari'a* is defined as "the immutable Divine Law as revealed in the Quran and the *Sunna*" while *fiqh* refers to human attempts to understand that "Divine Law."[79] The Quran refers to the compilation of the Word of God as revealed to his Prophet Mu-

76. *See* Rome I Regulation, *supra* note 5, at 1.

77. Beximco Pharm. Ltd. v. Shamil Bank of Bahrain [2004] EWCA (Civ) 19 [48] (Eng.).

78. It is also important to note that both a wealth of literature accessible to a western audience and the possibility of expert witnesses on the subject exist to educate the English Court of Appeal judges on the topic. *See, e.g.*, CHIBLI MALLAT, INTRODUCTION TO MIDDLE EASTERN LAW (2007).

79. FRANK E. VOGEL & SAMUEL L. HAYES III, ISLAMIC LAW AND FINANCE: RELIGION, RISK AND RETURN 19, 23–24 (1998).

hammad.[80] The *sunna* refers to the Prophet's "path" as conveyed by authenticated acts and word of God, and includes *hadith*, or authenticated written reports about the Prophet's lifetime.[81] Thus, Islamic jurisprudence is the interpretation of these texts by scholars.[82]

Islamic law is derived through the process of *ijtihad* (literally "effort"), or a method of interpretation done by legal experts following a specific methodology.[83] *Fiqh* rulings only carry the weight of being God's law when they are either (1) found in a revealed text or (2) agreed upon unanimously by all Islamic scholars, or *ijma'* (consensus).[84] The rules for reaching consensus are very strict, and so achieving it is relatively rare. This means that there is certainty about only a few rules.[85] However, many of the rules that are applied to Islamic finance fall into the first category, since they have origins in the written texts and thus carry the text's weight.[86]

It is important to note that an Islamic legal opinion is not just a ruling on the issue of permissibility, but also on morality.[87] All judgments are on a scale ranging from: prohibited (*haram*), reprehensible (*makhruh*), indifferent (*mubah*), meritorious (*mustahabb*) and obligatory (*wajib*).[88] Thus a transaction that is declared void is often also considered prohibited (*haram*).[89]

Islamic law has a system of general principles which apply directly to financial situations.[90] Among the most important is the fundamental respect of the freedom to contract, so long as the subject matter and conditions of the contract are not forbidden (*haram*).[91] Specifically, a contract that includes *riba* (interest), *gharar* (uncertainty) or *maysir* (gambling) is invalid on its face.[92] All of these prohibitions can be found in the written texts, and thus fall into the first category of legal rulings which carry the weight of God's law. Shari'a Boards at Islamic Banks turn to the specific texts that embody these prohibitions to interpret whether or not a financial instrument is compliant with Islamic law.[93]

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80. *Id.* at 23.

81. *Id.*

82. *Id.*

83. *Id.* at 32.

84. *Id.*

85. *Id.*

86. *Id.* at 53, 62.

87. *Id.* at 41.

88. *Id.*

89. *Id.* at 42.

90. Anowar Zahid & Hasani Mohd Alid, *Shariah as a Choice of Law in International Islamic Financial Contracts: Shamil Bank of Bahrain Case Revisited*, 10 U.S.-CHINA L. REV. 27, 31 (2013).

91. *Id.* at 32.

92. *Id.*

93. *See id.*

Riba is defined as "an excess or increase in return from a transaction" (or interest).[94] The Quran instructs followers of Islam to "devour not *riba.*"[95] The Quran goes on to warn that "those who devour *riba* do not stand except as one stands whom Satan has confounded with his touch."[96] Although unequivocal in its prohibition of *riba*, the Quran does not specifically define the term.[97] However, scholars have determined that during pre-Islamic times, the term *riba* was used to mean "an increase . . . in return for an extension . . . granted a borrower who could not make payment when due."[98] Since that is what the term meant at the time the Quran was written, most scholars understand that to be what is prohibited.[99]

The *sunna*, in the form of numerous hadiths, further elaborates on the definition of *riba*. For example, it states that "every *qard* (loan) that attracts a benefit is *riba*"[100] and that "God has allowed sale, and forbidden *riba'.*"[101] The term *qard* is defined as a loan of fungibles, which includes money.[102] The term "benefit" is understood to mean interest on a money loan.[103] There are two kinds of *riba*, *riba al-Nasiah* and *riba al-Fadal.*[104] *Riba al-Nasiah* refers to interest on loans, which is the type most commonly at issue in financial contracts.[105] Chief Justice Dr. Tanzil-ul-Rahman, in the seminal 1991 case from the Pakistan Federal Shariat court, explained that for this type of *riba*, there is no "difference of opinion regarding its prohibition." The Chief Justice goes on to say that "there is no Commentator of the Holy Qur'an, no narrator of Ahadith, and no Jurist of Islamic *Fiqh* worth the name who has expressed or even mentioned any doubt regarding any obscurity or ambiguity in its meaning."[106]

Gharar (risk) and *maysir* (gambling) are also prohibited. The Quran states that "[i]ntoxicants, *maysir* (games of chance/gambling), [worship of] idols, and [divination by] arrows are but an abomination, Satan's handi-

94. Babback Sabahi, *Islamic Financial Structures as Alternatives to International Loan Agreements: Challenges for U.S. Financial Institutions*, 24 ANN. REV. BANKING & FIN. L. 487, 490 (2005).

95. *The Quran* 3:130. Translations of Quranic passages in English are by VOGEL & HAYES III, *supra* note 79.

96. *The Quran* 2:275.

97. VOGEL & HAYES III, *supra* note 79, at 62.

98. *Id.*

99. *Id.*

100. *Id.* at 73.

101. MALLAT, *supra* note 78, at 53.

102. VOGEL & HAYES III, *supra* note 79, at 77.

103. *Id.*

104. MALLAT, *supra* note 78, at 341.3 (quoting Mahmood-ur-Rahman Faisal v. Secretary, Ministry of Law, (1992) 44 PLD (FSC) 1(Pak.)).

105. *Id.*

106. *Id.*

work; avoid it then, so that you might prosper!"[107] The *hadith*, again, reiterates this prohibition. For example, it states that "the Messenger of God forbade the 'sale of the pebble' [*hasah*, sale of an object chosen or determined by the throwing of a pebble], and the sale of *gharar*."[108] Additional examples include: "[t]he Prophet forbade sale of what is in the wombs, sale of the contents of the udders, sale of a slave when [he] is runaway . . . ";[109] "whoever buys foodstuffs, let him not sell them until he has possession of them";[110] and "[h]e who purchase food shall not sell it until he weighs it."[111]

All of these quotations can be placed on a spectrum of prohibited transactions. First, there are situations of pure speculation, such as gambling or when the final sale is of unknown value.[112] Second are situations where there is an uncertain outcome, involving contracts where the counter value is uncertain, and also perhaps not actually realized.[113] Third are situations with an unknowable future benefit, where the initial transferred benefits are known but the future benefit is unknown.[114] And finally, there are situations of simple inexactitude.[115] All of these transactions are forbidden.[116] Thus, a valid sale is one where both parties have full knowledge of all aspects of the sale, and the sale is of a concrete object.[117] In the context of finance, this prohibits derivatives because they are contracts where the consideration is "indeterminable."[118] This also prohibits traditional forms of insurance because the total number of premiums the policyholder will pay over their lifetime is not determined. [119]

Scholars have posited two potential rationales for this prohibition: (1) to prohibit risks regarding the existence of the object of the transaction;[120] (2) based on a prohibition of *maysir* (gambling), to prevent the possibility that it will lead to immorality and social harm. [121]

Today, Islamic law is mostly enforced through personal or communal means and not by the state apparatus (with the exception of family law).[122]

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107. *The Quran* 5:90–91.
108. VOGEL & HAYES III, *supra* note 79, at 64.
109. *Id.* at 88.
110. *Id.*
111. *Id.* at 88.
112. *See id.*
113. *Id.* at 89.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 90.
118. Sabahi, *supra* note 94, at 491.
119. *Id.*
120. VOGEL & HAYES III, *supra* note 79, at 90.
121. *Id.* at 90.
122. *Id.* at 47.

The institutions of Islamic jurisprudence were severely weakened through the process of colonialism and the replacement with Western legal institutions.[123] Since the oil boom, new institutions have risen in their place, including three or four *fiqh* academies.[124] Additionally, many Islamic financial institutions have their own "Shari'a Review Boards" which issue *fatwas* (an Islamic advisory ruling) for their new financial products.[125]

B. *What is Islamic Finance*

Islamic finance also underwent parallel periods of weakening and revival as the result of colonialism and the oil boom.[126] During the 1950s and 60s, while the Islamic world was revolting against colonialism, scholars began considering the possibility of rejecting Western financial and economic systems as well.[127] With the sudden influx of money in the 1970s due to the oil boom, these scholars were able to put theory into practice with the establishment of several banks with mandates to operate according to Islamic law.[128] The number of Islamic banks has "mushroomed" in the past few decades especially. Their increase and the corresponding size of their assets have caused even Western banks with Middle East operations to establish "Islamic portfolios."[129]

At the outset, it was unclear what the new Islamic banks' mandates meant.[130] This was due to the initial "quandary" that is the relationship between Islamic law and banking/finance.[131] Some modern Muslims believe that classical legal rules, like the prohibition of *riba* (interest), are "out of date" and thus that it is acceptable for a Muslim to participate in the modern Western financial landscape.[132] Instead, they contend that the Quran and the *sunna* should be "reinterpreted" to fit the times.[133] However, these Muslims are the minority throughout the world. Most practicing Muslims agree with traditional scholarship that it is a sin to participate in Western financial institutions.[134]

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123. *Id.* at 48.

124. *Id.*

125. *Id.* at 49.

126. *See* Yusuf Talal Delorenzo & Michael J.T. McMillen, *Law and Islamic Finance: An Interactive Analysis*, *in* ISLAMIC FINANCE: THE REGULATORY CHALLENGE 132, 137–38 (Simon Archer & Rifaat Ahmed Abdel Karim eds., 2007).

127. *See id.*

128. *Id.*

129. MALLAT, *supra* note 78, at 343.

130. Delorenzo & McMillan *supra* note 126, at 139.

131. VOGEL & HAYES III, *supra* note 79, at 25.

132. *Id.*

133. *Id.*

134. *See* William M. Ballantyne, *The Challenge of Islamic Commercial Law in the Middle East*, *in* ARAB COMMERCIAL LAW: PRINCIPLES AND PERSPECTIVES 15, 18 (William M. Ballantyne & Howard L. Stovall eds., 2002).

Thus, the goal of Islamic finance is to create a "permanently distinct sphere of finance" based on and in adherence with God's word as revealed by the Prophet Muhammad.[135] The Western financial system is contrary to Islam and must be "radically changed" to harmonize with these concepts.[136] Accordingly, Islamic scholars argue that Islamic finance is intended to represent what is, from the perspective of Islam, a morally, financially and socially superior system to Western finance, and one that, in theory, should create a more just society with greater wealth distribution and less corruption.[137] When Muslim financiers themselves use the term "Islamic finance," they do not mean that the institutions are themselves uniquely Muslim, only that they do not conflict with Islamic law.[138]

In the early heyday of Islamic finance, the 1970s and 1980s, scholars on the newly created Shari'a Boards of Islamic banks decided to interpret the new mandates by following the system of Islamic jurisprudence described above.[139] Based on that inquiry, the scholars introduced a system of "nominate contracts" which were well-defined contracts in adherence to the standard Islamic prohibitions of *riba*, *maysir* and *gharar* that would implement standard banking functions in a manner consistent with Islamic legal principles.[140] The most common of these "nominate contracts," and the one at issue in *Shamil Bank*, is the *murabaha* agreement.

A *murabaha* is a standardized product offered by most Islamic banks.[141] Essentially, a *murabaha* is a structure whereby the bank buys an item for the customer, the bank then sells the item to the customer at a marked-up price, and the customer pays the sales price back to the bank in installments on a deferred basis.[142] This way banks can still make a profit, but without violating the prohibition of *riba*.[143] *Murabaha* agreements carry their own risks, specifically for the banks, because they combine property ownership and financing and because they involve "real intermediaries" and thus have issues with assumption of risk, guarantees, insurance, default and maintenance.[144] This construct is essentially "a facilitation by the bank of short-term loans," and thus, in that sense, it is neither "original, [n]or revolutionary."[145] Since loan agreements are standard and considered sufficiently def-

135. VOGEL & HAYES III, *supra* note 79, at 25.

136. Ballantyne, *supra* note 134, at 18.

137. VOGEL & HAYES III, *supra* note 79, at 26.

138. *Id.* at 27–28.

139. Delorenzo & McMillan *supra* note 126, at 140–41.

140. *Id.* at 142, 144–45.

141. Sabahi, *supra* note 94, at 495.

142. *Id.*

143. *See id.*

144. Andreas Julius, *Islamic Finance: Issues Surrounding Islamic Law as a Choice of Law Under German Conflict of Laws Principles*, 7 CHI. J. INT'L L. 537, 539 (2007).

145. MALLAT, *supra* note 78, at 345.

inite, it follows that the *murabaha* agreements which follow their basic features are similarly definite.

V. APPLICATION IN INTERNATIONAL ARBITRATION PROCEEDINGS

As has been demonstrated *supra*, contrary to the English Court of Appeal's view, Islamic law is quite specific when it comes to transactional requirements of basic financial instruments and has manifested a solution to the problems those requirements might cause in the form of the extremely common *murabaha* agreement.

The fact that choice of law provisions which select Islamic Law have not presented issues in international arbitration proceedings, even in the Western context, exemplifies this specificity.[146] For example, in an International Chamber of Commerce ("ICC") arbitration between Sanghi Polyesters Ltd. (an Indian company) and International Investor KCSC (a Kuwaiti company), the choice of law clause was very similar to the one at issue in *Shamil Bank.* It read: "this dispute shall be governed by the Laws of England except to the extent it may conflict with the Islamic Shari'ah, which shall prevail."[147] The arbitrator, who was an expert in Islamic law, had no trouble enforcing this provision.[148] He simply awarded the principal and profit claims, but denied additional damages claims that would have been compliant with English law but prohibited by Islamic law.[149] The arbitrator's ease in applying the Islamic law provision was aided by his expertise in the field, which is true of arbitrators generally, since they are usually selected for their relevant knowledge. However, if Islamic law were as indefinite and impossible to apply in this kind of situation as the English Court of Appeal claimed, then even for an expert it should be un-administrable.

Scholars have argued that arbitral proceedings are particularly amenable to applying Islamic law due to their unique characteristics.[150] Specifically, because arbitration is based on both parties' consent, the forum is "free from the constraints of 'social engineering' objectives or values with which national courts are concerned."[151] That is, domestic courts, like the English Court of Appeal, may be constrained by their own world views and possess limited understanding of different legal and cultural systems, or their mis-

146. *See* Aisha Nadar, *Islamic Finance and Dispute Resolution: Part 1*, 23 ARAB L.Q. 1, 5 (2009).

147. Sanghi Polyesters (India) Ltd v International Investor (KCFC) (Kuwait), 2000 WL 389643, ¶ 4.

148. *Id.* ¶ 2.

149. *Id.*

150. Aisha Nadar, *Islamic Finance and Dispute Resolution: Part 2*, 23 ARAB L Q. 181, 186 (2009).

151. *Id.*

sion may include fostering societal objectives embodied in the jurisdiction's law, while arbitral forums do not.[152]

Additionally, arbitral forums are understood to be more accepting of non-state systems of law.[153] Many arbitration statutes allow for parties' choice of "rules of law." Commentators unanimously agree that the use of the term "rules of law" generally, instead of "the laws" or "laws," is an "implicit reference" to non-state laws—a fact that has never been questioned by the courts.[154]

For example, article 17 of the ICC Arbitration rules states that "the parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute."[155] Additionally, the English Arbitration Act states that "the arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute."[156] As a further example, the United Nations Commission on International Trade Law ("UNCITRAL") Model Law states 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."[157] Commentators have interpreted this provision as meaning that "the parties' choice is not limited to a national system of law but may include uniform law instruments to govern their dispute, whether or not they are part of a national system."[158]

However, neither of these aspects remains unique to international arbitration proceedings in the European context, especially since the Rome I Regulation's reference to "non-State law" is even more explicit than arbitration statutes' reference to "rules of law." Additionally, Islamic law is not just any non-state law—it is a highly developed system that has a global dimension with a bounty of literature accessible to western audiences available to educate judges in domestic courts.[159] Finally, it is common practice within the EU for legal expert witnesses to offer testimony on the intricacies of foreign and non-Member State law, and the same could be done for non-

152. *Id.* at 188.

153. *Id.* at 189.

154. *Id.*

155. Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L & COMPAR. L. REV. 565, 613–14 (2006).

156. Arbitration Act, (1996) § 46(1) (U.K.).

157. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ["UNCITRAL"] MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 28(1) (2006).

158. Michal Konig, *Non-State Law in International Commercial Arbitration*, 35 POLISH Y.B. INT'L L. 265, 270 (2015) (quoting F. Ferrari & L. Silberman, *Getting to the Law Applicable to the Merits*, *in* CONFLICT OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 268, 269 (F. Ferrari & S. Kroll eds., 2010)).

159. *See* MALLAT, *supra* note 78.

state law systems like Islamic law.[160] There are plenty of reasons why parties might not want arbitration as their dispute resolution mechanism, and it would be fundamentally unfair to force them to do so simply because of their selection of non-state law.[161] Unfortunately, the political pressures that affect state courts choice of law decisions suggest that this may be unlikely.

VI. CHOICE OF NON-STATE LAW

The English Court of Appeal is not alone in its concern that non-state law may not be suitable for adjudication. Many conflict of law scholars reject the applicability of non-state law, arguing that laws "can derive their authority only from the state."[162] Others simply point to the indeterminacy, unpredictability and lack of specificity (much like the English Court of Appeal did) of non-state legal systems.[163]

Most states also refuse to accept fully the role of non-state law. Generally, states approach non-state law in one of four ways: outright rejection, incorporation, delegation, or deference.[164] Rejection describes those states that reject the application of non-state law through their choice of law regime, as the English Court of Appeal did in *Shamil Bank*.[165] Incorporation describes the "transformation of non-state law into domestic law." Through this process the state "recognizes non-state communities as generators of norms, but it denies these norms the status of autonomous law" and instead "reiterates its own monopoly on the production of legal norms."[166] Through delegation, the state transforms the non-state law into a subordinated version of state law by allowing the non-state community to produce their own rules, which the state acknowledges but maintains in their subordinated status.[167] Finally, through deference, the state recognizes the normative autonomy of communities but at the same time "denigrates" their norms "to the status of facts for the purpose of legal analysis."[168]

In none of the aforementioned approaches does the state give non-state law the same force as state law. This matters since, "today, as a matter of

160. *See* EUROPEAN GUIDE FOR LEGAL EXPERTISE, GUIDE TO GOOD PRACTICES IN CIVIL JUDICIAL EXPERTISE IN THE EUROPEAN UNION 5 (Oct. 2015), http://experts-institute.eu/wp-content/uploads/2018/03/2016-01-07-eeei-guide-to-good-pratices-egle-en-brochure.pdf.

161. *See What Are the Advantages and Disadvantages of Arbitration?*, UPCOUNSEL, http://www.upcounsel.com/what-are-the-advantages-and-disadvantages-of-arbitration (last visited Mar. 9, 2022) (for example: cost, lack of appeal, not public, etc.).

162. Ralf Michaels, *The Re-state-ment of Non-state Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209, 1212 (2005).

163. *See* SAGI PEARL, THE FOUNDATION OF CHOICE OF LAW 69, 92 (2018).

164. Michaels, *supra* note 162, at 1228.

165. *Id.* at 1228.

166. *Id.* at 1231–33.

167. *Id.* at 1233.

168. *Id.*

course, only the state determines which law should apply in its boundaries . . . if one speaks today of a national law, this is more and more not understood to mean the law of a people . . . but the law of a state. And this state now orders that everyone and everything which is situated in its territory be subject to its law."[169]

This begs the question: What is so special about state law? In theory, a body of non-state law is no more unfamiliar to a court than the law of any number of foreign state legal systems which courts routinely enforce. However, there are policy reasons for why courts treat non-state law differently. After all, if a state treated all communities, including non-states, as equal, then it could no longer maintain its "transcendent position."[170] Or, as Michaels argues, "the state cannot recognize non-state law as law and at the same time maintain the same concept of itself."[171]

But this policy preference is not a universal one. One attempt to counter it is The Hague Principles on Choice of Law in International Contracts. The Hague Principles were drafted by The Hague Conference on Private International Law, which was founded in 1893.[172] The Hague Conference is "the most venerated institution for the international unification of private international law"[173] and has ninety members (eighty-nine countries and the EU).[174] The Hague Principles were suggested as a soft law instrument, based on the model of the UNIDROIT, and were intended as a model for legislation or to be used by courts and arbitrators as a supplementary source for interpretation.[175] Article 3 of The Hague Principles states "the law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise."[176] It is unclear whether Islamic law could be considered "generally accepted" in this sense. While Islamic law may not be formally recognized in much of the world, it is arguably "accepted on [a] . . . regional level" (that is, in Muslim majority countries) as "a neutral and balanced set of rules." Nevertheless, once again, the Principles are clearly "contemplating" non-state law, contrary to the

169. *Id.* at 1245–46 (quoting and translating Eugen Ehrlich, *Internationales Privatrecht*, 126 DEUTSCHE RUNDSHAU 419, 425 (1906)).

170. Michaels, *supra* note 162, at 1239

171. *Id.* at 1250.

172. Ralf Michaels, *Non-State Law in The Hague Principles on Choice of Law in International Commercial Contracts*, *in VARIETIES OF EUROPEAN ECONOMIC LAW AND REGULATION: LIBER AMICORUM FOR HANS MICKLITZ, 43, 51–53* (Kai Purnhagen & Peter Rott eds., 2014) [hereinafter Michaels, *Non-State Law in The Hague Principles on Choice of Law*].

173. *Id.* at 51

174. *About HCCH*, HAGUE CONF.ON PRIVATE INT'L L., http://www.hcch.net/en/about (last visited Mar. 2, 2022).

175. *Id.*

176. HAGUE CONF. ON PRIVATE INT'L L., PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS art. 3 (2015).

English Court of Appeal's opinion. In fact, the official introduction to the Principles specifies that:

> One of the salient features is found in article 3, which allows the parties to choose not only the law of a state but also "rules of law," emanating from non-State sources, within certain parameters. Historically, choice of norms or "rules of law" has typically been contemplated only in an arbitral context. Where a dispute is subject to litigation before a state court, private international law regimes have traditionally required that the parties' choice of law agreement designate a state system of law. Some regimes have allowed parties to incorporate by reference in their contract "rules of law" or trade usages. Incorporation by reference, however, is different from allowing parties to choose "rules of law" as the law applicable to their contract.[177]

Thus, not only do The Hague Principles specifically allow for parties' choice of "rules of law" (using parallel language to the arbitration statutes described *supra*), but they are explicit that by using that phrase they intend to refer to non-state law, and to permit the application of non-state law in contexts beyond arbitration and simple incorporation. It is unclear whether the drafters intended to include Islamic Law as a possible set of "rules of law," but since arbitral tribunals have interpreted it as such, this suggests that The Hague Principles should allow for it as well.

Additionally, similar to the Rome I Regulation, The Hague Principles explicitly respect party autonomy. As article II of the Principles states, "(1) A contract is governed by the law chosen by the parties. (2) The parties may choose: a) the law applicable to the whole contract or to only part of it; and b) different laws for different parts of the contract."[178]

The Hague Principles' drafting history sheds some light on why the drafters explicitly chose to allow parties to select "rules of law." In the 2008 Feasibility Study on Choice of Law in International Contracts, The Hague Conference's Permanent Bureau expressed its desire to explore the question of party choice of non-state law because it has "for long [sic] played an important role in arbitration but is also of growing importance in court proceedings."[179] In a follow-up study in 2009, the Permanent Bureau suggested that the Working Group should "take into consideration both the rules applied by State courts and specific international arbitration rules" on this question.[180] In a footnote to this statement, they observed that the issue was

177. *Id.* art. 1(18).

178. *Id.* art. 2(1)–(2).

179. HAGUE CONF. ON PRIVATE INT'L L., FEASIBILITY STUDY ON THE CHOICE OF LAW IN INTERNATIONAL CONTRACTS: REPORT ON WORK CARRIED OUT AND CONCLUSIONS (FOLLOW-UP NOTE) ¶ 28 (Feb. 2008), http://assets.hcch.net/upload/wop/genaff_pd05e2008.pdf.

180. HAGUE CONF. ON PRIVATE INT'L L., FEASIBILITY STUDY ON THE CHOICE OF LAW IN INTERNATIONAL CONTRACTS: REPORT ON WORK CARRIED OUT AND SUGGESTED WORK

the "subject of intense debates" during Rome I Regulation negotiations.[181] At their first meeting in January 2010, the Working Group advocated for allowing parties to select non-state law regardless of the method of adjudication (whether via the court system or arbitration) since they considered there to be no meaningful differences between the two.[182]

In general, the drafters justified the expanded role of non-state law as an opportunity to "strengthen state courts and their role in international commercial litigation."[183] Indeed, to the extent that commercial actors desire to regulate their transactions by recourse to non-state legal principles, states' refusal to honor such choices in national courts, while enforcing arbitral awards incorporating non-state law, effectively drives the adjudication of a significant volume of commercial disputes out of the state jurisprudential system. A number of The Hague Principles' drafters lamented this result. One of the members of the working group, José Antonio Moreno Rodriguez, stated that the reason the Inter-American Convention on the Law Applicable to International Contracts, which was the first treaty to allow for the choice of non-state law,[184] was not more widely adopted was partly because of states' "lack of information and conservatism," but that he hoped that the new Hague Principles could overcome this.[185] Another participant claimed that the reason that more parties do not select non-state law is because of the risk of uncertainty, but that allowing state courts to build up precedent would create more certainty.[186]

Since the Principles are a non-binding soft law instrument, their impact depends on parties' and courts' awareness of their existence and decision to implement them.[187] The Working Group that drafted the Principles was composed mostly of academics and few practitioners, "thus there is a long road to be travelled from the forum that drafted the Principles to those who

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PROGRAMME FOR THE DEVELOPMENT OF A FUTURE INSTRUMENT ¶ 41 (Mar. 2009), http://assets.hcch.net/upload/wop/genaff2009pd07e.pdf.

181. *Id.*

182. Michaels, *Non-State Law in The Hague Principles on Choice of Law*, *supra* note 172, at 54–55.

183. *Id.* at 63.

184. *See* Inter-American Convention on the Law Applicable to International Contracts art. 9(2)(ii), Mar. 17 1994, O.A.S.T.S. No. 78 (requiring the judge to look to "general principles of law" when the parties haven't chosen a source of law). The convention has been ratified only by Mexico and Venezuela. *See* Signatories and Ratifications to the Inter-American Convention on the Law Applicable to International Contracts, ORG. AM. STATES, http://www.oas.org/juridico/english/sigs/b-56.html (last visited Mar. 2, 2022).

185. José Antonio Moreno Rodríguez, *Contracts and Non-State Law in Latin America* 16 UNIF. L. REV. 877, 881–82, 888 (2011).

186. Michaels, *Non-State Law in The Hague Principles on Choice of Law*, *supra* note 172, at 65.

187. *See* Jurgen Basedow, *The Hague Principles on Choice of Law: Their Addresses and Impact,* 22 UNIF.. L. REV 304, 308 (2017).

might decide on their actual use one day."[188] Jurisdictions with robust choice of law rules likely have little use for the Principles. Nonetheless, jurisdictions, like China, that lack specific choice of law rules are more likely to benefit from the Principles.[189] In short, although The Hague Principles present an optimistic opportunity for states to allow parties to select non-state law, their impact depends on states listening to scholars who advocate for their implementation.[190] Giving legal force to the decisions of commercial actors to adopt non-state legal principles would give state actors an opportunity to retain their traditional adjudicatory role in this tranche of commercial disputes. This recognition would enhance the overarching emphasis in most choice of law doctrines on party autonomy by allowing parties to anticipate the same level of respect for their choice of law decisions regardless of the dispute resolution mechanism that they select.

VII. CONCLUSION

In 2004, when the English Court of Appeal reached its decision in *Beximco v. Shamil Bank*, it was easy to understand why it chose not to apply the contract's selection of Islamic law. The decision adequately represented the EU's regulatory framework for choice of law issues at that time, the Rome I Convention, and the court's own understanding of the limits of Islamic law.

However, this note demonstrates that a European Member State court should not follow the *Shamil Bank* decision's reasoning if a similar issue were to arise. This is primarily because the reasoning the court used is now legally flawed. The Rome I Convention has been replaced with the Rome I Regulation, which, through its text and its legislative history, demonstrates a commitment to respecting parties' choice of non-state law. Additionally, Islamic commercial law has a principled and coherent approach to financial transactions—one which meets the needs of a significant community of the world's commercial actors to regulate their conduct according to principles that embody some of their most fundamental beliefs. As demonstrated by the Islamic scholars themselves and by arbitral rulings like the *Sanghi Polyesters* decision, such a rule brings a range of readily justiciable controversies before traditional state forums. Thus, one would hope that with the current EU regulatory framework's respect for non-state law, European courts might take the opportunity to respond differently to an issue of a choice of law clause that selects Islamic or many other non-state legal doctrines than the English Court of Appeal did in 2004.

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188. *Id.*

189. *Id.*

190. *See, e.g.*, Michael Douglas & Nicholas Loadsman, *The Impact of The Hague Principles of Choice of Law in International Commercial Contracts*, 19 MELB. J. INT'L L. 1, 3 (2018).

However, as Michaels' analysis suggests, it is unlikely that even though the legal arguments that undergirded the English Court of Appeal's opinion have not withstood the test of time, the political pressure for state courts to apply only state law may mean that this will be unlikely to make a difference. Unless, of course, more states decide that it is beneficial to compete with arbitral forums to reclaim the adjudication of these disputes, by, for example, implementing The Hague Principles and giving parties the option to select non-state law. Additionally, courts should have at least one important institutional reason to depart from the *Shamil Bank* decision; namely, their stated respect for party autonomy, since it would mean that parties' drafting choices would be enforced regardless of whether they select the courts or arbitration as their dispute resolution mechanism. There are legitimate reasons that parties might choose to have their disputes resolved before a court instead of via international arbitration, and those choices should be respected.[191]

Thus, the intention of this note has not been to argue that courts should open the floodgates and allow parties to select any form of non-state law they want, but especially for legal systems like Islamic Law which have a robust system of jurisprudence in their own right, and is specific enough for courts to apply in these kinds of situations, it is only right that they respect parties' decisions.

191. For example: cost, access to a jury, opportunity for appeal etc.