Regulating the governing law clauses in Sukuk transactions

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Abstract

The crystallization of the Islamic capital markets (ICM) in the last decade has led to increased acceptance of Islamic financial products in the global market. However, a fundamental question that lies at the intersection of law and ICM is what impact does the governing law clause imposed in a typical Sukuk prospectus have on the parties of the transaction and the courts of jurisdiction. This paper argues that the selection of Islamic finance documentation involved in the process of structuring a Sukuk transaction will accord an increasing number of parties to the conceptual and practical questions that arise at the beginning of the governing law clause. With the increasing provision of English law as the governing law of Sukuk transactions, a question that readily comes to mind is whether it is possible to have an alternative governing law while retaining the choice of jurisdiction clause. In order to create a regulatory environment that is conducive to the prevailing trends in the modern world, this study critically analyses through the governing law clauses of 10 selected Sukuk prospectuses and makes interesting findings regarding the attitude of draftsmen and their clients. A preliminary finding of this study is the paradigm shift to arbitration as an alternative or precedent to litigation in some of the Sukuk prospectuses reviewed. As there are regional and international arbitral institutions set up exclusively for Islamic finance disputes, it may be more appropriate to resolve any dispute arising from a Sukuk transaction under Sharia-compliant rules and supervised by experts in Islamic law. The interviews conducted for this research with 10 prominent Sharia scholars who have been involved in the certification of Sukuk structures prove this hypothesis, and the qualitative data are consistent with it, albeit with some dissenting views. © 2015 Macmillan Publishers Ltd.

Author keywords

choice of law; dispute resolution; governing law clause; Islamic capital market; Islamic finance; Sukuk

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