

Can decisions of Shariah boards amount to enforceable legal opinions as a matter of English law?



LAW (EUROPE)

By Shakeel Adli

The High Court in London is currently hearing the case of Golden Belt 1 Sukuk Company v BNP Paribas, with the judgment eagerly anticipated by businesses involved with Islamic finance. This significant judgment will determine whether decisions of Shariah boards can amount to enforceable legal opinions.

The case relates to the issuance of a US\$650 million Sukuk facility, with:

1. the arranger/bookrunner being BNP Paribas, and
2. Saad Trading Contracting and Financial Services Company being the ultimate economic borrower.

Under various lease arrangements, the sums under the Sukuk were passed by Golden Belt to Saad, which issued a promissory note (governed by the laws of Saudi Arabia) for the full US\$650 million to Golden Belt.

An offering circular was released by BNP Paribas which offered the Sukuk to the market. The offering contained a pronouncement from BNP Paribas's Shariah board which advised it had reviewed the Sukuk documents, confirmed the validity of the Sukuk facility and approved it for issue.

Saad later defaulted under the lease agreements and resisted the enforcement of the promissory note on the basis that no 'wet ink' signature (as required by Saudi Arabian law) had been applied to it. This issue is currently the subject of ongoing legal proceedings in Saudi Arabia.

As a result of the default, Golden Belt issued proceedings before the English High Court. One of its claims is that the pronouncement of BNP's Shariah board amounted to a legal representation as to the validity of the promissory note. BNP, however, asserts that the pronouncement represented only a religious opinion. If Golden Belt's



claim succeeds, it will have significant ramifications given the potential legal liability which may arise in relation to the pronouncements of Shariah boards.

At this stage, the outcome of the English case cannot be predicted with any certainty. However, a number of issues in support of BNP Paribas's position may impact upon the High Court's decision as follows:

- The pronouncement in the offering circular did not mention the legal enforceability of the Sukuk documents and the members of the board were religious scholars, not lawyers.
- Furthermore, it is presumable that the parties had legal representation and should have been made aware of the issues associated with executing documents subject to Saudi Arabian law.

Arguably, it would not have been reasonable to rely upon the pronouncement rather than obtaining specific legal advice on the validity of the promissory note.

- An additional consideration is that the English courts have shown an unwillingness to incorporate Shariah principles into contracts governed by English law (Beximco Pharmaceuticals and others v Shamil Bank of Bahrain [2004] EWCA Civ 19). There is nothing to suggest that they will depart from this stance to construe religious representations as being legally enforceable in order to support claims subject to English law.

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Whatever the decision of the High Court may be, it will be of significant interest to those who rely on the pronouncements of Shariah boards and it has the potential to alter the way that such pronouncements are issued.☺

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