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# Commercial Arbitration in the Islamic Middle East

Arthur J. Gemmell\*

## Introduction

As any observer of the international commercial scene will attest, globalization has spawned an untold number of daily international business transactions. From these transactions, disputes arose and states worried that their domestic court system would be unable to deal with foreign commercial disputes expeditiously and equitably. In order to both address these concerns and to promote the use of international arbitration, a host of international and regional conventions was established to deal with the peaceful settlement of disputes. The Islamic Middle East has not fully embraced what might be euphemistically referred to as a “modern” arbitral system.

To comprehend the nature of dispute settlement in the Islamic Middle East, this paper contends that knowing “the law” of the Middle East is insufficient. The lawyer-scholar must accept and internalize the fact that history and religion are the keys to understanding commercial arbitration in this part of the world.

Part I of this article will briefly examine the historical and religious antecedents that have spawned the dynamics of today’s commercial arbitration world in the

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Islamic Middle East. While it may seem unconventional to begin a law article on commercial arbitration with a religious and historical retrospective, as this one will, it is critical to do so in order to provide the proper foundation to comprehend the law of this region.

Islamic law pervades the commercial world, as well as a Muslim's way of life. Islam is "a complete way of life: a religion, an ethic, and a legal system all in one."<sup>1</sup> *Din*—the Arabic word for religion, ". . . encompasses theology, scripture, politics, morality, law, justice, and all other aspects of life relating to the thoughts or actions of men . . . it is not that religion dominates the life of a faithful Moslem, but that religion . . . is his life."<sup>2</sup>

If the foreign investor and her counsel fail to comprehend the religious underpinnings supporting commercial arbitration in the Islamic Middle East, they may well find themselves in a dispute resolution system that will shroud their investment with ambiguity and uncertainty.

Part II of this article will analyze the workings of the various commercial arbitration systems in the Islamic Middle East — a vast area encompassing eighteen countries (excluding Israel, Palestine, and Turkey), whose footprint on the planet measures some 14.5 million square kilometers inhabited by 350 million people.

This analysis will demonstrate that due to the pervasiveness of regional historical and religious mandates, the implementation of a "modern" commercial arbitration system has been spotty, at best. For an international commercial arbitral system to be effective, private arbitral agreements and awards must be enforced. The arbitral system provides even successful commercial enterprises doing business in the Islamic Middle East with unpredictable enforcement of arbitral remedies.

Lastly, the article will suggest an approach that walks the line between the religious and commercial worlds in order to heighten the efficacy of commercial arbitration in the Islamic Middle East.

1. ALL'AMAH SAYYID M.H. TABATABA'I, THE QUR'AN IN ISLAM: ITS IMPACT AND INFLUENCE ON THE LIFE OF MUSLIMS, 86 (1987) (citing Amir Khoury, *Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks*, 43 IDEA 151, 199 (2003)).
2. *Id.* (citing D.S. ROBERTS, ISLAM: A WESTERNER'S GUIDE-FROM BUSINESS AND THE LAW TO SOCIAL CUSTOMS AND FAMILY LIFE, 67-68 (1982)).

## PART I

### A. *The Shariah*

Islamic law is known as the *Shariah* and has four primary sources.<sup>3</sup> Divided into 114 *Surahs* (chapters) and 6,666 verses, the Koran is the primary source for the *Shariah*, as it is considered by Muslims to be the revealed word of God in the Arabic language through the Prophet Muhammad (570-632 AD).<sup>4</sup>

The *Sunna* are the second primary sources of the *Shariah*. *Sunna* are the sayings and traditions of the Prophet Muhammad, having been recorded into what is known as the *Hadith*. *Sunna* are deemed secondary sources inasmuch as the primary source, the Koran, is held to be the literal word of God.<sup>5</sup>

Thirdly, *Ijma*, usually translated as “consensus,” becomes a valid source of Islamic law only after there has been widespread consultation (*Shu'ra*) by Islamic scholars and the use of juristic reasoning (*Itihad*).<sup>6</sup> As evidence of his support for *Ijma*, Akaddaf cites the Prophet Muhammad, “[m]y nation will not agree unanimously in error.”<sup>7</sup>

And lastly, *Qiyas* are legal principles arrived at by analogy or analogical deduction. However, the logic utilized must be based on the Koran, *Sunna* or *Ijma*. Khaliq writes that *Qiyas* are often used to apply Islamic principles to the modern era.<sup>8</sup>

So important is the *Shariah*, that it is either a primary source or the primary source of law in the constitutions of Syria, Egypt, Kuwait, Yemen, Bahrain, Qatar, and the United Arab Emirates.<sup>9</sup>

Neither Saudi Arabia nor Oman has formal constitutions and each apply the *Shariah* as the only Islamic law.<sup>10</sup> The Saudi “Constitution” was enacted as The Basic Law of Government,<sup>11</sup> Oman’s as The Basic Law of the Sultanate of

3. The sources for the *Shariah* come from Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women’s Convention in the Law as Stipulated by the Shari’ah*, 2 BUFF. JOUR. INT’L L. 1, 8-12 (1995).
4. ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLE, I (1992).
5. Khaliq, *supra* note 3, at 9.
6. *Id.* at 11.
7. 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, 18 (2001).
8. Khaliq, *supra* note 3, at 12.
9. SAMIR SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST, 11-12 (2d ed. 1984).
10. *Id.* at 12.
11. BASIC LAW OF GOVERNMENT [Constitution] art. 1 (Saudi Arabia), Adopted by Royal

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Oman.<sup>12</sup>

At Chapter 1, Article 1, the Saudi Basic Law states, “[t]he Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God’s Book and the Sunnah of His Prophet, God’s prayers and peace be upon him, are its constitution . . . .” Supplemental Saudi laws (relating to various aspects of modern life) are called “regulations” and enjoy the full effect of law, provided they are consistent with *Shariah* law.<sup>13</sup>

Similarly, the Omani Basic Law proclaims at Article 2, “[t]he religion of the State is Islam and the Islamic *Shariah* is the basis of legislation.”

### ***B. Islamic Schools of Interpretation***

To compound the difficulty of comprehending commercial arbitration in the Islamic Middle East, another ingredient has to be added to the mix: the schools of interpretation of Islam. The two major interpretive groups of Islam are the Sunni and the *Shi’a*. Both Sunni and *Shi’a* Muslims share the most fundamental Islamic beliefs and articles of faith. The differences between them initially stemmed not from spiritual differences, but over leadership: who was to lead the Muslim nation after the death of the Prophet?

Sunni Muslims maintained that their post-Prophet leader should come from among those capable of the job and selected Muhammad’s close friend and advisor, Abu Bakr, as the first Caliph of the Islamic nation. The word “Sunni” in Arabic means “one who follows the traditions of the Prophet.”<sup>14</sup>

However, the *Shi’a* held that post-Prophet leadership belonged within the Prophet’s own family, among those specifically appointed by him, or among Imams appointed by God Himself. The *Shi’a* Muslims contended that leadership should have passed to Muhammad’s cousin/son-in-law, Ali, and to the descendants of Ali. The term *Shi’a* or *Shi’ite* derives from a shortening of *Shiat* Ali or partisans of Ali.<sup>15</sup>

decree of King Fahd , Mar. 1992 Royal Order No.A/90, of 1 Mar. 1992, to promulgate the Constitution.

12. THE BASIC LAW OF THE SULTANATE OF OMAN [Constitution] art. 2 (Oman), Royal Sultani Decree No. 101/96

13. Khoury, *supra* note 1, at 201.

14. Hussein Abdulwaheed Amin, *The Origins of the Sunni/Shia Split in Islam*, available at [www.islamfortoday.com/shia.htm](http://www.islamfortoday.com/shia.htm).

15. *Id.*

### 1. Arbitration of Old

It is tempting, given the ubiquitous coverage given to the Middle East's oil interests, to fail to acknowledge that the Islamic Muslim world has a centuries' long commercial history. In fact, one commenter Linda Lim, submits that Islam has always been a religion of trade and of world traders and that the Prophet's wife was herself a trader whose earnings permitted Muhammad to conduct his proselytizing efforts.<sup>16</sup>

In the Pre-Islamic Arab community, self-help tended to be the most relied upon method of dispute resolution.<sup>17</sup> If the parties, through negotiations, failed to resolve their differences over matters such as property, succession, or torts, an *hakam*<sup>18</sup> (an arbitrator) was appointed. An *hakam* could be any male possessing high personal qualities who enjoyed a favorable reputation in the community and whose family was noted for their competence in dispute settlement.<sup>19</sup>

If the *hakam* agreed to arbitrate, the parties then put up a meaningful form of security (property or hostages) to ensure their compliance with the *hakam's* decision.<sup>20</sup>

The decision of the *hakam* was final but not enforceable (hence, the reason for the security) — it was an authoritative statement as to what the customary law was or should be. In fact, Schacht refers to a *hakam* in such situations as “a lawmaker, an authoritative expounder of the normative legal custom or sunna.”<sup>21</sup> Schacht continues, “[t]he arbitrators applied and at the same time developed the sunna; it was the sunna with the force of public opinion behind it, which had in the first place insisted on the procedure of negotiation and arbitration.”<sup>22</sup>

Arbitration continued as a dispute resolution practice in the Muhammad and post-Muhammad eras, as well. In fact, for a Muslim, arbitration carries with it no better imprimatur<sup>23</sup> than that given to it by the Prophet himself.

There are, in the literature, a number of examples of Muhammad taking on the

16. Linda Lim, *Terrorism and Globalization: An International Perspective*, 35 VAND. J. TRANSNAT'L L. 703, 704 (2002).

17. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 7 (1964).

18. In some texts the term *qadi* is used to signify an arbitrator. Both Schacht and Salah seem to agree that a *qadi* is more akin to a judge (a public official), whereas the *hakam* is a private arbitrator.

19. SCHACHT, *supra* note 17, at 7.

20. *Id.* at 8.

21. *Id.*

22. *Id.*

23. If one will permit a bit of mixed religious usage.

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role of a *hakam* before and after his Prophethood.<sup>24</sup> Two notable examples are those provided by Abu-Nimer, who writes of an instance when the Prophet was involved in a dispute between himself and the Banu Qurayza (a Jewish tribe). The Prophet, notwithstanding his prominence, agreed with the Jewish people to submit their dispute to a third party chosen by them.<sup>25</sup> Abu-Nimer also writes of the Prophet's selection by the disputants to arbitrate a conflict between Arab and Jewish tribes.<sup>26</sup> These and other examples of the Prophet's commitment and participation in the arbitral process caused Majeed to refer to Muhammad as an "exemplary standard for the independence of arbitrators."<sup>27</sup>

Schacht concurs, writing that Muhammad's commitment to the arbitral process was such that, not only did Muhammad attach great importance to being appointed by the believers as a *hakam*, but his subsequent authority as a political and military leader resulted in Muhammad becoming a "Prophet-Lawgiver."<sup>28</sup>

Besides the Prophet's participation and support, additional validation of arbitration is found in the Koran. Two often cited examples are:

And if you fear a breach between the two, then appoint a judge from his people and a judge from her people; if they both desire agreement, Allah will effect harmony between them; surely Allah is knowing, Aware.<sup>29</sup>

[Y]ou should always refer disputes to God and to His Prophet. And obey Allah and His Messenger; And fall into no disputes, lest you lose heart And your power to depart; and be patient and persevering: for Allah is with those who patiently persevere.<sup>30</sup>

In light of Muhammad's and the Koran's explicit blessings for the arbitral process, one might have expected that a smooth and orderly transition into the modern workings of arbitration would have occurred, however, it did not. Beside the Sunni-*Shi'a* division, there are within the Sunni branch of Islam four schools of *Shariah* interpretation and, each School varies its doctrinal approach to the resolution of disputes.<sup>31</sup> Thus, this article must focus, briefly, on the approach of

24. Mohammed Abu-Nimer, *A Framework for Nonviolence and Peacebuilding in Islam*, 15 J. L. & RELIGION 217, n. 62. (2000-2001).

25. *Id.*

26. *Id.*

27. Nudrat Majeed, *Investor-State Disputes and International Law: From the Far Side*, 98 AM. SOC'Y. INT'L L. PROC. 30, 32 (2004).

28. Schacht, *supra* note 17, at 10-11.

29. Koranic verse (4:35) cited by David Karl, *Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know*, 25 GEO. WASH. J. INT'L L. & ECON. 131, fn. 286 (1992) (quoted by Sarvenaz Bahar, *Khomeinism, The Islamic Republic of Iran, and International Law: The Relevance of Islamic Political Ideology*, 33 HARV. INT'L L. J. 145, fn. (1992)).

30. Koranic verse (8:46) quoted by Abu-Nimer, *supra* note 24 at 245.

31. Saleh, *supra* note 9, at 4-6.

each Sunni School so that a full exposition to commercial arbitration in the Middle East can be made.

***i) The Hanafi School***

Hanafi scholars emphasize that the contractual nature of arbitration<sup>32</sup> and arbitral awards are characterized by the use of subjective opinions.<sup>33</sup> The Hanafi School stresses the close connection between arbitration and conciliation. Thus, to the Hanafis, an arbitral award more closely approximates conciliation than a court judgment, and, consequently, is of lesser force than a court judgment.<sup>34</sup>

New problems are examined and anticipated through the use of analogy (*qiyas*). Reason and equitable principles are used.<sup>35</sup> A disputing party is obligated to abide by the arbitral award because the agreement to resort to arbitration binds the parties like any other contract.<sup>36</sup>

***ii) The Maliki School***

The Maliki School relies on the use of the *Ijma* of the Medina legal scholars, local Medina customs, the Koran, and the *Sunna* and *Qiyas*. For the Malikis, the notion of public good is a valid jurisprudential principle.<sup>37</sup> The Malikis evidence a unique trust in arbitration by permitting one of the disputants to be chosen as an arbitrator by the other disputing party.<sup>38</sup> Unlike the other three schools, this School holds that an arbitrator cannot be removed after the commencement of the arbitration proceedings.<sup>39</sup>

***iii) The Shafi School***

Shafi teaching is eclectic, borrowing from the Hanafis and the Malikis, and often appears to be torn between logic and traditional teaching. Shafis stress the importance of both the Koran and the *Sunna*, but select the *Sunna* more critically than the Malikis.<sup>40</sup> There is little use of *Qiyas* in the arbitral process.<sup>41</sup>

32. Zeyad Alqurashi, *Arbitration under the Islamic Sharia*, Vol.1, Issue 2 Oil, Gas and Energy Law Intelligence Mar. 2003 para. 4.1 available at (with password) [http://www.gasandoil.com/ogel/articles/welcome.asp?article\\_63.htm](http://www.gasandoil.com/ogel/articles/welcome.asp?article_63.htm).

33. Saleh, *supra* note 9, at 5.

34. Alqurashi, *supra* note 32.

35. Saleh, *supra* note 9, at 5.

36. Alqurashi, *supra* note 32.

37. Saleh, *supra* note 9, at 5.

38. ABDUL HAMID EL-AHDAB, *ARBITRATION WITH THE ARAB COUNTRIES*, 19 (1999).

39. Alqurashi, *supra* note 32.

40. Saleh, *supra* note 9, at 5-6.



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Shafi arbitration is a legal practice; however, the position of arbitrators is inferior to that of judges since arbitrators under this School may be removed by the parties up to the time of the issuance of the award.

*iv) The Hanbali School*

The most “conservative” of the four Schools is the Hanbali school. Hanbali teachings are deeply centered on the Koran and uncritically accept the authenticity of the *Sunna*, even those rejected by other schools.<sup>42</sup> The Hanbalis make few concessions to personal reasoning (*ra’y*) or equity.<sup>43</sup>

According to the Hanbali School, a decision made by an arbitrator has the same binding nature as a court’s judgment. Thus, the award made by an arbitrator (who must have the same qualifications as a judge) carries a *res judicata* effect upon both of the parties since it was they who chose him.<sup>44</sup>

**2. The Medjella**

Before discussing modern commercial arbitration, one additional piece of arbitral historiography is worthy of note: the *Medjella*. *The Medjella of Legal Provisions* was the first codification of the *Shariah* under the Ottoman Empire.<sup>45</sup> A number of Islamic countries relied on the *Medjella* even after the fall of the Ottoman Empire, until they developed their own civil law.

An entire section of the *Medjella* is devoted to arbitration; however, the form arbitration takes was more in line with conciliation and compromise. Only a court judgment gave final authority to the arbitral award. There was no *res judicata* effect based solely on the award itself. Nonetheless, the contractual nature of arbitration was affirmed and reinforced.

Arbitration awards that were made by a panel of arbitrators were required to be rendered unanimously. Either party was permitted to dismiss an arbitrator before an award was made.

The parties were expected to adhere to an award rendered, since, it was reasoned, the award was derived in the first instance from an agreement by the parties. A court could void an arbitrator’s award if the award was found to be contrary to a previously rendered court judgment.

41. *Id.* at 6.

42. *Id.*

43. *Id.*

44. Alqurashi, *supra* note 32, at para. 4.3.

45. This portion of the article comes exclusively from El-Ahdab, *supra* note 38, at 21-22.

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An arbitrator's scope was less than that of a court and was limited only to matters before him relating to the dispute.

Schacht characterized the *Medjella* as, ". . . an experiment [that] was undertaken under the influence of European ideas, and it is, strictly, speaking a secular code . . . not intended for the tribunals of the kadis and was in fact not used by them . . . it contains certain modifications of the strict doctrine of Islamic law."<sup>46</sup> Schacht's characterization is consistent with El-Ahdab's contention that the *Medjella* "remained in force (subject to subsequent legislation) in the territories and later states which were detached from the Ottoman Empire after 1918, where it was applied as the civil law . . ."<sup>47</sup>

### C. *Shaping Modern Day Arbitration*

No serious student of Islamic Middle Eastern commercial arbitration can easily skip over the impact that the Libyan, Abu Dhabi, and ARAMCO cases have had on the development of Islamic commercial arbitration. Each of the cases requires analysis since they dealt with disputes over oil concessions granted by the respective national governments to western oil companies.

Between 1971 and 1974, the Libyan government nationalized the properties of three foreign oil companies. Each of the nationalizations was publicly touted by Colonel Muammar el-Qaddafi as Libyan state actions in retaliation for UK and US foreign policy positions.<sup>48</sup>

Each of the concession agreements contained arbitration clauses. The agreements included choice of law provisions under which Libyan law and international law (as relevant) would govern.<sup>49</sup>

The outcome of the Libyan arbitrations<sup>50</sup> is a tale of three arbitrations: each with identical factual backgrounds; each with identical legal documents; and each to be resolved in accordance with three identical choice of law clauses.<sup>51</sup>

The Libyan government lost all three cases, but what is of note to scholars of

46. Schacht, *supra* note 17, at 92-3.

47. El-Ahdab, *supra* note 38, at 21.

48. Robert von Mehren & P. Nicholas Kourides, *International Arbitrations Between States and Foreign parties: The Libyan Nationalization Cases*, 75 A.J.I.L 476, 476-90 (1981).

49. *Id.* at 498-99.

50. *Texas Overseas Petroleum Co. v The Gov't of the Libyan Arab Republic*, 53 ILR 389 (1979); *B.P. Exploration Co. v. The Gov't of the Libyan Arab Republic*, 53 ILR 297 (1979); *Libyan American Oil Co. v. The Gov't of the Libyan Arab Republic* 20 ILM 1 (1981).

51. Amr Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 448 (2000).

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international commercial arbitration is that each arbitrator based their decisions on a different legal analysis.

To illustrate, the question of choice of law was a critical procedural issue that the arbitrators had to decide in each case. The arbitrator in the British Petroleum case ruled that, absent party agreement, the principle of the *lex situs arbitri* should prevail. Since the arbitration was to be conducted in Copenhagen, Danish procedural law needed to be fixed as the applicable procedural law.<sup>52</sup>

In the LIAMCO Arbitration, it was decided that in the absence of an agreement by the parties as to which procedural law should govern, the UN Draft Convention on Arbitral Procedure needed to apply.<sup>53</sup>

In the Texaco case, the arbitrator decided that international procedural law needed to apply since international law was utilized to select an arbitrator. It deductively followed, the arbitrator held, that he had been granted broad powers to decide the appropriate procedural rules.<sup>54</sup>

The inconsistencies continued as the arbitrators struggled with the question: if the concession contract was breached by Libya, was *restitutio in integrum* (what we might refer to modernly as equitable restitution) an appropriate remedy in each of the disputes?

Arbitrator Lagergren, in the BP case, seemingly influenced by the principles of the *Chorzow Factory*<sup>55</sup> case, held not for restitution, but for damages in full in cases of unlawful expropriation.<sup>56</sup>

In the Texaco case, Arbitrator Dupuy turned to the principle of *Chorzow* and *pacta sunt servanda* and ordered, on the basis of equitable restitution, that Libya resume performance under the concession agreement.<sup>57</sup>

LIAMCO's Arbitrator Mahmassani was betwixt and between over the issue of restitution. On one hand, he reasoned that *restitutio in integrum* violated the principle of sovereign autonomy within the sovereign's territory. On the other hand, he was somewhat inclined toward both *damnum emergens* (actual, not prospective loss) and *lucrum cessans* (prospective loss). In the end, he held that

52. Von Mehren, *supra* note 48, at 505.

53. *Id.* at 507.

54. *Id.*

55. The *Chorzow Factory* case was for some time the seminal "reparations" case which dealt with a claim by Germany over the expropriation of a factory. The case citation is *The Factory at Chorzow* (Ger. v. Pol.), 1927 (ser. A) No. 17, available at <http://www.icjci.org/icjwww/idecisions/icpij/>.

56. Partick Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the Int'l Law of Expropriation*, 85 A.J.I.L 474, 480 (1991).

57. *Id.* at 480-81.

*lucrum cessans* was not available in this case and awarded equitable compensation on the basis of lost profits.<sup>58</sup>

While the arbitral hermeneutics of these three awards had to be bewildering to Middle Eastern arbitral observers, they were baffling and remain so to Western scholars. Looking over the landscape created by these awards, one academic critic wrote, “[t]rois arbitrages, un meme problem, trois solutions.”<sup>59</sup> It is no wonder that the Islamic legal world looked askance at the “logic” and “rationales” used by the arbitrators in these cases which, in turn, led to a subsequent, and perhaps justifiable, distrust of the “Western” arbitral process.

At least, the “Libyan” arbitrators did not go as far as the arbitrator in the Abu Dhabi arbitration.<sup>60</sup> In a similar dispute, also over an oil concession contract, Lord Asquith acknowledged that Abu Dhabi law should govern and concluded that the Abu Dhabi Sheik was “an absolute, feudal monarch . . . [who] administers a purely discretionary justice with the assistance of the Koran; and 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 instruments.” Asquith held that the terms of the contract “invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilised nations — a sort of ‘modern law of nature.’” Although Lord Asquith conceded that “English municipal law [was] inapplicable as such,” he determined that “some of its rules are . . . so firmly grounded in reason, as to form part of this broad body of jurisprudence” and, indeed, are “principle[s] of ecumenical validity” and “mere common sense.”<sup>61</sup>

Similar to the Libyan cases, the arbitrator in the ARAMCO case<sup>62</sup> decided that ARAMCO’s rights would be unable to be “secured in an unquestionable manner by the law of force in Saudi Arabia . . . [and that Saudi laws] must 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.”<sup>63</sup>

In these cases, the arbitrators concocted a unique arbitral stew consisting of one part cynicism for local law and one part disdain for the Islamic parties’ ability to

58. *Id.* at 481.

59. Brigitte Stern, *Revue de L'Arbitrage* 1, 3 (1980) (citing Abul Maniruzzaman, *The Lex Mercatoria and Int'l Contracts: A Challenge for International Commercial Arbitration*, 14 *AM. U. INT'L REV.* 657, 719 (1999)).

60. *Petroleum Dev. (Trucial Coast) Ltd. v Sheik of Abu Dhabi*, 18 *I.L.R.* 144 (1951).

61. C. Brower & J. Sharpe, *International Arbitration and the Islamic World: The Third Phase*, 97 *AMJIL* 643, 644 (2003).

62. *Saudi Arabia v Arabian Am. Oil Co.*, 27 *I.L.R.* 117 (1958).

63. Brower & Sharpe, *supra* note 61, at n.16.

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enforce rights. They added equity and *lex mercatoria*, and further contributed some allusions to *jus cogens* and *jus gentium*. The profound and lasting impact of these arbitrations on the region's arbitral psyche should not be underestimated. It is no wonder that "Western" forms of commercial arbitration have, to this day, not been an integral to the Islamic legal system.

## PART II

### A. Arbitration Agreements and Arbitration Clauses

This article will now examine the various components of contemporary Islamic Middle Eastern commercial arbitration.

The Main Elements of a *Shariah* - based arbitration are:<sup>64</sup> an extant dispute, an agreement by the parties to submit their dispute to an arbitrator — who, though not a *qadi*, must possess *qadi*-like qualities, acceptance by the parties of the arbitrator, and determination of the dispute according to Islamic law. The Hanafis stress the contractual nature of arbitration agreement; the Malikis insist on the arbitrator's neutrality; the Hanbalis stress the qualifications of the arbitrator; and the Shafis tend to view arbitration thematically. All schools view the arbitration contract as valid (though not binding for the Hanafis).<sup>65</sup>

What may be arbitrated<sup>66</sup> varies by school. While the Hanafi school permits more cases to go to arbitration than do the other schools, the Hanafis prohibit arbitration in cases involving *Hadd* (fixed punishments which are publicly administered) and *qisas* (retaliation). The *Medjella* took a broad view of arbitration authorizing arbitration in virtually any financial matter involving private rights. Malikis and Shafis allow arbitration in all financial and compensation cases but forbid arbitrations for *Hadd* and family law. Hanbalis take a wide view as to subject matter may be arbitrated, but preclude arbitration for certain *Hadd* offenses.

Islamic Middle Eastern Arbitration Clauses Fall Into Two Categories:<sup>67</sup> First there are valid arbitration clauses, which are those necessary to the contract, appropriate to the contract and commonly used in commercial transactions. Secondly, invalid arbitration clauses are those that contain any of the following provisions: the payment of *riba* (usury/interest/unearned advantage); that include

64. SALEH, *supra* note 9, at 21.

65. *Id.* at 22.

66. *See generally id.* at 47-48.

67. EL-AHDAB, *supra* note 38, at 26-27.

*shurut* (extraneous conditions); and that contain *gharar* (uncertainty or are executory). The *Shariah* prohibits agreements to arbitrate future disputes or disputes not yet formulated.<sup>68</sup> If included, the contract is void *ab initio*.

Nevertheless arbitration does take place in the Islamic Middle East. How is this accomplished? Is it through sophistry or pragmatism? It appears that most of the literature comes down on the side of pragmatism, “[i]n practice . . . Muslim individuals and their governments routinely charge and pay interest on loans, and conclude and enforce contracts of insurance because it is impossible to have a viable economic system today without these practices.”<sup>69</sup>

More directly, Ballantyne, writing of commercial law in general of and *riba* in particular, suggests, “[t]o generalize again, this has been done by preserving *Sharia* principles but abandoning them in commercial codes . . . . This is, of course, is not compromise . . . but evasion.”<sup>70</sup>

So be it through pragmatism, evasion, or the principle that “agreements must be observed,” arbitration agreements are, in fact, sprinkled with “Western” style provisions in a number of parts of the Islamic Middle East.

In recent years, Tunisia, Egypt, Bahrain, and Oman joined Lebanon and Djibouti in the enactment of international arbitration laws.<sup>71</sup> Generally modeled on the UNCITRAL<sup>72</sup> model, these states have also put in their own unique requirements to the arbitral mix. Nonetheless, the statutes exist and, being based on UNCITRAL, the drafters of national arbitral legislation attempted to define arbitration agreements and arbitration clauses as commercial matters rather than exclusively religious matters.

Two examples are noteworthy. First, Egypt crafted a new arbitration act in 1994<sup>73</sup> that widened the scope of arbitration to, as El-Ahdab puts it, “. . . any legal dispute whatever be the legal nature of the relationship which is the subject matter of the dispute.”<sup>74</sup>

68. William Ballantyne, *The Challenge of Islamic Commercial Law in the Middle East*, in ARAB COMMERCIAL LAW, 17 (William Ballantyne and Howard L. Stovall eds., 2002).

69. Abdullah An-Na'im, *Islam and Human Rights: Beyond the Universality Debate*, 94 AM. SOC'Y INT'L L. PROC. 95, 98 (2000).

70. Ballantyne, ARAB COMMERCIAL LAW, *supra* note 68, at 20.

71. Fathi Kemicha, *Arbitration in the Arab World in the Twenty-First Century* in ARAB COMMERCIAL LAW, *supra* note 68, at 153.

72. UNCITRAL is the acronym for the *United Nations Commission on International Trade Law* whose charter includes the development of model laws applicable to private parties in international transactions and disputes. Model rule for arbitration, *available at* [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1976Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html).

73. *Egyptian Arbitration Law* no. 27/94.

74. El-Ahdab, *supra* note 38, at 168.

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Secondly, Oman closely followed Egypt's lead and, based also on the UNCITRAL model, enacted a new arbitration act<sup>75</sup> far more secular in nature than had previously existed.<sup>76</sup>

### ***B. Applicable or Choice of Law***

As is found throughout the Islamic Middle East, two approaches to the choice of law are applied when disputants are faced with arbitration: whether the state adheres to the *Shariah* requirements of arbitration; or, whether a state has bifurcated its religious and secular civil codes.

For at least the Hanafi and Maliki schools, the procedural and substantive rules of the *Shariah* apply.<sup>77</sup> In fact, for the Malikis, application of Maliki doctrine is mandatory when Malikis are the parties to arbitration.<sup>78</sup> Shafi and Hanbali have little teaching on the issue of choice of law or applicable law.<sup>79</sup>

Saleh relates an interesting approach taken by the Hanafis to circumvent the substantive and procedural requirements of the *Shariah*. Article 1850 of the *Medjella* permits two arbitrators, one chosen by each side, to act as *amiable compositeurs* who attempt to reach a conciliative solution. If such a solution is consummated, then these solutions are not subject to judicial review and are irrevocable under Article 1156 of the *Medjella*.<sup>80</sup>

As Sunni Hanafi countries, Jordan's and Kuwait's laws reflect a bifurcated approach between their religious and civil approaches to commercial arbitration. Jordan's civil code is primarily based on Ottoman law with its arbitration act<sup>81</sup> heavily influenced by English arbitration laws.<sup>82</sup> Kuwaiti law was also Ottoman-based, but subsequent to its independence was influenced by Egyptian jurists.<sup>83</sup>

Both the Kuwaiti and the Jordanian arbitration acts require arbitrator(s) to apply that law which has been chosen by the parties.<sup>84</sup> In fact, their arbitration acts mirror the approach taken by many countries throughout the world, i.e. the disjunction between the place of arbitration and the law applied.

Yemen, a country similar to Jordan and Kuwait religiously, is predominately

75. *Sultani Decree No. 48/97*, the Law of Arbitration of Civil and Commercial Disputes.

76. EL-AHDAB, *supra* note 38, at 478-79.

77. SALEH, *supra* note 9, at 55.

78. *Id.* at 56.

79. *Id.* at 57.

80. *Id.*

81. *Act No. 13/62* — Official Gazette dated 1 Mar., 62 No. 1603.

82. EL-AHDAB, *supra* note 38, at 239 (Jordan).

83. *Id.* at 289-90 (Kuwait).

84. *Id.* at 275 (Jordan) and at 307 (Kuwait).

*Shi'a* Zayidi with a substantial Sunni Shafi population. Yet it too has enacted a "progressive" arbitration act,<sup>85</sup> permitting arbitrators to use Yemeni law or another international law depending on the law to which the parties have agreed.<sup>86</sup>

This Yemeni modernity is rather surprising in a country reputed to be one of the more conservative Islamic states. The ability to mix the proverbial old with the new was illustrated in the Yemeni Minister of Justice's comments when, along with a series of other statutes, the arbitration act was promulgated. The Minister called Yemen's efforts, "an avant-garde experience [that] cast the provisions of the *Shariah* in a modern mould . . . and taking the doctrinal treasure of the "Fiqh" . . . [created] a model of codification and the nucleus of a unified Moslem legislation which can be applied throughout the entire Moslem world."<sup>87</sup>

### C. The Selection of Arbitrators

When dissecting national laws that deal with the naming of arbitrators, one typically looks at three elements: 1) how the arbitrator is selected; 2) whether or not there a fixed number of arbitrators required; and 3) the process by which an arbitrator can be dismissed, if at all.

As for the selection process, a number of Islamic Middle Eastern states permit the parties to choose the arbitrator (Algeria, Bahrain, Egypt, Jordan, Kuwait, Lebanon, Libya, and Syria).<sup>88</sup> Morocco permits party autonomy in the selection of arbitrators for commercial, but not for civil matters.<sup>89</sup> Saudi Arabia provides the parties with a list of arbitrators. The use of the list is encouraged but not required.<sup>90</sup>

None of the four Islamic legal schools specify the number of arbitrators required for an arbitration, that decision is left to the parties.<sup>91</sup> Arbitrators, needless to say, should be dismissed only under unusual circumstances. A top line review of various Middle Eastern states reveals that Jordan permits dismissal of an arbitrator due to misconduct or for having exceeded the scope of his charter, Algeria, Bahrain, Morocco, Saudi Arabia, and Libya permit dismissal by agreement of the parties, and Syria and Kuwait, in addition to removal by consent

85. *Act N° 33/1981* (Official Gazette N° 12 of 31 Dec. 1981).

86. El-Ahdab, *supra* note 38, at 763.

87. *Id.* at 742.

88. *Id.* at 87-9 (Algeria), at 107 (Bahrain), at 173-74 (Egypt), at 247-8 (Jordan), at 299-300 (Kuwait), at 343-45 (Lebanon), at 429-30 (Libya), at 658 (Syria).

89. *Id.* at 457-59.

90. *Id.* at 577.

91. Alqurashi, *supra* note 32, at para. 5.2.



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of the parties, permit the dismissal of an arbitrator if he is found to have a relationship with either party. Egypt permits dismissal for unforeseen impartiality or independence on the part of the arbitrator. Libya also permits dismissal through a court order.<sup>92</sup>

### 1. How do Arbitrators Accept Their Arbitral Responsibilities?

The methods by which arbitrators accept their responsibilities vary by country. Bahrain<sup>93</sup> requires that an arbitrator signifies his acceptance in writing, whereas, in Morocco<sup>94</sup> it can be deduced from the arbitrator's commencement of the arbitral proceedings that he has accepted his charge. Similarly, in Lebanon, notwithstanding the country's civil code requirement that an arbitrator's acceptance be in writing, a Lebanese court held that an arbitrator's signature on his award was sufficient evidence of his acceptance.<sup>95</sup> Libya accepts an arbitrator's signature on the agreement to arbitrate as evidence of acceptance.<sup>96</sup> Jordan's law does not require that the arbitrator accept his appointment in writing, only that the appointment be made through a writing.<sup>97</sup>

### D. The Arbitration Award

Under *Shariah* principles, an arbitration award must be signed by the arbitrator and witnessed by two people. The award should be divided into four parts: a description of the dispute; the finding of facts under *Shariah* rules of evidence; the reasoning of the award with reference to *Shariah* sources; and the decision itself.<sup>98</sup>

Only a minority of Shafi scholars dissent from the generally accepted view that arbitral awards have the same *res judicata* effect as a judgment made by a *qadi*. Maliki and Hanbali commentators consider an arbitration award as binding and enforceable as an ordinary court judgment. Most Hanafi scholars and the *Medjella* require no affirmation of an arbitration award by a *qadi*.<sup>99</sup>

It seems somewhat counterintuitive that, under *Shariah* principles, an arbitration award is binding, whereas the agreement to arbitrate is revocable. The revocable

92. EL-AHDAB, *supra* note 38, at 249 (Jordan), at 68 (Algeria), at 108 (Bahrain), at 458 (Morocco), at 583 (Saudi Arabia), at 430 (Libya), at 659 (Syria), at 300-01 (Kuwait), at 430 (Libya).

93. *Id.* at 108.

94. *Id.* at 457.

95. *Id.* at 348-49.

96. *Id.* at 430.

97. *Id.* at 249.

98. SALEH, *supra* note 9, at 74.

99. *Id.* at 75.

becomes irrevocable at award.

In consonance with the above, Egypt, which is predominately Shafi, requires that awards be in writing, contain the arbitrator's reasoning for his decision, the award be dated and signed, and has *res judicata* effect as of the date the award is signed. The award, however, must be registered with the court of jurisdiction.<sup>100</sup>

In predominately Hanafi Jordan, an arbitration award does not have *res judicata* effect until approved by the Jordanian courts.<sup>101</sup>

*Shi'a* Yemdi Yemen law speaks to the *res judicata* effect of an arbitration award, but a Yemeni award is not enforceable until the requisite time for appeal to set aside an award has expired.<sup>102</sup>

In a rather consistent pattern, arbitration laws in Islamic Middle Eastern countries speak to the *res judicata* effect of an arbitration award, yet, court registration or court supervision is maintained. This is the case in Bahrain (court registration and supervision), as well as in Kuwait, Oman, and Syria (*res judicata* as of the date signed but subject to court registration).<sup>103</sup> In Morocco, an arbitration award has the same legal status as a notarized deed and its leave to enforce is granted only by a court.<sup>104</sup> In Saudi Arabia, an arbitration award has *res judicata* effect, but only when validated by a court judgment.<sup>105</sup>

An arbitrator does not necessarily bring finality to a dispute between parties. Sufficient room is left, procedurally, for either expeditious judicial management or judicial meddling, procrastination, and delay.

### 1. Time Limits for an Award

While one of the perceived advantages of commercial arbitration is the speed of the arbitration process, Turck finds fault with the requirements of some Middle Eastern states, suggesting that by attempting to accelerate the process, the end result may be an inefficient arbitral process and undesirable consequences.<sup>106</sup> She exemplifies this by pointing out that Libya and Syria require an award to be issued with three months of the arbitrator's date of acceptance. In Libya, a one-time three month extension is granted, beyond that the arbitration starts anew. In Syria, if no

100. EL-AHDAB, *supra* note 38, at 186-89.

101. *Id.* at 282.

102. *Id.* at 765.

103. *Id.* at 112-13 (Bahrain), at 308-09 (Kuwait), at 499-500 (Oman), at 667-68 (Syria).

104. *Id.* at 464-65.

105. *Id.* at 602-03.

106. Nancy Turck, *Trends in Middle East Arbitration Laws and Practices*, in ARAB COMERCIAL LAW, *supra* note 68, at 136.

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award is made within three months, the parties start anew.<sup>107</sup> Certainly, the parties should expect that an award be made in a timely fashion, but not to the extent that these two countries mandate.

## 2. Enforcement of Foreign Arbitration Awards

The document most credited with the enforcement of international arbitral awards is the New York Convention.<sup>108</sup> Writing that the New York Convention “stands as a landmark between the ancient world and the new one,” Di Pietro and Platte proclaim, “[t]hanks to the New York Convention arbitration has overcome the uncertainty of the past . . . .”<sup>109</sup>

Adopted in 1958 and entered into force in 1959, the New York Convention requires courts of each contracting state to “apply . . . the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.” And “also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”<sup>110</sup> There have been over 130 countries that have ratified the Convention, including all the major trading powers of the world.<sup>111</sup>

The Convention permits states to subscribe to the Convention with two reservations: “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>112</sup>

The reciprocity reservation permitted under the Convention has been instrumental in permitting states to ratify the Convention, knowing full well that

107. *Id.* at 136-7.

108. The convention is formally known as *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)*, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html) [hereinafter New York Convention].

109. DOMENICO DI PIETRO & MARTIN PLATTE, ENFORCEMENT OF INT’L ARBITRATION AWARDS, 13 (2001).

110. The New York Convention, *supra* note 108, at art. 1, ¶ 1.

111. Gloria Miccioli, *A Selective Guide to Online Int’l Arbitration Resources*, June 21, 2004, <http://www.llrx.com/features/intarbitration.htm> (emphasis added).

112. New York Convention, *supra* note 108, at art. 1, § 3.

the Convention will be applicable only to states that recognize each other's foreign judgments. In addition, the commercial reservation assures subscribing states that matters strictly domestic, such as family or inheritance law, will not be subject to the Convention. This is especially important to Middle Eastern Islamic states, where such matters are reserved exclusively to domestic jurisdiction.

Under the New York Convention, there are grounds available to a resisting party for refusal to recognize and enforce an award. They are: incapacity of the parties to perform; lack of due process, specifically, notice; invalidity of the arbitration agreement; faulty composition of the arbitration tribunal and/or the existence of faulty arbitration procedure; and the arbitration award was not yet "binding" on the parties or had been set aside at the place of arbitration.<sup>113</sup>

These exceptions to enforcement are broad legal terms subject to interpretive differences. Their breadth is understandable given the intent of the drafters of the Convention to appeal to as many states as possible. However, the subsequent and inevitable legal parsing made to each exception requires that practitioners of international commercial arbitration fully contemplate how the enforcement sections within their arbitration agreements are drafted. Nonetheless, the New York Convention is brief and written with a great deal of clarity. Arguably, it is the most important means for enforcement of foreign arbitration awards.<sup>114</sup>

The Convention provides a simple and effective way to obtain recognition and enforcement of both arbitration agreements and arbitration awards, since Article V of the Convention limits the grounds for judicial review. "It is mainly due to the provisions of the New York Convention that arbitration has become a very attractive alternative to traditional litigation."<sup>115</sup> How then does the New York Convention and its enforcement mechanism play out in the Islamic Middle East for those nations that are subscribing states and for those who are not?

As of July, 2005, the following relevant states had become signatories to the New York Convention: Egypt, Syria, Djibouti, Jordan, Kuwait, Morocco, Saudi Arabia, Syria, Tunisia, Bahrain, Algeria, Brunei, Lebanon, Oman, Iran, and Qatar.<sup>116</sup> But as we shall see, the fact that these states have signed the Convention does not mean all is well with the enforcement of foreign awards.

As previously done, the *Shariah* is analyzed first.

113. *Id.* at art. 5, ¶ 1.

114. Laure Leservoisier, *Enforcing Arbitration Awards and Important Conventions in the Arbitration Process*, in *THE ARBITRATION PROCESS: COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS* 255, 256 (D. Campbell ed., 2002).

115. DI PIETRO, *supra* note 109, at 17.

116. Convention signatories available at [www.nortonrose.com/html\\_pubs/view.asp?id=4777](http://www.nortonrose.com/html_pubs/view.asp?id=4777).

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El-Ahdab, quite succinctly, states that under *Shariah* law, non-Muslims are free to contract and enter business relationships. The judgments and awards arising out of their business relationships are free from the proscriptions and authorizations of Muslim law.<sup>117</sup> However, once a Muslim becomes party to a contract, cognizance of *Shariah* principles is necessary.<sup>118</sup>

As was earlier illustrated, international lawyers must take care when drafting foreign award enforcement provisions. If a Muslim and a non-Muslim contract with each other under principles other than *Shariah*, then a Muslim court may invoke the “public order” provision of the New York Convention and refuse to enforce the foreign award.<sup>119</sup> El-Ahdab agrees with this conclusion and using Saudi Arabia as an example, points out that any award made abroad or using foreign law is subject to the public order reservation if the award is deemed contrary to the *Shariah*.<sup>120</sup>

Although a number of Middle Eastern states have become signatories to the New York Convention, there exists something of a duality between form and substance. Mallet writes that since the ARAMCO decision, the Saudi position, “may be extreme, legislation tends to create all kinds of typically procedural problems to arbitration. This is done either for special contracts of some commercial significance, like those related to agency and distribution, or in a more general manner.”<sup>121</sup> Mallet explains, “[w]hether rejected openly by legislation or hampered by administrative means, the uselessness in Lebanon of an arbitration clause . . . is true of Bahrain, of the UAE, of Kuwait, of Jordan, and Oman. The list is not comprehensive.”<sup>122</sup>

This pervasive attitude carries over into enforcement, as well. Again, Mallet states, “there is a long string of statutes allowing setting aside arbitration awards granted internationally, by freezing them, subjecting them to various appeals, or simply ignoring them.”<sup>123</sup>

As evidence, Mallet cites various legislative decrees in Algeria, the UAE, and Kuwait. He also quotes an unnamed but “well known” English barrister who

117. EL-AHDAB, *supra* note 38, at 50-51.

118. *Id.* at 51.

119. New York Convention, *supra* note 108, at Article V, §2(b) gives a national court the authority to refuse to recognize an award on the grounds that the subject matter is not arbitrable in the “enforcement” state or that an arbitration award is contrary to public policy.

120. EL-AHDAB, *supra* note 38, at 601.

121. Chibli Mallat, *A Comparative Critique of the Arbitration process in the Arab World*, 1(3) LEBANESE REVIEW OF ARAB ARBITRATION 1, 5-7 (1996), available at <http://www.mallat.com/articles/arbitration.htm>.

122. *Id.*

123. *Id.*

spoke of Oman, saying that “since the commercial judicature was constituted in its current form, more than ten years ago, there has been no case where direct enforcement of a foreign arbitral award has been granted.”<sup>124</sup>

Lest one think that Mallet is particularly hard on Islamic Middle Eastern enforcement mechanisms, or the lack thereof, Akaddaf chimes in, “[a]lso, although Saudi Arabia ratified the New York Convention . . . , the Saudi legal system does not recognize or enforce agreements of foreign jurisdictions.”<sup>125</sup> Akaddaf goes on to point out that Iran only recognizes foreign awards conditionally, the former Iraq not at all, Syria will enforce a foreign award only with an *exequatur*, and Egypt will enforce a foreign award if the foreign award does not go against public policy or morals.<sup>126</sup>

Roy is more optimistic about those states that have acceded to the New York Convention. She points to Kuwait and Syria, writing that, “[i]n fact, Kuwaiti enforcement of international arbitration awards was routine prior to its adoption of the New York Convention.”<sup>127</sup> To bolster her contention, Roy cites a Kuwaiti court’s enforcement of a one million dollar English arbitration award against a Kuwaiti national in favor of Merrill Lynch.<sup>128</sup>

As for Syria, she writes, “Syria, therefore, enforces all non-Syrian arbitral awards, whether or not the award was made by a New York Convention signatory. The New York Convention prevails over traditional Syrian law in all cases of non-Syrian arbitral award enforcement.”<sup>129</sup>

As for Saudi Arabia, Roy is more in tune with the above writers: “[a]s Saudi Arabian law and policy is diametrically opposed to the rules and laws of many member nations, Saudi Arabian courts may find it easy to reject non-domestic arbitral awards pursuant to New York Convention Article V(2)(b).<sup>130</sup> In essence, Saudi Arabia may not be required to enforce any more non-domestic arbitral awards than it did prior to its 1994 accession to the New York Convention.”<sup>131</sup>

In addition to the New York Convention, two regional Conventions have been adopted for the enforcement of judicial and arbitral decisions within the region:

124. *Id.*

125. Akaddaf, *supra* note 7, at 24

126. *Id.*

127. Kristin Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy to Refuse Enforcement of Non-Domestic Arbitration Awards*, 18 *FORDHAM INT’L L.J.* 920, 936 (1995).

128. *Id.* at 937.

129. *Id.* at 938.

130. This is the public order exception of the Convention.

131. Roy, *supra* note 127, at 954.

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*The Riyadh Convention for Judicial Cooperation (1983) and The Amman Arab Convention on Commercial Arbitration (1987).*

The Riyadh Convention is rarely used for international commercial arbitration. In fact, there is but one section (Article 37) of the Riyadh Convention that deals with arbitration.<sup>132</sup> The remainder of the Convention deals with judicial cooperation. With exceptions, member states are required to recognize and enforce judicial awards rendered by other member states without looking to the merits of the case.<sup>133</sup>

As for arbitration, the Convention precludes the recognition and enforcement of disputes against the government of a contracting state even, presumably, when the state is acting *de jure gestionis*.<sup>134</sup> The Convention permits the invocation of *Shariah* law against fellow signatory states. Hence, if a contracting state's arbitration award is deemed to be antithetical to *Shariah* dictates, that award need not be recognized by the "enforcing" court.<sup>135</sup> Recognition of an arbitration award by the court of the enforcing country requires the presentment of an *exequatur* from the court of the country where the award was made.<sup>136</sup> (The New York Convention has long since done away with the *exequatur* requirement.)

In April, 1987, thirteen Arab Ministers of Justice created the Amman Convention, which was to come into being once acceded to by at least seven states. The Convention went into effect in 1992 when eight states ratified the Convention. Since 1992, however, no other state represented at the creation of the Convention has ratified it.<sup>137</sup>

The Riyadh Convention applies to commercial disputes between any natural or juristic person, regardless of nationality, that is connected by means of commerce with any contracting government. Its provisions recognize the right of parties to agree to commercial arbitration through the placement of such clauses in contracts or after a dispute has arisen, and the courts of each member country must enforce any award unless "contrary to public order."<sup>138</sup>

Within the Riyadh Convention is the promise of the establishment of an

132. *Id.* at 788.

133. General Counsel's Office of the US Department of Commerce, *Overview of Commercial Law in Iraq*, Sept. 12, 2003, available at [http://www.export.gov/iraq/pdf/iraq\\_commercial\\_law\\_current.pdf](http://www.export.gov/iraq/pdf/iraq_commercial_law_current.pdf) [hereinafter *Overview of Commercial Law in Iraq*].

134. EL-AHDAB, *supra* note 38, at 791.

135. *Id.*

136. *Id.* at 793.

137. Jordanian Law and Arbitration Center, *Arbitration Under the 1987 Amman Convention* [www.lac.com.jo/news1-8.htm](http://www.lac.com.jo/news1-8.htm).

138. *Overview of Commercial Law in Iraq*, *supra* note 133.

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arbitration center in Rabat, Morocco. The Center has not yet become operative.<sup>139</sup> No commercial dispute has yet been settled nor even referred to Rabat since the Convention went into effect in 1992.<sup>140</sup>

There may be a bright spot. Rather than relying on a regional Convention, Bahrain developed its own regional arbitral center in 1993 in Manama. Of Bahrain as an arbitral center, Martin is rather encouraged, citing Bahrain's "relatively pro-ADR history . . . [since] Bahrain first set up arbitral tribunals in the 1930s to resolve commercial disputes."<sup>141</sup>

Carbonneau concurs, maintaining that Bahrain is, "the Arab state that appears to be most adapted to the Western view of international commercial arbitration."<sup>142</sup> He points out that Bahrain adopted the UNCITRAL Model Law; utilizes the Bahrain Centre for International Commercial Arbitration; and is a signatory to the New York Convention.<sup>143</sup>

There is, however, one troubling matter. Bahrain's accession to the New York Convention included the two standard reservations most countries adopt: reciprocity and public order. However, in its implementing legislation,<sup>144</sup> Bahrain maintained that it would execute New York Convention awards "as far as possible."<sup>145</sup> The legal question is, of course: what does that mean? In less than a glowing endorsement, the US Commerce Department advises business people that Bahrain's enforcement of foreign arbitration awards is "less problematic here than in most other GCC [Gulf Cooperation Council] states."<sup>146</sup>

Dubai, likewise, has attempted to lure commercial arbitration to its International Arbitration Center which opened in 1994.<sup>147</sup> Bahrain and Dubai should be lauded for their attempts to broaden the umbrella under which international arbitration

139. The convention is in French as *Convention Arabe D'Amman Sur L'Arbitrage Commercial (1987)*, available at <http://www.jus.uio.no/lm/arab.l.arbitrage.commercial.convention.1987>.

140. *Overview of Commercial Law in Iraq*, *supra* note 133.

141. Julia Martin, *Arbitrating in the Alps Rather than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution*, 49 STAN. L. REV. 917, n. 361(1997).

142. Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 795 (2002).

143. *Id.*

144. *The Accession by the State of Bahrain to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958* (June 4, 1988).

145. *Id.* The legislation also provided that Bahrain's accession did not constitute recognition of Israel.

146. US Dept. of Commerce, *Investment Climate*, [http://arabchamber.com/arab-countries/bahrain/G/investment\\_climate.htm](http://arabchamber.com/arab-countries/bahrain/G/investment_climate.htm), (last visited Nov. 23, 2006).

147. Int'l Arbitration Center, [http://www.freezonesuae.com/international\\_arbitration\\_center.htm](http://www.freezonesuae.com/international_arbitration_center.htm) (last visited Nov. 23, 2006).



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will be conducted in their respective countries. But, until they earn a reputation in the international commercial world as a quality venue for enforcement, their short term utility is likely to be for domestic commercial arbitration only.

## Conclusion

It is anomalous that modern commercial arbitration in the Islamic Middle East stands in stark contrast to the endorsements given to arbitration by both the Prophet and the *Shariah*. If blessed by the Prophet and by the *Shariah*, the vigorous utilization and enforcement of international commercial arbitration does not represent apostasy; rather the practice appears to be doctrinally inconsistent with religious principles.

The Koran, it appears, provides no rules regarding arbitration, rather it seems to provide guidance and direction toward the use of arbitration. Where Koranic doctrine is explicit, religious tolerance must let the *Shariah* rule for the believer. However, if there is a doctrinal void or doctrinal gap as to the use of commercial arbitration, the use of international private law to fill the void or fill in the *lacunae* should be considered by Middle Eastern commercial lawmakers. For example, Kuwait is considering the bifurcation of domestic civil law and international private law.

While the traditions of the past provide comfort to believers, it is imperative to be cognizant of the present state of the world. In an ever-shrinking commercial world, religion-civil bifurcation would be an attractive starting point to provide comfort to the commercial business world that there was legal determinacy in the Islamic Middle Eastern arbitral process.

There should be no expectation that national arbitration statutes and regional conventions be uniform or identical. After all, this article addresses the arbitral practices and difference of a number of states. However, Mallet's contentions should raise the eyebrows of foreign and Middle Eastern corporations. Deleterious procedural tactics in order to delay, prolong, or ignore the implementation of foreign arbitration awards is unacceptable in today's commercial world. It is in the best interests of all parties, that such practices be stopped in order to allow a more efficient regional and global economy.

No experienced businessperson would suggest that international arbitration is essential to dispute resolution. Commercial arbitration is, however, a well-recognized and vibrant method for international dispute resolution, as evidenced by the number of signatories to the New York Convention.

Fairness demands that there be an attestation to the respectable progress that has

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taken place in the Islamic Middle East regarding commercial arbitration. Again, not ascribing cure-all qualities to commercial arbitration, sound, cogent, workable commercial arbitration laws can reach beyond the legalities of dispute resolution. Such laws can represent an important factor in the international commercial relations between states. It takes little business acumen to ascertain whether an investor will put money into a country or region wherein implementation of the New York Convention is robust or into a country or region wherein implementation of the Convention is either lukewarm or lethargic. Regrettably, current oil prices might very well generate a “who cares” attitude from a state confronted with the potential loss of broad foreign investment due to its dispute resolution mechanisms.

One need not be a lyrical optimist to be sanguine about the future prospects for commercial arbitration in the Islamic Middle East. Currently, the “developed” world needs Middle Eastern oil and the prospects of international “arm twisting” are unlikely. However, the day will inevitably come when mutual commercial interests will intertwine and become so interdependent that international private law and Islamic law will stand where neither dominates the other; this day will be predicated on a mutual respect and understanding for each body of law, including its historical foundations and modern application.