

10-1-1992

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Recommended Citation

Paul E. Pompeo, *East Meets West: A Comparison of Government Contract Dispute Resolution in the Common Law and Islamic Systems*, 14 Loy. L.A. Int'l & Comp. L. Rev. 815 (1992).

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East Meets West: A Comparison of Government Contract Dispute Resolution in the Common Law and Islamic Systems

PAUL E. POMPEO*

I. INTRODUCTION

In general terms, the process for contracting with the government consists of solicitation, award, and performance. Often during the performance phase, however, some unanticipated events will occur, and, absent a specific risk allocation clause, will require a procedure for dispute resolution.¹ As international transactions become more prevalent, the government contractor must understand the methods of dispute resolution from an international perspective.² Accordingly, government contractors must be versed in the available methods of dispute resolution.

This Article addresses government contract dispute resolution in the international context. Specifically, it surveys and compares dispute resolution in two legal systems³: the common law system⁴ and

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1. See JOHN CIBINIC, JR. & RALPH C. NASH, JR., *ADMINISTRATION OF GOVERNMENT CONTRACTS* 178 (2d ed. 1986) (discussing the concept of risk allocation).

2. K. Barry Marvel, *Dispute Resolution in International Contracts*, *CONT. MGMT.*, Mar. 1991, at 22, 24.

3. This Article does not include a discussion of civil law or Roman-Dutch law. Generally, under the civil law system as in France, barring negotiation, disputes are settled in the administrative courts. See Claude Goldman, *An Introduction to the French Law of Government Procurement Contracts*, 20 *GEO. WASH. J. INT'L L. & ECON.* 461, 487 (1987). In Belgium, however, contractors have the option to present their cases before the High Committee for Control. Royal Decree of July 29, 1970 (Rules of Procedure for the High Committee for Control). See Johan Verbist, *Government Procurement Law and Procedure of Belgium*, 21 *GEO. WASH. J. INT'L L. & ECON.* 5, 24 (1987).

4. Representative countries of the common law system discussed herein are Canada, the United Kingdom, and the United States of America.

the Islamic system.⁵ Discussed herein are such issues as sovereign immunity; contrasting principles of contract law; the methods of dispute resolution available in specific countries,⁶ both formal and informal; and a comparison of the approaches the two legal systems take regarding contract performance dispute resolution.⁷ This Article concludes that no fundamental difference exists between the legal systems; in fact, most differences exist within the same legal system. Nevertheless, a contractor's level of risk will be diminished to the extent that there will always be some means to redress any potential government contract performance dispute.

II. SOVEREIGN IMMUNITY

The first roadblock a contractor faces when seeking redress from a government during a contract dispute is the government's claim of sovereign immunity.⁸ Under the doctrine of sovereign immunity, a government may claim immunity from suit.⁹ If the government claims such immunity, the contractor has no means to pursue a claim against the government.¹⁰

5. Representative countries of the Islamic system discussed herein are the Sultanate of Oman, the Kingdom of Saudi Arabia, and the United Arab Emirates.

6. Discussion is limited to the national or federal level rather than local level of government.

7. This Article restricts itself to contract performance dispute resolution and does not address contract formation dispute resolution procedures. The scope of this Article is intra-national contracting, and it does not address international arbitration. Nor does this Article address contract performance dispute resolutions of international agreements. It is noteworthy that, to date, the European Community has not developed dispute resolution procedures in its government procurement code.

8. RALPH C. NASH, JR. & JOHN CIBINIC, JR., *FEDERAL PROCUREMENT LAW* 104 (2d ed. 1969).

9. See generally *id.* at 104-13 (discussing sovereign immunity as it applies to government contracts in the United States); Clark Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1484-93 (1962); Georges R. Delaume, *State Contracts and Transnational Arbitration*, 75 AM. J. INT'L L. 784, 786-87 (1981).

10. In *Beers v. Arkansas*, 61 U.S. 527 (1857), the United States Supreme Court held that the doctrine of sovereign immunity "is an established principle of jurisprudence in all civilized nations." *Id.* at 529.

The doctrine of sovereign immunity is prevalent in the common law system.¹¹ This doctrine traces back to England,¹² where the King could not be sued without his consent.¹³ There are several reasons for this doctrine: the King could do no wrong;¹⁴ it would be absurd to direct the King to appear in his own court;¹⁵ the King would be degraded by appearing in the courts of his creation;¹⁶ being subjected to repeated suits would "endanger the performance of the public duties of the sovereign;"¹⁷ and "there can be no legal right as against the authority that makes the law on which the right depends."¹⁸ Courts must strictly construe any waiver of immunity and cannot imply a sovereign's consent to suit.¹⁹

Although the common law doctrine of sovereign immunity is based on the existence of a monarchy, the rule has survived in the common law republics.²⁰ However, most common law countries allow an exception for government contractors by statute. For example, the United States' Contract Disputes Act,²¹ Canada's Federal Courts Act,²² and the United Kingdom's Crown Proceedings Act of

11. However, according to the Secretary of the Procurement Review Board of Canada, sovereign immunity is not an issue in Canada, a common law country. Interview with Jean Archambault, Secretary of the Procurement Review Board of Canada (Nov. 26, 1990) [hereinafter Archambault Interview]; see also *Windsor & Annapolis Ry. v. The Queen*, 10 S.C.R. 335 (Can. 1885), *varied*, 11 App. Cas. 607 (P.C. 1886).

12. The doctrine has existed since at least the time of King Edward I. *United States v. Lee*, 106 U.S. 196, 205 (1882).

13. *Id.*; *Manshul Constr. Corp. v. United States*, 687 F. Supp. 60 (E.D.N.Y. 1988). Under international law, a sovereign may consent explicitly or may implicitly waive immunity from suit by submitting to arbitration. Delaume, *supra* note 9, at 786-87.

14. *Manshul Constr. Corp.*, 687 F. Supp. at 60. The maxim that the King could do no wrong has been explained to mean that "the King has no legal power to do wrong." H.W.R. WADE, *ADMINISTRATIVE LAW* 809 (4th ed. 1977).

15. *Lee*, 106 U.S. at 206.

16. *Id.*

17. *Id.*

18. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

19. *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

20. In fact, Justice Gray of the United States Supreme Court contended that the doctrine is not limited to a monarchy but applies equally to republics. *Lee*, 106 U.S. at 226 (Gray, J., dissenting).

21. 41 U.S.C. §§ 601-13 (1988). The United States first made an exception to the rule of sovereign immunity for contracts in 1855 when Congress established the Court of Claims. In 1887, Congress enacted the Tucker Act, enlarging the jurisdiction of the Court of Claims to allow judgment on a claim against the government, rather than mere recommendation of disposition to Congress. NASH & CIBINIC, *supra* note 8, at 104-13 (discussing the history of sovereign immunity in the government contracts arena in the United States).

22. R.S.C., ch. F-7, § 17 (1985) (Can.). *But see supra* note 11 (sovereign immunity had already been abolished by common law).

1947²³ all grant jurisdiction for claims against the respective governments under contract.

While the doctrine of sovereign immunity in the common law system arose from a monarchy, in the Islamic system, which predominates with monarchies,²⁴ no such principle exists.²⁵ The Shari'ah, the basis of Islamic law,²⁶ does not accept the view that the King can do no wrong.²⁷ In fact, Islamic law praises a King who appears on equal footing with his opponent before a judge and abides by the decision of the court.²⁸ Jurisdiction for suits against the government in contract disputes is nevertheless codified in the Islamic system. For example, in the Kingdom of Saudi Arabia ("Saudi Arabia") jurisdiction is codified by the Board of Grievances Law,²⁹ in the Sultanate of Oman ("Oman") by the Rules for Hearing Lawsuits and Arbitration Requests Before the Authority for the Settlement of Commercial Disputes,³⁰ and in the United Arab Emirates ("U.A.E.") by the Provisional Constitution.³¹

III. COMMON LAW NATIONS

A. *The Common Law System*

The common law has been described as "a system which consisted in applying to new combinations of circumstances those rules

23. 10 & 11 Geo. 6, ch. 44 (Eng.), reprinted in 13 HALSBURY'S STATUTES 16-48 (4th ed. 1985). The first effective means of suing the British government, the Crown, in contract was through the Petition of Rights Act of 1860. WADE, *supra* note 14, at 810 (citing the landmark decision of *Thomas v. The Queen*, 10 Q.B. 31 (Eng. 1874)).

24. For example, of the three Islamic nations discussed herein, one is a Kingdom and another a Sultanate.

25. Saleh Enani, Public Contract Disputes in Saudi Arabia 9 n.19 (May 1988) (on file with the George Washington University Government Contracts Program Library); Ismail S. Nazer, *Shari'a Law and Its Commercial Application*, MIDDLE EAST EXECUTIVE REP., Sept. 1979, at 2, 18; *Judicial Authority and the Court System of Saudi Arabia*, MIDDLE EAST EXECUTIVE REP., Sept. 1979, at 2, 16 [hereinafter *Judicial Authority*].

26. A thorough discussion of the Islamic legal system appears later in this Article. See *infra* notes 201-219 and accompanying text.

27. Enani, *supra* note 25, at 9 n.19.

28. *Id.*

29. Royal Decree No. M/51 (May 10, 1982), translated in MIDDLE EAST EXECUTIVE REP., Nov. 1982, at 26-29.

30. Royal Decree No. 32/84, translated in 7 ALLEN P.K. KEESEE, COMMERCIAL LAWS OF THE MIDDLE EAST: OMAN 1 (Mar. 1986).

31. U.A.E. PROVISIONAL CONST., translated in 6 ALLEN P.K. KEESEE, COMMERCIAL LAWS OF THE MIDDLE EAST 46 (Mar. 1984).

which we derived from legal principles and judicial precedents.'"³² In other words, common law abides by the rule of *stare decisis*. Once a precedent has been established, jurists will adhere to the principle and apply it to future cases with like facts.

The common law finds its genesis in England, and, thus, the law of contracts is generally a product of the English courts.³³ Contract law in common law systems developed through the application of general principles as molded by the needs of society, commencing with agrarian, feudal England to the modern commercial era.³⁴ The law of contract, therefore, is evolving and each contract dispute contributes to the development of modern day contract law.³⁵ Common law essentially is judge-made law,³⁶ requiring a review of decisions in order to determine the principles.³⁷ Judges apply these principles to subsequent cases containing identical or analogous circumstances so that like circumstances will receive a common resolution.

It is impossible to summarize all of the common law principles of contract in this Article. Even the more narrow body of government contract law is too mammoth to encapsulize.³⁸ Such an endeavor would require multiple volumes of text.³⁹ Suffice it to say, a fundamental principle is the freedom to contract. Parties are at liberty to design independently the promises to which they are bound, so long as such promises are not illegal. A party may break its promise, but must accept the consequences of such breach.

To some extent, the common law system has codified its contract principles. However, such statutes were not enacted until the late nineteenth century.⁴⁰ These statutes address specific principles and

32. HERBERT J. LIEBESNY, *FOREIGN LEGAL SYSTEMS: A COMPARATIVE ANALYSIS* 256 (4th ed. 1981) (quoting M.C. SETALVAD, *THE COMMON LAW IN INDIA* 48 (2d ed. 1970)).

33. ANSON'S *LAW OF CONTRACTS* 1 (A.G. Guest ed., 1979).

34. *Id.* at 1-18 (discussing the history of English contract law).

35. 1 HOWARD O. HUNTER, *MODERN LAW OF CONTRACTS: BREACH AND REMEDIES* 1-2 n.2 (1986).

36. See Hanns Hohmann, *The Nature of the Common Law and the Comparative Study of Legal Reasoning*, 38 *AM. J. COMP. L.* 143, 146 (1990) (characterizing the common law judge as a legislator).

37. ANSON'S *LAW OF CONTRACTS*, *supra* note 33, at 17-18.

38. In the United States, unlike Canada and the United Kingdom, there is a body of government contract law separate from commercial contract law, although it developed under the common law system.

39. For example, the eminent treatise on common law contracts, WILLISTON ON CONTRACTS, consists of eighteen volumes. See SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* (Walter H.E. Jaeger ed., 3d ed. 1957).

40. ANSON'S *LAW OF CONTRACTS*, *supra* note 33, at 17-18.

do not cover the entire body of law.⁴¹

B. Canada

1. Legislation

Canada has specific public procurement legislation.⁴² However, this legislation does not directly address contract performance dispute resolution. Only the Federal Courts Act addresses the resolution of government contract disputes.⁴³ The Act grants "exclusive original jurisdiction" to the Trial Division of the Federal Court "in all cases in which . . . the claim arises out of a contract entered into by or on behalf of the Crown."⁴⁴ Therefore, a contractor may sue the Canadian government alleging failure of performance without other special statutory authorization.

However, because the Act refers specifically to "relief . . . claimed against the Crown,"⁴⁵ it does not apply to government claims against the contractor. To remedy this situation, the Act also provides "concurrent original jurisdiction" in the Trial Division of the Federal Court "in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief."⁴⁶ This broad language allows a government claim arising from a contract dispute.

2. Informal Dispute Resolution

Two main sources of Canadian government contract policy are the Treasury Board Manual ("TBM"),⁴⁷ which contains a volume devoted to government contracts, and the Department of Supply and Services ("DSS") Supply Policy Manual.⁴⁸ Each manual contains dispute resolution policies.

41. The Uniform Commercial Code ("U.C.C.") in the United States is one of the most comprehensive endeavors in the codification of common law contract principles. However, the U.C.C. is sufficiently ambiguous to engender a great deal of case law. HUNTER, *supra* note 35, at 1-3. Moreover, the U.C.C. does not encompass the entire body of the common law of contract.

42. See, e.g., Defence Production Act, R.S.C., ch. D-1 (1985) (Can.); Public Works Act, R.S.C., ch. P-38 (1985) (Can.); Department of Supply and Services Act, R.S.C., ch. 5-25 (1985) (Can.).

43. R.S.C., ch. F-7 (1985) (Can.).

44. *Id.* § 17(a)(b).

45. *Id.* § 17(1).

46. *Id.* § 17(5)(a).

47. TREASURY BOARD MANUAL, INFORMATION AND ADMINISTRATIVE MANAGEMENT: CONTRACTING (1989).

48. DEPARTMENT OF SUPPLY AND SERVICES SUPPLY POLICY MANUAL (1984) [hereinafter DSS MANUAL].

The TBM articulates the government's fundamental policy of "expeditious handling" of disputes.⁴⁹ Recognizing that litigation prolongs a contract dispute, the government recommends litigation only as a last resort.⁵⁰ Consequently, the TBM emphasizes informal dispute resolution such as negotiation, mediation, and arbitration,⁵¹ in that order. Thus, if negotiations fail, third party mediation should ensue.⁵²

The TBM establishes three principles of mediation. First, each party should volunteer to mediate.⁵³ Second, the mediator's power should be persuasive rather than adjudicative.⁵⁴ Third, the parties should share the cost of mediation.⁵⁵ Demonstrative of the government's earnest attempt to employ mediation is the TBM's inclusion of a standard mediation agreement.⁵⁶

Arbitration represents the final mode of informal dispute resolution. Because arbitration is so similar to litigation, the TBM has established stringent requirements for its use. For example, questions must be limited to factual inquiries. Further, a government agency may not engage in binding arbitration without the approval of the Department of Justice.⁵⁷

In contrast, the DSS Supply Policy Manual contains General Conditions for contracts but no disputes clause.⁵⁸ Instead, the Supply Policy Manual provides a Directive that contains guidelines and pro-

49. TREASURY BOARD MANUAL, *supra* note 47, § 12.8.1.

50. *Id.* § 12.8.6.

51. This scheme for alternative dispute resolution resembles that suggested by the rules of the United States Claims Court and the Department of Transportation Board of Contract Appeals. See, e.g., Board of Contract Appeals, 48 C.F.R. § 6301 (1991); see also *infra* notes 152-64 and accompanying text.

52. TREASURY BOARD MANUAL, *supra* note 47, § 12.8.4.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* app. M.

57. *Id.* § 12.8.5.

58. In fact, no standard dispute provision exists. Archambault Interview, *supra* note 11; Telephone Interview with Raymond Wayne, Chairman of the Contract Settlement Board of Canada (Apr. 4, 1991) [hereinafter Wayne Interview]; see also GENERAL CONDITIONS OF GOVERNMENT CONTRACTS FOR BUILDING AND CIVIL ENGINEERING WORKS (2d ed. 1977) [hereinafter GENERAL CONDITIONS]; cf. Wayne D. Barton & Richard G. Ungar, *Government Procurement in Canada*, 21 GEO. WASH. J. INT'L L. & ECON. 27, 47-50 (1987).

The Special Powers of Determination clause, the equivalent of the United States' Termination for Convenience clause, provides that the contractor may report to the Authority any hardship caused by termination. The Authority makes a final and conclusive determination of the matter. GENERAL CONDITIONS, *supra* note 58, § 44.

cedures for dispute resolution.⁵⁹ Unlike the TBM, the DSS Supply Policy Manual Directive offers guidance in defending a contract claim. For example, the Directive advises a contract administrator to monitor the contract for potential claims. It further recommends that if a claim seems likely, the administrator should demand continued performance of the contract, and record any disagreements with thorough documentation.⁶⁰ Should a claim arise, the DSS suggests an approach to resolution different than that in the TBM. Claims should be handled by the Contract Settlement Board ("CSB").⁶¹

3. Dispute Resolution Fora

a. *The Contract Settlement Board*

The CSB is a forum created by the DSS to resolve contract performance disputes.⁶² The CSB enjoys no legal status in that no statute authorizes its function.⁶³ The CSB offers a procedure more formal than traditional alternative dispute resolution methods such as negotiation, mediation, and arbitration, yet not as formal as litigation.

Use of the CSB is voluntary, and it is employed for the parties' convenience.⁶⁴ A contractor may submit a claim to the CSB any time during performance, or upon completion of a contract.⁶⁵ The claim should include a discussion of the government's legal obligations.⁶⁶ The CSB's Secretary consults with the parties and recommends a ruling to the CSB.⁶⁷ At that point, the parties may request an informal meeting before the CSB, but the parties may not introduce new evidence.⁶⁸ The CSB considers the competing claims and issues a writ-

59. See DEPARTMENT OF SUPPLY AND SERVICES, SUPPLY POLICY MANUAL, Directive No. 6507 (Nov. 30, 1979) [hereinafter Directive].

60. *Id.* at 3.

61. See *infra* notes 62-76 and accompanying text.

62. The CSB does not have jurisdiction over pre-award disputes. Pre-award jurisdiction belongs to the Procurement Review Board of Canada ("PRB"). The PRB is a product of the United States-Canada Free Trade Agreement, and became an effective entity on January 1, 1989. Free Trade Agreement, Dec. 22 & 23, 1987 & Jan. 2, 1988, U.S.-Can., ch. 13, 27 I.L.M. 293 (1988).

63. Barton & Ungar, *supra* note 58, at 51; Archambault Interview, *supra* note 11. Therefore, the CSB is different from the Boards of Contract Appeals in the United States, which are established by statute, and enjoy legally binding decisions and appeals to the federal court system. Contract Disputes Act, 41 U.S.C. §§ 601-13 (1988).

64. Archambault Interview, *supra* note 11.

65. Directive, *supra* note 59, § 12.

66. *Id.* § 14.

67. Wayne Interview, *supra* note 58.

68. *Id.*

ten conclusion, including a recommendation for settlement.⁶⁹ However, if the CSB recommends that the government pay the additional costs incurred by the contractor, or pay because the government was clearly at fault, the Assistant Deputy Minister of Corporate Management Service must concur with the recommendation.⁷⁰

Once rendered, the decision of the CSB binds the government, but not the contractor.⁷¹ Accordingly, the contractor may pursue litigation, provided there is no signed settlement agreement waiving that right.⁷² Even so, a contractor may not pursue both methods of resolution simultaneously. Thus, a contractor may not issue a writ for court and also present its case before the CSB.⁷³

The CSB's efficacy is limited because government contracts do not contain a disputes clause, and no contractual provision mentions filing a CSB claim.⁷⁴ Consequently, many contractors are unaware of the CSB's existence.⁷⁵ Practically speaking, the Contracting Officer often recommends dispute resolution through the CSB.⁷⁶

b. Federal Court

The Trial Division of the Federal Court has original jurisdiction over government contract claims.⁷⁷ In fact, contractors frequently resort to the Federal Court for dispute resolution, rather than the CSB.⁷⁸ The Federal Court represents a national court system. Although the Court sits in Ottawa, judges will preside over hearings at other locations if it is more convenient for the parties.⁷⁹ The Federal Court provides a common law trial. Further, the statute requires that "[a]ll causes or matters before the Court shall be heard and determined without a jury."⁸⁰

69. Directive, *supra* note 59, §§ 18-23. The CSB consists of seven members. Wayne Interview, *supra* note 58.

70. Directive, *supra* note 59, §§ 24(c)(1)-(4).

71. Wayne Interview, *supra* note 58.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. See *supra* notes 44-46 and accompanying text.

78. Archambault Interview, *supra* note 11; see also *supra* note 74 and accompanying text.

79. Federal Courts Act, R.S.C., ch. F-7, § 16 (1985) (Can.); cf. *infra* note 178 (similar convenience provided in the United States' system).

80. *Id.* § 49. This procedure comports with the United States' traditional government contract resolution procedure, in which neither the Boards of Contract Appeals nor the United States Claims Court provides a jury trial.

No specific body of government contract law exists. At trial, therefore, the judge applies the common law of contract "of the Province in which the cause of action arose."⁸¹ Should the government be found liable, only money damages may be awarded for the breach; the government will not be subject to specific performance or an injunction.⁸² Additionally, the Federal Court system does not award interest on a claim against the government.⁸³ The government may appeal a damage award to the Federal Court of Appeals and, ultimately, to the Supreme Court of Canada.⁸⁴

C. United Kingdom

1. Legislation

The United Kingdom has no legislation in the area of government procurement.⁸⁵ Authority for a suit by or against the government rests in the Crown Proceedings Act ("CPA") of 1947.⁸⁶ The CPA applies to England, Scotland, and Northern Ireland,⁸⁷ and provides a person the right to enforce a claim against the Crown.⁸⁸ However, public corporations have no government immunity and are subject to ordinary law.⁸⁹ The provisions of the CPA are broad and, unlike the Federal Courts Act in Canada, do not specifically enumer-

81. *Bartlett v. Osterhout*, 11 C.E.D. (West. 3d) 212 n.54 (1990).

82. This is by virtue of Proceedings Against the Crown Acts promulgated by each of the Provinces. *See, e.g.*, 8 C.E.D. (Ont. 3d) §§ 337, 338 (1975).

83. Federal Courts Act, R.S.C., ch. F-7, § 36 (1985) (Can.). Consequently, the contract must provide for pre-judgment interest. *Barton & Unger, supra* note 58, at 48. However, if Provincial law permits interest, then it may be granted. *E.g.* 8 C.E.D. (Ont. 3d) § 320 (1975). In contrast, the United States specifically provides for pre-judgment interest at least in terms of the filing of an initial claim with a contracting officer. Contract Disputes Act, 41 U.S.C. § 611 (1988).

84. Federal Courts Act, R.S.C., ch. F-7, §§ 27, 31 (1985) (Can.). For a discussion of the Federal Court rules, see R.S.C., ch. 50, §§ 22-27 (Can.); *see also* 8 C.E.D. (Ont. 3d) §§ 344-352 (1975).

85. *See* Alfred H. Blyth, *Government Procurement in the United Kingdom*, 21 GEO. WASH. J. INT'L L. & ECON. 127 (1987) [hereinafter Blyth, *Government Procurement*]; Alfred H. Blyth, *United Kingdom Government Contracts: Resolution of Disputes*, 1985 A.B.A. SEC. PUB. CONT. L. REP. 44, 53 [hereinafter Blyth, *Resolution of Disputes*].

86. Crown Proceedings Act, 1947, 10 & 11 Geo. 6, ch. 44 (Eng.), *reprinted in* 13 HALSBURY'S STATUTES 16-48 (4th ed. 1985).

87. *Id.* § 52.

88. *Id.* § 1. The main substantive section addresses a "claim against the Crown"; however, other provisions refer to proceedings instituted by or against the Crown. *Id.* §§ 13, 15; *see also* WADE *supra* note 14, at 808, 821.

89. *See, e.g.*, *British Broadcasting Corp. v. Johns*, [1965] 1 Ch. 32 (C.A.). A statute may provide the corporation with immunity from suit, though. WADE, *supra* note 14, at 169.

ate breach of contract as a cause of action.⁹⁰ Each party may file a claim in either the County Court or the High Court.⁹¹

The Standard Conditions of Government Contracts subject all contracts to English law.⁹² Accordingly, government contract disputes in the United Kingdom are resolved according to the common law and the codification of common law principles.⁹³

2. Informal Dispute Resolution

All government contracts, except those of nominal value,⁹⁴ contain the standard Arbitration Clause.⁹⁵ The Clause is strict and all encompassing, and provides that, other than issues determined by the Review Board for Government Contracts ("Review Board"),⁹⁶

all disputes, differences or questions between the parties to the Contract with respect to any matter or thing arising out of or relating to the Contract, other than a matter or thing as to which the decision of the Authority is under the Contract to be final and conclusive and except to the extent to which special provision for arbitration is made elsewhere in the Contract, shall be referred to the arbitration of two persons, one to be appointed by the Authority and one by the Contractor, or their Umpire, in accordance with the provisions of the Arbitration Act, 1950, or any statutory modification or re-enactment thereof.⁹⁷

This Clause virtually requires parties to arbitrate. Under the Arbitration Act, the arbitrators must select an umpire to make a final decision in case of a deadlock.⁹⁸ The arbitrator's decision is binding on the parties,⁹⁹ and is enforced like a court judgment.¹⁰⁰ Because arbitration is costly and time consuming, it is rare for parties to refer

90. Suits under contract effectively are incorporated into the CPA by the rules of the County Court and High Court. County Courts Act, 1984, ch. 28, § 15 (Eng.); Supreme Court Act, 1981, ch. 54 (Eng.).

91. Crown Proceedings Act, 1947, 10 & 11 Geo. 6, ch. 44, §§ 13, 15 (Eng.), *reprinted in* 13 HALSBURY'S STATUTES 16-48 (4th ed. 1985).

92. Standard Conditions of Government Contracts for Stores Purchases (Form GC/STORES/1) ¶ 29 (1979) [hereinafter Standard Conditions]. Paragraph 29(a) of the Standard Conditions subjects the contract to Scots law.

93. *See, e.g.*, Sale of Goods Act, 1979, ch. 54 (Eng.).

94. Blyth, *Resolution of Disputes*, *supra* note 85, at 67.

95. Standard Conditions, *supra* note 92, ¶ 30. Paragraph 30(a) of the Standard Conditions is effective if Scots law applies.

96. *See infra* notes 105-118 and accompanying text.

97. Standard Conditions, *supra* note 92, ¶ 30.

98. Arbitration Act, 1950, ch. 42, § 8 (1950) (Eng.).

99. *Id.* § 16.

100. *Id.* § 26.

disputes to arbitration.¹⁰¹ Therefore, the option to arbitrate provides leverage for negotiation and encourages negotiation as a means of dispute resolution.¹⁰²

The Arbitration Clause also provides certain exceptions from arbitration. Among these are contracts which include provisions that render the decision of the Authority final and conclusive. Further, arbitration is not required when the contractor includes claims of hardship arising from the government's termination of the contract,¹⁰³ or because of national security reasons.¹⁰⁴ Arbitration will also not be required for those disputes referred to the Review Board.

3. Dispute Resolution Fora

a. *The Review Board for Government Contracts*

In 1968, the United Kingdom, in conjunction with the Confederation of British Industry ("CBI"), established the Review Board.¹⁰⁵ The Review Board consists of a government appointed Chair and four members; the government and the CBI each appoint two members.¹⁰⁶ The Review Board's function is to review and rule on "[g]overnment profit formula risk contracts or sub-contracts,"¹⁰⁷ upon the request of either party.¹⁰⁸

The issues that the Review Board may rule on are limited. The Review Board may only review a contract where the profit exceeds 27.5% of capital employed, after post-costing, or a loss of 15% of

101. Blyth, *Government Procurement*, *supra* note 85, at 144; Blyth, *Resolution of Disputes*, *supra* note 85, at 69.

102. Blyth, *Government Procurement*, *supra* note 85, at 144; Blyth, *Resolution of Disputes*, *supra* note 85, at 69.

103. Standard Conditions, *supra* note 92, ¶ 56(1).

104. *Id.* ¶ 59.

105. Memorandum of Agreement between her Majesty's Government and the Confederation of British Industry covering the establishment of the Review Board for Government contracts, its functions and related matters [hereinafter Memorandum of Agreement], *reprinted in* AMERICAN BAR ASSOCIATION SECTION OF PUBLIC CONTRACT LAW, THE LONDON TRANSCRIPT: A COMPARATIVE LOOK AT PUBLIC CONTRACTING IN THE UNITED STATES AND THE UNITED KINGDOM (Full Proceedings of the A.B.A. Section of Public Contract Law Meetings in London, England on July 14-16, 1971) I-44 through I-49 (Colin C. Turpin & John W. Whelan eds., 1973) [hereinafter LONDON TRANSCRIPT].

106. *Id.* ¶ 5.

107. *Id.* ¶ 13. Aside from the limitations discussed in the text, the contract must also contain Standard Condition 48, Availability of Information, which allows the government to perform a post-costing investigation. Standard Conditions, *supra* note 92, ¶ 48. The contract price must also be based on estimates and not actual costs. Blyth, *Government Procurement*, *supra* note 85, at 142.

108. Memorandum of Agreement, *supra* note 105, ¶ 13.

capital employed, or where the "achievement of a fair and reasonable price for the [c]ontract was frustrated because the information on which it was based has proved materially inaccurate or incomplete."¹⁰⁹ In its ruling, the Review Board may alter the price.¹¹⁰

Although proceedings before the Review Board are informal, there are strict requirements that must be met in order for a party to appear before the Board. First, the contract must contain Standard Condition 50, which provides for referral to the Review Board.¹¹¹ After filing a written notice,¹¹² either party may refer the contract to the Review Board if it involves over £100,000.¹¹³ The parties must inform the Review Board about matters that require additional evidence.¹¹⁴ The Chair, along with one government and one CBI appointed member, examine the evidence and issue a written finding.¹¹⁵ The decision of the Review Board is final and conclusive.¹¹⁶ However, very few referrals are actually brought before the Review Board.¹¹⁷ This is due in part to the restrictions placed on post-costing and the fact that most post-costing disputes result in settlements.¹¹⁸

b. County Courts

Most disputes arising from government contracts are not resolved in court because of the Arbitration Clause in United Kingdom government contracts.¹¹⁹ However, the Arbitration Clause does not prohibit court action.¹²⁰ Nevertheless, a court may stay the proceeding if it determines the parties can resolve the dispute through arbitra-

109. *Id.* ¶¶ 16, 17; Standard Conditions, *supra* note 92, ¶ 50(3)(b). The issues upon which the Review Board rules resemble defective pricing issues in the United States, which are prohibited in the Truth in Negotiations Act, 10 U.S.C. § 2306a (1988).

110. Memorandum of Agreement, *supra* note 105, ¶ 13.

111. Standard Condition 50 largely restates the Memorandum of Agreement. Standard Conditions, *supra* note 92, ¶ 50.

112. *Id.* ¶ 18; see also Blyth, *Resolution of Disputes*, *supra* note 85, at 65.

113. Memorandum of Agreement, *supra* note 105, ¶ 15.

114. *Id.* ¶ 22(a). The Review Board may hold an informal hearing. Blyth, *Resolution of Disputes*, *supra* note 85, at 65.

115. Memorandum of Agreement, *supra* note 105, ¶ 22(c).

116. This is by virtue of an agreement within Standard Condition 50 that such decisions shall be final. Standard Conditions, *supra* note 92, ¶ 50(5)(a).

117. Blyth, *Resolution of Disputes*, *supra* note 85, at 66 (citing only seven referrals from the Review Board's creation to 1985).

118. *Id.*

119. Blyth, *Government Procurement*, *supra* note 85, at 144; Blyth, *Resolution of Disputes*, *supra* note 85, at 69.

120. Blyth, *Government Procurement*, *supra* note 85, at 144.

tion.¹²¹ Under the CPA, either party may file a claim in the County Courts.¹²² The County Courts' jurisdiction, however, as it affects government contracts, is limited to disputes under £25,000.¹²³ If the amount exceeds the statutory limit, a plaintiff may remain in the County Court only if the excess is waived.¹²⁴

The County Courts sit in districts,¹²⁵ which renders a trial more convenient to the parties. Trials are not heard before a jury unless by a court order after a party's request.¹²⁶ After a full trial, the court may render any form of relief other than an injunction or specific performance in a suit against the Crown.¹²⁷ However, the court may grant interest on a claim by or against the Crown.¹²⁸ On appeal, the Court of Appeal¹²⁹ may order a new trial or render judgment for either party.¹³⁰

c. High Court

The rules of the County Courts are applicable to the High Court as well. The High Court may sit anywhere in England and Wales,¹³¹ and provide a jury trial at its discretion.¹³² It may render any form of redress against the government, with interest,¹³³ except for an injunction or specific performance,¹³⁴ and a party may appeal to the Court of Appeal.¹³⁵ One distinctive feature of the High Court is that no jurisdictional threshold exists. Therefore, a litigant with a claim exceeding £25,000 has no choice but to file with the High Court. The High Court is divided into three divisions, with contract cases heard by the Queen's Bench.¹³⁶

121. See County Courts Act, 1984, ch. 28, § 64 (Eng.).

122. Crown Proceedings Act, 1947, 10 & 11 Geo. 6, ch. 44, §§ 15, 46 (Eng.).

123. County Courts Act § 15.

124. *Id.* § 17.

125. *Id.* §§ 1, 2(3).

126. *Id.* § 66.

127. Crown Proceedings Act § 21.

128. *Id.* § 24; County Courts Act § 69. Although awarding interest is discretionary, it is usually awarded, and is calculated from the date when the amount due should have been paid. *Panchaud Freres S.A. v. Pagnan & Fratelli*, [1974] 1 Lloyd's Rep. 394, 409 (C.A.).

129. County Courts Act § 77.

130. *Id.* §§ 77, 81.

131. Supreme Court Act, 1981, ch. 28, § 71 (Eng.).

132. *Id.* § 69.

133. *Id.*

134. Crown Proceedings Act § 21.

135. Supreme Court Act, 1981, ch. 28, § 16 (Eng.).

136. *Id.* § 5, schedule 1.

D. United States of America

1. Legislation

While the United Kingdom has little regulation over government contracts, the United States represents the other end of the spectrum.¹³⁷ Amid the plethora of legislation and regulation of government procurement are statutes that specifically address the resolution of government contract disputes. These include the Contract Disputes Act ("CDA"),¹³⁸ the Federal Courts Improvement Act,¹³⁹ the Tucker Act,¹⁴⁰ and the Administrative Dispute Resolution Act.¹⁴¹

The CDA, the main statute governing contract disputes, has restructured the dispute resolution process.¹⁴² The CDA grants jurisdiction to the Boards of Contract Appeals ("BCAs") and the United States Claims Court for claims against both the government and the contractor.¹⁴³ The CDA specifically defines the government to include wholly-owned government corporations, as well as the Postal Service.¹⁴⁴ Before the BCA or the Claims Court will grant an appeal, the contracting officer must make a final decision within a reasonable time.¹⁴⁵

Additionally, a contractor asserting a claim exceeding \$50,000 against the government must certify to the contracting officer that "the claim is made in good faith, that the supporting data are accurate and complete to the best of [the contractor's] knowledge and belief, that the amount requested accurately reflects the contract adjustment

137. Among the numerous statutes and regulations governing the area of government contracts in the United States are the Truth in Negotiations Act, 10 U.S.C. § 2306a (1988), the Brooks Act, 40 U.S.C. § 759 (1988), the Buy American Act, 41 U.S.C. § 10a (1988), the Equal Access to Justice Act, 5 U.S.C. § 504 (1988), and the Federal Acquisition Regulation, 48 C.F.R. §§ 1-99 (1990). In fact, the entirety of Title 41 of the United States Code is dedicated to public contracts.

138. 41 U.S.C. §§ 601-13 (1988).

139. Pub. L. No. 97-164, 96 Stat. 25 (1982).

140. 28 U.S.C. §§ 1346, 1491 (1988).

141. Pub. L. No. 101-552, 104 Stat. 2736 (1990).

142. The standard Disputes Clause restates the CDA. 48 C.F.R. § 52.233-1 (1991).

143. 41 U.S.C. §§ 605, 607, 609 (1988). Under the Federal Courts Administration Act of 1992, section 902, the name of the United States Claims Court changed to the United States Court of Federal Claims, effective October 29, 1992. Accordingly, all references in this Article to the Claims Court are deemed to be to the Court of Federal Claims (at the time of publication of this Article, a public law number had not yet been assigned to this act).

144. *Id.* § 601(2); *cf.* WADE *supra* note 14, at 165 (discussing the Post Office Act of 1969, which made the British Post Office a public corporation); *see also supra* note 88 and accompanying text; *British Broadcasting Corp. v. Johns*, [1965] 1 Ch. 32 (C.A.) (British public corporations are subject to ordinary law).

145. 41 U.S.C. § 605 (1988).

for which the contractor believes the government is liable and that the certifier is duly authorized to certify the claim on behalf of the contractor."¹⁴⁶ Prior to October 29, 1992, failure to certify properly deprived the contracting officer, BCAs, and Claims Court the jurisdiction to hear the claim.¹⁴⁷

The Tucker Act does not allow a claim against the contractor, and, unlike the CDA, is not comprehensive.¹⁴⁸ The Tucker Act was the first waiver of sovereign immunity in the area of government procurement in the United States.¹⁴⁹ In its present form, the Tucker Act gives the Claims Court "jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."¹⁵⁰ As for the United States District Courts, the Tucker Act provides jurisdiction for an

action or claim against the United States, not exceeding \$10,000 in amount, founded . . . upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of [such actions] which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978.¹⁵¹

2. Informal Dispute Resolution

The policy of the United States government is to encourage informal dispute resolution through mutual agreement.¹⁵² In fact, government regulation requires the contracting officer to "consider the use of informal discussions between the parties by individuals who have not participated substantially in the matter in dispute to aid in resolving the differences."¹⁵³

In order to resolve disputes quickly, many tribunals issue orders and regulations that give notice to filing parties that alternative dis-

146. *Id.*, amended by Federal Courts Administration Act of 1992, § 907(a) (Oct. 29, 1992).

147. *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586 (Fed. Cir. 1987); *Tecom, Inc. v. United States*, 732 F.2d 935 (Fed. Cir. 1984). *But see* Federal Courts Administration Act of 1992, § 907(a) (Oct. 29, 1992).

148. *Compare* 28 U.S.C. §§ 1346, 1491 *with* 41 U.S.C. §§ 601-13.

149. *NASH & CIBINIC*, *supra* note 8, at 105-06; *CIBINIC & NASH* *supra* note 1, at 944.

150. 28 U.S.C. § 1491 (1988).

151. *Id.* § 1346.

152. 48 C.F.R. § 33.204 (1991).

153. *Id.*

pute resolution ("ADR") procedures are available.¹⁵⁴ Recommended ADR procedures include a settlement judge or mini-trial.¹⁵⁵ A settlement judge mediates negotiations.¹⁵⁶ The judge facilitates resolution by assessing the reasonableness of each party's claim, and meets separately with each party to discuss possible concessions. The judge confers openly with the parties as to settlement, and maintains lines of communication between the parties.¹⁵⁷

A mini-trial¹⁵⁸ is more complex. An expedited discovery period precedes the hearing,¹⁵⁹ and parties submit written summaries of their respective positions at a pre-hearing conference with the judge.¹⁶⁰ Because the rules of procedure and evidence do not apply, the parties themselves define the rules at the pre-hearing conference.¹⁶¹ The hearing, which lasts no more than a day, gives the parties an opportunity for oral argument, witness testimony, and submission of demonstrative evidence.¹⁶² The judge actively questions witnesses and participates in post-hearing settlement discussions.¹⁶³ At the conclusion of the mini-trial, the judge issues a non-binding opinion.¹⁶⁴

To ensure the use of ADR in the government contracts arena, the United States Congress enacted the Administrative Dispute Resolution Act ("ADRA").¹⁶⁵ The ADRA authorizes government agencies to employ alternative dispute resolution procedures,¹⁶⁶ but does

154. General Order No. 13, 12 Cl. Ct. XXI (1987); 48 C.F.R. § 6302.30 (1990); see generally Alexander J. Brittin, *Alternative Dispute Resolution in Government Contract Appeals*, 19 PUB. CONT. L.J. 210 (1990) (discussing the use of alternative dispute resolutions in the area of government contracts in the United States).

155. See, e.g., General Order No. 13, 12 Cl. Ct. XXI.

156. Recommendations and Statement of the Administrative Conference Regarding Administrative Practice and Procedure, 53 Fed. Reg. 26,025, 26,031 (1988) [hereinafter Recommendations and Statement]; Recommendations Regarding Administrative Practice and Procedure, 52 Fed. Reg. 49,141, 49,150 (1987).

157. Recommendations and Statement, *supra* note 156; Recommendations Regarding Administrative Practice and Procedure, *supra* note 156; see also General Order No. 13, 12 Cl. Ct. XXI.

158. See generally James F. Henry, *Use of Mini-trial Seeks to Ease Burden of Corporate Litigation*, WASH. POST, Oct. 13, 1985, at D4, D5 (citing the benefits of a mini-trial).

159. General Order No. 13, 12 Cl. Ct. at XXIII-XXIV.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Recommendations Regarding Administrative Practice and Procedure, *supra* note 156, at 49,150.

165. Pub. L. No. 101-552, 104 Stat. 2736 (1990). The ADRA is only effective through October 1, 1995. *Id.* § 11.

166. *Id.* § 4.

not restrict the government to any particular means of dispute resolution.¹⁶⁷ Any method the parties choose must be by mutual consent.¹⁶⁸

The ADRA specifically authorizes the arbitrator to make awards.¹⁶⁹ However, the declaration must include an "informal discussion of the factual and legal basis for the award."¹⁷⁰ The ADRA also provides rules for the informal arbitration hearing.¹⁷¹ The decision becomes final thirty days after it is issued.¹⁷² However, the head of the agency that is a party to the arbitration may vacate the decision during this time period.¹⁷³ The decision may be reviewed by a United States District Court only upon application by a party adversely affected or aggrieved by the award made in the arbitration proceeding.¹⁷⁴

3. Dispute Resolution Fora

a. *Boards of Contract Appeals*

Twelve government agencies have BCAs with varying numbers of judges.¹⁷⁵ A party must appeal the final decision of a contracting officer to the appropriate BCA within ninety days.¹⁷⁶ Within thirty days of the docketed appeal, the appellant must file a complaint for the respondent to answer.¹⁷⁷ The parties may conduct discovery and may ask for either a hearing, complete with testimony and submission of evidence, or a decision on the record.¹⁷⁸

Alternatively, where the dispute involves an amount equal to or under \$50,000, the contractor may choose an accelerated procedure.

167. According to the ADRA, alternative dispute resolutions include "settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination thereof." *Id.*

168. *Id.*

169. For a discussion of the issues involved in the use of arbitration in the field of government contracts under the law of the United States, see Timothy S. Hardy & R. Mason Cargill, *Resolving Government Contract Disputes: Why Not Arbitrate?*, 34 FED. BAR J. 1 (1975).

170. Pub. L. No. 101-552, § 4, 104 Stat. 2736.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* However, the party must be one other than a party to the arbitration. *Id.* § 5.

175. See CIBINIC & NASH, *supra* note 1, at 109 (listing the BCAs and the number of members). A federal agency that does not have a BCA may refer cases to an agency that does maintain a BCA, upon agreement between the two agencies. 41 U.S.C. § 607(c) (1988).

176. 41 U.S.C. § 606 (1988).

177. FINAL UNIFORM RULES OF PROCEDURE FOR BOARDS OF CONTRACT APPEALS UNDER THE CONTRACT DISPUTES ACT OF 1978, rule 6.

178. *Id.* rules 4, 8. The BCAs all sit in Washington, D.C. However, judges will travel to locations convenient to the parties to preside over hearings.

Election of this procedure compels the Administrative Judge to resolve the dispute within 180 days of such election.¹⁷⁹ Where the amount in dispute is less than \$10,000, the contractor may elect the accelerated small claims procedure, wherein the Administrative Judge renders a decision within 120 days from the election date.¹⁸⁰

A BCA may issue either a written or oral decision.¹⁸¹ Among the forms of relief available from a BCA are reformation, rescission, and breach of contract damages.¹⁸² A BCA has authority to grant monetary damages and interest from the date the claim was filed with the contracting officer.¹⁸³ Under certain circumstances, a BCA may award attorney fees.¹⁸⁴ Within 120 days of the BCA decision, a party may appeal to the United States Court of Appeals for the Federal Circuit.¹⁸⁵

b. United States Claims Court

As an alternative to the BCAs,¹⁸⁶ the CDA provides jurisdiction in the United States Claims Court.¹⁸⁷ A party has one year from receipt of a contracting officer's final decision to file a claim before the Claims Court,¹⁸⁸ rather than only ninety days as provided by the BCA.¹⁸⁹ The parties may have a trial before a judge, complete with testimony, demonstrative evidence, and oral argument, within the

179. 41 U.S.C. § 607(f) (1988).

180. *Id.* § 608(a).

181. *Id.* § 607(e).

182. Matthew S. Perlman & William W. Goodrich Jr., *Contract Dispute Procedures*, BRIEFING PAPERS, No. 82-6, Dec. 1982, at 1, 6; see 41 U.S.C. § 607(d) (1988).

183. 41 U.S.C. § 611; *cf. supra* note 83 and accompanying text (discussing interest awards in Canada). However, a BCA may not award interest on a claim that the government has initiated. *Ruhnau-Evans-Ruhnau Assoc. v. United States*, 3 Cl. Ct. 217 (1983); see also *Security Assoc. Int'l Inc.*, DOTCAB No. 1340, 84-2 BCA (CCH) ¶ 17,444 (contractor may convert a government claim into a contractor claim in order to recover interest).

184. 5 U.S.C. § 504 (1988).

185. 41 U.S.C. § 607(g)(1) (1988). The disposition period of appeals from the BCA to the Federal Circuit is approximately nine months. Michael J. Shea & Michael J. Schaengold, *A Guide to the Court of Appeals for the Federal Circuit*, BRIEFING PAPERS, No. 90-13, Dec. 1990, at 1, 3-4.

186. The main reason parties provide for choosing the Claims Court over a BCA is the belief that the Claims Court will be more impartial. Richard J. Webber, *Choice of Forum in Federal Contract Disputes: Highlights of the Federal Contract Claims and Remedies Committee's Survey*, 24 PUB. CONT. NEWSL. 3, 5 (1988). However, most litigants file claims under the CDA with the BCAs. *Id.* at 3.

187. 41 U.S.C. § 609(a) (1988). See *supra* note 143 regarding the name change to Federal Court of Claims.

188. 41 U.S.C. § 609(c)(3).

189. See *supra* text accompanying note 176.

bounds of the rules of the United States Claims Court and the Federal Rules of Evidence.¹⁹⁰ However, like a proceeding before a BCA, there is no jury trial.¹⁹¹

The Claims Court affords the same remedies as the BCAs, including interest,¹⁹² and under some circumstances, attorney fees.¹⁹³ Similar to the BCA, appeals from the Claims Court rest with the United States Court of Appeals for the Federal Circuit.¹⁹⁴

Contractors with contracts predating the CDA who do not elect to use the CDA may file a claim in the Claims Court under the Tucker Act.¹⁹⁵ The procedural rules are otherwise the same.

c. *United States District Courts*

In limited instances, a contractor may bring a claim against the government in a United States District Court. The CDA limits claims before the district courts to those involving contracts with the Tennessee Valley Authority.¹⁹⁶ Additionally, under certain circumstances,¹⁹⁷ district courts have jurisdiction to decide claims brought under the Tucker Act.¹⁹⁸

Because of the severe jurisdictional limitations, few contractors file claims in the district courts.¹⁹⁹ However, unlike the BCAs and the Claims Court, district courts do allow a jury trial and equitable relief.²⁰⁰ District court trials are governed by the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Appeal lies in the United States Court of Appeals for the circuit in which the district court resides.

190. Pub. L. No 97-164, § 139, 96 Stat. 25, 42.

191. *Id.* § 105.

192. *Id.* § 302. *But see supra* note 183.

193. 28 U.S.C. § 2412(d)(1) (1988); *see also id.* § 2412(d)(2)(f). *But see id.* § 2412(d)(3).

194. Pub. L. No. 97-164, § 127, 96 Stat. 25, 37. The disposition period in the Federal Circuit for appeals from the Claims Court is approximately eight months. Shea & Schaengold, *supra* note 185, at 30-34.

195. *See supra* notes 148-51 and accompanying text.

196. In fact, district courts hold *exclusive* jurisdiction over such claims. 41 U.S.C. § 609(a)(2) (1988); *see also* 28 U.S.C. § 1337 (1988).

197. *See supra* note 151 and accompanying text.

198. 28 U.S.C. § 1346.

199. *See Webber, supra* note 186, at 5 (indicating that the BCAs are the preferred forum for government contract dispute resolution).

200. This is due to the fact that United States District Courts derive authority from Article III of the United States Constitution, whereas Congress promulgated the Claims Court under Article I. Pub. L. No. 97-164, § 105, 96 Stat. 25.

IV. ISLAMIC LAW NATIONS

A. *The Islamic System*

The Islamic legal system is based on religion. Islamic law, called the Shari'ah,²⁰¹ has four primary sources, and is applied in descending order. The supreme source of law is the "Quran," "the word of God delivered to God's messenger, Mohammed."²⁰² Shari'ah law requires strict observance of the Quran.²⁰³ The second most important source is the "Sunna," or "Traditions,"²⁰⁴ containing what "Mohammed was reported to have said, done, or approved."²⁰⁵ The Sunna explains the rules of the Quran.²⁰⁶ The third source is the "Ijmah," the consensus of scholars.²⁰⁷ The rules of the Ijmah developed in response to those situations where neither the Quran nor the Sunna provided applicable rules.²⁰⁸ When none of the above-mentioned sources of law provides an answer, a fourth source is "Kias," or analogy.²⁰⁹ Analogy follows and fulfills the principle of the Shari'ah that law should apply equally to similar cases.²¹⁰

There are four different sects and schools of interpretation of the Shari'ah. Saudi Arabia, for example, follows the Hanbali school of the Sunni sect of interpretation of the Shari'ah.²¹¹ This is the most rigid interpretation, restricted to the Quran and Sunna.²¹² In fact,

201. "The Shari'ah . . . is not 'law' in the western sense of the word; rather, it is the 'path' to be pursued by the believer." Jeanne Asherman, *Doing Business in Saudi Arabia: The Contemporary Application of Islamic Law*, 16 INT'L LAW. 321, 322 (1982).

202. Hassan Mahassni & Neil F. Grenley, *Public Sector Dispute Resolution in Saudi Arabia: Procedures and Practices of Saudi Arabia's Administrative Court*, 21 INT'L LAW. 827, 828 (1987).

203. Nazer, *supra* note 25, at 2.

204. *Id.*

205. Mahassni & Grenley, *supra* note 202, at 828.

206. *Id.*

207. *Id.* at 829.

208. Nazer, *supra* note 25, at 2.

209. Mahassni & Grenley, *supra* note 202, at 829; *see also* Nazer, *supra* note 25, at 2.

210. Mahassni & Grenley, *supra* note 202, at 829. This implies the application of precedent, much like the common law system. In fact, it has been suggested that precedent plays a role in the Saudi legal system. Enani, *supra* note 25, at 17-19. It is generally held however, that precedent—in the sense of binding case law—does not exist under Shari'ah law. Unlike the common law system, Shari'ah law is not based on case law. The only binding "decisions" are those of Mohammed and the Ijmah of the old jurists. *Judicial Authority*, *supra* note 25, at 16; *Government Contracts and the Grievance Board*, MIDDLE EAST EXEC. REP., Apr. 1985, at 13. The Sunnis consider Kias nothing more than persuasive authority. Nabil Saleh, *The Law Governing Contracts in Arabia*, 38 INT'L & COMP. L.Q. 761, 779-80 (1989).

211. Asherman, *supra* note 201, at 323.

212. *Id.*

Saudi Arabia has adhered to the Hanbali school "in rather a puritanical form" and has resisted the modern trend to follow western law.²¹³ In Oman, the Ibadi sect's interpretation prevails.²¹⁴ The Ibadi differ from the Sunni, for example, in placing less emphasis on the Ijmah and Kias.²¹⁵

Two fundamental principles govern the law of contracts under Shari'ah.²¹⁶ The first is the freedom of contract: "[M]en shall be permitted to make all the transactions they need, unless these transactions are forbidden by the Book [Quran] or by the Sunna."²¹⁷ Second, contracts are binding and are themselves law, because "God is a witness to any contract entered into by individuals or by collectivities . . . [therefore you must b]e faithful to your pledge to God, when you enter into a pact."²¹⁸ Therefore, a disputes clause in a contract would inherently carry great weight. These principles apply equally to government contracts, because the Shari'ah does not distinguish between public contracts and commercial law.²¹⁹

B. Sultanate of Oman

1. Regulation²²⁰

As a Sultanate, all executive and regulatory power in Oman is exercised by the Sultan.²²¹ Consequently, laws are created through Royal Decrees.²²² The Royal Decree addressing government procurement is the Government Tender Law and Regulations.²²³ However, this Decree does not address the resolution of contract performance

213. LIEBESNY, *supra* note 32, at 239.

214. Saleh, *supra* note 210, at 761.

215. *See id.* at 762-63.

216. Asherman, *supra* note 201, at 34.

217. *Id.* at 335 (quoting an arbitral award decision interpreting the Hanbali school of Shari'ah). Examples of unenforceable contracts include lease agreements for buildings not yet built, and options to extend a lease after the expiration of the original term. Nazer, *supra* note 25, at 19. In addition, insurance contracts are invalid because they depend on chance. *Judicial Authority*, *supra* note 25, at 15.

218. Asherman, *supra* note 201, at 335.

219. *Id.*

220. Islamic nations do not have legislation per se, but rather regulation. The Shari'ah considers God the real legislator. Accordingly, national rulers may only *regulate*. Nazer, *supra* note 25, at 17-18.

221. 7 ALLEN P.K. KEESEE, COMMERCIAL LAWS OF THE MIDDLE EAST: OMAN 10 (Mar. 1984).

222. *Id.*

223. Royal Decree No. 86/84, translated in 7 ALLEN P.K. KEESEE, COMMERCIAL LAWS OF THE MIDDLE EAST: OMAN (Mar. 1986).

disputes.²²⁴ Instead, the Rules for Hearing Lawsuits and Arbitration Requests before the Authority for the Settlement of Commercial Disputes²²⁵ address the resolution of government contract disputes. The Rules give life to the Decree that established the Authority,²²⁶ and together the Decrees restructured dispute resolution in Oman.

2. Informal Dispute Resolution

Royal Decree No. 32/84 provides the Authority for the Settlement of Commercial Disputes ("Authority") jurisdiction over "requests for arbitration in commercial matters in which the Government of the Sultanate is a party."²²⁷ However, the Decree qualifies this jurisdiction by stating, "government bodies *may accept* the jurisdiction of the Authority,"²²⁸ thus rendering such jurisdiction discretionary. The Decree reiterates this discretion in another provision, stating that the "Authority may consider arbitration requests in which the government or one of its administrative units is a party if the government or the administrative unit accepts arbitration after the dispute arises."²²⁹ Regardless of the jurisdictional limitations, this Decree clearly provides a means of informal dispute resolution for disputes with the government.

The parties must agree to arbitrate in writing.²³⁰ Each party must select an arbitrator, or the Authority judge assigned as president of the arbitration²³¹ will appoint the arbitrators.²³² The arbitrators must render a decision within the time frame determined by the arbitration agreement, or within two months if no time period has been specified.²³³ Failure to meet the deadline results in the termination of

224. The Decree promulgates the Tender Board, which reviews bids and awards contracts, among other responsibilities. It is not a judicial body. *Id.* art. 2.

225. Royal Decree No. 32/84, *translated in* 7 ALLEN P.K. KEESEE, COMMERCIAL LAWS OF THE MIDDLE EAST: OMAN (Mar. 1986), and MIDDLE EAST EXECUTIVE REP., Aug. 1984, at 23.

226. Royal Decree No. 79/81, *translated in* MIDDLE EAST EXECUTIVE REP., Aug. 1984, at 23. This Decree provided for the dissolution of the Committee for the Settlement of Commercial Disputes upon the enactment of rules for the Authority for the Settlement of Commercial Disputes. *Id.* art. 5.

227. Royal Decree No. 32/84, *supra* note 225, art. 15.

228. *Id.* (emphasis added).

229. *Id.* art. 59.

230. *Id.*

231. The president also serves to break a deadlocked decision. *Id.* art. 63.

232. *Id.* art. 60.

233. *Id.* art. 61.

arbitration and the commencement of a lawsuit.²³⁴

The arbitral decision must be in writing, and must include "a copy of the arbitration document, a summary of the opponents' statements with their evidence, [and] the reasons for the decision."²³⁵ The arbitral decision is final,²³⁶ and the Authority resolves any disputes arising from the execution of the decision.²³⁷

3. Formal Dispute Resolution

Royal Decree No. 32/84 also allows the Authority to act as a judicial tribunal. Like the provision for arbitral jurisdiction, the jurisdiction of the Authority to hear a suit involving the government is qualified by the government's acceptance of the Authority's jurisdiction.²³⁸ However, because there are only two other judicial bodies in Oman, the Police Court and the Shari'ah courts, neither of which has full jurisdiction over commercial matters,²³⁹ a government contractor has no recourse for a dispute but through the Authority.²⁴⁰

To initiate a suit, a plaintiff files a complaint stating the facts at issue, the request for relief, and any supporting evidence.²⁴¹ The defendant must submit an answer within ten days after receiving the complaint.²⁴² A hearing will commence within thirty days thereafter.²⁴³

The President of the Authority and three Authority judges preside over the hearing.²⁴⁴ The parties are permitted oral argument and

234. *Id.*

235. *Id.* art. 63.

236. *Id.* art. 64.

237. *Id.* art. 68.

238. *Id.* art. 15.

239. The Police Court handles criminal and commercial matters, such as fraud, which may be prosecuted under the criminal code. The Shari'ah courts occasionally accept jurisdiction over commercial cases. 7 ALLEN P.K. KEESSEE, *COMMERCIAL LAWS OF THE MIDDLE EAST: OMAN* 11 (Mar. 1984).

240. The Authority replaced the former Committee for the Settlement of Commercial Disputes ("Committee"). The Committee was a quasi-judicial body composed of four government representatives and five businessmen. Commercial Companies Law of 1974, pt. VIII, translated in ALLEN P.K. KEESSEE, *COMMERCIAL LAWS OF THE MIDDLE EAST: OMAN* (July 1982). The Authority, however, consists of seven judges, three of whom are Egyptian judges trained in law. Royal Decree No. 79/81, *supra* note 226, art. 3; Ellen C. Kerrigan, *New Rules Announced for Settling Commercial Disputes*, MIDDLE EAST EXECUTIVE REP., Aug. 1984, at 9, 10.

241. Royal Decree No. 32/84, *supra* note 225, art. 16.

242. *Id.* art. 21.

243. *Id.* art. 22.

244. *Id.* art. 36.

may submit any corroborative evidence.²⁴⁵ The parties may also submit final briefs within seven days of the hearing.²⁴⁶ The Authority must render a decision within fifteen days of the hearing.²⁴⁷

The Authority is bound to apply the laws effective in the Sultanate.²⁴⁸ Accordingly, the remedies provided for in the 1990 Law of Commerce apply.²⁴⁹ General remedies for breach of contract include the value of the claim, plus interest,²⁵⁰ as well as consequential damages.²⁵¹ Additionally, the Authority may award litigation expenses.²⁵²

Originally, the decision of the Authority was final and not subject to appeal.²⁵³ However, a 1987 amendment created a level of appeal for cases exceeding RO10,000.²⁵⁴ Even prior to the amendment, however, a party could appeal the Authority's decision under special circumstances.²⁵⁵ The appeal must be filed within thirty days of the decision.²⁵⁶ Although the Authority hears the appeal, the entire membership attends the review session.²⁵⁷

C. Saudi Arabia

1. Regulation

As a monarchy, Saudi Arabia developed a body of law through

245. *Id.* art. 33.

246. *Id.* art. 34.

247. *Id.* art. 35.

248. *Id.* art. 44.

249. See Bridget McArdle McKinney, *Contract Law Under Oman's New Law of Commerce 1990*, MIDDLE EAST EXECUTIVE REP., Apr. 1991, at 19 (discussing the provisions of the Law of Commerce).

250. *Id.*; Royal Decree No. 32/84, *supra* note 225, art. 18. Interest is calculated from the day the complaint is filed. *Id.* It is unusual that interest is available, because it is contrary to a strict reading of the Shari'ah. See *infra* note 304 and accompanying text.

251. McKinney, *supra* note 249, at 19.

252. Royal Decree No. 32/84, *supra* note 225, art. 47.

253. *Id.* art. 46.

254. Saleh, *supra* note 210, at 766 n.18 (discussing the provisions of Royal Decree No. 38/87).

255. The original grounds for appeal are:

1. If a disputant's misrepresentation affects the decision or prevents the production of determinative documents.

2. If it is adjudged after the decision that papers or testimony upon which the decision is based were forged.

3. If the terms of the judgment were not requested by the disputant, or if the decision is internally inconsistent.

4. If the decision is issued against a natural or juristic person who was not validly represented in the lawsuit.

Royal Decree No. 32/84, *supra* note 225, art. 54.

256. *Id.* art. 55.

257. *Id.* art. 57.

Royal Decrees.²⁵⁸ When the Shari'ah has not addressed a particular area, the King may regulate it by Royal Decree.²⁵⁹ The Law Governing Procurement of Government Purchases and Execution of its Projects and Works ("Procurement Law")²⁶⁰ is the single, comprehensive law governing public procurement in Saudi Arabia. However, this law does not address dispute resolution. The most important decree in the field of dispute resolution is that which enacted the Board of Grievances,²⁶¹ which has jurisdiction over government contract disputes.

2. Informal Dispute Resolution

Saudi policy recognizes that the better approach to dispute resolution is mutual reconciliation. Consequently, both negotiation and arbitration are available for contract performance dispute resolution. The standard Disputes Clause provides that "[a]ll disputes arising from the fulfillment of this Contract and which can not be *mutually resolved between the two parties* shall be referred to the Board of Grievances for its final judgment."²⁶² By referencing settlement in the clause, the government demonstrates a preference for pursuing expeditious negotiation as a first step to dispute resolution.

If the negotiations result in the payment of damages by the government, the agreement does not become final until the Council of Ministers or the Board of Grievances approves it.²⁶³ This is because the Council of Ministers Act requires the Council to approve all expenditures of government funds.²⁶⁴ Ratification by the Board of Grievances, then, is a final judicial determination.

An alternative to negotiation is arbitration. However, Saudi Arabia has been hesitant to accept arbitration as a method of government contract dispute resolution. In 1963, the Council of Ministers

258. A Royal Decree promulgates a decision by the Council of Ministers.

259. Asherman, *supra* note 201, at 325.

260. Royal Decree No. M/14. The Decree prefers joint ventures. Saudi citizens have first priority to contract with the government, followed by entities with a majority of Saudi ownership. *Id.* art. 1(d).

261. Royal Decree No. M/51 (May 10, 1982), *translated in* MIDDLE EAST EXECUTIVE REP., Nov. 1982, at 26-29. The Board of Grievances had existed in various forms over the years. In 1963, the Council of Ministers vested the Board with jurisdiction over government contract disputes, although the Board had handled such disputes for years prior. Mahassni & Grenley, *supra* note 202, at 832.

262. Standard Public Works Contract, Council of Ministers Resolution No. 136 (Feb. 1, 1988), art. 57, *translated in* MIDDLE EAST EXECUTIVE REP., Oct. 1988, at 25, 27.

263. Enani, *supra* note 25, at 3-4.

264. *Id.* at 4 n.6 (citing the regulation).

issued a decree²⁶⁵ that partially prohibited the government from submitting disputes with a private party to arbitration,²⁶⁶ unless the government found arbitration to be to its advantage.²⁶⁷ Throughout the 1970s, however, the Saudi government authorized a number of arbitration clauses in government contracts.²⁶⁸ Additionally, some government corporations, which are autonomous by virtue of their enabling regulations, submitted to arbitration.²⁶⁹

With the promulgation of the Arbitration Regulation Act²⁷⁰ in 1983, the Saudi government continued to restrict arbitration in government contracts. The Act and the Implementation Rules²⁷¹ expressly prohibit arbitration by government agencies unless approved by the President of the Council of Ministers.²⁷² Thus, arbitration is not a real alternative for the resolution of Saudi government contract disputes.

Although arbitration with the Saudi government is an unlikely prospect, the regulation and rules deserve brief discussion. To initiate arbitration, the parties must file the arbitration instrument "with the authority originally competent to hear the dispute."²⁷³ In the case of a government contract, the competent authority is the Board of Grievances.²⁷⁴ The arbitrators must render a decision within the time frame prescribed by the arbitration agreement.²⁷⁵ The award document must include a brief of the parties' depositions, documents sub-

265. Decree No. 58 of 1963. See Berge Setrakian, *Arbitration Under the Legal System of the Middle East Countries*, MIDDLE EAST EXECUTIVE REP., Dec. 1978, at 10 (discussing Decree No. 58).

266. The Decree prohibits arbitration clauses in a government contract providing foreign jurisdiction. Setrakian, *supra* note 265, at 10.

267. Enani, *supra* note 25, at 6-8; J. Ford & H. Bixler, *Middle East Construction Contracting*, BRIEFING PAPERS, June 1977, at 11.

268. Enani, *supra* note 25, at 7.

269. Dr. Zaki Mustafa, *Legal Aspects of Doing Business in Saudi Arabia*, in NORMAN VANDER CLUTE, *THE MIDDLE EAST: A LEGAL UPDATE* 28 (1978).

270. Royal Decree No. M/46 (Apr. 25, 1983), translated in MIDDLE EAST EXECUTIVE REP., July 1985, at 25.

271. Resolution of the Council of Ministers No. 7/2021/M (May 27, 1985); see Neil F. Allam, *Arbitration in the Kingdom: The New Implementation Rules*, MIDDLE EAST EXECUTIVE REP., Aug. 1985, at 9.

272. Royal Decree No. M/46, *supra* note 270, art. 3; Enani, *supra* note 25, at 8; Mahassni & Grenley, *supra* note 202, at 830.

273. Royal Decree No. M/46, *supra* note 270, art. 5.

274. Allam, *supra* note 271, at 17; see also *infra* notes 286-306 and accompanying text (discussing the Board of Grievances). The authority may affect the arbitration process by appointing arbitrators when the parties cannot agree, or hearing complaints concerning the arbitrators. Royal Decree No. M/46, *supra* note 270, arts. 10, 12.

275. Royal Decree No. M/46, *supra* note 270, art. 9. Where there is no set time, arbitra-

mitted by the parties, a rationale for the award, and the text of the award.²⁷⁶ Parties may appeal the arbitrator's decision within fifteen days to the Board of Grievances.²⁷⁷ The Board either rejects the appeal or decides the case.²⁷⁸ Failure to appeal the arbitral decision renders such decision final²⁷⁹ and binding as if the Board rendered the decision.²⁸⁰

3. Dispute Resolution Fora

a. *The King*

The principles of the Shari'ah form the bases of the monarch's authority.²⁸¹ In the King's role as iman, he must uphold the Shari'ah.²⁸² The King is, in effect, the court of first and last resort. Thus, a party may petition the King directly for resolution of a claim.²⁸³ Generally, the King delegates authority for determination of the claim to either a committee or the judiciary.²⁸⁴ However, petitions to the King are unusual, and not a realistic alternative for dispute resolution.²⁸⁵

b. *The Board of Grievances*

The Saudi judicial system consists of two types of courts: (1) the Shari'ah courts, and (2) specialized courts.²⁸⁶ Originally, the Shari'ah courts were courts of general jurisdiction. However, the advent of specialized courts limited their domain.²⁸⁷ As mentioned above, the Board of Grievances has jurisdiction over claims against the Saudi government or its instrumentalities.²⁸⁸ Therefore, the Board of Grievances, which is an "administrative judicial board" whose members

tors must decide within 90 days. Failure to resolve the dispute within the limited time may result in resolution by the competent authority. *Id.*

276. *Id.* art. 17.

277. *Id.* art. 18.

278. *Id.* art. 19.

279. *Id.* art. 18.

280. *Id.* art. 21.

281. Asherman, *supra* note 201, at 324.

282. *Id.*

283. Enani, *supra* note 25, at 9-10; Mahassni & Grenley, *supra* note 202, at 831.

284. Enani, *supra* note 25, at 10; Mahassni & Grenley, *supra* note 202, at 831; *see also* *Judicial Authority*, *supra* note 25, at 2, 14-15 (discussing the role of the King in the judiciary).

285. Mahassni & Grenley, *supra* note 202, at 831.

286. *Id.* at 829.

287. *Id.*

288. Royal Decree No. M/51, *supra* note 261, art. 8(d); *see also supra* note 261 and accompanying text.

“enjoy the rights and guarantees prescribed for other judges”²⁸⁹ within Saudi Arabia, is, in effect, the only forum to redress government contract disputes.²⁹⁰

A contractor may initiate an action by submitting a claim to the Board indicating the jurisdictional basis for the claim, the contractual provisions at issue, and a statement of damages.²⁹¹ The Board will hold a series of hearings until the Board believes it has obtained sufficient evidence to render a finding.²⁹² Generally, these hearings are informal, and “[i]ntense cross-examination is almost never permitted.”²⁹³ Additionally, there is no jury, because juries are excluded by the Shari’ah.²⁹⁴ Further, the judges of the Board are amenable to site visits, and may refer technical matters to the Saudi House for Consulting Services, a government-owned corporation.²⁹⁵ Decisions of the Board are published,²⁹⁶ and the claimant may appeal the decision to the King.²⁹⁷ Generally, the King will refer the matter to the Council of Ministers, who decide whether the Board should reconsider the case.²⁹⁸ Thus, the King does not actually render a decision, but merely orders reconsideration.²⁹⁹

The Board may consider principles of equity,³⁰⁰ award damages, and may even award liquidated damages.³⁰¹ The Board may also can-

289. Royal Decree No. M/51, *supra* note 261, arts. 1, 16; J. Robert Steelman, *The Grievance Board in Saudi Arabia—An Overview of Royal Decree M/51*, MIDDLE EAST EXECUTIVE REP., May 1983, at 8, 17 (citing Article 16 of the Decree).

290. See *Government Contracts and the Grievance Board*, MIDDLE EAST EXECUTIVE REP., Apr. 1985, at 13, 14.

291. Mahassni & Grenley, *supra* note 202, at 836-37.

292. *Id.* at 837-39. The Board sits in Riyadh. However, as needs arise, the Board has authority to open “branches.” Royal Decree No. M/51, *supra* note 261, art. 1.

293. *Judicial Authority*, *supra* note 25, at 16.

294. *Id.* at 15.

295. Mahassni & Grenley, *supra* note 202, at 839-40.

296. Royal Decree No. M/51, *supra* note 261, art. 47. However, the President is only required to publish decisions at the end of the year to submit, along with his annual report, to the King. *Id.* Additionally, the decisions often lack facts and analysis. *Government Contracts and the Grievance Board*, *supra* note 290, at 13.

297. *Government Contracts and the Grievance Board*, *supra* note 290, at 14; *Judicial Authority*, *supra* note 25, at 16. The government usually will not appeal the decision of the Board. *Government Contracts and the Grievance Board*, *supra* note 290, at 14.

298. *Government Contracts and the Grievance Board*, *supra* note 290, at 14; *Judicial Authority*, *supra* note 25, at 16.

299. *Government Contracts and the Grievance Board*, *supra* note 290, at 14.

300. *Id.* However, a claimant “should not rely heavily on principles of equity if the language of the contract is reasonably clear and implies otherwise.” *Id.*

301. Mahassni & Grenley, *supra* note 202, at 841; Enani, *supra* note 25, at 19. In fact, the Procurement Law includes a schedule of liquidated damages for undue delay. The schedule

cel the contract for default by the government.³⁰² Additionally, the Board may award compensation for lost profit.³⁰³

However, the Board cannot award interest on a claim. The prohibition of interest finds its basis in the Shari'ah. The Quran expressly prohibits interest (*riba*), stating that "[t]hose who devour *riba* shall only rise again as one whom Satan strikes with his touch; this because they say, 'selling is like usury'; but Allah has permitted selling and forbidden usury . . . [t]hey who relapse to usury, are the people of Hell, they shall remain in it forever.'"³⁰⁴ Accordingly, an interest clause in a contract is prohibited, because it would contradict the express proscription of the Shari'ah.³⁰⁵

D. United Arab Emirates

1. Regulation

The U.A.E. has specific regulations regarding government contracts.³⁰⁶ In fact, the Provisional Constitution of the U.A.E. establishes jurisdiction for government contract disputes. The Provisional Constitution gives broad jurisdiction to the Union Primary Tribunals over "[c]ivil, commercial and administrative disputes between the Union and individuals whether the Union is plaintiff or defendant."³⁰⁷ As a government contract is both a civil and commercial matter, it clearly falls within this provision of the Constitution. Thus, the Constitution creates a forum for both a contractor and the government to file an action.³⁰⁸

2. Informal Dispute Resolution

There is no federal arbitration law, although a number of the

ranges from a base of 4% of the value of a supply contract, to a ceiling of 10% in construction contracts. Royal Decree No. M/14. Unlike its predecessor law, the Procurement Law provides the contractor a wide range of excuses from performance. *Id.* art. 9(a).

302. Enani, *supra* note 25, at 22.

303. *Id.* at 20-21.

304. Asherman, *supra* note 201, at 336 (quoting the Quran). *But see supra* note 250 and accompanying text (interest on a claim permitted in Oman).

305. *See supra* note 217 and accompanying text.

306. Federal Purchases, Tenders and Contracts Law, Financial Order No. 16 of Nov. 17, 1975, translated in 6 ALLEN P.K. KEESSEE, COMMERCIAL LAWS OF THE MIDDLE EAST: UNITED ARAB EMIRATES (Jan. 1982).

307. U.A.E. PROVISIONAL CONST. art. 102(1), translated in 6 ALLEN P.K. KEESSEE, COMMERCIAL LAWS OF THE MIDDLE EAST 44-45 (Mar. 1984).

308. *Id.*

Emirates have enacted arbitration laws.³⁰⁹ However, both the Union and some of the individual Emirates have specifically prohibited an arbitration clause in government contracts.³¹⁰ Unless both parties agree to conciliation, there is no forum other than the federal courts for dispute resolution.³¹¹

3. Dispute Resolution Fora

The Provisional Constitution grants the federal courts jurisdiction over disputes with the government.³¹² Additionally, the Provisional Constitution gives local Shari'ah courts jurisdiction over "judicial matters not assigned to the Union judicature in accordance with this Constitution."³¹³ Thus, because disputes with the government are assigned to the Union judicature, the federal courts have exclusive jurisdiction over government contract disputes.

The trial courts are divided into civil and criminal courts.³¹⁴ Therefore, government contract disputes are filed in the civil courts, which have jurisdiction over all civil matters.³¹⁵ Appeals from the trial courts are made to the Union Supreme Court.³¹⁶ However, there is a jurisdictional limit of Dh10,000.³¹⁷ Furthermore, there are only two appellate courts, one in Abu Dhabi and one in Sharjah,³¹⁸ and each court has only three judges.³¹⁹ Final appeal rests with the Supreme Federal Court,³²⁰ which consists of a President and up to five judges.³²¹

The Emirates of Dubai and Sharjah codified contract law.³²² Local law may be applied so long as it does not conflict with Shari'ah or

309. Giles Dixon & Priscilla Wood, *Arbitration Law, Practice and Enforcement of Awards in the United Arab Emirates—I*, MIDDLE EAST EXECUTIVE REP., Oct. 1988, at 23; see, e.g., Abu Dhabi Arbitration Law, Code of Civil Procedure, ch. 9 (1970), translated in 6 ALLEN P.K. KEESSE, COMMERCIAL LAWS OF THE MIDDLE EAST (Jan. 1982).

310. Dixon & Wood, *supra* note 309, at 23 (discussing the 1986 amendments to the standard federal government contracts for construction and consultants).

311. *Id.* at 23.

312. See *supra* note 307 and accompanying text.

313. U.A.E. PROVISIONAL CONST. art. 104.

314. Amjad Ali Khan, *The Courts and the Legal System in the U.A.E.*, MIDDLE EAST EXECUTIVE REP., Aug. 1983, at 8, 23.

315. *Id.*

316. *Id.*; see also U.A.E. PROVISIONAL CONST., art. 103.

317. Khan, *supra* note 314, at 23.

318. *Id.*

319. *Id.*

320. *Id.* at 21-23.

321. U.A.E. PROVISIONAL CONST. art. 96.

322. Dubai Contract Law of 1971, translated in 6 ALLEN P.K. KEESSE, COMMERCIAL

federal law.³²³ Presumably, then, the Law of Contract could apply in federal court. The Law of Contract allows damages for breach of contract,³²⁴ liquidated or penal damages,³²⁵ and compensation upon rescission.³²⁶ The law also allows interest where it is stipulated as a penalty.³²⁷

V. COMPARISONS

The most obvious point of comparison between common law and Islamic systems is that each guarantees some procedure for dispute resolution. Thus, a potential government contractor will be encouraged to enter a government contract, because there is an established means of dispute resolution in the event a dispute arises.³²⁸ An established means to recoup losses is important from a risk reduction and business perspective.

There is a relationship between dispute resolution fora and the doctrine of sovereign immunity.³²⁹ A contractor from a common law country, where the doctrine of sovereign immunity persists, would most likely expect preclusion of a suit against the government, whereas a contractor from an Islamic country would not even consider this issue because the doctrine does not exist in Islamic legal systems. Thus, given the western world's perception of Islamic governments as severe and rigid,³³⁰ western contractors are surprised to discover established government contract dispute resolution tribunals in the Islamic world.

Ironically, the doctrine of sovereign immunity arose in the common law system because England was ruled by a monarch.³³¹ The doctrine persisted in other common law countries despite their status

LAWS OF THE MIDDLE EAST (Mar. 1984); see also Gary R. Feulner & Amjad Ali Khan, *Dispute Resolution in the Emirates*, MIDDLE EAST EXECUTIVE REP., July 1985, at 22-23.

323. U.A.E. PROVISIONAL CONST. arts. 7, 151; Feulner & Kahn, *supra* note 322, at 22; cf. *supra* note 81 and accompanying text (Provincial law applies in the Federal Courts of Canada).

324. Law of Contract of 1971, § 93.

325. *Id.* § 94.

326. *Id.* § 95.

327. *Id.* § 94(2). However, this is inconsistent with the Shari'ah's prohibition of interest. See *supra* note 304 and accompanying text.

328. See Marvel, *supra* note 2 at 24.

329. See *supra* notes 8-31 and accompanying text.

330. See Hassan Mahassni, *Public Sector Dispute Resolution in Saudi Arabia: Procedures and Practices of Saudi Arabia's Administrative Court*, in DISPUTE RESOLUTION IN INTERNATIONAL PUBLIC CONTRACTING 108-09 (1985).

331. See *supra* note 12 and accompanying text.

as republics. In contrast, the Islamic system, which is replete with monarchies, does not adhere to the doctrine of sovereign immunity.

Although dispute resolution fora for government contracts exist under both legal systems, the particular legal system does not appear to affect the type of dispute resolution available. By far the most complex system exists in the United States, with its numerous initial fora, various procedural rules, multiple levels of appeal, and availability of several forms of alternative dispute resolution.³³² On the other hand, the least complicated system is that in the United Kingdom, also a common law country.

In contrast, countries from the Islamic legal system are consistent in the degree of procedure and availability of methods of alternative dispute resolution. However, there is a noticeable difference in the alternatives available among the legal systems. As a rule, the Islamic countries provide only one tribunal for formal dispute resolution. The common law system, on the other hand, generally offers a variety of tribunals.

The speed of the dispute resolution process is not necessarily linked to the legal system. For example, the United States has the most lengthy proceedings, despite offering a variety of fora, such as the Boards of Contract Appeals, which are intended to expedite proceedings. Appeal from the trial court alone will take nearly a year.³³³ The United Kingdom, however, uses arbitration as the main approach to dispute resolutions. Generally, arbitration consumes less time than the entire discovery process and trial in the common law system.

A more expeditious resolution may be obtained in an Islamic country. This is due to the lack of numerous levels of appeal. Further, the procedures in the Islamic system tend to promote an expeditious result. For example, in Oman, an answer to the complaint must be filed within ten days after receiving the complaint, and a hearing commences within a month.³³⁴ Additionally, the Islamic hearing is less formal than a common law trial. Because the procedures are less complex, an Islamic contractor will obtain a resolution more quickly than his or her common law counterpart.

Expeditious dispute resolution also depends on the availability of alternatives to formal dispute resolution. In this regard, the common law countries have the advantage. The United Kingdom promotes

332. See *supra* notes 175-200 and accompanying text.

333. See *supra* note 194.

334. See *supra* notes 241-43 and accompanying text.

the use of arbitration to such a degree that it requires arbitration as a dispute resolution procedure in its standard contract conditions.³³⁵ Such a provision virtually ensures that all government contract disputes will be resolved outside of the court system. Likewise, the United States, with its newly enacted Administrative Disputes Resolution Act, provides a variety of alternatives to its complex formal dispute resolution procedure.³³⁶ Thus, a contractor may expeditiously arrive at a dispute resolution through arbitration or any number of other informal means.³³⁷ Canada is similar to the other common law systems in providing alternatives to formal dispute resolution. Although it does not promote such alternatives through statutes or standard contract provisions,³³⁸ it does promote various forms of alternative dispute resolution through agency regulations.

In contrast, the Islamic countries provide a limited range of dispute resolution fora and generally are opposed to informal dispute resolution of government contracts. Probably the most extreme example is the United Arab Emirates, which specifically prohibits the use of arbitration to resolve disputes arising from government contracts. Saudi Arabia and Oman are only slightly less restrictive; they allow, but strictly limit, arbitration by leaving its use to the government's discretion.³³⁹ Consequently, aside from formal dispute resolution, a contractor has little chance of negotiation or conciliation.

If a contractor must resort to formal dispute resolution in an Islamic country, he or she can take comfort in the fact that Islamic fora are considered fair.³⁴⁰ Contract law under the Shari'ah does not distinguish between foreigners and nationals nor between those of different race or creed.³⁴¹

Additionally, common law and Islamic systems share fundamen-

335. See *supra* note 98 and accompanying text.

336. See *supra* notes 165-74 and accompanying text.

337. See *supra* note 167 (discussing the available alternatives).

338. It may well be, however, that the CSB is unknown as a means of alternative dispute resolution because the CSB is not the product of legislation. See *supra* notes 62-76 and accompanying text.

339. See *supra* notes 227-37, 265-80 and accompanying text.

340. See Mahassni & Grenley, *supra* note 202, at 844 (noting that non-Saudi plaintiffs routinely win cases). But see *Government Contracts and the Grievance Board*, *supra* note 290, at 14 (noting a perception by foreigners that the Board's decisions in Saudi Arabia are unfair).

341. Asherman, *supra* note 201, at 329; Saba Habachy, *Similarities and Common Principles of Western and Middle Eastern Systems of Law*, MIDDLE EAST EXECUTIVE REP., July 1979, at 2, 14. The lack of discrimination against non-Muslims in the Islamic legal system may be surprising to Westerners who perceive the Middle East as fraught with religious fervor and disdain for non-Muslims.

tal contract principles.³⁴² The avenues for dispute resolution in common law countries also are considered fair. For example, although there is some contention that the United States' Boards of Contract Appeals are biased,³⁴³ the contractor who perceives bias has a number of alternatives. Additionally, the Boards of Contract Appeals have the benefit of specialized knowledge, for, unlike their counterparts in other countries, the Boards' jurisdiction is limited to resolving government contract disputes.³⁴⁴

However, if one considers predictability as part of fairness, then the Islamic countries might be less than fair. The Islamic system, unlike the common law system, does not follow precedent. Thus, there is less assurance of predictability for the outcome of a dispute than there is in a common law country.³⁴⁵ Even a particular judge in an Islamic court may render different decisions in factually similar cases.³⁴⁶ Furthermore, there is limited publication of Islamic decisions. Such publicity might give some insight into the tribunal's thought process.³⁴⁷ Even among the limited publications, there is little or no analysis and detail that would provide an interpretation of the regulations.³⁴⁸ However, this lack of predictability affects both parties to a dispute. Thus, the government has no advantage in predicting a tribunal's reasoning.³⁴⁹

Several legal principles are common among the legal systems. Freedom of contract and the binding force of a contract are examples.³⁵⁰ Also, general rules of equity apply in both systems.³⁵¹ Another interesting principle common to the legal systems is the lack of a jury trial in government contract dispute resolution.³⁵²

Finally, the Islamic and common law systems are consistent in

342. See *supra* notes 32-41, 217-19 and accompanying text.

343. See *supra* note 186.

344. In contrast, other tribunals have jurisdiction over government claims in general, therefore providing a potpourri of issues for resolution.

345. See *Government Contracts and the Grievance Board*, *supra* note 290, at 13-14.

346. Saleh, *supra* note 210, at 786.

347. *Id.*; see also *supra* note 296 and accompanying text (discussing the requirement that the Board of Grievances print decisions annually).

348. *Government Contracts and the Grievance Board*, *supra* note 290, at 13-14.

349. See *id.* at 14.

350. Asherman, *supra* note 201, at 334; Habachy, *supra* note 341, at 13.

351. See, e.g., 41 U.S.C. § 607(d) (1988); *Government Contracts and the Grievance Board*, *supra* note 290, at 14.

352. Canada specifically prohibits jury trials by statute. Federal Courts Act, R.S.C., ch. F-7, § 49 (1985) (Can.). But see *supra* notes 126, 132 and accompanying text (jury trials are possible in the United Kingdom).

the remedies available, including the prohibition of interest on a claim against the government.³⁵³ In the Islamic system, interest per se is forbidden by the Quran.³⁵⁴ In the common law system, interest is prohibited by statute.³⁵⁵ Consequently, a contractor must consider the impact of a denial of interest on his or her claim. However, damages are available and a contractor is placed in the position where he or she would have been had there been no breach.

VI. CONCLUSION

The divergent legal systems of the common law and Islamic countries have recognized the need to resolve disputes that arise with their contractors. Although the two systems offer varying degrees of formal resolution and are almost opposite in terms of informal dispute resolution, each system gives a contractor redress. Accordingly, each legal system has facilitated the arena of government contracting, because a contractor who weighs heavily the risk associated with a government contract dispute will perceive a lesser risk where resolution mechanisms abide.

353. The one exception appears to be the United States, which specifically allows interest that accrues from the time a claim is filed. 41 U.S.C. § 611 (1988).

354. The imposition of interest is denounced strongly in the Quran. *See supra* note 304 and accompanying text.

355. *E.g.*, Federal Courts Act, R.S.C., ch. F-7, § 36 (1985) (Can.).