

## **The Shari'a Factor in International Commercial Arbitration**

Faisal Kutty, LL.B.  
Baksh & Kutty  
Barristers, Solicitors, Notaries and Trade Mark Agents  
80 Corporate Drive, Suite 302  
Toronto, Ontario, M1H 3G5  
Tel. (416) 289-9666x28  
Email: [kutty@bakshkutty.com](mailto:kutty@bakshkutty.com)

**LL.M. Candidate**  
**Osgoode Hall Law School**  
**York University**

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## Abstract

The world has witnessed a phenomenal growth in commercial disputes transcending national borders due to our increasingly interrelated and globalized world economy. In addition to issues in interpretation of commercial agreements and practices, differences in custom, language, culture and religion will continue to fuel conflicts and disagreements between commercial players. Over the last few decades there have been growing commercial interaction between Western companies and their Middle Eastern counterparts. Given this interaction and the great geopolitical and economic importance of this region, it is imperative that Western lawyers and dispute resolution professionals have a reasonable grasp of the general principles of *Shari' a* or Islamic law, a source (to varying degrees) of law in most nations in the Middle East. It is clear that the increase in international commercial transactions has contributed to the globalization of the legal community, but it is disturbing that there has been very little examination of the influence and impact on the Middle East's legal system's religious underpinnings upon the continued acceptance of international commercial arbitration. Given the growing calls for a return to the *Shari' a* and increasing global interdependence, the western legal community can no longer be satisfied to leave the *Shari' a* as a preserve of Middle East specialists, Arabists and comparative law experts. It is a trite observation that cultural or more aptly in the Middle East, religious considerations, can play a vital role in the acceptance and successful functioning of international commercial arbitration. The religious variable may impact on the following: the scope of arbitration; the nature of arbitration; the choice of law; the appointment of arbitrators; liability of arbitrators; limitations periods; interest awards; public policy considerations; evidentiary considerations; enforceability of decisions, etc. This paper will explore the development and acceptance of international commercial arbitration in the Middle East and analyze the issues and areas which create tension between international commercial arbitration and the *Shari' a*. There is certainly a need to reform Islamic law from within to deal with contemporary norms, transactions and institutions, but there is an equal need to better accommodate and address the issues of concern from an Islamic perspective. The assumption and belief that the *Shari' a* is being sidelined, and that the current international commercial arbitration framework is exclusively derived from the Western legal heritage may create obstacles in the acceptance and continued legitimacy of international commercial arbitration in the Middle East, and even in the other Islamic nations. This is clearly unacceptable if we recall that the twin objectives of the legal framework underpinning international commercial arbitration are to ensure enforceability of arbitration agreements/clauses and arbitral awards and to insulate the arbitration process as much as possible from interference by domestic courts and other national or international institutions. This can only be achieved when there is mutual respect and understanding of the various laws, practices, cultures and religious worldviews prevalent in the world today. There is a clear need for dialogue. The aim of such a dialogue will be to help develop an international commercial arbitration regime in which the business community can have confidence, while staying true to the core principles of *tahkim* (arbitration) under the *Shari' a*. This will help remove a potential crutch that may be used by those who oppose the international commercial arbitration movement as being one of purely Western import.

# The *Shari' a* Factor in International Commercial Arbitration<sup>1</sup>

By Faisal Kutty

## I. Introduction

The world has witnessed a phenomenal growth in commercial disputes transcending national borders due to our increasingly interrelated and globalized world economy.<sup>2</sup> In addition to issues in interpretation of commercial agreements and practices, differences in custom, language, culture and religion will continue to fuel conflicts and disagreements between commercial players.<sup>3</sup>

Consistent with the increased globalization, over the last few decades there have been growing commercial interaction between Western companies and their Middle Eastern counterparts.<sup>4</sup> The interaction is now evolving from raw material extraction to more sophisticated transactions and growing trade and investments, as parties explore

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<sup>1</sup> Prepared for the LL.M. program at Osgoode Hall Law School of York University. He studied economics at York University and holds an LL.B. from the University of Ottawa. I would like to thank Professor Charles Gastle for his encouragement, guidance and support in supervising this paper and Professor Donald McRae for his comments on parts of this paper. I would also like to thank Paul Scotland, David Kolinsky, Nafisa Chowdhry, Bushra Yousuf, Imran Yousuf and Shadia Yousuf for comments on various drafts of this paper.

<sup>2</sup> Volker Behr, Enforcement of United States Money Judgments in Germany, 13 *J.L. & Com.* 211, 211 (1994).

<sup>3</sup> Jane L. Volz & Roger S. Haydock, "Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser," 21 *Wm. Mitchell L. Rev.* 867.

<sup>4</sup> In Canada, for instance, imports from the Arabian peninsula has grown from \$400 million in 1998 to over \$1 billion in 2003, while exports have grown from \$700 million to \$1 billion during the same time. See ([www.dfait-maeci.gc.ca/middle\\_east/trade\\_stats\\_jan04-en.asp](http://www.dfait-maeci.gc.ca/middle_east/trade_stats_jan04-en.asp)). See the United States Trade Representatives website for information about all the new free trade agreements with Middle Eastern countries (<http://www.ustr.gov/new/fta/middleeast.htm>).

commercial opportunities beyond oil and gas exploration.<sup>5</sup> Given the great geo-political and economic importance of the Middle East, it is imperative that Western lawyers and dispute resolution professionals have a reasonable grasp of the general principles of *Shari' a* or Islamic law<sup>6</sup>, a source of law in most nations in the Middle East to varying degrees, and one of the three major legal systems prevailing in the world today. It is clear that the increase in international commercial transactions has contributed to the globalization of the legal community, but it is disturbing that there has been very little examination of the influence and impact on the Middle East's legal system's religious underpinnings upon the continued acceptance of international commercial arbitration. Given the growing calls for a return to the *Shari'a* and increasing global interdependence, the western legal community can no longer be satisfied to leave Islamic law or the *Shari' a* as a preserve of Middle East specialists, Arabists and comparative law experts. As Professor M. Ballantyne notes:

“Even where the *Shari' a* is not applied in current practice, there could be a reversion to it in any particular case... Without doubt, a knowledge of the *Shari' a* will become increasingly important for practitioner, not only in Saudi Arabia, but in the other Muslim jurisdictions.”<sup>7</sup>

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<sup>5</sup> This trend will continue as nations attempt to develop other sources of income. For instance, Bahrain has been promoting itself as a regional Banking center and the United Arab Emirates as a tourist and commercial center.

<sup>6</sup> *Shari' a* and Islamic law will be used interchangeably throughout the paper though the two may not exactly have the same meaning. Muhammad Asad, the prominent Islamic thinker, narrows down the *Shari' a* to the *nusus*, the definitive ordinances of the *Qur'an* which are expounded in positive legal terms, see M. H. Kamali, “Source, Nature and Objectives of Shari'ah” 33 *Islamic Quarterly* 211 at 233. While Islamic law is far broader and includes those rules and laws that have been derived using the sources and methodologies for deriving laws sanctioned by Islamic jurisprudence as well as all the quasi-Islamic laws in existence in Muslim countries as a result of colonization and secularization.

<sup>7</sup> M. Ballantyne, “Book Review of Commercial Arbitration in the Arab Middle East (A Study in Shari' a and Statute Law,” *Arbitration International*, Vol. 4, No. 3 (1989), pp. 269-274.

It is a trite observation that cultural or more aptly in the Middle East, religious considerations, can play a crucial role in the acceptance and successful functioning of international commercial arbitration.<sup>8</sup> The religious variable may impact on the following: the scope of arbitration; the nature of arbitration; the choice of law; the appointment of arbitrators; liability of arbitrators; limitations periods; interest awards; public policy considerations; evidentiary considerations; enforceability of decisions, etc.<sup>9</sup>

As M. McCary points out:

“Where arbitral clause do not specify the commercial principles governing a dispute (e.g., those found in U.N. Investment Dispute Resolution of International Transactions (UNIDROIT), arbitrators are forced to evaluate foreign legal provisions and cultural differences in determining an equitable settlement. In cases concerning Islamic issues or clients, Middle Eastern cultural differences will have to be considered in any interpretation of contract formation and negotiation.”<sup>10</sup>

This paper will explore the development and acceptance of international commercial arbitration in the Middle East and analyze the issues and areas which create tension between international commercial arbitration and the *Shari' a*. Given that the legal systems of the Middle Eastern nations incorporate *Shari' a* principles to varying degrees, this paper will use the existing commercial arbitration laws in Saudi Arabia and to a lesser extent in the United Arab Emirates (UAE) to compare and evaluate the tensions

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<sup>8</sup> The Canadian Department of Foreign Affairs and International Trade website ([www.dfait-maeci.gc.ca/middle\\_east/doing\\_business-en.asp](http://www.dfait-maeci.gc.ca/middle_east/doing_business-en.asp)) notes for instance: It is impossible to establish meaningful business relationships in the Middle East without some understanding and knowledge of Islam... Muslims see their religion as an integral part of their daily life. They make no distinction between sacred and the secular, morality, laws and politics. For example, the Quran lays down clear economic guidelines.”

<sup>9</sup> M. McCary, “Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective,” 35 *Tex. Int'l L. J.* 289, at 319.

<sup>10</sup> *Id.* See also Carolyn R. Ruis, *Legal Practice Shaped by Loyalty to Tradition: The Case of Saudi Arabia*, 7 *Mich. Y. B. Int'l Legal Stud.: Issues of Transnat'l Legal Prac.* 103, 107-11 (Linda Elliott et al. eds. 1985).

and differences that exist or may arise between international commercial arbitration in general and arbitration as it would be practiced in jurisdictions influenced by the *Shari'a*.<sup>11</sup>

In the process, this paper hopes to dispel the prevalent Western notion that the *Shari'a* is an unsophisticated, obscure and defective system.<sup>12</sup> This attitude on the part of Western lawyers has bred a lot of distrust within the Islamic world and has devalued an influential legal system in the eyes of many in the West. The recognition, acceptance and analysis of Islamic law and its impact on the practice of international commercial arbitration in the Middle East is particularly important given the increasing Islamic revivalist spirit sweeping the region. Moreover, the experience from the Middle East will be helpful in understanding the same topic in Islamic nations outside the Middle East.<sup>13</sup> As Nudrat Majeed accurately points out, the ground realities in many Muslim nations and growing

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<sup>11</sup> "Middle East" is used in the loose sense to include the countries spanning from Morocco to Iran and from Sudan to Turkey. Islamic law is a factor to some level or the other, in all of the countries in this region, except Israel. The UAE legal system though claiming to be based on Islamic law is more western oriented than the Saudi system, particularly in the area of commercial law. Though it is by no means the most western in the region. It is worth noting that even the commercial laws of Saudi Arabia are significantly influenced by Western commercial laws, though the Saudi Arabian legal system itself is among the least influenced by Western legal principles.

<sup>12</sup> Shlomo Avineri, *The Return to Islam*, In *Global Studies: The Middle East 167-70* (1973). Unfortunately, this is not a new attitude. For instance the renowned Roman legal scholar opined that "Every nation's law, except our own, is crude and almost laughable." Though, it is interesting to note that a number of legal scholars, including John Makdisi and George Makdisi have documented the influence of Islamic law on common law. See generally John A. Makdisi, "The Islamic Origins of the Common Law," 77 *N. C. L. Rev.* 1635 (1999). See also George Makdisi, "Legal History of Islamic Law and The English Common Law: Origins and Metamorphoses" 34 *Cleveland State Law Review* 3.

<sup>13</sup> Islamic law is not only a force in the Middle East, but is the basis – to varying degrees -- of much legislation in other countries which are becoming growing players in the international marketplace, including Malaysia, Indonesia, Pakistan, Nigeria, and even some of the more recently minted republics of Central Asia. It is worth noting that contrary to popular perception, the vast majority of the world's Muslim population lives outside of the Middle East.

calls for a return to the *Shari' a* suggest that “it is doubts about the significance of the Shariah that are now academic.”<sup>14</sup>

A caveat is in order at the outset. Any endeavor, which attempts to provide an overview and comparative analysis of complex systems and institutions, will always run the risk of oversimplification. Clearly, it is an impossible task to set out detailed discussions of the systems, institutions and principles covered in this paper as such a task can easily take up a number of volumes. The paper does not attempt to provide a comprehensive study, but rather a basic or even cursory survey of some of the issues, which will hopefully contribute to a better understanding of some of the unique concerns of Islamic law jurisdictions, when it comes to the practice, and procedure of International commercial arbitration.

## **II. International Commercial Arbitration**

At its most basic, commercial arbitration is a private dispute resolution system, which allows parties to resolve their disputes faster, cheaper and within a neutral and confidential setting.<sup>15</sup> It is chosen because it provides parties more flexibility and control

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<sup>14</sup> Nudrat Majeed, “Good Faith and Due Process: Lessons from the Shari’ah,” *Arbitration International* Vol. 20, No. 1 (2004), at 97. Majeed refers to the decision of the Supreme Court of Pakistan in 2000 which stunned the domestic and international banking community when it held that “all prevailing forms of riba (interest), either in banking transactions or in private transaction” are in contravention of Shari’ a.

<sup>15</sup> See, e.g., A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* 3 (2d ed. 1991) (“two or more parties, faced with a dispute which they cannot resolve for themselves, agreeing that some private individual will resolve it for them and if the arbitration runs its full course ... it will not be settled by a compromise, but by a decision.”); de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 *Tulane L. Rev.* 42, 42-43 (1982) (“a mode of resolving disputes by one or more persons who derive their power from the agreement of the parties and whose decision is binding upon them”); M. Reisman, L. Craig, W. Park & J. Paulsson, *International Commercial*

over the proceedings and may help eliminate the uncertainties in choice of decision maker, forum and applicable law.<sup>16</sup> Moreover, arbitration tribunals can maintain jurisdiction over parties<sup>17</sup> that have submitted to it pursuant to an agreement or arbitration clause, and perhaps most importantly it provides the mechanism to internationally enforce arbitral awards, at least within the nations that are signatories to the relevant conventions and treaties.<sup>18</sup>

International commercial arbitration is essentially arbitration between or among transnational actors be it between states or private parties.<sup>19</sup> Arbitration has become the preferred mechanism to resolve international commercial disputes:

“In the realm of international commercial transactions, arbitration has become the preferred method of dispute resolution. Arbitration is preferred over judicial methods of dispute resolution because the parties have considerable freedom and flexibility with regard to choice of arbitrators, location of the arbitration, procedural rules for the arbitration, and the substantive law that will govern the relationship and rights of the parties.”<sup>20</sup>

International commercial arbitration is designed to assure parties from different jurisdictions that their dispute will be settled in a neutral fashion using presumably

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*Arbitration* xxviii (1997) (“a contractual method for the relatively private settlement of disputes”); Carolyn B. Lamm, Recent Developments in International Arbitration, 36 *Fed. B. News & J.* 276, at 276 (1989). See also Gabriel M. Wilker, *Domke on Commercial Arbitration* 2.01 at 13.

<sup>16</sup> Richard H. McLaren and John P. Sanderson, Q.C., *Innovative Dispute Resolution: The Alternative 8-1* (Thomson/Carswell, 2004).

<sup>17</sup> J. Sorton Jones, International Arbitration, 8 *Hastings Int’l & Comp. L. Rev.* 213 (1985). Essentially when parties agree to arbitration before a dispute arises, they waive potential jurisdictional objections.

<sup>18</sup> *Supra* note 15.

<sup>19</sup> Arbitrations may also be differentiated by those that involve states as a party, and those which do not. Special institutions are available for arbitrations in which states are a party. The Permanent Court of Arbitration in the Hague (<http://www.pca-cpa.org>) was formed to handle arbitrations exclusively involving states, but since 1992 has broadened its mandate to include disputes involving states and private parties, as well as disputes involving international organizations. The International Center for the Settlement of Investment Disputes (ICSID) (<http://www.worldbank.org/icsid/>) is also concerned with disputes between foreign investors and state parties.

<sup>20</sup> Buchanan, *Public Policy and International Commercial Arbitration*, 26 *Am. Bus. L.J.* 511, 512 (1988).

internationally-neutral procedural rules detached from domestic courts, governmental institutions and without the “cultural biases of either party.”<sup>21</sup> As we shall see, this is a tall order indeed.

National laws, international conventions, and institutional arbitration rules provide a specialized legal regime governing international commercial arbitrations:

“In addition to transnational treaties, international commercial arbitration is governed by several sources of law, including: (1) the national law governing the parties’ capacity to enter into the arbitration agreement; (2) the law governing the arbitration agreement itself; (3) the law controlling the arbitral proceedings, such as the rules of a permanent arbitral institution like the International Arbitration Forum or an ad hoc arbitral body established by the parties; and (4) the law governing the substantive issues in the dispute.”<sup>22</sup>

The potential for disagreements and differences between nations and regions in both substance and procedure is obvious from the foregoing passage.

We will now proceed to explore briefly the major international conventions as well as the leading arbitral institutions and the United Nations Commission on International Trade Law Model Law (“UNCITRAL Model Law”) to set up our comparative analysis.

Arbitration can be *ad hoc* or institutional.<sup>23</sup> *Ad hoc* arbitrations are conducted by parties without the assistance or supervision of an arbitral institution. The parties can either use

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<sup>21</sup> G. A. Born, *International Commercial Arbitration*, (2nd ed. 2001), at p. 1.

<sup>22</sup> *Supra* note 3 at 872-873.

<sup>23</sup> *Supra* note 21 at pp. 1 – 52.

the United Nations Commission on International Trade Law (“UNCITRAL”) rules<sup>24</sup> or select another set of procedural rules. The UNCITRAL rules are not as comprehensive as the arbitration rules of the ICC discussed below for instance.<sup>25</sup> Parties have to be a more careful in planning when involved in *ad hoc* arbitration, as they will lack the expertise available from the institutions.<sup>26</sup>

An institutional arbitration is one that is entrusted to one of the major arbitration institutions to handle. The best known of these institutions include the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the American Arbitration Association (AAA).<sup>27</sup> It is important to note that these are not the only arbitral institutions, though these have become the most respected and experienced.<sup>28</sup> Each of these arbitral institutions, as well as the others, have enacted sets of procedural rules that apply where parties have agreed to arbitration pursuant to such rules.

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<sup>24</sup> U.N. Comm’n on Int’l Trade Law, UNCITRAL Arbitration Rules, U.N. Doc. No. A/31/17, U.N. Sales No. E. 77.V.6 (1976), reprinted in 15 I.L.M. 702 (1976) [hereinafter UNCITRAL Rules].

<sup>25</sup> Avraham Azrieli, “Improving Arbitration Under the U.S.-Israel Free Trade Agreement: A Framework for a Middle East Free Trade Zone,” 67 *St. John’s L. Rev.* 187.

<sup>26</sup> For instance, the parties need to ensure they have designated an “appointing authority” in the event they cannot agree on an arbitrator. Most of the leading arbitral institutions can act as an “appointing authority,” if the parties in an *ad hoc* arbitration request them.

<sup>27</sup> Their websites which provide detailed information are as follows: ICC -- <http://www.iccwbo.org/>; LCIA -- <http://www.lcia-arbitration.com/lcia/lcia/index.htm>; AAA -- <http://www.adr.org/index2.1.jsp>.

<sup>28</sup> For brief descriptions of major international arbitration institutions, see G. Born, *International Arbitration and Forum Selection Agreements* 44-55 (1999); von Mehren, *Rules of Arbitral Bodies Considered From a Practical Point of View*, 9 *J. Int’l Arb.* 105 (1992); Tiefenbrun, *A Comparison of International Arbitral Rules*, 15 *Boston C. Int’l & Comp. L. Rev.* 25 (1992). Links to other arbitral institutions can be found at the website for Juris International (<http://www.jurisint.org/pub/03/en/index.htm>), and from the WWW Virtual Library Arbitration (<http://www.interarb.com/vl/pages/>).

These institutions do not arbitrate the dispute, but merely facilitate and provide support and guidance to the arbitrators selected by the parties.<sup>29</sup> The institutional rules set out the basic procedural framework for the arbitration process. Generally, the rules also authorize the arbitral institution to act as an “appointing authority” in the event the parties cannot agree; set a timetable for the proceedings; help resolve challenges to arbitrators; designates the place of arbitration; help set or influence the fees that can be charged by arbitrators; and in some situations review the arbitral award to reduce the risk of unenforceability.<sup>30</sup>

The International Chamber of Commerce is the world’s leading arbitral institution.<sup>31</sup> The ICC's International Court of Arbitration (the Court) established in 1923 currently boasts membership from over 80 nations.<sup>32</sup> The ICC remains a pioneer in the development of international arbitration and its Rules of Conciliation and Arbitration (ICC Rules) are used extensively.<sup>33</sup> The ICC boasts that since its inception the Court has handled more than 13,000 cases, and in 2003 about 580 new matters involving 123 jurisdictions were filed with the Court.<sup>34</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Supra* note 21 at pp. 1 – 52.

<sup>31</sup> For commentary on the ICC, see Y. Derains & E. Schwarz, *A Guide to the New ICC Rules of Arbitration* (1998); ICC, *Guide to ICC Arbitration* (1994); W. Craig, W. Park & J. Paulson, *International Chamber of Commerce Arbitration* (2d ed. 1990); Bond, The Present Status of the International Court of Arbitration of the ICC: A Comment on an Appraisal, 1 *Am. Rev. Int'l Arb.* 108 (1990); Wetter, The Present Status of the International Court of Arbitration of the ICC: An Appraisal, 1 *Am. Rev. Int'l Arb.* 91 (1990).

<sup>32</sup> See the ICC website -- <http://www.iccwbo.org/court/english/arbitration/introduction.asp>.

<sup>33</sup> Cohn, The Rules of Arbitration of the International Chamber of Commerce, 14 *Int'l & Comp. L.Q.* 132 (1965).

<sup>34</sup> *Supra* note 9.

The ICC Rules were ratified at the ICC Congress in 1923 and were most recently revised in 1998.<sup>35</sup> Pursuant to the ICC Rules, the ICC is involved extensively in the administration of individual arbitrations. The role includes, but is not limited to the following:<sup>36</sup> (i) determine whether there is a *prima facie* agreement to arbitrate; (ii) decide on the number of arbitrators; (iii) appoint arbitrators in the event one party defaults or parties cannot agree; (iv) decide challenges against arbitrators; (v) ensure that arbitrators are conducting the arbitration in accordance with the ICC Rules and replace them if necessary; (vi) determine the place of arbitration; (vii) fix and extend time-limits; (viii) determine the fees and expenses of the arbitrators; (ix) setting and collecting payments on account of costs; (x) reviewing the “Terms of Reference” which define the issues to be arbitrated; and (xi) scrutinize arbitral awards.

Founded in 1892, the London Court of International Arbitration (LCIA) is becoming an increasingly important player in international commercial arbitration.<sup>37</sup> It is still seen as a primarily English institution, despite its efforts to shake this image.<sup>38</sup> The LCIA administers a set of arbitration rules, the London Court of International Arbitration Rules (“LCIA Rules”), which were extensively revised in 1998.<sup>39</sup> The LCIA is not as involved in the process as the ICC. In contrast with the ICC Rules, the LCIA Rules contain no Terms of Reference procedure and do not provide for review of arbitral awards.<sup>40</sup>

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<sup>35</sup> Y. Derains & E. Schwarz, *supra*, note 31

<sup>36</sup> *Id.*

<sup>37</sup> See the LCIA website at <http://www.lcia-arbitration.com/arb/>. It claims a current caseload of 50 cases per year.

<sup>38</sup> For instance the UK members on the Court are now restricted to 25%. See website *id.*

<sup>39</sup> *Supra* note 37.

<sup>40</sup> *Id.*

Though the LCIA does have power to order discovery and security for legal costs among other things.<sup>41</sup>

The most active arbitral institution is the American Arbitration Association (the “AAA”).<sup>42</sup> It is increasingly become active in resolving international commercial disputes. This arbitral institute has promulgated numerous arbitration rules for specialized types of disputes.<sup>43</sup> The most extensively used are the AAA Commercial Arbitration Rules.<sup>44</sup> The AAA boasts of handling roughly 400 international disputes on an annual basis.<sup>45</sup> In 1991, the AAA promulgated the AAA International Arbitration Rules designed specifically for international arbitrations. The rules are based principally on the UNCITRAL Arbitration Rules (discussed below), and were intended to permit a maximum of flexibility and a minimum of administrative supervision.<sup>46</sup> They were most recently revised in April 1997.<sup>47</sup> Under the 1997 version, the AAA International Arbitration Rules provide the applicable set of AAA arbitration rules in “international” disputes.

AAA administrative staff play less of a role in the arbitration process than the ICC.

Among other things, the AAA does not receive or serve initial notices or requests for

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<sup>41</sup> *Id.*

<sup>42</sup> See the AAA website at <http://www.adr.org/index2.1.jsp?JSPssid=15747>. The AAA claims to have arbitrated over 2 million cases.

<sup>43</sup> *Id.* Mostly of relevance to domestic arbitration. Parties can select these in their arbitration agreements.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

arbitration; does not require or review a Terms of Reference; does not review draft awards; and plays a less significant role in setting the arbitrators' fees.<sup>48</sup>

In addition to the foregoing institutions, there are also other subject specific arbitral institutions.<sup>49</sup> The International Center for the Settlement of Investment Disputes (ICSID)<sup>50</sup> offers an alternative to foreign investors who do not wish to use the domestic courts to resolve investment disputes.<sup>51</sup> The limitations in using the ICSID include; the fact that the subject country must have ratified the ICSID Convention; the matter must be an “investment dispute” as defined in the Convention; and the dispute must be between a party and a foreign country and not between two parties.

The United Nations Commission on International Trade Law arbitration rules (“UNCITRAL Arbitration Rules”) in 1976 also contributed significantly to the spread of international commercial arbitration.<sup>52</sup> The UNCITRAL Arbitration Rules could be used by parties which wanted to participate in *ad hoc* arbitration and as well as those who did not wish to use one of the existing arbitral institutions. The Commission also drafted the UNCITRAL Model Law in 1985 as a model law for use in international commercial arbitration.<sup>53</sup> The Model Law has served as the basis for the arbitration laws of many nations.<sup>54</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> See for instance, *inter alia*, the websites for the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center (<http://www.arbiter.wipo.int/center/index.html>), and the Court of Arbitration for Sport (<http://www.tas-cas.org>).

<sup>50</sup> See website <http://www.worldbank.org/icsid/>

<sup>51</sup> *Id.*

<sup>52</sup> See website <http://www.uncitral.org/english/texts/arbitration/arb-rules.htm>

<sup>53</sup> See website <http://www.uncitral.org/english/texts/arbitration/ml-arb.htm>

<sup>54</sup> *Id.*

In our comparative analysis section we shall touch upon various rules from some of these institutions as well as the UNCITRAL Model Law as suitable for purposes of illustration and comparison.

It should also be noted that most developed trading states (and many other countries) have enacted national arbitration legislation. These provide for *inter alia* the enforcement of international arbitration agreements and awards; limit judicial interference in the arbitration process; authorize specified judicial support for the arbitral process; affirm the capacity of parties to enter into valid and binding agreements to arbitrate future commercial disputes; provide mechanisms for the enforcement of such arbitration agreements; and require the recognition and enforcement of arbitration awards. In addition, most modern arbitration legislation restrict the ability of national courts to interfere in the arbitration process, both when arbitral proceedings are pending and in reviewing ultimate arbitration awards. Some domestic legislation even authorize limited judicial assistance to the arbitral process. Judicial assistance can include selecting arbitrators or arbitral sities, enforcing a tribunal's orders with respect to evidence taking or discovery, and granting provisional relief in aid of arbitration.

### III. Islam and its Legal System

#### a) Islam

The maximum *ubi societas ubi jus* succinctly expresses a trite observation, namely that to have a society, one must have rules. A society is defined as “a community, nation, or broad grouping of people having common traditions, institutions, and collective activities and interests.”<sup>55</sup> In order for the civilization to endure, the common factors that define it must be protected. This can only be accomplished successfully through the promulgation of laws and regulations that preserve the very nature of the society, its values and institutions. These laws in turn become one of the constituents that characterizes the particular civilization. It is clear, therefore, that in order for a civilization to remain distinct, it must preserve its institutions, especially its legal foundation which is a crucial substructure in upholding and shaping the values that help mould the civilization. Indeed, as the late scholar Ismail Faruqi wrote “Islamic law made Islamic civilization, not vice versa.”<sup>56</sup>

An appreciation of the sources, major principles, depth and dynamism of the *Shari' a* is imperative to understand how it can impact on international arbitration in the Middle East. Before embarking on an introduction to the *Shari' a*, it is helpful to briefly look at the ideological framework of Islam. The word Islam means submission to God.<sup>57</sup> It is derived from the word *salaam*, which means peace. The *Shari' a* is the path to achieve

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<sup>55</sup> Webster's Ninth New Collegiate Dictionary (Springfield, Mass.: Merriam-Webster Inc., 1990).

<sup>56</sup> Ismail Faruqi and Lamy Faruqi, *The Cultural Atlas of Islam* (New York: MacMillan Publishing Co., 1986) at 279.

<sup>57</sup> C.L.G. Eaton, *Islam and the Destiny of Man* (Albany: State University of New York Press, 1985); F. Rahman, *Islam* (Garden City, NY: Doubleday & Company, Inc. 1968).

this submission.<sup>58</sup> The *Shari' a* aims to fulfill both spiritual and material welfare as Islam envisions no separation between the temporal and the spiritual:

“In Islam it is reality which appears as Church looked at from one point of view and State from another. It is not true say that Church and State are two sides or facets of the same thing. Islam is a single unanalyzable reality which is one or the other, as your point of view varies.”<sup>59</sup>

The essence of the belief system is the absolute authority of God:

“There can be no doubt that the essence of Islamic civilization is Islam; or that the essence of Islam is tawhid, the act of affirming God to be the One, absolute, transcendent Creator, Lord and Master of all that is.”<sup>60</sup>

The belief in the supremacy of God results in the inescapable conclusion that God's creation must serve and fulfill His will. In Islam, therefore, God is the source of authority and the sole sovereign lawgiver.<sup>61</sup> The *Shari' a* is divine and eternal, not in letter but rather in spirit.<sup>62</sup> All human legislation must conform to the divine will as discerned from the *Qur'an* and *Sunnah* and understanding of al *dhawq al shar'i*, or intuitive knowledge of the purposes of the law.<sup>63</sup> God has created human beings with the potential to ascertain the divine imperatives, as Islam teaches that humans are

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<sup>58</sup> J. L. Esposito, *Islam the Straight Path* (New York: Oxford University Press, 1988).

<sup>59</sup> Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (Lahore: Sheikh Muhammad Ashraf, 1977) at 165.

<sup>60</sup> *Supra* note 56 at 279. For a good introductory discussion on the supremacy of God or *tawhid* see E. D. Adelowo, “The Concept of Tauhid in Islam: A Theological Review” 35 *Islamic Quarterly* 23.

<sup>61</sup> Qur'an 12:40: “The command is for none but God. He hath commanded that ye worship none but Him.”; Qur'an 7:54: “Verily, His are the creation and the command.”

<sup>62</sup> Ismail Faruqi, “Islamization of Knowledge: Problems, Principles and Prospective” in *Islam: Sources and Purpose of Knowledge* (Herndon, Virginia: International Institute of Islamic Thought, 1988) at 34; A. Hasan, *The Early Development of Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 1970) at 7 states: “Abu Hanifah, if the ascription of K. al-'Alim wa'l-Muta'allim to him is correct, distinguished *din* from *Shari' a* on the ground that *din* was never changed, whereas *Shari' a* continued to change through history.”

<sup>63</sup> Hasan, *id.*, at 34.

distinguished from God's other creations by the mere fact that humans can think rationally.<sup>64</sup>

The distinction must be made between *Shari' a* and many of the technical legal rules derived from the *Qur'an* and *Sunnah* through *fiqh*.<sup>65</sup> A *faqih*<sup>66</sup> or jurist derived these rules and thus the decision is not eternal and it is open to re-interpretation in light of, *inter alia*, new social, economic, educational and political circumstances. The *Shari' a* differs from the western legal tradition in many respects including the derivation of its legitimacy, sources, and methodology for evolution or reform.<sup>67</sup> But there are also some similarities, in particular, like most western legal systems it is a positive system of law and not merely religious law, and they are both judge made law using the case law method in their own peculiar ways.<sup>68</sup>

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<sup>64</sup> W. Chan et al., *The Great Asian Religions: An Anthology* (New York: MacMillan Publishing Co., 1969) at 309: "...Islam puts its trust in reason, the supreme faculty of knowledge with which man is endowed, as the only method possible for ever deciding the issue."; and I. Khaldun, *Muqaddimah*, III, at 481.

<sup>65</sup> M. H. Kamali, "Source, Nature and Objectives of Shariah," *Islamic Quarterly* 211 at 212, Vol. XXXIII (1989).

<sup>66</sup> A. G. Muslim, "Islamic Laws in Historical Perspective: An Investigation Into Problems and Principles in the Field of Islamization" 31 *Islamic Quarterly* at 69: "A *Faqih* means a jurist; an expert in the field of law, who possesses outstanding knowledge of revealed sources and methodology, and the intelligence to make use of the basic sources through independent reasoning and the principles provided by the *Shari' a*."; See also Ismail Faruqi, *Supra*, note 62 at 34: "The great jurists of Islam -- Shafi' i, Abu Hanifah, Malik and Ahmad ibn Hanbal -- all understood the compound term *usul al fiqh* - not as the general principles of Islamic law, but the first principles of Islamic understanding of life and reality ...The *faqihs* of the classical period were real encyclopedists, masters of practically all the disciplines from literature and law to astronomy and medicine. They were themselves professional men who knew Islam not only as law..."

<sup>67</sup> See J. Schact, *The Origins of Muhammadan Jurisprudence* (London: Oxford University Press, 1959).

<sup>68</sup> See Volume 34:1 of the *Cleveland State Law Review*, which published lectures from the Conference on Comparative Links between Islamic Law and the Common Law.

In order to appreciate the depth and comprehensiveness of Shari' a, it is necessary to understand the various sources of Islamic law, its mechanisms for evolution as well as the history and evolution of Islamic thought. As Asaf Fyzee noted:

“Islamic law is not a systematic code, but a living and growing organism; nevertheless there is amongst its different schools a large measure of agreement, because the starting point and the basic principles are identical. The differences that exist are due to historical, political, economic and cultural reasons, and it is, therefore, obvious that this system cannot be studied without a proper regard to its historical development.”<sup>69</sup>

Revelation provided both the principles and the mechanism for its renewal in order for the *Shari' a* to conform to changing human conditions. The fundamental principles of the law and the methodology for its development were instituted in Islam under divine instruction.

During the life of the Prophet Muhammad, solutions to legal problems were settled by resort to the Prophet who relied on revelation or his inspired interpretation of the divine revelation or *data revelata*.<sup>70</sup> After the demise of the Prophet, his companions had to extrapolate, infer and deduce legal prescriptions from their knowledge of the first principles of Islamic understanding of life and reality.<sup>71</sup> Twenty-seven companions of Prophet Muhammad distinguished themselves as legal experts.<sup>72</sup> Included among them were the four Caliphs in order of their rule, Abu Bakr al Siddiq, Umar Ibn al Khattab, Uthman Ibn Affan, and Ali Ibn Abu Talib as well as A'ishah one of the Prophet's wives.

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<sup>69</sup> A.A.A. Fyzee, *Outlines of Muhammadan Law*, 3<sup>rd</sup> edition (London: Oxford University Press, 1949).

<sup>70</sup> *Supra* note 56 at 274.

<sup>71</sup> A. Hasan, *supra*, note 62, at xiv.

<sup>72</sup> *Id.*

Umar, Ali and A'ishah had a great impact on the development of Islamic law, as the two early schools of jurisprudence, the jurists of Medinah and Kufa, derived their legal doctrines from their verdicts among others.<sup>73</sup>

The practice of the companions of the Prophet was to first consult the *Qur'an*, and then the *Sunnah*. If these two primary sources were silent then they resorted to extrapolating and deducing from the first principles gleaned from the two divinely inspired sources. Umar, the second Caliph of Islam, instituted the body of legal opinions of some of the companions as a tertiary source that could be consulted by later jurists or *fuqaha*.<sup>74</sup> It is clear that Islamic law has three distinguishable facets, namely, revelation (the *Qur'an* and the *Sunnah* which is also considered inspired), interpretation and application.<sup>75</sup>

A century after the death of the Prophet none of the companions were alive and so there developed a vacuum in the legal field. This resulted from the fact that the earlier generation knew about the situational contexts and spirit of Islam and the Prophet's mission. They were thus in a position to legislate with these guidelines in mind. The later Muslims were going to be deprived of these advantages if these were not recorded for posterity. The *Qur'an* as will be discussed in the next section had already been committed to writing, therefore the early Muslim jurists and scholars, set out to

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<sup>73</sup> *Id.* at 2: In fact, Umar was so prominent in the development of Islamic law (he was known as Al Faruq, or the just) that on the occasion of his death Ibn Masud, a great scholar in his own right, remarked that nine-tenths of *ilm* (knowledge) had gone away with him.

<sup>74</sup> *Supra*, note 56, at 275. *Fuqaha* (jurists) is the plural of *faqih*.

<sup>75</sup> A. Z. Hammad, *Islamic Law: Understanding Juristic Differences* (Indianapolis: American Trust Publications, 1992) at 10.

canonize the *Sunnah* and invented *fiqh* to systematize the development of the law. *Fiqh* is divided into two components, namely, *usul al fiqh* and *furuh al fiqh*.<sup>76</sup> *Usul al fiqh* is the science of jurisprudence covering the origins and sources from which the rules of human conduct are derived; it includes the philosophy of law, sources of rules, and the principles of legislation, interpretation and application of the *Qur'an* and *Sunnah*.<sup>77</sup> *Furuh al fiqh* are the derivatives or the legal rules; these are subject to change.

There evolved much scholarship in this area and numerous schools of jurisprudence developed<sup>78</sup>; they began along geographical lines, in Medinah and Kufa (Iraq), but later evolved around individual scholars or jurists.<sup>79</sup> Due to historical and political factors four schools of jurisprudence survived in the *Sunni* tradition<sup>80</sup>. The four schools of *Sunni* jurisprudence<sup>81</sup> are named after the respective founders: the Hanafi School (Abu Hanifah. d.767), the Maliki School (Malik ibn Anas, d.795), the Shafi'i School (d.819), and the Hanbali School (d.855). The early era was a period of great intellectual progress. George Makdisi documents that the scholastic method of disputation and lecture was developed by Islamic jurists in the ninth century; a

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<sup>76</sup> *Supra*, note 65, at 212. See also M. Cherif Bassiouni and Gamal M. Badr, "The Shari'ah: Sources, Interpretation, and Rule Making," 1 *UCLA J. Islamic & Near E. L.* 135.

<sup>77</sup> *Id.*

<sup>78</sup> According to the great Islamic philosopher and legal scholar Muhammad Iqbal: "From about the middle of the first century up to the beginning of the fourth, not less than nineteen schools of law and legal opinion appeared in Islam. This fact alone is sufficient to show how incessantly our early doctors of law worked in order to meet the necessities of a growing civilization," in *The Reconstruction of Religious Thought in Islam* (Lahore: Sheikh Muhammad Ashraf, 1977) at 165.

<sup>79</sup> *Supra*, note 62.

<sup>80</sup> The two main branches of Islam are the *Sunni* and *Shia* branches. The schism occurred after the arbitration between Ali Ben Abu Taleb and Muawiyat Ben Sufiane for the Caliphate. The *Shia* insisted that the Caliphate had to remain in the family of the Prophet (represented by his cousin Ali) while the *Sunni* tradition did not insist on this.

<sup>81</sup> This paper will focus on *Sunni* jurisprudence, as this is the prevalent system in most of the Islamic world, including the Middle East.

method which was later used in Bologna, Paris, Oxford and elsewhere referred to as "readings" and "moots".<sup>82</sup>

## **b) Sources and Methodology of Islamic Law<sup>83</sup>**

### **i) Qur'an:**

The *Qur'an* is composed of 114 *suwar* (chapters), 6,616 *ayat* (verses), and 77,934 words.<sup>84</sup> Most of the revelations to Prophet Muhammad had a situational context which is referred to as *asbab al nuzul* (the situational causes of revelation). Many orientalist proclaim that the Prophet produced the Qur'an himself, but at the same time they do not deny that the existing text is unaltered in that it is exactly as the Prophet had dictated to his scribes.<sup>85</sup> William Muir concluded, "we might beyond the strongest presumption affirm that every verse in the Kor'an is the genuine and

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<sup>82</sup> George Makdisi, "Legal History of Islamic Law and The English Common Law: Origins and Metamorphoses" 34 *Cleveland State Law Review* 3 at 6.

<sup>83</sup> In the light of the scope of this paper it is not possible to dwell on this matter in the detail it deserves and requires. The sources discussed are not finite, for example the renowned Islamic scholar M. Hamidullah sets out the sources as follows:

- a. The *Qu'ran*.
- b. The *Sunna*, or Tradition of the Prophet.
- c. The orthodox practice of the early Caliphs.
- d. The practice of other Muslim rulers not repudiated by the jurisconsults.
- e. The opinions of celebrated Muslim jurists:
  1. consensus of opinion, or *Ijmah*; or
  2. individual opinions, or *Qiyas*.
- f. The arbitral awards.
- g. The treaties, pacts and other conventions.
- h. The official instructions to commanders, admirals, ambassadors and other state officials.
- i. The internal legislation for conduct regarding foreign relations and foreigners.
- j. The customs and usage.

In Muslim Conduct of State, 4th ed., (1961) at 18. See also T.J. al Alwani, *Usul Al Fiqh Al Islami: Source Methodology in Islamic Jurisprudence* (Herndon, Virginia: International Institute of Islamic Thought, 1991).

<sup>84</sup> *Supra*, note 56, at 100.

<sup>85</sup> W. Muir, *The Life of Muhammad* (Edinburgh: John Grant, 1923) at xxviii.

unaltered composition of Muhammad.”<sup>86</sup> Muslims on the contrary believe that the *Qur'an* is the verbatim revelation sent by God and it was a generally known fact that Muhammad was illiterate and so could not have composed such a work.<sup>87</sup>

The *Qur'an* is believed to be the last revelation sent to mankind, encompassing and reforming many of the earlier revelations sent to other prophets, including the Psalms of David, the Torah of Moses, and the Bible as revealed to Jesus. Muslims see it as the culmination of the evolutionary process of revelation.<sup>88</sup> The *Qur'an* is not a legal treaties, but rather lays down certain guidelines and general principles for an ideal civilized society - - which with the aid of the *Sunnah* (precedent set by Prophet Muhammad), *ijma* (community consensus), *qiyas* (analogical reasoning), *ijtihad* (independent reasoning or intellectual effort) and *urf* (custom) must be expanded into a body of law.<sup>89</sup> Only 350 verses addresses legal issues and most of these were revealed in response to problems that were actually encountered (*al-ahkam al amaliyyah* or practical rulings pertaining to the conduct of the individuals).<sup>90</sup>

All scholars are unanimous that the *Qur'an* is the primary source of the *Shari' a* even though in the writings of early Muslim jurists this statement does not frequently

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<sup>86</sup> *Id.*

<sup>87</sup> M. Lings, *Muhammad His Life Based on the Earliest Sources* (New York: Inner Traditions International Ltd., 1983).

<sup>88</sup> Muslims believe that unlike the previous revelations sent from God, the text of the *Qur'an* has been preserved intact. At the time of the Prophet's death nearly 30,000 people had memorized the *Qur'an* (Muslims must recite the *Qur'an* from memory in their 5 daily prayers and other occasions). Moreover, being illiterate, the prophet had scribes write the revelations, which were compiled and distributed. One of the early copies still exists in (Central Asia). See I. Faruqi & L. Faruqi, *supra*, note 56 at 100: "Its grammar, syntax, idioms, literary forms -- the media of expression and the constituents of beauty - are still the same as they were in the Prophet's time."

<sup>89</sup> Bassiouni and Badr, *supra*, note 76.

<sup>90</sup> *Supra*, note 65, at 215.

occur.<sup>91</sup> Muslims believe that unlike revelation, humanity's understanding of it is fallible, therefore Islamic scholars do not feel that there is any contradiction between reason and revelation; reason is there to correct man's erroneous understanding of the *data revelata*.<sup>92</sup>

The additional sources and methodologies elaborated upon below help in the interpretation of and or discovery of the divine will.

## **ii) *Sunnah*:**

The *Sunnah*<sup>93</sup> is the term used to refer to the normative behavior, decisions, actions, and tacit approvals and disapprovals of the Prophet. The *Sunnah* was heard, witnessed, memorized, recorded, and transmitted from generation to generation (as the Arabs had a great oral tradition).<sup>94</sup> They were compiled into collections of traditions, known as *ahadith* (*plural of hadith*), starting from the third century.<sup>95</sup> Over time, six of these collections became the most authoritative, or *sihan* collections: al Bukhari (256/870), Muslim (251/865), Abu Da'ud (275/888), al Tirmidhi (279/892), al Nasa'i (303/915), Ibn Majah (273/886), with the first two collections being more respected.<sup>96</sup> The authenticity attributed to these collections

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<sup>91</sup> This is attributed to the fact that this was too evident to be stressed at the time. There is ample proof that the *Qur'an* was used as an authoritative source of Islamic law. See for example Z. I. Ansari, "An Early Discussion of Islamic Law" in *Islamic Perspectives*, K. Ahmad & Z. I. Ansari, eds. (London: The Islamic Foundation, 1979); and A. Hasan, *supra*, note 62.

<sup>92</sup> See I. Faruqi & L. Faruqi, *supra*, note 56, at 265.

<sup>93</sup> The majority of theologians accept the *Sunnah* as the second main source *Shari'a* but one group of scholars, mainly the Mu'tazilah theologians did not accept this. For a discussion and refutation of their position see S. M. Darsh, *Islamic Essays* (London: Islamic Cultural Centre, 1979) at 79.

<sup>94</sup> Bassiouni and Badr, *supra*, note 76, at 141.

<sup>95</sup> I. Faruqi & L. Faruqi, *supra*, note 56, at 114.

<sup>96</sup> *Id.*

is determined based on the scrutiny of references, and crosschecking of witnesses, employed by the respective collectors as well as the *isnad* (credibility of the chain of authorities attesting to the accuracy of a particular tradition). Scholarship also flowered in the area of *Sunnah* through *usul al hadith* (the science of *hadith*) in the early years of Islam. The traditions have the practical effect of elaborating on the principles laid down in the *Qur'an*.

### iii) *Ijma*, *Qiyas* and *Ijtihad*:

*Qiyas* is reasoning by analogy to solve a new legal problem.<sup>97</sup> According to Wael Hallaq, *qiyas* encompasses the *a fortiori* argument in both its forms, the *a minori ad maius* and *a maiori ad minus*, *reductio ad absurdum* and *induction*.<sup>98</sup> The only argument not included is the *argumentum e contrario*, which is considered a linguistic argument in *usul al fiqh*.

*Ijtihad*<sup>99</sup> is defined as the intellectual effort by a *mujtahid* (one who is qualified to do *ijtihad*, a jurisconsult) in deriving rules consistent with the first principles of Islam.<sup>100</sup>

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<sup>97</sup> See A. Hasan, "Qiyas in Islamic Jurisprudence" 19 *Islamic Studies* 1; J. Makdisi, "Legal Logic and Equity in Islamic Law" 32 *American Journal of Comparative Law* 63; W. Hallaq, "Legal Reasoning in Islamic Law and the Common Law: Logic and Method" 34 *Cleveland State Law Review* 79; A.A. AbuSulayman, "Islamization of Knowledge: A New Approach Toward Reform of Contemporary Knowledge" in *Islam: Source and Purpose of Knowledge* (Herndon, Virginia: International Institute of Islamic Thought, 1988) at 106: "The effect of time and place and a comprehensive study of issues in their right perspective puts special emphasis on the method of Qiyas, which ensures arriving at conclusions that are not limited by time and place but are in keeping with the spirit of the Prophet's Sunnah."

<sup>98</sup> W. Hallaq, *supra*, note 97, at 80.

<sup>99</sup> Some scholars discuss *ijtihad* as part of *qiyas*, others discuss it as a separate category. See Hasan, *supra*, note 62; Ansari, *supra*, note 91; Muslim, *supra*, note 66, at 71: "It must be kept in mind, however, that if this mechanical application of *Qiyas* were to result in judgments which are unjust or against the public

*Ijtihad* could refer to the use of *qiyas* to extend a rule or independently taking account of the *maqasid al shari'a* (the higher purposes or objectives of the *Shari' a*). The six *maqasid al Shari' a* are preservation of life, property, family, religion, honour or dignity and *al aql* (reason or rational knowledge).<sup>101</sup> To carry out these techniques it was imperative that jurists, "be familiar with the broad purposes of the Law, so that when choices are to be made they will be able to choose interpretations which accord with the spirit of the Law."<sup>102</sup>

In principle the *Shari' a* permits legal rules to be changed and modified in accordance with changing circumstances. Muhammad Iqbal referred to *Ijtihad* as "[t]he principle of movement in the structure of Islam."<sup>103</sup> The justification for *qiyas* and *ijtihad* is found in the *Qur'an* and *Sunnah*.<sup>104</sup>

Scholars have identified three ways *ijtihad* could operate<sup>105</sup>: 1) with regard to speculative (*zanni*) textual rulings in the *Qur'an* and *Sunnah* due to meaning (*dalalah*) or transmission (*ridwayah*), then *ijtihad* can be employed to determine the correct

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interest, or where the revealed sources are silent on some confronting issue then there may be a need to exert independent judgment, namely *Ijtihad*."

<sup>100</sup> *Supra*, note 65, at 223.

<sup>101</sup> *Supra*, note 56, at 270. Most writers refer to it as the five *maqasid al shari'a* see M. H. Kamali, *supra*, note 65 at 225.

<sup>102</sup> B. Weiss, "Interpretation in Islamic Law: The Theory of *Ijtihad*" (1978), 26 *American Journal of Comparative Law* at 210.

<sup>103</sup> Iqbal, *supra*, note 78, at 165.

<sup>104</sup> Qur'an 38:29 -- "(Here is) a Book which We have sent down unto thee, full of blessings, that they may meditate on its Signs, and that men of understanding may reflect."; also Qur'an 29:69 -- "And those who strive in Our (cause), We will certainly guide them to Our paths. For verily God is with those who do right." The most authentic *Hadith* concerning *qiyas* and *ijtihad* is the one concerning the appointment of Mu'adh ibn Jabal as a judge for Yemen. Prior to departure, he was asked, "[a]ccording to what will you judge?" Mu'adh responded, "[a]ccording to the book of God." "And, if you do not find it therein?" the Prophet asked. "According to the *Sunnah* of the Prophet." "And, if it is not therein?" Mu'adh replied, "[t]hen I will exert myself to from my own judgment." Omer Ibn Hattab, the Caliph, approved of this response. Al-Sarakhsi, *Al-Mabsut*, Cairo 1930, vol. 16 at 69.

<sup>105</sup> *Supra*, note 65, at 224.

interpretation that is in harmony with the objectives and higher purposes of the law<sup>106</sup>;

2) where there is no *nass* (clear injunction) or *ijma* (consensus), then resort can be made to *ijtihad* with the guiding factor being the *maqasid al Shari' a*; this is known as *ijtihad bi al ray* (*ijtihad* founded in opinion); and 3) with respect to existing rules of *fiqh* which originated from analogical reasoning (*qiyas*), juristic preference (*istihsan*) and other forms of *ijtihad*, then the *mujtahid* may perform fresh *ijtihad* if these rulings no longer serve the higher objectives of the *Shari' a* in light of, *inter alia*, new social, economic, political, or cultural considerations.

The *Shari' a* identifies three factors that must be kept in mind in pursuing the *maqasid al Shari' a* or objectives of the law.<sup>107</sup> These include: educating the individual (*tahdhid al fard*) to inspire faith and instill the qualities of trustworthiness and righteousness; to establish justice (*adl*) which is one of the major themes of the *Qur'an*<sup>108</sup>; and consideration of public interest (*maslahah*).<sup>109</sup>

*Ijma* or consensus of the community is a third source of Islamic law.<sup>110</sup> Once a fresh *ijtihad* or *qiyas* has been done and there develops a consensus around it (ratification

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<sup>106</sup> The majority of scholars agree that if the text concerns religious observances or ibadat then change is not possible. In cases where the text is about "worldly transactions, the majority of jurists have held that it is open to interpretation and *ijtihad*....If the text is specific and does not admit of *ijtihad*, the dominant view is that no change should be attempted. But even so, numerous instances can be found in the precedent of the Caliph `Umar bin al-Khattab, where such changes have been made even in cases of the presence clear text." See *supra*, note 65, at 224.

<sup>107</sup> *Supra*, note 65, at 225.

<sup>108</sup> There are at least 53 instances where the *Qur'an* commands *adl* or justice.

<sup>109</sup> *Supra*, note 65, at 225.

<sup>110</sup> A. Hasan, *supra*, note 62.

by the community) then it becomes part of the corpus juris of Islamic law.<sup>111</sup> The *ijma* of an earlier generation is not binding on future generations.<sup>112</sup>

Other techniques and principles that one should be aware of when analyzing the *Shari' a* include<sup>113</sup>: *Naskh* (a technique where verses of the *Qur'an* are abrogated or abrogation of one *Sunnah* by another *Sunnah* and cross-abrogation of *Qur'an* and *Sunnah*); *al tamassuk bil asl*, the rule that originally and essentially all beneficial actions are legitimate and all harmful ones illegitimate; *istishab al hal*, the presumption in the laws of evidence that a state of affairs known to exist in the past is valid unless there is evidence challenging this; *al masalih al mursalah*, the rule that a benefit is deemed legitimate if the *Shari' a* is not known to have established or denied it; *al dhara'i'*, the rule that the legitimacy of means is directly affected by the benefit or harm implicit in the final end it seeks to achieve; *al istiqlal al naqis*, the rule that a universal law can be derived from a particular law through ascending generalization, if no exception is known to challenge the generalization; *al istihsan*, the rule that a weaker *qiyas* may be preferred to a stronger one if the former fulfils the objectives of the *Shari' a* better; and *al urf wal adah*, the rule that custom and established practice may be legitimate sources of law, if they don't contradict the *Shari' a*. *Urf* or custom is of particular significance in our context as many of the rules of international commercial arbitration have evolved to the level of custom. All schools of Islamic

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<sup>111</sup> There is great debate as to whose consensus will make it into law. Some scholars contend it is only the consensus of the jurists others contend it is the consensus of the community. See Hasan, *id.*; Iqbal, *supra*, note 78; A.S. Babeair, "The Role of the Ulama in Modern Islamic Society: An Historical Perspective" 37:2 *Islamic Quarterly* (1993) 80.

<sup>112</sup> For example if an earlier generation had declared war on a certain people (through consensus), this is not binding on later generations.

<sup>113</sup> A. Hasan, *id.*; I. Ghanem, *Outlines of Islamic Jurisprudence* (Saudi Publishing & Distributing House, 1983); Faruqi, *supra*, note 56, at 267.

jurisprudence accept *urf* as a supplementary source of rules of law.<sup>114</sup> According to Islamic legal scholar Husayn H. Hassan, “what is established by custom is like what is stipulated (among contractual parties).”<sup>115</sup> Though custom cannot change a mandatory rule of the *Shari’a*.<sup>116</sup>

The foregoing is by no means exhaustive nor the definitions comprehensive, but this will be sufficient for a basic understanding of Islamic laws and rules concerning international commercial arbitration and the dynamism and flexibility inherent in the *Shari’a*. One of the difficulties in determining what is Islamic law is due to the fact that there has been strong resistance to codification of the law, which is derived from the *Shari’a*’s fundamental character as an evolutionary system.<sup>117</sup>

#### **IV. Arbitration under the *Shari’a***

Arbitration, *tahkim* as it is known, has a long history in the Middle East stretching back to the pre-Islamic period.<sup>118</sup> The pre-Islamic Arabs did not have a formal legal system in place, but they did have a form of tribal justice administered by the chief of the tribe and they also used arbitration extensively.<sup>119</sup> The following excerpt from Abdul Hamid El-Ahdab’s work provides an excellent glimpse of arbitration as it existed among pre-Islamic Arabs:

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<sup>114</sup> Bassiouni and Badr, *supra*, note 76, at 157-158.

<sup>115</sup> Husayn H. Hassan quoted in *id* at 158.

<sup>116</sup> *Id.*

<sup>117</sup> Khaled Abou El Fadl, *Speaking in God’s Name: Islamic Law, Authority and Women* 97 (2001).

<sup>118</sup> Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries* 11 (2d ed., 1999).

<sup>119</sup> Sobhi Mahmassani, *The Legislative Situation in the Arab Countries: its past and present* p. 31-33 (2<sup>nd</sup> ed., Dar El-Elm Lil Malain).

The Arabs of Jahiliya (pre-Islamic period) knew arbitration because adversaries (be they individuals or tribes) usually resorted to arbitration in order to settle their disputes....Arbitration was optional and was left to the free choice of the parties. Arbitral awards were not legally binding their enforcement depended solely on the moral authority of the arbitrator.”<sup>120</sup>

This practice of arbitration was approved of in the *Qur'an*, particularly in the matrimonial context:

“If ye fear a breach between them twain (i.e. husband and wife), then appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, God will cause their conciliation; for God hath full knowledge, and is acquainted with all things.”<sup>121</sup>

Islamic history also reveals that the Prophet accepted the decision of an arbitrator; he advised others to arbitrate and in fact, his closest companions used it to resolve disputes as well.<sup>122</sup> In fact, even the first treaty entered by the Muslim community, the Treaty of Medinah signed in 622 A.D. between Muslims, Non-Muslim Arabs and Jews, called for disputes to be resolved through arbitration.<sup>123</sup> Moreover, the Prophet also resorted to *tahkim* in his dispute with the Banu Qurayza tribe.<sup>124</sup> Not only is *tahkim* approved of by the *Qur'an* and evident in the *Sunna* of the Prophet, the two main sources of Islamic law, but the *ijma* or consensus has also confirmed its use as an Islamic dispute resolution tool.<sup>125</sup>

## V. Arbitration in the Middle East

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<sup>120</sup> *Supra*, note 118, at 11.

<sup>121</sup> *Qur'an* 4:35.

<sup>122</sup> *Supra*, note 118, at 12.

<sup>123</sup> *Id.*

<sup>124</sup> See *Libyan Am. Oil Co. (LIAMCO) v. Libyan Arab Republic* (1977), 20 I.L.M., 41 (1981).

<sup>125</sup> *Supra*, note 118, at 13.

The historical acceptance of arbitration is also evident from more contemporary times as Bahrain was a center of international commercial arbitration before Paris and London.<sup>126</sup> In Saudi Arabia for instance, until the 1950's arbitration was the primary tool for resolving oil concession agreement disputes.<sup>127</sup> Despite this history and tradition, international commercial arbitration in the Islamic world in recent history can best be summarized as a troubled or “roller coaster” experience.<sup>128</sup> Brower and Sharpe identify three phases in the Middle East when it comes to international commercial arbitration in the mid-1900's.<sup>129</sup>

The first phase from the end of World War II to the 1970's was a time when Islamic domestic laws were undermined and negated and the “superior” western laws were imposed in the arbitration of long-term oil concession disputes.<sup>130</sup> In the case of *Petroleum Development (Trucial Coasts) Ltd. V. Shaikh of Abu Dhabi*<sup>131</sup>, Lord Asquith, the arbitrator, acknowledged that given that the contract was executed in Abu Dhabi and was to be performed there, the applicable law ought to be the laws of Abu Dhabi. But, he then went on to undermine Abu Dhabi laws which were grounded in Islamic law because “...it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial

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<sup>126</sup> Hassan Ali Radhi, State Courts and Arbitration in the Gulf Cooperation Council (GCC) Countries, *ICC Int'l L. Ct. Arb. Bull.*, May 1992. In the early 1900, European merchants and traders made use of the commercial arbitration center located in Bahrain.

<sup>127</sup> See generally S. Saleh, Commercial Arbitration in the Arab Middle East 4-6 (1984); and Salah Hejailan, National Reports: Saudi Arabia, *IV Y.B. Com. Arb.* 162, 169 (1979).

<sup>128</sup> Charles N. Brower and Jeremy K. Sharpe, “International Arbitration and the Islamic World: The Third Phase,” *97 A.J.I.L.* 643.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Case No. 37, *ILR* 1951; 1 *ICLQ* 247.

instruments.”<sup>132</sup> He applied principles of English law being the “common practice of the generality of civilized nations.”<sup>133</sup> The thrust of the rejection was that there was no general law of contract in the *Shari’ a*. The same arrogance is evident in the case of *Ruler of Qatar v. International Marine Oil Company Ltd.*, where the arbitrator held that Qatar law, which was based on Islamic law, was the proper law to apply but then dismissed it by stating “...I am satisfied that the [Islamic] law does not contain any principles which would be sufficient to interpret this particular contract.”<sup>134</sup> Both arbitrators ignored the extensive Islamic legal scholarship, which had set out clear principles of contract law based on the primary and secondary sources of Islamic law.<sup>135</sup>

The alienation and distrust of international arbitration was reinforced by the decision in the Arabian American Oil Company arbitration in 1963. In *Saudi Arabia v. Arab Am. Oil Co. (ARAMCO)*<sup>136</sup>, the panel ruled against the Saudi’s. The panel held that Saudi laws had to be “interpreted or supplemented by the general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence,” because ARAMCO’s rights could not be “secured in an unquestionable manner by the law in force in Saudi Arabia.”<sup>137</sup> In the wake of this decision the Saudi Council of Ministers passed resolution no. 58 which forbade government agencies from participating in arbitration.<sup>138</sup> The hostility and distrust of arbitration was not limited to Saudi Arabia

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<sup>132</sup> *Petroleum Dev. (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi*, 1 INT’L & COMP. L. Q. 247 at 250-251.

<sup>133</sup> *Id.* at 251.

<sup>134</sup> 1953 20 *ILR* 534.

<sup>135</sup> William Ballantyne, “The Shari’ a and its Relevance to Modern Transactional Transactions” in *Arab Comparative and Commercial Law: The International Approach* (Graham & Trotman, 1987), vol. 1, p. 12.

<sup>136</sup> 27 *ILR* 117 (1963).

<sup>137</sup> *Id.* at 169.

<sup>138</sup> For a discussion of Resolution No. 58, see Salah Hejailan, *National Reports: Saudi Arabia*, IV *Y.B. Com. Arb.* 162, 169 (1979).

and still colours the perception of many in this region when it comes to transnational arbitration.<sup>139</sup>

The second phase is characterized with many Middle Eastern nations as well as the developing world in general gaining more confidence as a result of a number of factors including, *inter alia*: the end of colonialism; rise in nationalism; challenge to capitalism; increasing oil wealth, etc.<sup>140</sup> The firm belief in many of these nations that the whole international arbitration framework was developed without any consideration being given to their culture, values and legal traditions gave impetus to a growing challenge to the international arbitration regime's very legitimacy.<sup>141</sup>

The third and current phase, according to Brower and Sharpe, is characterized by growing participation in and promotion of the international arbitration movement by Islamic countries.<sup>142</sup> As part of this growing "global adjudication system"<sup>143</sup> these two authors suggest that more and more Islamic nations are becoming party to international arbitration conventions; adopting "arbitration-friendly" domestic arbitration laws; and are

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<sup>139</sup> See Amed Sadek El-Kosheri, "Is There a Growing International Arbitration Culture in the Arab-Islamic Juridical Culture?" in *International Dispute Resolution: Towards an International Arbitration Culture* 47, 48 (Albert Jan van den Berg ed., 1998): "In general, the legal community throughout the Arab world is still manifesting its hostility to transnational arbitration mainly as a result of the great publicity devoted to the criticism of certain unfortunate arbitral awards rendered as of 1951 by western arbitrators who excluded, with terms of a humiliating nature, the application of the national applicable legal systems of countries like Abu Dhabi or Qatar."

<sup>140</sup> *Supra*, note 128, at 645.

<sup>141</sup> *Id.* at 646. The Libyan nationalization cases represented the mood during this phase, which was characterized by legal, ideological and political clashes between the Western world and the developing world. See Robert B. von Mehren & P. Nicholas Kourides, "International Arbitration Between States and Foreign Private Parties: The Libyan Nationalization Case," 75 *AJIL* 476.

<sup>142</sup> *Supra*, note 128, at 645.

<sup>143</sup> Charles N. Brower, Charles H. Brower II, & Jeremy K. Sharpe, "The Coming Crisis in the Global Adjudication System, 19 *Arb. Int'l* (2003).

setting up arbitration centers.<sup>144</sup> The best evidence that arbitration is coming back into favour in the region is that more than half the members of the Organization of Islamic Countries and fourteen of the twenty-two League of Arab States have acceded to the New York Convention of 1958<sup>145</sup> and many of them have acceded to the ICSID Convention.

Two other developments indicate that arbitration is becoming more acceptable in the Middle East; over the last two or three decades we have witnessed the modernization of arbitration laws in a number of countries; and a number of new arbitration centers have been established in the region.<sup>146</sup> The modernization initiatives have ranged from adoption of western models (such as Lebanon and Qatar, etc.) to adoption of the UNCITRAL Model Law (such as Bahrain, Iran, Jordan, Oman, Tunisia, etc.).<sup>147</sup> In Saudi Arabia reforms in 1983 and 1985 clarified and simplified some elements of the traditional tahkim system, a number of restrictions remain in place including religious and gender differences.<sup>148</sup>

The UAE, a federation consisting of Abu Dhabi, Dubai, Sharjah, Ras Al Khaimah, Umm Al Quwain, Fujairah and Ajman, also witnessed the enactment of federal arbitration laws in 1992.<sup>149</sup> The laws were part of the new Federal Code of Civil Procedure (CCP) (Law No. 11 of 1992).<sup>150</sup> The section on “Arbitration” is contained in Book II, Part III, Arts.

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<sup>144</sup> *Id.* See for instance M.I.M. Aboul-Enein, *The Development of International Commercial Arbitration Laws in the Arab World*, 65 *Arb. Int'l.* 314 (1999).

<sup>145</sup> *Supra*, note 128, at 647.

<sup>146</sup> *Supra*, note 128, at 650-653.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Supra*, note 118, at 714.

<sup>150</sup> *Id.*

203-218.<sup>151</sup> These provisions supersede the individual Emirate laws dealing with arbitration and they apply, without distinction, to both domestic and international arbitration. Article 1 of the Code provides:

“In the absence of a text in this Code, the Courts shall resort to Moslem Shari’ a and choose the most adequate solutions amongst those taught by the Hanbali and Maleki doctrines. Failing them, they shall resort, as need may be, to the Shafi’i and Hanafi doctrines.”<sup>152</sup>

Notwithstanding this provision, the UAE arbitration laws, unlike its Saudi counterpart, it has done away with some of the stringent restrictions such as stipulating the religion and gender of the arbitrator.<sup>153</sup>

The region is also witnessing the growth of arbitration centers.<sup>154</sup> These centers promote the concept of international commercial arbitration in the Middle East. Though it is an uphill struggle, particularly given that the resurgence of Islam in the region will challenge some of the norms sought to be introduced. Indeed, some Islamists may to see the international arbitration movement in the same light as many opponents see it in the developing world: essentially “the removal of a vast sphere of dispute settlement” from

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<sup>151</sup> *Id.*

<sup>152</sup> Reproduced in *id.* at 714.

<sup>153</sup> United Arab Emirates Arbitration Rules, The Civil Procedure Code, Federal Law No. (11) of 1992, Part II, Section III, Chapter Three, Article 206(1).

<sup>154</sup> These include the Cairo Regional Centre for International Commercial Arbitration jointly set up by Egypt and the African-Asian Legal Consultative Committee; the Arab Centre for Commercial Arbitration in Rabat, Morocco set up by the Amman Arab Convention on Commercial Arbitration; the Arbitration Centre at the Chamber of Commerce and Industry of Beirut, Lebanon; the Conciliation and Arbitration Centre of Tunis, Tunisia; The Bahrain Centre for International Commercial Arbitration; the Kuwait Centre for Commercial Arbitration; the Abu Dhabi Centre for Conciliation and Arbitration; and the Dubai Centre for Arbitration and Conciliation.

domestic judicial control, the undermining of domestic laws and the elevation of a “supranational laws of uncertain origins... inimical to developing states.”<sup>155</sup>

It is undeniable that the *Shari' a* has a profound impact on the psyche of most Middle Easterners, but the impact on actual legislation varies from nation to nation. A number of writers have attempted to group countries according to the level of influence of both the *Shari' a* and western legal systems.<sup>156</sup> The legal systems in the Middle East can be divided into loose groupings based on influence of western and Islamic principles<sup>157</sup>: 1) the first group includes countries which have adopted western laws: civil law tradition (such as Lebanon, Syria, and Egypt, Algeria, Bahrain, Kuwait, Libya, Morocco, and Tunisia.) and the common law tradition (such as Iraq, Jordan, Sudan and the United Arab Emirates); 2) those countries that have drawn more substantially – though not completely -- from the *Shari' a* such as Saudi Arabia, Qatar, Oman and Yemen; and 3) those countries which westernized their commercial laws but still are strongly influenced by *Shari' a* principles, such as Iraq, Jordan and Libya.<sup>158</sup> The United Arab Emirates can also be included in this latter category. Obviously, there are no discrete and definite groups, but these loose categories will enable us to get a macro view of the situation as it is today and also give us a sense of what direction the region's arbitration discourse may take.

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<sup>155</sup> M. Sornarajah, “The UNCITRAL Model Law: A Third World Viewpoint,” *J. Int'l Arb.*, Dec. 1989, at 20.

<sup>156</sup> Some writers break it down into two groups, those influence by the Napoleonic Codes and those influenced primarily by the *Shari' a*. See for instance Julian D.M. Lew, “The recognition and enforcement of arbitration agreements and awards in the Middle East,” *Arb. Int'l* Vol. 1 No. 2 (1985).

<sup>157</sup> H. S. Shaaban, “Commercial Transactions in the Middle East: What Law Governs?” 31 *Law & Pol'y Int'l Bus.* 157 at 158; and Nayla Comair-Obeid, *The Law of Business Contracts in the Arab Middle East* 119 (1996).

<sup>158</sup> H. S. Shaaban, *id.* at 158; and Nayla Comair-Obeid, *id.*, at 119.

It is beyond the scope of this paper to provide a summary of each of the jurisdictions but it is worth noting the reference to the *Shari' a* in some legislation in the region. The Syrian and Libyan Civil Codes state:

“Article 1(2). In the absence of an applicable legal provision the judge shall decide in accordance with the principles of the Islamic Shari’ a, and in accordance with custom. In the absence of custom, the Judge will apply the principles of natural law and the rules of equity.”<sup>159</sup>

Meanwhile in Egypt and Iraq, there is less recourse to *Shari' a* and only after reference to custom, which in turn may form part of the *fiqh* rules. In UAE, Bahrain, Kuwait and Qatar the constitutions provide that the “Shari’ a is a primary source of law.”<sup>160</sup> Moreover, it is worth noting in Egypt that the Constitution was amended in 1980, the Constitution was amended to reflect that the *Shari' a* was “the” rather than “a” principal source of law.<sup>161</sup>

## VI. Comparative Analysis

Though there is clear evidence of the acceptance of arbitration or *tahkim* in the Islamic legal tradition, albeit not as we know it today in the West, arbitration has a checkered track record in the last century in the Islamic world.<sup>162</sup> Indeed, there is no disagreement

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<sup>159</sup> Reproduced in David Pearl, *A Textbook on Muslim Law* 196 at 198 (1979).

<sup>160</sup> M. Ballantyne, Book Review of *Commercial Arbitration in the Arab Middle East (A Study in Shari’a and Statute Law)* by Samir Saleh (Graham and Trotman Ltd., U.K.) 1984, in *Arb. Int’l* Vol. 4, No. 3 (1989) at 272.

<sup>161</sup> *Id.* at 271.

<sup>162</sup> *Supra*, note 128, at 643.

about tahkim being an acceptable form of dispute resolution, but there are significant historical and conceptual differences with the western concept of arbitration. The differences can be discussed under five broad headings: 1) Nature of Arbitration; 2) Scope of Arbitration; 3) Uncertainty in the Rules and Regulations Regarding Arbitration Under the *Shari' a* and in the Various Middle Eastern Jurisdictions<sup>163</sup>; 4) Substantive Law Applicable; and 5) Scope of Judicial Review and Enforcement.

The paper will proceed to analyze each of these issues by looking at the *Shari' a* principles as well as the legislation addressing these issues in Middle Eastern nations, with a particular focus on Saudi Arabia and the UAE.

### **1) Nature of Arbitration:**

One of the characteristics of arbitration as we know it in the west is its binding nature.<sup>164</sup> This explains the emphasis on ensuring the finality of arbitral decisions. In fact, one of the objectives behind the web of international laws, treaties, national laws and arbitration rules which attempt to regulate international commercial arbitration is to ensure that arbitral decisions are binding.

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<sup>163</sup> This paper's analysis is restricted to a brief look at the arbitration laws in Saudi Arabia and the United Arab Emirates.

<sup>164</sup> *Supra*, note 21, at p. 1.

The issue is not as clear-cut in the *Shari' a* and in the Middle East.<sup>165</sup> There is much debate in Islamic jurisprudence around the question of whether arbitration or *tahkim* is more than simple conciliation.<sup>166</sup> Commentators who favor the view that arbitration is simply conciliation point to verse 35 of *Surah* or chapter 4.<sup>167</sup> They point to the language used as well as the even number of arbitrators to argue that *tahkim* is no more than conciliation. The majority view on the matrimonial dispute resolution verse in the *Qur'an* is that any decision made by the two spousal representatives would not be final or binding, unless both parties wish to accept it. On the other hand, those who advocate arbitration as a mechanism with a binding character also find their basis in the *Qur'an*:

“God doth command you to render back your trusts to those whom they are due; And when ye judge between people, that ye judge with justice; Verily how excellent is the teaching which He giveth you! For God is He who heareth and seeth all things.”<sup>168</sup>

The wording of this verse is read to authorize those who judge to make decisions that are binding.<sup>169</sup> Arbitrators must therefore be appointed with this understanding and so the practice is to appoint an odd number of arbitrators. The hesitation to make decisions binding arise from a fear that judges of the State and ultimately the State itself may be challenged or undermined if arbitrators are given the power to make binding decisions.

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<sup>165</sup> George Sayen, “Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia,” 24 *U. Pa. J. Int'l Econ. L.* 905 at 921.

<sup>166</sup> *Supra*, note 118, at 16.

<sup>167</sup> *Qur'an* 4:35.

<sup>168</sup> *Qur'an* 4:58.

<sup>169</sup> *Supra*, note 118, at 17.

There is no clear position on this question in any of the four leading Sunni schools.<sup>170</sup>

Hanafi *fiqh* suggests that arbitration is closer to conciliation, though some jurists have held that an arbitrator has the same function as a judge. In the Shafi'i School, arbitrators have a lesser role and status than judges as their appointment can be revoked while a judge cannot be removed. Indeed, Imam Shafi'i, the founder of this school of jurisprudence, is also of the view that arbitration is closer to conciliation.<sup>171</sup> Maliki *fiqh* holds that a decision of an arbitrator is binding unless there is a "flagrant injustice."<sup>172</sup> While the Hanbali jurists hold the view that an arbitral award has the same binding force as a court judgment and that an arbitrator must have the same qualifications as judge.<sup>173</sup>

The Ottoman Turks, influenced by the Civil law tradition, began an initiative in 1869 to codify Hanafi *fiqh*.<sup>174</sup> The "Medjella of Legal Provisions" dealt with civil law matters and had a whole section on arbitration or *tahkim*.<sup>175</sup> The provisions confirmed the conciliatory nature of arbitration, as held by the Hanafi jurists, and considered arbitral awards of lesser force than court judgments as arbitral decisions could be set aside by judges.<sup>176</sup> Though the Medjella did note that arbitral decisions would still be binding between the parties just as a contract would be binding under the *Shari'a*.

It is safe to state that both concepts of arbitration existed in the *Shari'a* though the view of arbitration as conciliation was the prevalent one.

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<sup>170</sup> The position is similar in the *Shiite* tradition, but our focus is on *Sunni fiqh* which ...in much of the Middle East with the exception of Iran, parts of Iraq, and to lesser extent within smaller communities in Lebanon and some of the other Gulf states. *Supra*, note 118, at 17.

<sup>171</sup> See Al Mawardi, *Adab Al Kadi*, T. II, p. 382.

<sup>172</sup> *Supra*, note 118, at 19.

<sup>173</sup> *Id.* at 19.

<sup>174</sup> *Id.* at 21.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

The Saudi arbitration law over time appears to have selected the view of arbitration as binding as reflected in the Hanbali school.<sup>177</sup> Again this speaks volumes about the flexible and evolutionary nature of the *Shari'a* and leaves it open for any Muslim nation which wishes to adopt the current international binding approach to arbitration as one consistent with Islamic law. Though obviously this must be a conscious and considered legislative decision to have legitimacy.

## **2) Scope of Arbitration:**

As noted earlier, arbitration was explicitly provided for in the *Qur'an* for family disputes and the companions of the prophet used it to resolve disputes involving goods and chattels.<sup>178</sup> The question of the scope of arbitration remained open for debate. Legal scholars who favor its broader use point to the use of arbitration to resolve the dispute between Muawiyat Bin Abu Sufiyan and Ali Bin Abu Talib, when Muawiyat refused to accept the Caliphate of Ali after the demise of the third Caliph Othman Bin Affan.<sup>179</sup> It is reported that Muawiyat suggested to Ali that the matter be resolved as follows:<sup>180</sup>

“I wish to choose a man amongst my men and that you choose a man amongst yours so that both of them settle the dispute between us and make their award in compliance with the provisions of

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<sup>177</sup> *Id.* at 552. “Thus the Saudi legislator, by adopting one trend rather than the other in order to adapt to the economic evolution of the country and to facilitate commerce, stayed within the framework of the *Shari'a*.”

<sup>178</sup> *Qur'an* 4:35.

<sup>179</sup> *Supra*, note 118, at 14.

<sup>180</sup> *Supra*, note 118, at 14.

the Holy Book.”<sup>181</sup>

The suggestion was accepted and the two camps selected their arbitrators and drafted what may be the first formal Islamic arbitration agreement in 659 AD<sup>182</sup>, which extended by *qiyas* (analogy) the *Qur'anic* directive of arbitration in the family setting to a setting in the political arena. The ensuing disagreements about Ali's acceptance of arbitration lead to serious bloodshed and paved the way for “Islam's enduring split into the Shiite and Sunni branches.”<sup>183</sup>

Notwithstanding its use in the political arena, the common view among the four *Sunni* schools of Islamic jurisprudence is that arbitration is applicable primarily in matters of property and finances.<sup>184</sup> This does not appear to pose any serious issues from the perspective of international commercial arbitration, as most such disputes will revolve around finances and property.

Article 1 of the Rules for the Implementation of the Saudi Arabian Arbitration Regulation (27 May 1985) states:

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 15. The following excerpts from the agreement clearly illustrate that the parties had fully considered arbitration: “In the name of God, the Powerful and Merciful, This is what was agreed between Ali Ben Abu Taleb and Muawiyat Ben Sufiane, Ali for the people of Iraq and their Moslem and believing partisans and Muawiya for the people from the country of Damascus and their Moslem and believing partisans: We shall comply with the decision of God by complying with the provisions of His book with respect to our dispute and by applying them from the beginning up to the end, affirming what is affirmed therein and rejecting what is therein rejected...This dispute must be examined in a time period expiring during the month of Ramadan unless the arbitrators desire to settle the dispute earlier or later...If one of the arbitrators dies, the Chief of each sect shall appoint, with the help of his partisans, a man to replace him and who shall be chosen amongst the wise and just. The place of arbitration shall be located between Kufa, Damascus, and the Hedjaz...Each of the arbitrators shall be entitled to appoint the witnesses of his choice, but these witness statements must be written in this document...”

<sup>183</sup> *Supra*, note 128, at 643.

<sup>184</sup> Sayed Hassan Amin, *Commercial Arbitration in Islamic and Iranian Law* (Vahid Publications), p. 41.

“Arbitration in matters wherein conciliation is not permitted, such as *hudoud*<sup>185</sup> *laan*<sup>186</sup> between spouses, and all matters relating to the public order, shall not be accepted.”<sup>187</sup>

A similar provision is found in the Arbitration Rules of the United Arab Emirates:

“4. Arbitration shall not be permissible in matters, which are not capable of being reconciled. An arbitration agreement may be made only by the parties who are legally entitled to dispose of the disputed right.”<sup>188</sup>

There is also uncertainty about a number of federal laws in the UAE, which give jurisdiction over certain issues to the national courts, such as commercial agencies.<sup>189</sup> In fact, there are conflicting court decisions on whether a commercial agency contract can be the subject of arbitration.<sup>190</sup>

The Saudis take it further and exclude arbitration not only in areas in which no compromise is possible but also those areas in which arbitration or *tahkim* would be contrary to public order, which in itself leaves it wide open to exclude matters from arbitration.<sup>191</sup> In addition to these limitations, Saudi law: 1) prohibits the Services of the Commercial Register (the “Registrar”) from registering (without special authorization) any company which refers any dispute between the company and the Registrar to arbitration outside of Saudi Arabia; 2) requires that all disputes dealing with commercial

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<sup>185</sup> *Hudoud* is a category of crimes in the *Shari’ a* which include murder, assault, adultery, drunkenness, theft and robbery.

<sup>186</sup> *Laan* is a *Shari’ a* procedure whereby the married couple terminate their marital relationship upon one party accusing the other of adultery.

<sup>187</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation (27 May 1985) reproduced in J. Paulson (ed.), *International Handbook on Commercial Arbitration*, Suppl. 8 (December, 1987).

<sup>188</sup> The Civil Procedure Code, Federal Law No. (11) of 1992, Part II, Section III, Chapter Three.

<sup>189</sup> *Supra*, note 118, at 719.

<sup>190</sup> *Id.*

<sup>191</sup> For instance, no compromise would be permitted under the *Shari’ a* when someone is seeking divorce for the other spouse’s adultery. More relevant to international commercial disputes, interest provisions in contracts would not be enforceable as it would be contrary to the public order under the *Shari’ a* (please see more detailed discussion of this below).

agency contracts must be brought before the Diwan Al-Mazalem and not be resolved through arbitration<sup>192</sup>; 3) stipulates that the Diwan Al-Mazalem shall have exclusive jurisdiction over disputes among foreign contractors or companies and their Saudi sponsor. Moreover, given that Decree No. 58 is still on the books, there is debate about the status of the prohibition against state agencies participating in arbitration without the approval of the Council of Ministers.<sup>193</sup> Abdul Hamid El-Ahdab, for instance, argues that given the Kingdom's execution of the Overseas Private Investment Corporation (OPIC) convention and its accession to the ICSID Convention, "[t]he scope of the prohibition became extremely restricted and one may now say that if, previously prohibition under Decree No. 58 was the rule, this has now been reversed and today arbitration is the rule."<sup>194</sup> Others are not so confident.<sup>195</sup>

The question of what matters can be arbitrated becomes problematic when you consider the matters that may potentially be excluded from arbitration for various reasons including public policy. Consider for instance that the UNCITRAL Model Law Article 36 provides that recognition and enforcement of an arbitral award may be refused, *inter alia*:

- “(b) if the court finds that:
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
  - (ii) the recognition or enforcement of the award would be contrary

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<sup>192</sup> Decree of 13.03.1399 (H.) (31 October 1980) directed to the Services of the Commercial Register.

<sup>193</sup> See note 15, George Sayen, “Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia,” 24 *U. Pa. J. Int'l Econ. L.* 905.

<sup>194</sup> *Supra*, note 118, at 563.

<sup>195</sup> See for instance *supra*, note 193, at 910.

to the public policy of this State.”<sup>196</sup>

A similar provision is found in the New York Convention, where Article V(2) provides that recognition and enforcement may be refused if it is found that :

“(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.”<sup>197</sup>

It is clear that the differences among jurisdictions in what are considered matters that can be arbitrated will impact greatly on the practice of international commercial arbitration, particularly when it comes to enforcement. There will be differences between nations with respect to what areas are excluded from arbitration, but also what types of agreements may be void *ab initio* (such as those determining questions of interest or deal with speculative contracts in the context of Muslim nations) as well as what are excluded through public policy considerations, the latter two which are discussed below.

### **3) Uncertainty in the Rules and Philosophical Differences**

The fact that the *Shari'a* attempts to regulate the secular as well as the spiritual realms as well as the fact that much of classical jurisprudence was formulated in a historical and cultural setting long gone, lead to many areas of conflict with the current international framework. These differences are reinforced and augmented by the underlying *Shari'a* theme of attaining the common good, as seen within the Islamic worldview, in this world

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<sup>196</sup> *Supra*, note 24.

<sup>197</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 *U.S.T.* 2517, entered into force, 7 June 1959 United Nations, Treaty Series, vol. 330, p. 38, No. 4739 (1959) (hereinafter “New York Convention”).

and the hereafter. This paper cannot explore all of these differences and/or tensions, but provides a brief overview of a number of these areas for illustrative purposes.

### **a) Public policy**

A primary objective of the *Shari' a* is to help mankind attain the benefits “both in this world and the next.”<sup>198</sup> *Maslahah* or public interest (known alternatively as the common good of humanity) is an important factor in the development of the *Shari' a*.<sup>199</sup> One of the great scholars al Shatibi singled out *maslaha* as being the only overriding objective of the *Shari'a* which encompasses all measures beneficial to people.<sup>200</sup> The question of what is in the public interest will generate different answers depending on the worldview. Indeed, according to the Islamic philosopher, al-Ghazali, only the genuine public interest which essentially revolve around protecting the five *maqasid al-Shari' a* discussed earlier.<sup>201</sup> It is not difficult to see that these parameters as well as the reference to life after death element may produce results significantly different from Western conceptions.

On a practical level, the fact that Saudi Arabia is a signatory to the New York Convention provides no security to foreign corporations who have entered into contracts in or with

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<sup>198</sup> *Supra*, note 65, at 228.

<sup>199</sup> See for instance M. Cherif Bassiouni and Gamal M. Badr, *supra*, note 76, at 158: “When a new rule is needed to regulate a novel situation and cannot be derived from qiyas, ijma, or urf, resort to maslaha is permissible. It is, in some respects, equivalent to the common law’s equity, though it is much broader because it extends beyond the parties to a given conflict.”

<sup>200</sup> *Supra*, note 65, at 228.

<sup>201</sup> *Id.* at 229.

Saudi Arabian entities, in terms of enforceability of arbitral awards.<sup>202</sup> As we discussed above, pursuant to article V(2)(b) of the Convention signatories who have availed themselves of this reservation, including Saudi Arabia, do not have to recognize an arbitral award that is contrary to its public policy.<sup>203</sup> Public order in Saudi Arabia is determined by reference to the *Shari' a*, including its measure of the common good of humanity not just the parties involved in a dispute.<sup>204</sup>

Article 2 of the UAE Civil Code provides that “one shall resort to the rules and principles of the Moslem Fiqh in the construction of the laws.”<sup>205</sup> It further states in Article 27 that those laws which are contrary to the “Shari’ a, public order or good morals of the State of the United Arab Emirates shall not be applied.”<sup>206</sup>

Indeed, national courts of a number of Islamic nations have refused to recognized “foreign arbitral awards on domestic public policy grounds, including precepts of Islamic law.”<sup>207</sup> This is despite the arguable view that the public policy referred to in the Convention is international public policy.<sup>208</sup>

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<sup>202</sup> Kristin T. Roy, “The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?” 18 *Fordham Int’l L. J.* 920.

<sup>203</sup> *Supra*, note 197.

<sup>204</sup> Hassan Mahassani: “Moslem Law is a main part of Saudi public order” Conference in Jeddah, 20 January 1977. Quoted in *supra*, note 118, at p. 608.

<sup>205</sup> *Supra*, note 153.

<sup>206</sup> *Id.*

<sup>207</sup> Samir Saleh, “The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East,” in *Contemporary Problems in International Arbitration* 340, 341-42 (Julian D. M. Lew, ed., 1986).

<sup>208</sup> See Albert Jan Van Den Berg, *The New York Arbitration Convention of 1958: Towards A Uniform Judicial Interpretation* 361 (1981). Interestingly Islamic nations such as Algeria, Djibouti, Lebanon and Tunisia have expressly incorporated international public policy into their arbitration laws. See Brower and Sharpe, *supra*, note 128, at 649.

It is obvious that there will be clear differences between public policy in Islamic nations and in the west. In addition to the obvious philosophic differences arising from the *Shari'a's* focus on collective rights<sup>209</sup> as opposed to western focus on individual/corporate rights will lead to definite conflicts in interpretation and implementation of laws and treaties.

### **b) Interest, Speculation and Unfair Trade Practices**

Interest or *riba* is a contentious issue in Islamic jurisdictions. The *Shari'a* prohibits *riba*<sup>210</sup> and there have been no court cases or arbitral awards to address the question of whether interest would be enforced against parties in Islamic nations which prohibit interest in its domestic law.<sup>211</sup>

*Riba* is broader than simply interest as it literally means “an excess.” It is defined as “any unjustified increase of capital whether in loans or sales.”<sup>212</sup> It is essentially any unlawful

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<sup>209</sup> As the late Islamic legal scholar A. K. Brohi pointed out, “[c]ollectivity has a special sanctity attached to it in Islam.” See A. K. Brohi, “The Nature of Islamic Law and the Concept of Human Rights” in Human Rights in Islam, Report of a Seminar organized by the International Commission of Jurists, University of Kuwait and the Union of Arab Lawyers (Geneva: International Commission of Jurists, 1980) at 48. This no way implies that Islam is devoid of consideration for individual rights. On the contrary the Islamic system “is inherently individualistic...it is designed first...to defend and protect the basic dignity of the human person against imposition by the society and the state.” See M. H. Kamali, “Freedom of Religion in Islamic Law” 21 *Capital University Law Review* 63 at 64. This is not a contradiction as a number of writers including Harry Triandis have shown that individualism and collectivism can coexist, see H. C. Triandis, C. McCusker & C. H. Hui, “Multimethod Probes of Individualism and Collectivism” 59 *Journal of Personality and Social Psychology* 1006.

<sup>210</sup> *Riba* has been interpreted by some to mean interest while others say it is usury and distinguish commercial interest from *riba*. The prohibition of *riba* is stated in five different places in the *Qur'an*. See note 233 of T.S. Twibell, “Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) Under the Shari'a (Islamic Law): Will Article 78 of the CISG be Enforced When the Forum is in an Islamic State?” 9 *Int'l Legal Persp.* 25.

<sup>211</sup> *Id.*

<sup>212</sup> Zamir Iqbal, *Islamic Financial Systems*, World Bank Publications (June 1997).

or unjustified gain.<sup>213</sup> Any contracts, which include an excessive profit margin, will also be considered as a form of *riba* if it is exploitative, oppressive or unconscionable.<sup>214</sup>

The UNCITRAL and ICC Arbitration rules do not contain any explicit reference to the awarding of interest.<sup>215</sup> While other arbitration rules including those of the World Intellectual Property Organization (WIPO), LCIA and AAA provide for the awarding of simple and even compound interest.<sup>216</sup> In fact, even the United Nations Conventions on Contracts for the International Sale of Goods (CISG)<sup>217</sup> provides: “If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.”<sup>218</sup>

The fact that interest will meet with strong opposition in many Islamic jurisdictions,<sup>219</sup> is borne out by the negotiations leading up to the drafting of the CISG, during which proposals to set an interest rate were rejected by Islamic nations because interest was banned in their domestic law.<sup>220</sup> Again, as with the other *Shari’a* rules there are differences in the domestic laws of Muslim nations.<sup>221</sup> Some countries have legalized it in

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<sup>213</sup> Nabil Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law – Riba, Gharar and Islamic Banking* 13 (Cambridge University Press 1986).

<sup>214</sup> C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* 31 at 67 (1988).

<sup>215</sup> Natasha Affolder, “Awarding Compound Interest in International Arbitration,” 12 *Am. Rev. Int’l Arb.* 45 at 51.

<sup>216</sup> Article 60(b) of the WIPO Rules, Article 28(4) of the AAA Rules and Rule 26.6 of the LCIA Rules.

<sup>217</sup> The United Nations Conventions on Contracts for the International Sale of Goods, Apr. 11, 1980, 19 *I.L.M.* 668 (1980).

<sup>218</sup> *Id.* art. 78.

<sup>219</sup> If not at the present time, then over time as the Islamic perspective gains more influence.

<sup>220</sup> First Committee Deliberations, 34<sup>th</sup> Meeting, Statement of Mr. Shafik (Egypt), Doc C(4) (A/Conf.97/C.1/SR.34), OR 415, 416 (1980), reprinted in John O Honnold, *Documentary History of the Uniform Law for International Sales the Studies, Deliberations and Decisions that Led to the 1980 United Nations Convention with Introductions and Explanations* 637 (1987).

<sup>221</sup> Daniel Klein, “The Islamic and Jewish Laws of Usury: A Bridge to Commercial Growth and Peace in the Middle East,” 23 *Denv. J. Int’l L. & Pol’y* 535.

some very unconventional ways while others have legislated it legal while still others deem it illegal. In Egypt, for instance, the constitutionality of interest was challenged, but upheld by the Supreme Court because the interest law predated the Constitution which made the *Shari'a* the principle source of law.<sup>222</sup> Similarly, in Morocco interest was legalized through some questionable legal gymnastics of distinguishing between human and artificial entities.<sup>223</sup> The rationale being that the *Qur'an* only prohibited charging interest in “transactions between Muslim individuals ‘personnes physiques’ who abide by the Islamic faith whereas artificial entities such as banks, corporations, public agencies or the like may freely charge interest in commercial transactions since they have no religion.”<sup>224</sup>

In the UAE, there is a court ruling that authorized the collection of interest in a case of delayed payment, and was not apologetic in any way.<sup>225</sup> While in Saudi Arabia there is legislation prohibiting interest as being contrary to the *Shari'a*.<sup>226</sup>

A related concept is that of *Gharar* or gambling.<sup>227</sup> This legal principle will mean that “any contract containing speculation, or contract clauses that turns on the happening of a

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<sup>222</sup> Fatima Akaddaf, “Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?” 13 *Pace Int'l L. Rev.* 1.

<sup>223</sup> *Id.* at 55.

<sup>224</sup> *Id.*

<sup>225</sup> H. S. Shaaban, Note, Commercial Transactions in the Middle East: What Law Governs, 31 *Law & Pol'y Int'l Bus.* 157, 170 (1999).

<sup>226</sup> Nayla Comair-Obeid, *The Law of Business Contracts in the Arab Middle East* at 194 (1996).

<sup>227</sup> Peter D. Sloane, “The Status of Islamic Law in the Modern Commercial World,” 22 *Int'l Law.* 743, 745-746 (1988).

specified but unsure event, is void...”<sup>228</sup> For instance, under this doctrine, insurance contracts as we know them in the west would be void under the *Shari’a*.<sup>229</sup>

The prohibition of unlawful trade practices under the *Shari’a* include a positive duty to disclose defects for instance.<sup>230</sup> Though in line with the CISG duty of good faith, it would be interesting to see how this positive duty will impact on the *caveat emptor* maxim and the related concept of due diligence in common law jurisdictions.

### **c) Capacity of arbitrator**

The classical rules under the *Shari’a* seriously restricts the ability of parties in appointing arbitrators, as candidates would have to have the same qualifications as a judge, including being male and Muslim.<sup>231</sup> This is the position, for instance, in Oman and Saudi Arabia.<sup>232</sup> But interestingly, as we noted above, even though the UAE arbitration laws give primacy to the *Shari’a*, there are no requirements for arbitrators to be Muslim or male.<sup>233</sup>

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<sup>228</sup> *Supra*, note 202, at 947.

<sup>229</sup> *Id.*

<sup>230</sup> *Supra*, note 222, at 33.

<sup>231</sup> *Supra*, note 118, at 40. A judge had to be of the age of majority, wise, free, Muslim and capable of being a witness.

<sup>232</sup> *Supra*, note 128, at 651. The Saudi Arbitration Regulation, Section 3 provides: “The arbitrator shall be a Saudi national or Muslim expatriate from the free profession section or others.” See Regulations reprinted in Yearbook Commercial Arbitration, A. J. van den Berg (ed.), Vol. XI (1986), pp. 370-377. Though there is the view that there is nothing precluding women and non-Muslims from being arbitrators. See note 7 of Ahdab, *supra*, note 118, at 579 and 581.

<sup>233</sup> United Arab Emirates Arbitration Rules, The Civil Procedure Code, Federal Law No. (11) of 1992, Part II, Section III, Chapter Three, Article 206(1).

Obviously, restrictions along gender and religious lines would not only violate the international norms in the field of international commercial arbitration but would also be contrary to international human rights norms. The fact that these restrictions are ostensibly derived from the *Shari' a*, raise some serious concerns from the perspective of bringing uniformity between the Islamic law and international commercial arbitration. Imposing any standards from outside would be counterproductive and any reform initiatives must come from within using the methodology and mechanisms for evolution inherent within the *Shari' a*. Many scholars argue that the fundamental principle of equality in Islam, the historical evidence and the emphasis given to freedom to contract and contractual obligations provide sufficient justification to reassess the Islamic position when it comes to non-Muslims and women.<sup>234</sup>

With respect to women, the prohibition derives from the lesser weight given to their testimony in classical jurisprudence.<sup>235</sup> The rationale used where their alleged lack of memory, incompetence and general weakness in character.<sup>236</sup> It is interesting to note that the same jurists who took this position found no problem in accepting many of the *Sunnah*, the bulk of which were transmitted by the Prophet's wives, particularly Aisha. Though it should be noted that some jurists limited the inability to give testimony in business transactions as women were not involved in commerce and could not be trusted to understand the complexities. It is also worth noting that even though the majority of

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<sup>234</sup> See for instance AbdulHamid AbuSulayman, "Al-Dhimmah and Related Concepts in Historical Perspective, Vol. IX: No. 1; also see Najib Ghabbian, "Islamists and Women in the Arab World: From Reaction to Reform?" 12 *Am. J. Islamic Soc. Sci.* 19, 27 (1995).

<sup>235</sup> Asifa Quraishi, "Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective," 18 *Mich. J. Int'l L.* 287 at 307.

<sup>236</sup> *Id.*

scholars have a restrictive view of women's testimony, the position is not unanimous even in classical Islamic law.<sup>237</sup> "This limitation of testimony exclusively to men appears to be an incorporation into Islamic law of an antiquated custom which has now changed and in Islamic law, 'all rules in the shari'ah [Islamic law] that are based upon customs change when customs change.'<sup>238</sup>

With respect to women there is a clear disconnect between the *Qur'anic* spirit<sup>239</sup> and the actual Islamic legal rules or *fiqh*, which developed over time.<sup>240</sup> In fact, scholars have pointed out that the marginalization of women from equal participation in society was the result of cultural and patriarchal attitudes as well as the exclusion of women from participating in the development of the *Shari' a*.<sup>241</sup> This is reinforced by the fact that there is historical evidence indicating that women were appointed judges.<sup>242</sup> Indeed, there are authentic juristic interpretations to support this position.<sup>243</sup>

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<sup>237</sup> Mohamed Fadel, "Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought, 29 *Int'l. J. Middle E. Stud.* (1997).

<sup>238</sup> *Supra*, note 235, at 308. It is interesting to note that this is not an issue restricted to Islamic law. In fact Jewish law and other religious laws as well as secular laws in Switzerland and even French law at one point treated testimony of men and women differently. See Ahdab, *supra*, note 118, at 580.

<sup>239</sup> Amina Wadud-Muhsin, *Quran and Woman*, Ch. 1 (1992); AbdulHamid AbuSulayman, *supra*, note 234.

<sup>240</sup> Hamid M. Khan, "Nothing is Written: Fundamentalism, Revivalism, Reformism and the Fate of Islamic Law," 24 *Mich. J. Int'l L.* 273 at 330.

<sup>241</sup> *Supra*, note 235, at 307. This is a position endorsed by a growing number of prominent Islamic scholars including Hasan Turabi of Sudan; Rachid al-Ghanouchi of Tunisia and Muhammad al-Ghazali and Yusuf al-Qaradawi of Egypt. See also Quraishi at 309. Turabi for instance notes: "...the basic religious rights and duties of women have been forsaken and the fundamentals of equality and fairness...enshrined in the Shari' a, have been completely overlooked...The greatest injustice visited upon women is their segregation and isolation from the general society." H. Turabi, "The Real Islam and Women," 17:2 (July 1993) *The Message* 23 at 23.

<sup>242</sup> See note 85 in Quraishi, *supra*, note 235.

<sup>243</sup> Najib Ghadbian, *Islamists and Women in the Arab World: From Reaction to Reform?*, *Am. J. Islamic Soc. Sci.* 19, 27 (1995).

The objection to a non-Muslim being an arbitrator is based on the classical view that only a Muslim can judge between two Muslims by applying the *Shari'a*.<sup>244</sup> Again, there are differences on this position expressed by other scholars some claiming that this applies to only Muslim countries, others pointing out that there is no express prohibition of non-Muslim arbitrators in the primary sources of the *Shari'a*.<sup>245</sup> As in the case of women, similar contextual, historical and political arguments can be made with respect to non-Muslims. David L. Neal and Ashraful Hasan note that “Islam is very much built on a principle of human equality; and in nearly every respect, a dhimmi’s [non-Muslim] legal capacity is intended to match that of a Muslim peer.”<sup>246</sup> This is borne out by contemporary scholarship, which attempts to differentiate between the actual *Shari'a* principles and the culturally and historically contextualized classical *fiqh* rulings.<sup>247</sup>

Professor Hasan Askari sums up this position nicely:

“It seems unmistakably clear that with regard to the Muslim attitude towards non-Muslims, both globally and within a Muslim society, the classical juristic position is not only irrelevant but also misleading, for the historical situation in which that tradition originated is no longer the same. In other words, we are called upon to derive fresh values and rules from both the explicit and over-all normative framework of the Qur’an and the Sunnah. It appears that these values and rules, irrespective of the specific details, would actualize the potentiality

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<sup>244</sup> *Supra*, note 118, at 40.

<sup>245</sup> *Id.* at 41. Some scholars point to the fact that in the *Qur’anic* passage relating to matrimonial arbitration, the verse does not state that the non-Muslim spouse must appoint a Muslim arbitrator.

<sup>246</sup> David L. Neal and Ashraful Hasan, “Distinctions Between Muslims and Dhimmis: The Human Rights of Non-Muslims Under Islamic Law,” in *Human Rights Dilemmas in Contemporary Times: Issues and Answers* 9, at 32-33 (Ashraful Hasan ed., 1998).

<sup>247</sup> AbuSulayman, *supra*, note 234. See also Amina Wadud-Muhsin, “Understanding the Implicit Qur’anic Parameters to the Role of Woman in the Modern Context,” *Islamic Quarterly* vol. xxxvi (number 2) 1992 at 126: “Sincere efforts have been made to determine the Qur’anic intent with regard to the role of women. Motivated largely by belief in the basic justice of Islam, some of these efforts have raised serious objections to the traditionally accepted, but often ‘sexist’ conclusions and opinions of earlier scholars. However, one major methodological shortcoming is caused by an equation which places those opinions and conclusions of scholars on an equal footing with the Qur’an, resulting in a contaminated definition of connection with the primary sources of Islam.”

for a universalist perspective already present in the Islamic sources.”<sup>248</sup>

#### **d) Sanctity of Contract**

In Islamic society, a contract is very different from what we know in the West.<sup>249</sup> Under *Shari'a* principles, a contract is divine in nature, and there is a sacred duty to uphold one's agreements:

“O you who believe fulfill any contracts [that you make]...Fulfill God's agreement once you have pledged to do so, and do not break any oaths once they have been sworn to. You have set God up as a Surety for yourselves.”<sup>250</sup>

Shaikh Ismail al Jazaeri commenting on the above verse concludes that this would apply to any and all agreements reached by parties except on matters that the *Qur'an* has deemed void or unenforceable.<sup>251</sup> This special position of contracts is best summed up by the Islamic maxim *Al Aqd Shari'at al muta'aqqidin* which essentially states, “[t]he contract is the Shari' a or sacred law of the parties.”<sup>252</sup> This makes it abundantly clear that the contractual relationship is viewed much more strictly under the *Shari'a* and clearly would disapprove of the “efficient breach” theory.<sup>253</sup> Indeed, all contractual obligations must be specifically performed, unless it would contravene the *Shari'a* or some legitimate public policy devised in conformity with the *Shari'a*.<sup>254</sup>

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<sup>248</sup> Hasan Askari, Comment on AbdulHamid AbuSulayman's book *Al-Dhimmah and Related Concepts in Historical Perspective*, Vol. IX: No. 1 published in *Journal Institute of Muslim Minority Affairs*, Vol. 10:1, Jan. 89 at 112.

<sup>249</sup> See generally Nabil Saleh, *The Law Governing Contracts in Arabia*, 38 *Int'l & Comp. L. Q.* 761 (1989).

<sup>250</sup> *Qur'an* 5:1; see also *Qur'an* 16:91.

<sup>251</sup> Shaikh Ismail al Jazaeri, *Ayat-al-Ahkam* (Arabic text), p. 124.

<sup>252</sup> M. Cherif Bassiouni, *The Islamic Criminal Justice System* 10, xiii (M. Cherif Bassiouni, ed., 1982).

<sup>253</sup> See Marvin A. Chirelstein, *Concepts and Case Analysis in the Law of Contracts* 149-50 (3d ed. Foundation Press 1998).

<sup>254</sup> Sayed Hassan Amin, *Commercial Law of Iran* at 64 (Vahid Publications, 1986).

This approach is manifested in contemporary legislation in much of the Muslim world.<sup>255</sup>

The practical effect is that so long as it was not contrary to Islamic norms<sup>256</sup>, all agreements are enforceable. The position in Saudi Arabia is derived from the Hanbali jurist Ibn Taymiya, who wrote:

“The rule in contracts and provisions is that anything is permitted which is valid and that only that which is forbidden or set aside by one of the text or the ‘*Qiyas*’ (reasoning by analogy) is forbidden.”<sup>257</sup>

The duty to act in good faith is the essence of Islamic contract law but over and above this there is extensive legal scholarship, which have elaborated clear principles of Islamic contract law.<sup>258</sup> In fact, commentators have highlighted<sup>259</sup> the inherent flexibility in Islamic contracts law to take into consideration modern transactions.<sup>260</sup> Therefore, contrary to the view expressed by arbitrators in the *Abu Dhabi* and *Qatar* arbitrations, Islamic law has the capability to resolve modern contractual disputes.

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<sup>255</sup> See for instance Article 89 of the Egyptian Civil Code of 1949 which provides: “a contract is created, subject to any special formalities that may be required by law for its conclusion, from the moment that two persons have exchanged two concordant intentions.” Similar provisions are contained in the legislation in other Middle Eastern nations. See Nudrat Majeed, “Good Faith and Due Process: Lessons from the Shari’ a,” *Arbitration International*, Vol. 20, No. 1 (2004).

<sup>256</sup> Determined by reference to the *Qur’an*, legislation or by public policy or public interest.

<sup>257</sup> The Fatawa of Ibn Taymiya, III, p. 326.

<sup>258</sup> William Ballantyne, “The Shari’a and its Relevance to Modern Transactional Transactions” in Arab Comparative and Commercial Law: The International Approach (Graham & Trotman, 1987), vol. 1, p. 12. Al-Majallah also codified some of these principles, see Nudrat Majeed, “Good Faith and Due Process: Lessons from the Shari’ah,” *Arb. Int’l* vol. 2, no. 1 (2004) 97 at 100.

<sup>259</sup> Majeed, *supra*, note 258, at 102.

<sup>260</sup> See generally Majeed, *supra*, note 258. Also see Haim Gerber, *State Society and Law in Islam: Ottoman Law in Comparative Perspective* (State University of New York Press, 1994), p. 44.

Contractual provisions in the *Qur'an* have also been interpreted to extend to international treaties.<sup>261</sup> In fact, the *Shari'a* does not distinguish between a treaty and contract law.<sup>262</sup> Indeed, “the principle of *pacta sunt servanda* is recognized by all Muslim jurist-theologians.”<sup>263</sup> The acceptance of this principle may serve as a crucial element in encouraging Islamic nations to exert their best efforts to comply with international conventions and treaties. Again, this can only work if there is mutual respect between the proponents of western international commercial arbitration and advocates of the *Shari'a*.

It is evident from our discussion of the sources and methodology of the *Shari'a* that the concept of Islamic contract law can be sophisticated enough to be given consideration when resolving disputes particularly when parties have willingly made that choice of law decision. Clearly the emphasis on the notion of freedom of contract and the stress on good faith are in line with western conceptions. At the same time the sanctity of contracts in Islamic law and the public policy issue of what kinds of contracts are void and unenforceable may produce analysis and results which may differ from the western approach to contracts.

#### **e) Liability of Arbitrators**

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<sup>261</sup> Gamal M. Badr, A Survey of Islamic International Law, 76 Am. Soc’y Int’l Proc. 56, 59 (1982). See also Quran 9:4 – “Fulfill any treaty [you have] with them until their period is up. God loves those who do their duty!”. This Islamic duty to fulfill one’s commitments is illustrated in this statement made in 1950 by the founder of Saudi Arabia the late King Abdul Aziz Ibn Saud to F. A. Davies, chairman of the Board of Directors of the Arabian American Oil Company (ARAMCO): “You can have confidence in us because our religion and our law make it our bounden duty to keep our compact with you. I have given you my pledge and my peace (ahdi wa amani). You walk in the length and breadth of my land and enjoy the same security and protection as my own subjects.” See J.N.D. Anderson, *Islamic Law in the Modern World* xi, xii (1959).

<sup>262</sup> James Norman Anderson, *Law Reform in the Muslim World* xvi (The Athlone Press ed., 1976).

<sup>263</sup> Majid Khadduri, *War and Peace in the Law of Islam* 204 (AMS Press 1979).

The Saudi arbitration laws are silent on the liability of an arbitrator.<sup>264</sup> In view of the silence it is suggested that general principles of the *Shari' a* would hold the arbitrator liable for any “fault he commits which results in damage to any party.”<sup>265</sup> In addition an arbitrator may also be liable pursuant to a contractual obligation. This appears to be approach taken in the United Arab Emirates where Article 207(1) provides that the arbitrator must accept his or her appointment in writing or it must be recorded in the minutes of the sessions.<sup>266</sup> Article 207(2) then provides that:

“If an arbitrator, after having accepted his appointment, withdraws without a good reason, he may be held liable for compensation.”<sup>267</sup>

The Islamic approach is consistent with the civil law approach but differs from the common law, which focuses on the tortious concept of a duty of care.<sup>268</sup> Without going into all the details and intricacies, it is fair to state that in all three legal systems there is potential liability on the arbitrator though the basis and extent of the liability may vary.

The national laws differ in their treatment ranging from absolute and qualified immunity to unlimited liability. For instance in the United States arbitrators have absolute immunity for all acts related to the function of decision making.<sup>269</sup> While in a number

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<sup>264</sup> *Supra*, note 118, at 585.

<sup>265</sup> *Id.* at 585.

<sup>266</sup> *Supra*, note 153, Article 207(1).

<sup>267</sup> *Id.*

<sup>268</sup> Susan D. Franck, “The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity,” 20 *N.Y.L. Sch. J. Int'l & Comp. L.* 1 at 4.

<sup>269</sup> Peter Sanders, National Report on the United States, in *International Handbook on Commercial Arbitration* 18 (1998). Though there are exceptions to this immunity and debate about what acts will constitute decision-making.

of other countries including Islamic nations, there is qualified immunity.<sup>270</sup> The broadest liability is in countries which are closest to the traditional Islamic principles, including Saudi Arabia, where arbitrators can be liable for negligence for such things as “failing to take note of important documents, in losing or damaging important documents, or in failing to take note of a vital statement made by one of the [parties].”<sup>271</sup>

The UNCITRAL Model Law is silent on liability or immunity of arbitrators because it was deemed too controversial to be addressed.<sup>272</sup> The arbitral rules of some of the leading arbitral institutions do address this issue. The LCIA rules provide that an arbitrator shall not be liable except for “conscious or deliberate wrongdoing.”<sup>273</sup> Similar wording is used in the AAA international arbitration rules.<sup>274</sup> While the ICC rules provide absolute immunity by stipulating that arbitrators will not “be liable to any person for any act or omission in connection with the arbitration.”<sup>275</sup>

#### **f) Statute of Limitations**

The need for limitation periods to ensure predictability and certainty is obvious in the realm of dispute resolution from the perspective of litigants, particularly potential defendants. Obvious as it may be from the western perspective, the notion that an action or claim may be barred as a result of time limitations is not a widely accepted concept in

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<sup>270</sup> *Supra*, note 268, pp. 33 to 40.

<sup>271</sup> Salah Hejailan, National Report on Saudi Arabia, in 4 *Yearbook of Commercial Arbitration* 162, 167 (1979).

<sup>272</sup> Howard M. Holtzman & Joseph E. Neuhas, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 1119 (1989).

<sup>273</sup> The New London Court of International Arbitration Rules, Art. 31.1 (effective January 1, 1998).

<sup>274</sup> American Arbitration Association, *International Arbitration Rules*, Art. 35.

<sup>275</sup> International Chamber of Commerce, *Rules of Arbitration*, Art. 34 (effective Jan. 1, 1998).

the classical *Shari' a*.<sup>276</sup> This position is based on a *hadith* or saying of the Prophet Muhammad where he is reported to have stated that “[a] Muslim’s right cannot be abolished even if it is remote in the past.”<sup>277</sup> In fact, the Iranian Council of Guardians applying a *Shia* interpretation of the *Shari' a* rejected the idea of a statute of limitations.<sup>278</sup>

Despite the aversion to limitation periods, two *Sunni* schools of jurisprudence (Maliki and Hanafi) do provide that a time limitation may bar certain claims.<sup>279</sup> The practice in *Sunni* nations vary with some countries including Saudi Arabia following the Maliki and Hanafi view in the area of commercial and labour laws.<sup>280</sup>

Interestingly, the only Islamic country which is a party to the United Nations Convention on the Limitation Period in the International Sale of Goods of 1974, as amended by Protocol in 1980, is Egypt.<sup>281</sup>

#### **4) Choice of Law**

One of the advantages of international commercial arbitration, as we touched upon earlier, is the freedom that parties have to negotiate their choice of law provision. Article 28 of the UNCITRAL Model Law provides that the tribunal shall decide in accordance

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<sup>276</sup> Sayed Hassan Amin, *Islamic Law in the Contemporary World* 71, 86 (1985).

<sup>277</sup> *Id.* at 86.

<sup>278</sup> *Id.* at 96.

<sup>279</sup> H. S. Shaaban, *supra*, note 157 at 164.

<sup>280</sup> *Supra*, note 222, at 44. In corporate matters, the Saudi Arabian Companies Regulations of 1965 govern and in employment matters, the Labor and Workmen Regulations of 1969 apply. See Mahir Jalili, “Time Bar Clauses in Saudi Arabian Contracts, 13 *Int’l Construction L. Rev.* 488, 490-91 (1996).

<sup>281</sup> *Id.* at 42.

with the choice of law selected by the parties.<sup>282</sup> In the event the parties did not provide for this then the tribunal shall “shall apply the law determined by the conflict of laws rules which it considers applicable.”<sup>283</sup> The tribunal is also authorized to consider the “usages of the trade applicable to the transaction.”<sup>284</sup>

Article 17 of the ICC Arbitration Rules similarly provide:

”1) 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. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.

2) In all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages.”<sup>285</sup>

Article 28 of the AAA rules also provides that the parties can agree on the choice of law to be applied.

This choice does not exist when it comes to the *Shari’a*, at least as we know from existing *fiqh* rules. The very concept of a divinely inspired system of laws precludes the choice of any other law by the parties to a dispute.<sup>286</sup> In fact, *Qur’anic* injunctions urge believers to have their disputes judged “by what God has revealed.”<sup>287</sup> This explains why Saudi courts and regulations do not recognize Western conflict of laws principles and automatically apply Saudi laws.<sup>288</sup> The situation in the UAE is very similar.<sup>289</sup> Pursuant

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<sup>282</sup> *Supra*, note 24.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Supra*, note 27.

<sup>286</sup> *Supra*, note 165, at 924.

<sup>287</sup> *Qur’an*, Chapter IV, Verse 60. Chapter V, Verse 49 states: “Judge between them by what God has revealed and follow not their vain desires.”

<sup>288</sup> David J. Karl, Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know, 25 *Geo. Wash. J. Int’l L. & Econ.* 131, 131 (1992).

to the UAE legislation, unless the arbitrator was authorized to reconcile the parties, the arbitral award must “be in conformity with the provisions of law...”<sup>290</sup> As noted earlier, UAE law states that a main source of law is the *Shari’a*.

This is clearly an area that needs further scholarship to determine how and whether there are ways to ensure compliance with the *Shari’a* and at the same time ensuring that parties can exercise their contractual freedom when it comes to the determination of the choice of law.

## **5) Scope of Judicial Review and Enforcement of Foreign Judgments**

Although international arbitration is a voluntary mechanism, decisions rendered by arbitral tribunals are expected to be binding due to the interplay of a web of national and international laws discussed above.<sup>291</sup> It is worth noting at this point that the twin objectives of the legal framework are to ensure enforceability of arbitration agreements/clauses and arbitral awards and to insulate the arbitration process as much as possible from interference by domestic courts and other national or international institutions.<sup>292</sup>

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<sup>289</sup> Julian D. M. Lew, “The Recognition and Enforcement of Arbitration Agreements and Awards in the Middle East,” *Arbitration International*, Vol. 1, No. 2 (1985), pp. 161-178.

<sup>290</sup> United Arab Emirates Arbitration Rules, The Civil Procedure Code, Federal Law No. (11) of 1992, Part II, Section III, Chapter Three, Article 212(2).

<sup>291</sup> *Supra* note 21 at p. 1.

<sup>292</sup> *Id.* Indeed as Jane L. Volz and Roger S. Haydock, *supra* note 3: “Regardless of what laws govern, the critical issue in an international arbitration is whether the award can be easily enforced.”

The first truly international arbitration treaties were the 1923 Geneva Protocol on Arbitration Clauses<sup>293</sup> and 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.<sup>294</sup> These two precursors to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>295</sup> (the “the New York Convention”) failed to live up to their expectations in terms of facilitating the enforcement of foreign arbitral awards.<sup>296</sup> The main goal of the New York Convention was to remedy the limitations of the Geneva treaties and to pave the way for a more liberal enforcement of foreign arbitral awards.<sup>297</sup> As Jane L. Volz and Roger S. Haydock note, “without the guarantee of enforceability, the arbitration becomes meaningless, a mere prelude to frustrating litigation.”<sup>298</sup>

In principle, the Convention, applies to all arbitral awards<sup>299</sup>. However, Article I, paragraph (3) allows states to make reservations:

“When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.”<sup>300</sup>

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<sup>293</sup> Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. (hereinafter Geneva Protocol).

<sup>294</sup> Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301 (hereinafter Geneva Convention).

<sup>295</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, entered into force, 7 June 1959 United Nations, Treaty Series, vol. 330, p. 38, No. 4739 (1959) (hereinafter “New York Convention”).

<sup>296</sup> *Supra*, note 3, at 867. The Geneva Protocol did not facilitate enforcement of foreign arbitral awards because ratifying nations only had to enforce decisions rendered in their own jurisdiction. While the Geneva Convention was an improvement over the Protocol, the difficulty of satisfying Article I(d) that “the award...become final in the country in which it has been made,” created enough interpretation and application problems and provided enough of a loophole to refuse enforcement.

<sup>297</sup> See Albert J. Van Den Berg, *The New York Arbitration Convention of 1958* 1 (1981).

<sup>298</sup> *Supra*, note 3, at 867.

<sup>299</sup> *Supra*, note 197, Article I (1) and (2).

This has led to two reservations. The reciprocity reservation allows a state to declare that arbitral awards will only be recognized and enforced if made in the territory of another contracting state.<sup>301</sup> The second reservation, known as the commercial reservation, allows a state to limit the application of the Convention exclusively to commercial disputes as interpreted by its own domestic law.<sup>302</sup>

The party seeking to enforce an award only needs to produce the award and the arbitration agreement under which the award was made, for it to be recognized and be enforceable.<sup>303</sup> The onus is on the opponent to establish the existence of grounds to deny recognition and enforcement.<sup>304</sup> The Convention provides a limited series of grounds for refusal of recognition and enforcement of foreign arbitral awards.<sup>305</sup> However, no review of the merits of an award to which the Convention applies is allowed.

To prevent recognition and enforcement the opposing party must establish one of the following grounds: incapacity of the party or invalidity of the arbitration agreement; denial of a fair hearing; excess of authority or lack of jurisdiction; procedural irregularities.<sup>306</sup> There are two other circumstances in which an award may be deemed invalid and which can be considered *ex officio* by the judicial authority requested to recognize or enforce the decision: if the subject matter which formed the basis of the

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<sup>300</sup> *Id.* Article I (3).

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* Article IV.

<sup>304</sup> *Id.* Article V.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* Article V.

arbitration was not capable of settlement by arbitration according to the law of that country; or recognition and enforcement of the award would be contrary to the public policy of that country.<sup>307</sup>

The Convention has been ratified by more than 120 nations<sup>308</sup> and applies not only to arbitral awards but also to arbitration agreements. The Convention sets out the general principle that arbitration agreements must be in writing and that a tribunal in one contracting State must refer the parties back to arbitration when it is served with an arbitration agreement, which indicates that the subject of the dispute must be referred to arbitration.<sup>309</sup> The objective is obviously to ensure that disputes are resolved without resort to domestic courts.

There are also other international conventions, which impose similar comparable obligations on member states with respect to particular categories of disputes or with respect to particular bilateral or regional relationships.<sup>310</sup>

Consistent with the twin objectives of trying to attain binding decisions and universal enforceability the UNCITRAL Model Law as well the rules of the major arbitral institutions, including the LCIA, the ICC and the AAA provide that decisions shall be

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<sup>307</sup> *Id.*

<sup>308</sup> [http://www.chamber.se/arbitration/english/laws/1958\\_New\\_York\\_Convention\\_2003.pdf](http://www.chamber.se/arbitration/english/laws/1958_New_York_Convention_2003.pdf)

<sup>309</sup> *Supra*, note 197, Article II.

<sup>310</sup> See for instance Inter-American Convention on International Commercial Arbitration, Panama, Jan. 30, 1975, 14 *I.L.M.* 336 (hereinafter Panama Convention); the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 17 *U.S.T.* 1270, 575 *U.N.T.S.* 159, 4 *I.L.M.* 532 (hereinafter ICSID Convention); European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 *U.N.T.S.* 349; Arab Convention on Commercial Arbitration, <http://www.jurisint.org/pub/01/en/155.htm>; as well as other bilateral treaties.

binding and enforceable.<sup>311</sup> The international framework severely limits and precludes assessment of the merits of arbitral decisions. The Western concept of arbitration recognizes and accepts that an arbitral award may not be consistent with the law.<sup>312</sup>

Many Middle Eastern countries have ratified the New York Convention, including Saudi Arabia.<sup>313</sup> Though the United Arab Emirates has not acceded to the Convention as of the writing of this paper.

Limited judicial review is something alien to the Middle East.<sup>314</sup> In fact, in Oman, Qatar and Saudi Arabia, prior to their accession to the New York Convention, the merit of the dispute were reviewed in the domestic courts prior to enforcement of foreign arbitral awards.<sup>315</sup>

Saudi Arabia's hostility to the recognition and enforcement of foreign arbitral awards appears to have given way to the country's interest in increasing its attractiveness to foreign investors.<sup>316</sup> One commentator explained the Saudi accession to the Convention as a "curative remedy for a problem affecting Saudi foreign trade relations."<sup>317</sup> The logic essentially being that "non-Saudi Arabian investors may be more confident that the courts

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<sup>311</sup> See Article 34 and 35 of UNCITRAL Model Law, *supra*, note 24; see Article 29 of LCIA rules, *supra*, note 37; see Article 27 and 28 of the ICC rules, *supra*, note 27; and see Article 27 of the AAA rules, *supra*, note 27.

<sup>312</sup> *Supra*, note 165, at 924.

<sup>313</sup> See [http://www.chamber.se/arbitration/english/laws/1958\\_New\\_York\\_Convention\\_2003.pdf](http://www.chamber.se/arbitration/english/laws/1958_New_York_Convention_2003.pdf)

<sup>314</sup> *Supra*, note 65, at 924.

<sup>315</sup> *Supra*, note 128, at 648.

<sup>316</sup> *Supra*, note 202, at 921.

<sup>317</sup> Saudi Arabia's Decision on New York Convention Praised, *Riyadh Daily*, Feb. 11, 1994.

of Saudi Arabia will honor a dispute adjudicated by a non-Saudi Arabian tribunal.<sup>318</sup> This may be too optimistic of a view, because all indications are that Saudi courts will continue to review the merits of arbitral decisions to ensure that decisions are consistent with Saudi public policy as determined in accordance with the *Shari'a*.<sup>319</sup> In fact, some writers even suggest that “the enforcement of an arbitral award depends upon the belief of the governor of the region in which enforcement is sought as to the fairness of the award.”<sup>320</sup>

A similar situation prevails in the UAE, in the absence of a multilateral or bilateral convention<sup>321</sup>, a foreign arbitral award can only be enforced in the UAE if it meets the conditions for the enforcement of a foreign judgment, the most essential of which being that of reciprocity.<sup>322</sup>

## VII. Conclusion

In each of the foregoing it is clear that there are diverse opinions and enough dynamism and latitude within the *Shari'a* to reform and/or reinterpret the *fiqh* rules to be better reflective of modern transactions, circumstances and cultural outlook. Where the methodology and legal principles are not sufficient the sanctity attached to contractual obligations, including treaties in the *Shari'a* make it possible to reform Islamic law. At the same time there are some concepts such as usury, insurance and speculative contracts,

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<sup>318</sup> *Id.*

<sup>319</sup> *Supra*, note 202, at 953.

<sup>320</sup> *Supra*, note 118, at 605.

<sup>321</sup> The UAE is party to a number of regional and bilateral treaties as well as the ICSID Convention.

<sup>322</sup> *Supra*, note 118, at 736.

which as we discussed above, will be much more difficult, if not impossible to overcome if the *Shari'a* rules are adhered to.

There is no doubt that international commercial arbitration is becoming increasingly accepted, but concerns are still being voiced from the developing world<sup>323</sup> and the Islamic world.<sup>324</sup> Though the opposition has evolved from an economically based one to one asking for more cultural inclusion:

“Today, cries of foul play over arbitration are neither as vociferous nor as troubling as they were up to the end of the last decade. Why they occur now, as they occasionally do in the Arab Middle East, the oppositional claims are articulated increasingly in terms of a demand for incorporating the Islamic legal tradition in the international practice of arbitration;”<sup>325</sup>

Many of the third world nations most opposed to arbitration such as Iran and China have now adopted variations of the UNCITRAL Model Law.<sup>326</sup> And while there may be some accuracy to Chibli Mallat’s conclusion that “Middle Eastern commercial law as found in legislation or court cases reads for both practitioners and scholars as a direct transposition

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<sup>323</sup> See M. Sornarajah, *The UNCITRAL Model Law: A Third World View Point*, 6 *J. Int'l Arb.*, Dec. 1979, at 7.

<sup>324</sup> See generally Amr A. Shalakany, “Arbitration and the Third World: A Plea for Reassessing Bias Under the Spectre of Neoliberalism,” 41 *Harv. Int'l L. J.* 419. Shalakany explores the “paradigm shift” in the Third World’s opposition to international commercial arbitration from one based on demands for a New International Economic Order (NIEO) in the 1970’s and early 1980’s to one based on claims for cultural recognition. See also Mohammed Bedjaoui, *Towards a New International Economic Order* (1979) and Khizr Khan, *International Commercial Arbitration in the Legal Systems of Developing Countries* (1986) (unpublished LL.M. thesis, Harvard Law School) (on file with the Harvard University Library).

<sup>325</sup> Shalakany *Id.* at 420. See also Ibrahim al-Astal, *Arbitration under Islamic Law* (1986) (unpublished Ph.D. dissertation, Cairo University) (on file with Cairo University); Mohammed Bedjaoui, *International Commercial Arbitration in the Arab World*, 3 *ICC Int'l Ct. Arb. Bull.* (Spec. Supp. May 1992); Hassan Mahassni, *General Principles of Islamic Law Relating to International Commercial Arbitration*, 3 *ICC Int'l Ct. Arb. Bull.* (Spec. Supp. May 1992).

<sup>326</sup> Amr A. Shalakany, “Arbitration and the Third World: A Plea for Reassessing Bias Under the Spectre of Neoliberalism,” 41 *Harv. Int'l L. J.* 419 at 421.

of European law,”<sup>327</sup>; the fact remains that the *Shari’ a* cannot be totally marginalized, particularly given the growing calls for a return to Islamic principles echoing from all corners of the Muslim world.<sup>328</sup> As some of these nations move toward democracy and their populations call for a return to some *Shari’ a* principles, the demands for a more inclusive international regime will also grow louder. Indeed, even some nations which were seen to have been moving away from the *Shari’ a* one time appear to be returning to it. This is evident from the developments in many of the Muslim nations, including Egypt as we noted earlier in the paper and even in the UAE which saw the introduction of the UAE Law of Civil Transactions of 1985 which “constitutes a virtual return to the *Shari’ a*...”<sup>329</sup>

The foregoing has provided a brief introduction into some of the areas of tensions between international commercial arbitration and the *Shari’ a*. There are definite areas of conflict and tension, but it is also clear that the *Shari’ a* provides its own methodology for evolution and re-interpretation to meet the challenges of the modern era. Indeed, the concepts of *ijtihad*, *ijma*, *qiyas*, and *urf* as well as the principles discussed in the section on sources, combined with the divine characteristic attributed to treaty and contractual obligations ( *Al Aqd Shari’at al muta’aqqidin*) make it possible to develop a viable and modern framework for international commercial arbitration within the bounds of the *Shari’ a*.

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<sup>327</sup> Chibli Mallat, “Commercial Law in the Middle East: Between Classical Transactions and Modern Business,” 48 *Am. J. Comp. L.* 81 at 81.

<sup>328</sup> *Supra*, note 165, at 906; “Islamic reaction and general political unrest in the Middle East exert increasing pressure on these countries to adhere more closely to traditional values as expressed in their ancient religious law, the *Shari’a*.”

<sup>329</sup> *Supra*, note 135, at 272. He also note that the “various Courts Laws made under the new Constitution give stronger emphasis to the *Shari’a* and, as has been said, that emphasis is further stressed by the new code.”

The question for the proponents of the *Shari' a* is whether it will be reformed from within to meet new and expected challenges and to take into consideration the present era and its modern institutions and customs. While the question for the advocates of international commercial arbitration is whether they are prepared to engage in dialogue for a more inclusive and reflective international arbitration framework.<sup>330</sup>

The rich legal tradition of the *Shari'a* clearly reveals that it has many moral, ethical and legal commonalties with the civil law and common law traditions.<sup>331</sup> More importantly, it is a sophisticated system with its own methodology and mechanism for evolution to meet the needs of contemporary society. The dismissal of the *Shari' a* as an archaic and irrelevant system will not be conducive to developing the mutual respect required to fashion an inclusive international system. Interestingly, the undermining of the *Shari' a* is not something restricted to Western writers. In his review of Samir Saleh's seminal work on commercial arbitration in the Middle East, Professor Ballantye cautions against this attitude found even among Middle Easter writers:

“The author refers to the Shari' a as a primary source of law of the UAE (Article 7, UAE Provisional Constitution 1971) but goes on to say, ‘...it should be noted that the judges who preside over the courts are generally from Egypt, Jordan and Syria, and are strongly influenced by their national laws rather than by the Shari' a doctrine.’ True, but the various Courts Laws made under the Constitution give stronger emphasis to the Shari' a and, as has been said, that emphasis is further stressed by the new code. Thus one must increasingly question whether, particularly in the circumstances of the

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<sup>330</sup> According to M. Sornarajah even the “so-called *lex mercatoria* is a creation of a coterie of Western scholars and arbitrators who have loaded it with norms entirely favourable to international business.” See note 79 in *supra*, note 128.

<sup>331</sup> M. McCary, “Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective,” *Tex. Int.l L.J.* 289 at 320.

new code, the practice described by the author that 'as a result, the impact of Shari' a on commercial contracts, which are mainly drafted by Western lawyers, appears to be minimal', is not a dangerous one."<sup>332</sup>

It is not desirable and may no longer be possible for us to continue to impose our dominant position and values on others and to continue to judge other societies using our own standards. As Mona Abul-Fadl points out, dominance cannot be equated with truth, although it no doubt benefits from the old confusion of right and might.<sup>333</sup> Indeed, one of the most vocal Third World critics of international commercial arbitration, Singapore's legal scholar M. Sornarajah, commenting on third world concerns about arbitration notes:

“[Those] latter views [third world objections and oppositions] are regarded as polemical and the Western views are regarded as acts of high scholarship which are to be repeated as often as possible despite the mythical foundations on which they rest.”<sup>334</sup>

Notwithstanding the foregoing, there may be those who view the *Shari' a* as too obscure, archaic and too different to be taken seriously.<sup>335</sup> The proponents of international commercial arbitration cannot afford to alienate people whose experiences, socio-economic predicaments and cultural/religious norms may not align completely with Western conceptions.<sup>336</sup> In the case of the Islamic nations, we have seen that there is no

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<sup>332</sup> M. Ballantyne, "Book Review of Commercial Arbitration in the Arab Middle East (A Study in Shari' a and Statute Law)," *Arbitration International*, Vol. 4, No. 3 (1989), pp. 269-274.

<sup>333</sup> Mona Abul-Fadl, "Beyond Cultural Parodies and Parodizing Cultures" (1991) 8:1 *American Journal of Islamic Social Sciences* 15 1t 16.

<sup>334</sup> M. Sornarajah, *International Commercial Arbitration: The Problem of State Contracts*, ch. 1 (1990). He argues that the price of capitulating to the historically biased international commercial arbitration mechanism prejudices national judicial sovereignty. The developing world is forced to accept arbitration if they wish to receive any long-term foreign investment, he argues.

<sup>335</sup> *Supra*, note 331, at 320. It is also interesting to note that: "In point of fact, however, American judges have never held that Islamic legal principles were "uncivilized" and therefore not amenable to enforcement in American courts," in David F. Forte, "Islamic Law in American Courts," 7 *Suffolk Transnat'l L.J.* 1 at 10 (1983).

<sup>336</sup> See for instance Daneil S. Sullivan, "Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Democracy," 81 *Geo. L. J.* 2369. The article is a prime example of the

inherent opposition to the concept of international commercial arbitration. Yet, there are areas of tension and concern. As Abdul Hamid El-Ahdab notes:

“The answers given by Moslem Law to the problems raised by arbitration have been given before the commercial and economic evolution had reached today’s stage. However, they are not unalterable and do not constitute an exception to the universal rule that ‘the laws must change over the times’.”<sup>337</sup>

We have also seen that there are different interpretations as evidenced by the different schools of thought and in fact these differences were seen by Islamic jurists as a mercy from God, “because these disagreements injected Islamic laws with the degree of flexibility necessary for a religion which proclaimed itself suitable for all times, all people and all societies.”<sup>338</sup> It may not be very realistic to expect that international commercial arbitration rules will be consistent with all Islamic interpretations. Yet, given the flexibility inherent in the *Shari’a*, it is equally unrealistic to expect that international commercial arbitration rules and practice will continue to have legitimacy in the Middle East and the larger Islamic world if *Shari’a* principles and methodology are completely ignored or undermined.<sup>339</sup> And, even if commercial principles and pragmatism are expected to dampen the zeal to return to *Shari’a* principles, arbitrators will still have to have an understanding and appreciation of these very principles as well as the cultural and religious differences they have instilled in the people in determining intent, choice of

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arrogance which many in the developing world, including the Islamic world may find offensive. It is interesting to note that even the United States was opposed to international arbitration at one time, see for example Kristin T. Roy, *supra*, note 202, footnote 41.

<sup>337</sup> *Supra*, note 118, at 19.

<sup>338</sup> Azizah al-Hibri, “Islamic Constitutionalism and the Concept of Democracy,” *Case W. Res. J. Int’L.* 1 (1992).

<sup>339</sup> This becomes particularly poignant given the rising revivalist trend sweeping the Islamic world even impacting nations that were at one time seen as shunning Islam such as Turkey, where the majority democratically elected an Islamist government to power in the last elections.

wording, linguistic anomalies as well as in analyzing the negotiation and drafting of contracts.<sup>340</sup>

The assumption and belief that the *Shari' a* is being sidelined, and that the current international commercial arbitration framework is exclusively derived from the Western legal heritage may create obstacles in the acceptance and continued legitimacy of international commercial arbitration in the Middle East, and even beyond in the other Islamic nations.<sup>341</sup> This is clearly not acceptable if we recall that the twin objectives of the legal framework underpinning international commercial arbitration are to ensure enforceability of arbitration agreements/clauses and arbitral awards and to insulate the arbitration process as much as possible from interference by domestic courts and other national or international institutions. This can only be achieved when there is mutual respect and understanding of the various laws, practices, cultures and religious worldview prevalent in the world today.

There is a need to reform Islamic law from within to deal with contemporary norms, transactions and institutions, but there is an equal need to better accommodate and address the issues of concern from an Islamic perspective. There is a clear need for dialogue in this regard and proponents of both the Western and Islamic perspectives should reflect on the following:

“Minds fed on the myths of the dominant culture need to be provoked

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<sup>340</sup> See *Breard v. Greene*, 118 S. Ct. 1352 (1998).

<sup>341</sup> If democracy were to come to these regions, all indications are that the popular will of the people will take some of these nations closer to their Islamic roots. Democratic elections in the past in Turkey, Egypt and Algeria have clearly revealed the potency of the Islamic factor.

into rethinking their complacencies, and weaned to the idea that whatever the culture which might prevail at any given moment, there is always another possibility, an alternative to understanding and to virtue.”<sup>342</sup>

The aim of such a dialogue will be to help develop an international commercial arbitration regime in which the business community can have confidence, while staying true to the core principles of *tahkim* under the *Shari' a*.<sup>343</sup> This will help remove a potential crutch that may be used by those who oppose the international commercial arbitration movement as being one of purely Western import.

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<sup>342</sup> Mona Abul-Fadl, “Beyond Cultural Parodies and Parodizing Cultures” (1991) 8:1 American Journal of Islamic Social Sciences 15 It 16.

<sup>343</sup> George Sayen, “Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia,” 24 *U. Pa. J. Int'l Econ. L.* 905 at 906.