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The Shari'a Factor in International Commercial Arbitration

FAISAL KUTTY*

I. INTRODUCTION

Due to our increasingly interrelated and globalized economy, the world has witnessed a phenomenal growth in commercial disputes transcending national borders.¹ In addition to issues in interpretation of commercial agreements and practices, differences in custom, language, culture, and religion continue to fuel conflicts and disagreements between commercial players.²

Consistent with the increased globalization, there has been growing commercial interaction between Western companies and their Middle Eastern counterparts over the last few decades.³ The interaction is now evolving from raw material extraction to more sophisticated transactions and growing trade and investments, as parties explore commercial opportunities beyond oil and gas

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1. Volker Behr, *Enforcement of United States Money Judgments in Germany*, 13 J.L. & COM. 211, 211 (1994).

2. See Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 868 (1996).

3. In Canada, for instance, imports from the Arabian peninsula have grown from \$424 million in 1998 to over \$1 billion in 2003, while exports have grown from \$719 million to over \$1 billion during the same time. Canadian Department of Foreign Affairs and International Trade, Middle East and North Africa Trade Statistics, http://www.dfait-maeci.gc.ca/middle_east/trade_stats_jan04-en.asp; see also United States Trade Representatives, Middle East/North Africa, <http://www.ust.gov/index.html> (follow "World Regions: Europe and Middle East" hyperlink; then follow "Middle East/North Africa" hyperlink) (providing information about new free trade agreements with Middle Eastern countries).

exploration.⁴ Given the great geo-political and economic importance of the Middle East, it is imperative that Western lawyers and dispute resolution professionals have a reasonable grasp of the general principles of *Shari'a* or Islamic law,⁵ a source of law, of varying degrees, in most nations in the Middle East, and one of the three major legal systems prevailing in the world today.⁶ It is clear that the increase in international commercial transactions has contributed to the globalization of the legal community, but it is disturbing that there has been very little examination of the Middle East's legal system's religious underpinnings upon the continued acceptance of international commercial arbitration.⁷ Given the growing calls for a return to the *Shari'a* and increasing global interdependence, the Western legal community can no longer be satisfied to leave Islamic law or the *Shari'a* as a preserve of Middle East specialists, Arabists, and

4. See, e.g., Joanna Chung & William Wallis, *Middle Eastern Businesses are Looking Towards the City for Investors and to Raise their Profiles*, FIN. TIMES (London), Feb. 3, 2006, at 1. This trend will continue as nations attempt to develop other sources of income. For instance, Bahrain has been promoting itself as a regional banking center and the United Arab Emirates (UAE) as a tourist and commercial center. See HE Shaikh Ahmed bin Mohammed Al Khalifa, then-Governor of the Bahrain Monetary Agency, Speech: Financial Resources of the Gulf Region and Turkey (Dec. 11, 2003), <http://www.bma.gov.bh> (follow "InfoMedia" hyperlink, then follow "News Room" hyperlink, then follow "Speeches: English" hyperlink); UAE Tourism, <http://www.uae.gov.ae/Government/tourism.htm> ("[T]here has been a renewed focus on worldwide promotion of Dubai as an ideal tourist destination and a thriving commercial center.").

5. *Shari'a* and Islamic law will be used interchangeably throughout this Article though the two may not exactly have the same meaning. Muhammad Asad, the prominent Islamic thinker, narrowed down the *Shari'a* to "definitive ordinances of the Qur'an which are expounded in positive legal terms, known as the *nusus*." Muhammad Hashim Kamali, *Source, Nature and Objectives of Shari'ah*, 33 ISLAMIC Q. 211, 217 (1989) (emphasis in original). In comparison, Islamic law is far broader and includes those rules and laws that have been derived using sources and methodologies for deriving laws sanctioned by Islamic jurisprudence, as well as all the quasi-Islamic laws in existence in Muslim countries as a result of colonization and secularization. See Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origins and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 31-33 (2002); John H. Domboli & Farnaz Kashfi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 38 CORNELL INT'L L.J. 413, 418-19 (2005).

6. See W. M. Ballantyne, *Commercial Arbitration in the Arab Middle East (A Study in Shari'a and Statute Law)*, 4 ARB. INT'L 269, 269 (1988) (discussing the application of *Shari'a* in Egypt, Kuwait, Bahrain, Saudi Arabia, Qatar, and the UAE) (book review); HS Shaaban, Note, *Commercial Transactions in the Middle East: What Law Governs?*, 31 LAW & POL'Y INT'L BUS. 157, 158-59 (1999); Ali Ahmad, *The Role of Islamic Law in the Contemporary World Order*, 6 J. ISLAMIC L. & CULTURE 157, 157 (2001).

7. See Sandeep Gopalan, *The Creation of International Commercial Law: Sovereignty Felled?*, 5 SAN DIEGO INT'L L.J. 267, 272-74 (2004).

comparative law experts. As Professor W. M. Ballantyne notes, “Even where the *Shari'a* is not applied in current practice, there could be a reversion to it in any particular case. Without doubt, knowledge of the *Shari'a* will become increasingly important for practitioners, not only in Saudi Arabia, but in the other Muslim jurisdictions.”⁸

It is a trite observation that cultural considerations—or, more aptly in the Middle East, religious considerations—can play a crucial role in the acceptance and successful functioning of international commercial arbitration.⁹ The religious variable may impact the following: the scope of arbitration, the nature of arbitration, the choice of law, the appointment of arbitrators, liability of arbitrators, limitations periods, interest awards, public policy considerations, evidentiary considerations, and enforceability of decisions.¹⁰ As M. McCary points out:

Where arbitral clauses do not specify the commercial principles governing a dispute (e.g., those found in U.N. Investment Dispute Resolution of International Transactions (“UNIDROIT”)), arbitrators are forced to evaluate foreign legal provisions and cultural differences in determining an equitable settlement. In cases concerning Islamic issues or clients, Middle Eastern cultural differences will have to be considered in any interpretation of contract formation and negotiation.¹¹

This Article will explore the development and acceptance of international commercial arbitration in the Middle East and analyze the issues and areas which create tension between international commercial arbitration and the *Shari'a*. Given that

8. See Ballantyne, *supra* note 6, at 273.

9. M. McCary, *Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective*, 35 TEX. INT'L L. J. 289, 319 (2000); Canadian Department of Foreign Affairs and International Trade, Middle East and North Africa: Trade and Investments, http://www.dfait-maeci.gc.ca/middle_east/doing_business-en.asp.

It is impossible to establish meaningful business relationships in the Middle East without some understanding and knowledge of Islam. . . . Muslims see their religion as an integral part of their daily life. They make no distinction between the sacred and the secular, morality, laws and politics. For example, the Quran lays down clear economic guidelines.

Id.

10. McCary, *supra* note 9, at 319.

11. *Id.*; see also Carolyn R. Ruis, *Legal Practice Shaped by Loyalty to Tradition: The Case of Saudi Arabia*, in ISSUES OF TRANSNATIONAL LEGAL PRACTICE at 103, 107-11 (Michigan Yearbook of International Legal Studies, 1985).

the legal systems of the Middle Eastern nations incorporate Shari'a principles to varying degrees, this Article will use the existing commercial arbitration laws in Saudi Arabia, and to a lesser extent laws in the United Arab Emirates, to compare and evaluate the tensions and differences that exist or may arise between international commercial arbitration in general and arbitration as it would be practiced in jurisdictions influenced by the Shari'a.¹²

In the process, this Article hopes to dispel the prevalent Western notion that the Shari'a is an unsophisticated, obscure, and defective system.¹³ This attitude on the part of Western lawyers breeds significant distrust within the Islamic world and devalues an influential legal system in the eyes of many in the West.¹⁴ The recognition, acceptance, and analysis of Islamic law, and its impact on the practice of international commercial arbitration in the Middle East, is particularly important given the increasing Islamic revivalist spirit sweeping the region.¹⁵ Moreover, the experience from the Middle East will be helpful in understanding the same

12. "Middle East" is used in the loose sense to include the countries spanning from Morocco to Iran and from Sudan to Turkey. Islamic law is a factor to some level or the other in all of the countries in this region, except Israel. The UAE legal system though claiming to be based on Islamic law is more Western-oriented than the Saudi system, particularly in the area of commercial law. MSN Encarta, United Arab Emirates, <http://encarta.msn.com> (type in "United Arab Emirates" in search field, then follow "United Arab Emirates" hyperlink). Though it is by no means the most Western in the region. It is worth noting that even the commercial laws of Saudi Arabia are significantly influenced by Western commercial laws, though the Saudi Arabian legal system itself is among the least influenced by Western legal principles. See Shaaban, *supra* note 6, at 158-59, 161.

13. See, e.g., Fatima Akaddaf, *Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?*, 13 PACE INT'L L. REV. 1, 57 (2001). Unfortunately, this is not a new attitude. For instance, a renowned Roman legal scholar opined that "Every nation's law, except our own, is crude and almost laughable." Though, it is interesting to note that a number of legal scholars, including John Makdisi, have documented the influence of Islamic law on common law. John A. Makdisi, *The Islamic Origins of the Common Law*, 77 N. C. L. REV. 1635 (1999); see also George Makdisi, *The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court*, 34 CLEV. ST. L. REV. 3 (1985) (suggesting similarities—but no direct evidence of a connection—between Medieval England legal institutions and Islam).

14. See Akaddaf, *supra* note 13, at 57-58 (arguing Western scholarly criticism is "unfair" and overlooks good qualities of Shari'a).

15. See Hamid M. Khan, Note, *Nothing is Written: Fundamentalism, Revivalism, Reformism, and the Fate of Islamic Law*, 24 MICH. J. INT'L L. 273, 300-06 (2002) (describing and explaining the recent Revivalism movement).

topic in Islamic nations outside the Middle East.¹⁶ As Nudrat Majeed accurately points out, the ground realities in many Muslim nations and growing calls for a return to the Shari'a suggest "[i]t is the doubts about the significance of the Shari'ah that are now academic."¹⁷

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

II. INTERNATIONAL COMMERCIAL ARBITRATION

At its most basic, commercial arbitration is a private dispute resolution system which allows parties to resolve their disputes faster and cheaper than court proceedings.¹⁸ It is chosen because it

16. Islamic law is not only a force in the Middle East, but is the basis—to varying degrees—of much legislation in other countries which are becoming growing players in the international marketplace, including Malaysia, Indonesia, Pakistan, Nigeria, and even some of the more recently minted republics of Central Asia. It is worth noting that contrary to popular perception, the vast majority of the world's Muslim population live outside of the Middle East. *Muslims—The Facts*, NEW INTERNATIONALIST, May 2002, available at <http://www.newint.org/issue345/title345.htm>.

17. Nudrat Majeed, *Good Faith and Due Process: Lessons from the Shari'ah*, 20 *ARB. INT'L* 97, 98 (2004). Majeed refers to the decision of the Supreme Court of Pakistan in 2000 which stunned the domestic and international banking community when it held that "all prevailing forms of *riba* (interest), either in banking transactions or in private transactions" are in contravention of Shari'a. *Id.* at 97-98.

18. See, e.g., ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 3 (2d ed. 1991) (describing arbitration as "two or more parties, faced with a dispute which they cannot resolve for themselves, agreeing that some private individual will resolve it for them and if the arbitration runs its full course . . . it will not be settled by a compromise, but by a decision."); Henry P. de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 *TUL. L. REV.* 42, 42-43 (1982) (explaining arbitration as "a mode of resolving disputes by one or more third persons who derive their power from agreement of the parties and whose decision is binding upon them"); W. MICHAEL REISMAN ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION*, at xxviii (1997) (defining arbitration as "a contractual method for the relatively private settlement of disputes"); see also 1 GABRIEL M.

provides parties more flexibility and control over the proceedings and helps eliminate the uncertainties in choice of decision-maker, forum, and applicable law.¹⁹ Moreover, arbitration tribunals can maintain jurisdiction over parties who have submitted to it pursuant to an agreement or arbitration clause. Perhaps most importantly, commercial arbitration provides the mechanism to internationally enforce arbitral awards, at least within the nations that are signatories to the relevant conventions and treaties.²⁰

International commercial arbitration is essentially arbitration between or among transnational actors, between states or private parties.²¹ Arbitration has become the preferred mechanism to resolve international commercial disputes:

In this realm of international commercial transactions, arbitration has become the preferred method of dispute resolution. Arbitration is preferred over judicial methods of dispute resolution because the parties have considerable freedom and flexibility with regard to choice of arbitrators, location of the arbitration, procedural rules for the arbitration, and the substantive law that will govern the relationship and rights of the parties.²²

International commercial arbitration is designed to assure parties from different jurisdictions that their dispute will be settled

WILNER, DOMKE ON COMMERCIAL ARBITRATION § 2.01 (rev. ed. 1991); Carolyn B. Lamm, *Recent Developments in International Arbitration*, 36 FED. B. NEWS & J. 276, 276 (1989) ("Although speed and lower expense are usually cited as among the advantages of arbitration, they are more likely to be achieved in domestic arbitration.").

19. See J. Sorton Jones, *International Arbitration*, 8 HASTINGS INT'L & COMP. L. REV. 213, 213, 216, 222 (1985) (noting situations where arbitration may be more favorable than court proceedings).

20. Jones, *supra* note 19, at 213, 216, 222; Lamm, *supra* note 18, at 276 (describing arbitration's characteristic of jurisdiction over the parties as an "indisputable advantage"). Essentially when parties agree to arbitration before a dispute arises, they waive potential jurisdictional objections. *Id.* at 278.

21. Arbitrations may also be differentiated by those that involve states as a party, and those that do not. Special institutions are available for arbitrations in which states are a party. The Permanent Court of Arbitration in the Hague was formed in 1899 to handle arbitrations exclusively involving states, but since 1993 has broadened its mandate to include disputes involving states and private parties, as well as disputes involving international organizations. Permanent Court of Arbitration, General Information, <http://www.pca-cpa.org/ENGLISH/GI/>. The International Center for the Settlement of Investment Disputes (ICSID) also facilitates disputes between foreign investors and state parties. ICSID, About ICSID, <http://www.worldbank.org/icsid> (follow "About ICSID" hyperlink).

22. Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, 26 AM. BUS. L.J. 511, 512 (1988) (footnote omitted).

in a neutral fashion.²³ Such neutrality is achieved using presumably internationally-neutral procedural rules and arbitrators “detached from the courts, governmental institutions, and cultural biases of either party.”²⁴ As we shall see, this is a tall order indeed.

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

In addition to transnational treaties, international commercial arbitration is governed by several sources of law, including: (1) the national law governing the parties' capacity to enter into the arbitration agreement; (2) the law governing the arbitration agreement itself; (3) the law controlling the arbitral proceedings, such as the rules of a permanent arbitral institution like the International Arbitration Forum or an ad hoc arbitral body established by the parties; and (4) the law governing the substantive issues in the dispute.²⁵

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

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

Arbitration can be *ad hoc* or institutional.²⁶ *Ad hoc* arbitrations are conducted by parties without the assistance or supervision of an arbitral institution.²⁷ The parties can either adopt the rules of the United Nations Commission on International Trade Law (“UNCITRAL”)²⁸ or select another set of procedural rules.²⁹ The UNCITRAL rules are not, for instance, as comprehensive as the arbitration rules of the ICC discussed

23. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 2 (2d ed. 2001).

24. *Id.*

25. See Volz & Haydock, *supra* note 2, at 872-73 (footnote omitted).

26. BORN, *supra* note 23, at 11.

27. *Id.* at 12.

28. U.N. Comm'n on Int'l Trade Law (UNCITRAL), UNCITRAL ARBITRATION RULES, U.N. Doc. No. A/31/17, U.N. Sales No. E.77.V.6 (1976), reprinted in 15 I.L.M. 702 (1976), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules.pdf> [hereinafter UNCITRAL Rules].

29. BORN, *supra* note 23, at 45.

below.³⁰ Parties have to be more careful in planning when involved in *ad hoc* arbitration, as they will lack the expertise available from the institutions.³¹

An institutional arbitration is one entrusted to a major arbitration institution. The best known of these institutions include the International Chamber of Commerce,³² the London Court of International Arbitration,³³ and the American Arbitration Association.³⁴ It is important to note that these are not the only arbitral institutions, though these have become the most respected and experienced.³⁵ Each of these arbitral institutions, as well as the others, have enacted sets of procedural rules that apply where parties have agreed to arbitration pursuant to such rules.³⁶

These institutions do not arbitrate the dispute, but merely facilitate and provide support and guidance to the arbitrators selected by the parties.³⁷ The institutional rules set out the basic procedural framework for the arbitration process.³⁸ Generally, the rules also authorize the arbitral institution to: act as an "appointing authority" in the event the parties cannot agree, set a

30. Avraham Azrieli, *Improving Arbitration Under the U.S.-Israel Free Trade Agreement: A Framework for a Middle-East Free Trade Zone*, 67 ST. JOHN'S L. REV. 187, 216 (1993) (explaining that ICC Rules are more comprehensive since they include institutional rules for ICC panels and administrative provisions).

31. See Robert B. von Mehren, *Rules of Arbitral Bodies Considered from a Practical Point of View*, 9 J. INT'L ARB. 105, 106 (1992). For instance, the parties need to ensure they have designated an "appointing authority" in the event they cannot agree on an arbitrator. BORN, *supra* note 23, at 12. Most of the leading arbitral institutions can act as an appointing authority, if the parties in an *ad hoc* arbitration request them. *Id.* at 45 n.55.

32. See Int'l Chamber of Commerce, <http://www.iccwbo.org/>; see also GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: PLANNING, DRAFTING AND ENFORCING 46-47 (1999).

33. See London Court of International Arbitration (LCIA), <http://www.lcia-arbitration.com/>; see also BORN, *supra* note 32, at 47-48.

34. See American Arbitration Association, <http://www.adr.org/>; see also BORN, *supra* note 32, at 48-50.

35. BORN, *supra* note 32, at 45-46; von Mehren, *supra* note 31, at 105. For further information regarding other international arbitration institutions, see BORN, *supra* note 32, at 50-52 (describing other institutions); Juris International, Dispute Resolution Centres, <http://www.jurisint.org/en/ctr/index.htm> (listing contact information and hyperlinks to over 100 arbitral institutions); WWW Virtual Library—Arbitration Database, <http://www.interarb.com/vl> (follow "International bodies for Commercial Arbitration" hyperlink) (providing hyperlinks to various arbitral institutions).

36. BORN, *supra* note 32, at 44; BORN, *supra* note 23, at 4. For a helpful list comparing arbitral rules of UNCITRAL, the ICC, and the AAA, see Susan W. Tiefenbrun, *A Comparison of International Arbitral Rules*, 15 B. C. INT'L & COMP. L. REV. 25 (1992).

37. BORN, *supra* note 32, at 44.

38. *Id.* at 44-45.

timetable for the proceedings, help resolve challenges to arbitrators, designate the place of arbitration, help set or influence the fees that can be charged by arbitrators, and in some situations, review the arbitral award to reduce the risk of unenforceability.³⁹

The International Chamber of Commerce (“ICC”) is the world’s leading arbitral institution.⁴⁰ The ICC’s International Court of Arbitration (“the Court”), established in 1923, currently boasts membership from over eighty nations.⁴¹ The ICC remains a pioneer in the development of international arbitration and its Rules of Conciliation and Arbitration (“ICC Rules”) are used extensively.⁴² Since its inception, the Court has handled more than 13,000 cases, and in 2003 about 580 new matters involving 123 jurisdictions were filed with the Court.⁴³

The ICC Rules⁴⁴ were ratified at the ICC Congress in 1923 and were most recently revised in 1998.⁴⁵ Pursuant to the ICC Rules, the ICC is involved extensively in the administration of individual arbitrations.⁴⁶ This role includes, but is not limited to, the following: (1) determining whether there is a *prima facie*

39. See generally BORN, *supra* note 23, at 1-52 (discussing international arbitration in general).

40. INTERNATIONAL CHAMBER OF COMMERCE, GUIDE TO ICC ARBITRATION 9 (1994); see generally YVES DERAIS & ERIC A. SCHWARZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION (1998) (explaining the ICC and its Rules); W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (2d ed. 1990); J. Gillis Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 AM. REV. INT’L ARB. 91 (1990) (arguing the ICC Court and system of arbitration is outdated and must “modernize and streamline” its rules and organization); Stephen R. Bond, *The Present Status of the International Court of Arbitration of the ICC: A Comment on an Appraisal*, 1 AM. REV. INT’L ARB. 108 (1990) (responding to Dr. Wetter’s arguments by concluding ICC arbitration has been successful in the past and will continue to be useful in the future).

41. INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 40, at 9; ICC International Court of Arbitration, Introduction to Arbitration, <http://www.iccwbo.org/court/english/arbitration/introduction.asp>.

42. Introduction to Arbitration, *supra* note 41; BORN, *supra* note 23, at 14; Bond, *supra* note 40, at 122.

43. Introduction to Arbitration, *supra* note 41 http://www.iccwbo.org/court/english/intro_court/introduction.asp; ICC International Court of Arbitration, Statistics, http://www.iccwbo.org/court/english/intro_court/statistics.asp.

44. International Chamber of Commerce, Rules of Arbitration, Jan. 1, 1998 (2001), available at http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf [hereinafter ICC Rules].

45. BORN, *supra* note 23, at 13; DERAIS & SCHWARZ, *supra* note 40, at 2.

46. BORN, *supra* note 23, at 13.

agreement to arbitrate,⁴⁷ (2) deciding on the number of arbitrators,⁴⁸ (3) appointing arbitrators in the event one party defaults or the parties cannot agree,⁴⁹ (4) deciding challenges against arbitrators,⁵⁰ (5) ensuring that arbitrators are conducting the arbitration in accordance with the ICC Rules and replacing the arbitrators if necessary,⁵¹ (6) determining the place of arbitration,⁵² (7) fixing and extending time-limits,⁵³ (8) determining the fees and expenses of the arbitrators,⁵⁴ (9) setting and collecting payments on account of costs,⁵⁵ (10) reviewing the "Terms of Reference" which define the issues to be arbitrated,⁵⁶ and (11) scrutinizing arbitral awards.⁵⁷

Founded in 1892, the London Court of International Arbitration ("LCIA") is becoming an increasingly important player in international commercial arbitration.⁵⁸ It is mainly viewed as an English institution, despite its efforts to revamp this image.⁵⁹ The LCIA administers a set of arbitration rules, the London Court of International Arbitration Rules ("LCIA Rules"), which were extensively revised in 1998.⁶⁰ The LCIA is not as involved in the arbitration process as the ICC. In contrast with the ICC Rules, the LCIA Rules do not contain Terms of Reference procedure and do not provide for review of arbitral awards.⁶¹ However, the LCIA does have the power to order discovery and security for legal costs.⁶²

47. ICC Rules, *supra* note 44, art. 6, para. 2.

48. *Id.* art. 8, para. 2.

49. *Id.* art. 8, paras. 3-4.

50. *Id.* art. 11, para. 3.

51. *Id.* art. 12, para. 2.

52. *Id.* art. 14, para. 1.

53. *See, e.g., id.* art. 4, para. 4; art. 32, para. 2.

54. *Id.* art. 30, para. 2.

55. *Id.* art. 30, para. 3.

56. *Id.* art. 4, para. 6; art. 18, para. 1.

57. *Id.* art. 27.

58. BORN, *supra* note 23, at 15. The LCIA claims a current caseload of 50 cases per year. *Id.* *See also* LCIA, *supra* note 33.

59. For instance, no more than six of the 35 members of the Court may be of UK nationality. LCIA, *supra* note 33 (follow "LCIA" hyperlink, then follow "LCIA Court" hyperlink).

60. BORN, *supra* note 23, at 15.

61. *Id.*

62. *Id.*

The most active arbitral institution is the American Arbitration Association (“AAA”).⁶³ This arbitral institute has promulgated numerous arbitration rules for specialized types of international commercial disputes.⁶⁴ The most extensively used are the AAA Commercial Arbitration Rules.⁶⁵ The AAA boasts of handling roughly 400 international disputes on an annual basis.⁶⁶ In 1991, the AAA promulgated the AAA International Arbitration Rules designed specifically for international arbitrations.⁶⁷ The rules “are based principally on the UNCITRAL Arbitration Rules (discussed below), and were intended to permit a maximum of flexibility and a minimum of administrative supervision.”⁶⁸ They were recently revised in April 1997.⁶⁹ Under the 1997 version, the AAA International Arbitration Rules provide the applicable set of AAA arbitration rules in “international” disputes.⁷⁰

In comparison to the ICC, the AAA administrative staff plays less of a role in the arbitration process.⁷¹ Besides playing a less significant role in setting the arbitrators’ fees, the AAA does not receive or serve initial notices or requests for arbitration, nor does it require or review a Terms of Reference, nor does it review draft awards.⁷²

In addition to the foregoing institutions, there are also other subject-specific arbitral institutions.⁷³ The International Center for the Settlement of Investment Disputes (“ICSID”) offers an alternative for foreign investors who do not wish to use the

63. *Id.* at 16; *see also* Arbitration, Mediation and Other Forms of Alternative Dispute Resolution, American Arbitration Association, *supra* note 34. The AAA claims over 2 million disputes have been filed for resolution, either by arbitration, mediation or some form of alternative dispute resolution. AMERICAN ARBITRATION ASSOCIATION, PUBLIC SERVICE AT THE AMERICAN ARBITRATION ASSOCIATION 127 (2004), *available at* <http://www.adr.org/si.asp?id=1544>.

64. BORN, *supra* note 23, at 16. Parties can select these specialized rules in their arbitration agreements. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 16-17.

73. *See, e.g.,* World Intellectual Property Organization (WIPO), Arbitration and Mediation Center, <http://www.arbitrator.wipo.int/center/index.html>; Court of Arbitration for Sport (CAS), <http://www.tas-cas.org/en/present/frmpres.htm>.

domestic courts to resolve investment disputes.⁷⁴ The limitations in using the ICSID include: the fact that the subject country must have ratified the ICSID Convention; the matter must be an "investment dispute" as defined in the Convention;⁷⁵ and the dispute must be between a party and a foreign country, rather than between two parties.⁷⁶

The United Nations Commission on International Trade Law Arbitration Rules ("UNCITRAL Arbitration Rules")⁷⁷ of 1976 also contributed significantly to the spread of international commercial arbitration by harmonizing arbitration procedures.⁷⁸ The UNCITRAL Arbitration Rules could be used by parties who wanted to participate in *ad hoc* arbitration, as well as those who did not wish to use existing arbitral institutions.⁷⁹ The Commission also drafted the UNCITRAL Model Law in 1985 for use in international commercial arbitration.⁸⁰ The Model Law has served as the basis for the arbitration laws of many nations.⁸¹

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

It should also be noted that most developed trading states (and many other countries) have enacted national arbitration legislation. These national laws, *inter alia*, provide for the enforcement of international arbitration agreements and awards, limit judicial interference in the arbitration process, authorize specified judicial support for the arbitral process, affirm the capacity of parties to enter into valid and binding agreements to arbitrate future commercial disputes, provide mechanisms for the enforcement of such arbitration agreements, and require the

74. See About ICSID, *supra* note 21.

75. BORN, *supra* note 23, at 17.

76. International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules, art. 1, para. 2; art. 25, para. 1, (Jan. 2003) available at <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>; About ICSID, *supra* note 21.

77. UNCITRAL RULES, *supra* note 28.

78. BORN, *supra* note 23, at 46.

79. *Id.* at 45.

80. United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on International Commercial Arbitration (1985), available at http://www.uncitral.org/english/texts/arbitration/1985Model_arbitration.html [hereinafter UNCITRAL Model Law]; see also BORN, *supra* note 23, at 30-31.

81. BORN, *supra* note 23, at 31. Interestingly, the Model Law "has also been adopted by several U.S. states, including California, Connecticut, Oregon, and Texas." *Id.*

recognition and enforcement of arbitration awards.⁸² In addition, most modern arbitration legislation restricts the ability of national courts to interfere in the arbitration process, both when arbitral proceedings are pending and in reviewing ultimate arbitration awards.⁸³ Some domestic legislation even authorizes limited judicial assistance to the arbitral process.⁸⁴ Such judicial assistance can include selecting arbitrators or arbitral sities, enforcing a tribunal's orders with respect to evidence taking or discovery, and granting provisional relief in aid of arbitration.

III. ISLAM AND ITS LEGAL SYSTEM

A. *Islam*

The maxim *ubi societas ibi jus* succinctly expresses a trite observation, namely that to have a society, one must have rules.⁸⁵ A society is defined as "a community, nation, or broad grouping of people having common traditions, institutions, and collective activities and interests."⁸⁶ In order for the civilization to endure, the common factors that define it must be protected. This can only be accomplished through the promulgation of laws and regulations that preserve the very nature of the society, its values and institutions.⁸⁷ These laws in turn become one of the characteristics of the particular civilization. It is clear, therefore, that in order for a civilization to remain distinct, it must preserve its institutions, especially its legal foundation, which is a crucial substructure in upholding and shaping the values that help mold the civilization. Indeed, as the late scholar Ismail Faruqi wrote, "Islamic law made Islamic civilization, not vice versa."⁸⁸

An appreciation of the sources, major principles, depth, and dynamism of the Shari'a is imperative to understand its impact on international arbitration in the Middle East. Before embarking on

82. *See id.* at 27-34.

83. *See id.* at 30-34 (discussing national arbitration legislation in England, France, and Switzerland).

84. *See id.*

85. *See* Jianming Shen, *The Basis of International Law: Why Nations Observe*, 17 DICK. J. INT'L L. 287, 307 (1999).

86. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1119 (Frederick C. Mish ed., Merriam-Webster Inc. 1988).

87. ISMAIL FARUQI & LAMYA FARUQI, *THE CULTURAL ATLAS OF ISLAM* 279 (1986).

88. *Id.*

an introduction to the Shari'a, it is helpful to briefly look at the ideological framework of Islam. The word *Islam* means submission to God.⁸⁹ It is derived from the word *salaam*, which means peace.⁹⁰ The Shari'a is the path to achieve this submission.⁹¹ The Shari'a aims to fulfill both spiritual and material welfare, as Islam envisions no separation between the temporal and the spiritual:

In Islam it is the same reality which appears as the Church looked at from one point of view and the State from another. It is not true to say that the Church and the State are two sides or facets of the same thing. Islam is a single unanalysable reality which is one or the other as your point of view varies.⁹²

The essence of the belief system is the absolute authority of God: "There can be no doubt that the essence of Islamic civilization is Islam; or that the essence of Islam is *tawhid*, the act of affirming God to be the One, absolute, transcendent Creator, Lord and Master of all that is."⁹³

The belief in the supremacy of God results in the inescapable conclusion that God's creation must serve and fulfill His will. Therefore, in Islam, God is the source of authority and the sole sovereign lawgiver.⁹⁴ The Shari'a is divine and eternal, not in letter but rather in spirit.⁹⁵ All human legislation must conform to the divine will as discerned from the *Qur'an* and *Sunnah* and understanding of *al dhawq al shar'i*, or intuitive knowledge of the purposes of the law.⁹⁶ God created human beings with the

89. THE OXFORD DICTIONARY OF ISLAM 144 (John L. Esposito ed., Oxford Univ. Press 2003); GAI EATON, ISLAM AND THE DESTINY OF MAN 36 (Albany: State University of New York Press 1985); JOHN L. ESPOSITO, ISLAM THE STRAIGHT PATH 14 (New York: Oxford University Press 1988) (1991); see generally F. RAHMAN, ISLAM (1968).

90. THE OXFORD DICTIONARY OF ISLAM, *supra* note 89, at 274.

91. ESPOSITO, *supra* note 89, at 14.

92. MOHAMMAD IQBAL, THE RECONSTRUCTION OF RELIGIOUS THOUGHT IN ISLAM 154 (Kitab Publishing House 1974).

93. FARUQI & FARUQI, *supra* note 87, at 279. For a good introductory discussion on the supremacy of God or *tawhid* see E. Dada Adelowo, *The Concept of Tauhid in Islam: A Theological Review*, 35 ISLAMIC Q. 23, 23-34 (1991); THE OXFORD DICTIONARY OF ISLAM, *supra* note 89, at 317.

94. Qur'an 12:40 ("The command is for none but God. He hath commanded that ye worship none but Him."); Qur'an 7:54 ("Verily, His are the creation and the command.").

95. See Kamali, *supra* note 5, at 217 (1989); AHMAD HASAN, THE EARLY DEVELOPMENT OF ISLAMIC JURISPRUDENCE 7 (1970) ("Abu Hanifah . . . distinguished *din* from *shari'ah* on the ground that *din* was never changed, whereas *shari'ah* continued to change through history.").

96. See HASAN, *supra* note 95, at 34; THE OXFORD DICTIONARY OF ISLAM, *supra* note 89, at 287-88.

potential to ascertain the divine imperatives, as Islam teaches that humans are distinguished from God's other creations by the mere fact that humans can think rationally.⁹⁷

The distinction must be made between Shari'a and many of the technical legal rules derived from the Qur'an and Sunnah through *fiqh*.⁹⁸ A *faqih*,⁹⁹ or jurist, derived these rules and thus the decision is not eternal and is open to re-interpretation in light of, *inter alia*, new social, economic, educational, and political circumstances.¹⁰⁰ The Shari'a differs from the Western legal tradition in many respects including the derivation of its legitimacy, sources, and methodology for evolution or reform.¹⁰¹ But there are also some similarities. Like most Western legal systems, the Shari'a is a positive system of law and not merely religious law. Additionally, both systems apply judge-made law using the case law method in their own particular ways.¹⁰²

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

Islamic law is not a systematic code, but a living and growing organism; nevertheless there is amongst its different schools a

97. WING-TSIT CHAN ET AL., *THE GREAT ASIAN RELIGIONS: AN ANTHOLOGY* 309 (1969) ("Islam puts its trust in reason, the supreme faculty of knowledge with which man is endowed, as the only method possible for ever deciding the issue.")

98. Kamali, *supra* note 5, at 215, 216; *THE OXFORD DICTIONARY OF ISLAM*, *supra* note 89, at 288 (noting the distinction between Shari'a and *fiqh*, or jurisprudence).

99. Abdul Ghafur Muslim, *Islamic Laws in Historical Perspective: An Investigation Into Problems and Principles in the Field of Islamization*, 31 *ISLAMIC Q.* 69, 69 (1987) ("A *Faqih* means a jurist; an expert in the field of law, who possesses outstanding knowledge of revealed sources and methodology, and the intelligence to make use of the basic sources through independent reasoning and the principles provided by the *Shari'a*."); see also Faruqi, *supra* note 95, at 34 ("The great jurists of Islam—Shafi'i, Abu Hanifah, Malik and Ahmad ibn Hanbal—all understood the compound term *usul al fiqh* not as the general principles of Islamic law, but the first principles of Islamic understanding of life and reality The *faqihs* [*sic*] of the classical period were real encyclopedists, masters of practically all the disciplines from literature and law to astronomy and medicine. They were themselves professional men who knew Islam not only as.")

100. See *THE OXFORD DICTIONARY OF ISLAM*, *supra* note 89, at 288 (noting *fiqh* is "human efforts to codify Islamic norms in practical terms" and such "human generated legislation is considered fallible and open to revision").

101. See generally JOSEPH SCHACT, *THE ORIGINS OF MUHAMMADAN JURISPRUDENCE* (1959).

102. See generally 34 *CLEV. ST. L. REV.* 1 (1985) (publishing lectures from the Conference on Comparative Links between Islamic Law and the Common Law).

large measure of agreement, because the starting point and the basic principles are identical. The differences that exist are due to historical, political, economic and cultural reasons, and it is, therefore, obvious that this system cannot be studied without a proper regard to its historical development.¹⁰³

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

During the life of the Prophet Muhammad, solutions to legal problems were settled by resorting to the Prophet who relied on his inspired interpretation of the divine revelation (or *data revelata*).¹⁰⁴ After the demise of the Prophet, his Companions (*al-Sahabah*) had to extrapolate, infer, and deduce legal prescriptions from their knowledge of the first principles of Islamic understanding of life and reality.¹⁰⁵ Twenty-seven Companions of Prophet Muhammad distinguished themselves as legal experts.¹⁰⁶ Included among them were the four Caliphs in order of their rule—Abu Bakr al Siddiq, Umar ibn al Khattab, Uthman ibn Affan, and Ali ibn Abu Talib—as well as A'ishah, one of the Prophet's wives.¹⁰⁷ Umar, Ali, and A'ishah had a great impact on the development of Islamic law, since the two early schools of jurisprudence—the jurists of Medinah and Kufa (Iraq)—derived their legal doctrines from their verdicts among others.¹⁰⁸

The practice of the Prophet's Companions was to first consult the Qur'an, and then the Sunnah.¹⁰⁹ If these two primary sources were silent, they resorted to extrapolating and deducing from the

103. ASAF A. A. FYZEE, *OUTLINES OF MUHAMMADAN LAW* 1 (3d ed. 1964).

104. *Id.* at 31-32; FARUQI & FARUQI, *supra* note 87, at 274.

105. HASAN, *supra* note 95, at xiv.

106. *Id.*

107. See Mohammad Hashim Kamali, *Law and Society: The Interplay of Revelation and Reason in the Shariah*, in *THE OXFORD HISTORY OF ISLAM* 111-12 (John L. Esposito ed., 1999).

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

109. See generally Kamali, *supra* note 107, at 111 (noting the method of the Companions).

first principles gleaned from the two divinely inspired sources.¹¹⁰ Umar, the second Caliph of Islam, instituted the body of legal opinions of some of the companions as a tertiary source that could be consulted by later jurists, or *fukah*.¹¹¹ It is clear that Islamic law has three distinguishable facets: revelation (the Qur'an and the Sunnah which is also considered inspired), interpretation, and application.¹¹²

A century after the death of the Prophet, none of the Companions were alive and, therefore, a vacuum developed in the legal field. This resulted from the fact that the earlier generation knew about the situational contexts and spirit of Islam and the Prophet's mission.¹¹³ Thus, they were in a position to legislate with these guidelines in mind. Unfortunately, the later Muslims were going to be deprived of these advantages if these guidelines were not recorded for posterity. The Qur'an, as will be discussed in the next section, had already been committed to writing. Therefore the early Muslim jurists and scholars set out to canonize the Sunnah and invented *fiqh* to systematize the development of the law.¹¹⁴ *Fiqh* is divided into two components: *usul al fiqh* and *furu al fiqh*.¹¹⁵ *Usul al fiqh* is the science of jurisprudence covering the origins and sources from which the rules of human conduct are derived. It includes the philosophy of law, sources of rules, and the principles of legislation, interpretation, and application of the Qur'an and Sunnah.¹¹⁶ *Furuh al fiqh* are the derivatives or the legal rules; these are subject to change.¹¹⁷

There evolved much scholarship in this area and numerous schools of jurisprudence developed.¹¹⁸ They began along

110. See *id.* ("The Companions frequently resorted to personal reasoning and consultation in the determination of issues.")

111. FARUQI & FARUQI, *supra* note 87, at 275. *Fukah* (jurists) is the plural of *faqih*. THE OXFORD DICTIONARY OF ISLAM, *supra* note 89, at 80.

112. A. Z. HAMMAD, ISLAMIC LAW: UNDERSTANDING JURISTIC DIFFERENCES 10 (1992).

113. See Kamali, *supra* note 107, at 111 (noting the Companions as "direct recipients" of the Prophet's teachings).

114. See generally *id.* at 110-16 (giving a brief history of *fiqh* and Sunnah).

115. Kamali, *supra* note 5, at 212; Kamali, *supra* note 107, at 110; Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 50 (2002).

116. See M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E.L. 135, 135-37 (2002); THE OXFORD DICTIONARY OF ISLAM, *supra* note 89, at 329.

117. Kamali, *supra* note 107, at 110.

118. According to the great Islamic philosopher and legal scholar Muhammad Iqbal:

geographical lines, in Medinah and Kufa (Iraq), but later evolved around individual scholars or jurists.¹¹⁹ Due to historical and political factors, four schools of jurisprudence survived in the *Sunni* tradition.¹²⁰ The four schools of Sunni jurisprudence are named after their respective founders: the Hanafi School,¹²¹ the Maliki School,¹²² the Shafi'i School,¹²³ and the Hanbali School.¹²⁴ The early era was a period of great intellectual progress. According to Professor George Makdisi, the scholastic method of disputation and lecture was developed by Islamic jurists in the ninth century—a method which was later used in Bologna, Paris, Oxford, and elsewhere referred to as “readings” and “moots.”¹²⁵

[F]rom about the middle of the first century up to the beginning of the fourth not less than nineteen schools of law and legal opinion appeared in Islam. This fact alone is sufficient to show how incessantly our early doctors of law worked in order to meet the necessities of a growing civilization.

IQBAL, *supra* note 92, at 165.

119. Kamali, *supra* note 107, at 112-13.

120. *Id.* The two main branches of Islam are the *Sunni* and the *Shia* (or *Shiites*). The schism occurred after the arbitration between Ali ibn Abi Talib and Muawiyah ibn Abi Sufyan for the Caliphate. Fred M. Donner, *Muhammad and the Caliphate: Political History of the Islamic Empire Up to the Mongol Conquest*, in THE OXFORD HISTORY OF ISLAM 14-18 (John L. Esposito ed. 1999). The Shia insisted that the Caliphate had to remain in the family of the Prophet (represented by his cousin Ali) while the Sunni tradition did not insist on this.

121. Founded by Iraqi jurist Abu Hanifa (AD 699-767). Vincent J. Cornell, *Fruit of the Tree of Knowledge: The Relationship Between Faith and Practice in Islam*, in THE OXFORD HISTORY OF ISLAM, *supra* note 120, at 94.

122. Founded by Medinan scholar Malik ibn Anas (AD 715-795). *Id.* at 95.

123. Founded by successors of Muhammad ibn Idris al-Shafii (AD 767-820). *Id.*

124. Founded by Ahmad ibn Hanbal (AD 780-855). *Id.* This Article will focus on Sunni jurisprudence, as this is the prevalent system in most of the Islamic world, including the Middle East.

125. George Makdisi, *supra* note 13, at 6.

B. Sources and Methodology of Islamic Law¹²⁶

1. Qur'an

The Qur'an is composed of 114 *suwar* (chapters), 6,616 *ayat* (verses), and 77,934 words.¹²⁷ Most of the revelations to Prophet Muhammad had a situational context which is referred to as *asbab al nuzul* (the situational causes of revelation).¹²⁸ Many orientalist proclaim that the Prophet produced the Qur'an himself, but at the same time, they do not deny that the existing text is "unaltered" (meaning the Qur'an is written exactly as it was dictated to the Prophet's scribes).¹²⁹ William Muir concluded that "we may upon the strongest presumption affirm that every verse in the Kor'an is the genuine and unaltered composition of Mohammad himself."¹³⁰ On the contrary, Muslims believe the Qur'an is the actual verbatim revelation sent by God.¹³¹ It is a commonly known fact that Muhammad was illiterate¹³² and thus, could not have composed the work himself.

The Qur'an is believed to be the last revelation sent to mankind; it encompasses and reforms many of the earlier

126. In light of the scope of this Article, it is not possible to dwell on this matter in the detail it deserves and requires. The sources discussed *infra* are not finite; for example, the renowned Islamic scholar Muhammad Hamidullah sets out the sources as follows:

- The *Qur'an*.
- The *Sunna*, or Tradition of the Prophet.
- The orthodox practice of the early Caliphs.
- The practice of other Muslim rulers not repudiated by the jurisconsults.
- The opinions of celebrated Muslim jurists:
 - consensus of opinion, or *Igmah*; or
 - individual opinions, or *Qiyas*.
- The arbitral awards.
- The treaties, pacts and other conventions.
- The official instructions to commanders, admirals, ambassadors and other state officials.
- The internal legislation for conduct regarding foreign relations and foreigners.
- The customs and usage.

MUHAMMAD HAMIDULLAH, *MUSLIM CONDUCT OF STATE* 18 (4th ed. Ashraf Press 1961) (1935). See also T.J. al Alwani, *Usul Al Fiqh Al Islami: Source Methodology in Islamic Jurisprudence*, available at http://www.usc.edu/dept/MSA/law/alalwani_usulalfiqh/ch1.html.

127. FARUQI & FARUQI, *supra* note 87, at 100.

128. See THE OXFORD DICTIONARY OF ISLAM, *supra* note 89, at 25 (defining *Asbab al-Nuzul*).

129. WILLIAM MUIR, *THE LIFE OF MOHAMMAD*, at xxvii-xxviii (1923).

130. *Id.* at xxviii.

131. Donner, *supra* note 120, at 6-7.

132. See Abdal-Haqq, *supra* note 5, at 40.

revelations sent to other prophets, including the Psalms of David, the Torah of Moses, and the Bible as revealed to Jesus.¹³³ Muslims see the Qur'an as the culmination of the evolutionary process of revelation.¹³⁴ The Qur'an is not a legal treatise, but rather lays down certain guidelines and general principles for the attainment of an ideal civilized society.¹³⁵ Thus, the Qur'an, with the aid of the Sunnah (precedent set by Prophet Muhammad), *ijma* (community consensus), *qiyas* (analogical reasoning), *ijtihad* (independent reasoning or intellectual effort), and *urf* (custom) can be used as a basis upon which to build a body of law.¹³⁶ Only 350 verses address legal issues, and most of these were revealed in response to problems that were actually encountered (*al-ahkam al amaliyyah* or practical rulings pertaining to the conduct of the individuals).¹³⁷

Islamic legal scholars are unanimous in the view that the Qur'an is the primary source of the Shari'a, although this statement does not occur frequently in the writings of early Muslim jurists.¹³⁸ Muslims believe that unlike revelation, humanity's understanding of Shari'a is fallible. Therefore, Islamic scholars do not feel that there is any contradiction between reason and revelation—reason exists to correct man's erroneous understanding of the *data revelata*.¹³⁹

133. Donner, *supra* note 120, at 7.

134. Muslims believe that unlike the previous revelations sent from God, the text of the Qur'an has been preserved intact. At the time of the Prophet's death nearly 30,000 people had memorized the Qur'an (Muslims must recite the Qur'an from memory in their 5 daily prayers and other occasions). Moreover, being illiterate, the Prophet had scribes write the revelations, which were compiled and distributed. One of the early copies still exists in (Central Asia). See FARUQI & FARUQI, *supra* note 87, at 100 ("Its grammar, syntax, idioms, literary forms—the media of expression and the constituents of beauty—are still the same as they were in the Prophet's time.")

135. Donner, *supra* note 120, at 7.

136. Bassiouni & Badr, *supra* note 116, at 140-41; THE OXFORD DICTIONARY OF ISLAM, *supra* note 89, at 133, 134, 254-55, 305, 328 (defining Sunnah, Ijma, Qiyas, Ijtihad, and Urf, respectively).

137. Kamali, *supra* note 107, at 119-20. Indeed, "less than 3 percent of the [Quran] deals with legal matters." *Id.* at 119.

138. This is attributed to the fact that this was too evident to be stressed at the time. There is ample proof that the Qur'an was used as an authoritative source of Islamic law. See, e.g., Zafar Ishaq Ansari, *An Early Discussion on Islamic Jurisprudence: Some Notes on al-Raad 'ala Siyar al-Awza'i*, in ISLAMIC PERSPECTIVES: STUDIES IN HONOUR OF MAWLANA SAYYID ABUL A'LA MAWDUDI 147, 150 (Khurshid Ahmad & Zafar Ishaq Ansari eds.) (The Islamic Foundation 1979); HASAN, *supra* note 95, at 12-20.

139. See FARUQI & FARUQI, *supra* note 87, at 265.

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

2. Sunnah

The term *Sunnah* refers to the normative behaviors, decisions, actions, and tacit approvals and disapprovals of the Prophet.¹⁴⁰ The Sunnah were “heard, witnessed, memorized, recorded, and transmitted” from generation to generation (as the Arabs had a great oral tradition).¹⁴¹ Beginning in the third century, Sunnah were compiled into collections of traditions, known as *ahadith* (plural of *hadith*).¹⁴² Over time, six of these collections became the most authoritative (*sahih*) collections: al-Bukhari (256/870), Muslim (251/865), Abu Da'ud al-Sijistani (275/888), al-Tirmidhi (279/892), al-Nasa'i (303/915), Ibn Majjah al-Qazwini (273/886).¹⁴³ The al-Bukhari and Muslim remain the most respected of the six *sahih* texts.¹⁴⁴ The authenticity of the *sahih* is based on the scrutiny of references, the cross-checking of witnesses (employed by collectors), and the *isnad*.¹⁴⁵ The *isnad* is the credibility of the chain of authorities attesting to the accuracy of a particular tradition.¹⁴⁶ In the early years of Islam, scholarship also flowered in the study of Sunnah through *usul al hadith* (the science of hadith).¹⁴⁷ The aforementioned traditions elaborate on the principles laid down in the Qur'an.¹⁴⁸

140. The majority of theologians accept the Sunnah as the second main source Shari'a but one group of scholars, mainly the Mu'tazilah theologians, do not accept this. See S. M. DARSH, *ISLAMIC ESSAYS* 79 (1979) (discussing and refuting their position).

141. FARUQI & FARUQI, *supra* note 87, at 114; Bassiouni & Badr, *supra* note 116, at 150-51.

142. FARUQI & FARUQI, *supra* note 87, at 114; Cornell, *supra* note 121, at 74.

143. FARUQI & FARUQI, *supra* note 87, at 114; Cornell, *supra* note 121, at 74-75.

144. FARUQI & FARUQI, *supra* note 87, at 114; Cornell, *supra* note 121, at 74; THE OXFORD DICTIONARY OF ISLAM, *supra* note 89, at 273.

145. Bassiouni & Badr, *supra* note 116, at 151 (citing ABU ALI FARISI, *JAWAHIR AL-USUL FI ILM HADITH AL-RASUL* (1969)).

146. *Id.* (citing ABD ALLAH IBN QUTAYBA, *TA'WIL MUKHTALAFAT AL-HADITH* (1936)); THE OXFORD DICTIONARY OF ISLAM, *supra* note 89, at 151.

147. See generally Bassiouni & Badr, *supra* note 116, at 164-65 (citing MUHAMMAD IBN ALI SHAWKANI, *KITAB IRSHAD AL-FUHUL ILA TAHQIQ AL-HAQQ MIN ILM AL-USUL* (1909) & *ZAKARIYA AL-BIRRI, USUL AL-FIQH AL-ISLAMI* (1980)) (stating that independent reasoning has become easier than in the past because the Qur'anic sciences and science of hadith flourished in the early years of Islam).

148. *Id.* at 152.

3. Qiyas, Ijtihad, and Ijma

Qiyas is reasoning by analogy to solve a new legal problem.¹⁴⁹ According to Wael Hallaq, *qiyas* encompasses the *a fortiori* argument in both its forms, the *a minori ad maius* and *a maiori ad minus*, *reductio ad absurdum*, and *induction*.¹⁵⁰ The only argument not included is the *argumentum e contrario*, which is considered a linguistic argument in *usul al fiqh*.¹⁵¹

Ijtihad is defined as the intellectual effort by a *mujtahid* (or juriconsult) in deriving rules consistent with the first principles of Islam.¹⁵² *Ijtihad* can refer to the use of *qiyas* to extend a rule or the act of independently taking account of the *maqasid al Shari'a* (the higher purposes or objectives of the Shari'a).¹⁵³ The six *maqasid al Shari'a* are preservation of life, property, family, religion, honour or dignity, and *al aql* (reason or rational knowledge).¹⁵⁴ To carry out these techniques, it was imperative that jurists "be familiar with the broad purposes of the Law, so that when choices are to be made they will be able to choose interpretations which accord with the spirit of the Law."¹⁵⁵

149. See Ahmad Hasan, *The Definition of Qiyas in Islamic Jurisprudence*, 19 ISLAMIC STUDIES 1, 22 (1980) (explaining the various definitions of *qiyas*); see also John Makdisi, *Legal Logic and Equity in Islamic Law*, 32 AM. J. COMP. L. 63 (1985) (discussing the nature of Islamic legal reasoning); Wael B. Hallaq, *Legal Reasoning in Islamic Law and the Common Law: Logic and Method*, 34 CLEV. ST. L. REV. 79 (1985) (discussing the role of logic, deduction, induction and legal analogy in Islamic law); AbdulHamid A. AbuSulayman, *Islamization of Knowledge: A New Approach Toward Reform of Contemporary Knowledge*, in ISLAM: SOURCE AND PURPOSE OF KNOWLEDGE 106 (1988) ("The effect of time and place and a comprehensive study of issues in their right perspective puts special emphasis on the method of *Qiyas*, which ensures arriving at conclusions that are not limited by time and place but are in keeping with the spirit of the Prophet's Sunnah.").

150. Hallaq, *supra* note 149, at 80.

151. See *id.* at 80 n.2. See generally Wael B. Hallaq, *Non-Analogical Arguments in Sunni Juridical Qiyas*, 36 ARABICA 286, 286-306 (1989).

152. See THE OXFORD DICTIONARY OF ISLAM, *supra* note 89, at 134, 214 (defining *ijtihad* and *mujtahid*, respectively); Bassiouni & Badr, *supra* note 116, at 173. Some scholars discuss *ijtihad* as part of *qiyas*, others discuss it as a separate category. See HASAN, *supra* note 95; Ansari, *supra* note 138; Muslim, *supra* note 99, at 71 ("It must be kept in mind, however, that if this mechanical application of *Qiyas* were to result in judgments which are unjust or against the public interest, or where the revealed sources are silent on some confronting issue then there may be a need to exert independent judgment, namely *Ijtihad*.").

153. See Kamali, *supra* note 5, at 224 (stating the three capacities in which the *ijtihad* operates).

154. See *id.* at 229.

155. Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 AM. J. COMP. L. 199, 210 (1978).

In principle the Shari'a permits legal rules to be changed and modified in accordance with changing circumstances. Muhammad Iqbal referred to *ijtihad* as "[t]he principle of movement in the structure of Islam."¹⁵⁶ The justification for *qiyas* and *ijtihad* is found in the Qur'an and Sunnah.¹⁵⁷

Scholars have identified three ways *ijtihad* can operate: (1) with regard to speculative (*zanni*) textual rulings in the Qur'an and Sunnah due to meaning (*dalalah*) or transmission (*ridwayah*), then *ijtihad* can be employed to determine the correct interpretation that is in harmony with the objectives and higher purposes of the law; (2) where there is no *nass* (clear injunction) or *ijma* (consensus), then resort can be made to *ijtihad* with the guiding factor being the *maqasid al Shari'a*, this is known as *ijtihad bi al ray* (*ijtihad* founded in opinion); and (3) with respect to existing rules of *fiqh* which originated from analogical reasoning (*qiyas*), juristic preference (*istihsan*) and other forms of *ijtihad*, then the *mujtahid* may perform fresh *ijtihad* if these rulings no longer serve the higher objectives of the Shari'a in light of, *inter alia*, new social, economic, political, or cultural considerations.¹⁵⁸

156. MOHAMMAD IQBAL, *THE RECONSTRUCTION OF RELIGIOUS THOUGHT IN ISLAM* 148 (Kitab Publishing House 1974).

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

158. See Kamali, *supra* note 5, at 224 (stating the three capacities in which the *ijtihad* operates). The majority of scholars agree that if the text concerns religious observances (*ibadat*), then change is not possible. In cases where the text is about "worldly transactions":

[T]he majority of jurists have held that it is open to interpretation and *ijtihad* . . . If the text is specific and does not admit of *ijtihad*, the dominant view is that no change should be attempted. But even so, numerous instances can be found in the precedent of the Caliph Umar bin al-Khattab, where such changes have been made even in cases of the presence clear text.

Id. (citing Muhammad Salam Madkur, *Madkhal al-Fiqh al-Islami*, Cairo, Dar al-Qawmiyyah li al-Taba'ah wa al-Nashr, 1384/1964, 11); SUBHI MAHMASANI, *THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM* 109 (F. Ziadeh, et al. trans., 1961).

The Shari'a identifies three factors that must be kept in mind in pursuing the maqasid al Shari'a or objectives of the law.¹⁵⁹ These factors include educating the individual (*tahdhid al fard*) to inspire faith and instill the qualities of trustworthiness and righteousness, to establish justice (*adl*) which is one of the major themes of the Qur'an, and consideration of public interest (*maslahah*).¹⁶⁰

Ijma, or consensus of the community, is a third source of Islamic law.¹⁶¹ Once a fresh *ijtihad* or *qiyas* has been completed and a consensus develops around it (ratification by the community) then it becomes part of the *corpus juris* of Islamic law.¹⁶² *Ijma* may or may not be binding depending on whether or not it was an explicit *ijma* or a tacit *ijma* and also depending on a number of other variables.¹⁶³

Other techniques and principles one should be aware of when analyzing the Shari'a include: *Naskh* (a technique where verses of the Qur'an are abrogated or abrogation of one Sunnah by another Sunnah and cross-abrogation of Qur'an and Sunnah); *al tamassuk bil asl* (the rule that all beneficial actions are legitimate and all harmful ones illegitimate); *istishab al hal* (the presumption in evidence law that a state of affairs known to exist in the past is valid unless there is evidence challenging it); *al masalih al mursalah* (the rule that a benefit is deemed legitimate if the Shari'a is not known to have established or denied it); *al dhara'i'* (the rule that the legitimacy of means is directly affected by the benefit or harm implicit in the final end it seeks to achieve); *al istiqla al naqis* (the rule that a universal law can originate from a particular law through ascending generalization, if no exception is known to challenge the generalization); *al istihsan* (the rule that a weaker

159. Kamali, *supra* note 5, at 225.

160. *Id.* at 225-31. There are at least fifty-three instances where the Qur'an commands *adl* or justice. *Id.* at 227.

161. THE OXFORD DICTIONARY OF ISLAM, *supra* note 89, at 133; see generally Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 23-24, 63 (1998) (describing *ijma* and the scholarly debate surrounding it).

162. THE OXFORD DICTIONARY OF ISLAM, *supra* note 89, at 133. There is great debate as to whose consensus will make *ijtihad* or *qiyas* into law. Some scholars contend it is only the consensus of the jurists, while others contend it is the consensus of the community. See *id.*; IQBAL, *supra* note 92, at 162; Abdulwahab Saleh Babear, *The Role of the Ulama in Modern Islamic Society: An Historical Perspective*, 37 ISLAMIC Q. 80, 85 (1993).

163. For a detailed discussion as about the types of *ijma* and whether or not they are binding, see IMRAN AHSAN KHAN NYAZEE, ISLAMIC JURISPRUDENCE 182-94 (2000).

qiyas may be preferred to a stronger one if the former better fulfills the objectives of the Shari'a); and *al urf wal adah* (the rule that custom and established practice may be legitimate sources of law, as long as they do not contradict the Shari'a). *Urf*, or custom, is of particular significance in this context as many of the rules of international commercial arbitration have evolved to the level of custom. All schools of Islamic jurisprudence accept *urf* as a supplementary source of rules of law.¹⁶⁴ According to Islamic legal scholar Husayn H. Hassan, "[W]hat is established by custom is like what is stipulated (among contractual parties)."¹⁶⁵ This being said, custom cannot change a mandatory rule of the Shari'a.¹⁶⁶

The foregoing is neither exhaustive, nor are the definitions comprehensive. However, the above introduction is sufficient for gaining a basic understanding of Islamic rules and laws concerning international commercial arbitration. One of the difficulties in determining what is Islamic law is due to the fact that there has been strong resistance to codification of the law, which is derived from the Shari'a's fundamental character as an evolutionary system.¹⁶⁷

IV. ARBITRATION UNDER THE SHARI'A

Arbitration, or *tahkim*, has a long history in the Middle East stretching back to the pre-Islamic period.¹⁶⁸ The pre-Islamic Arabs did not have a formal legal system in place, but instead they had a form of tribal justice involving arbitration, which was administered by the chief of the tribe.¹⁶⁹ The following excerpt from Abdul Hamid El-Ahdab's work provides an excellent glimpse of arbitration as it existed among pre-Islamic Arabs:

The Arabs of Jahiliya (pre-Islamic period) knew arbitration because adversaries (be they individuals or tribes) usually resorted to arbitration in order to settle their disputes . . .

164. Bassiouni & Badr, *supra* note 116, at 157-58.

165. *Id.* at 158 (citing HUSAYN H. HASSAN, AL-MADKHAL LI DIRASAT AL-FIQH AL-ISLAMI 146, 213-17 (Cairo 1981)).

166. *Id.*

167. See KHALED ABOU EL FADL, SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN 97 (2001) (discussing the inseparable nature of the Sunnah or *hadith* from the creative practice of the juristic community).

168. ABDUL HAMID EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES 11-12 (2d ed. 1999).

169. See, e.g., Donner, *supra* note 120, at 16 (describing the arbitration between Ali and Muawiyah).

Arbitration was optional and was left to the free choice of the parties. Arbitral awards were not legally binding—their enforcement depended solely on the moral authority of the arbitrator.¹⁷⁰

The practice of arbitration was approved of in the Qur'an, particularly in the matrimonial context: “[i]f ye fear a breach between them twain (i.e. husband and wife), then appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, God will cause their conciliation; for God hath full knowledge, and is acquainted with all things.”¹⁷¹

Islamic history also reveals that the Prophet accepted an arbitrator's decisions; he advised others to arbitrate and his closest companions often used arbitration to resolve disputes as well.¹⁷² In fact, the first treaty entered by the Muslim community—the Treaty of Medinah signed in AD 622 between Muslims, Non-Muslim Arabs, and Jews—called for disputes to be resolved through arbitration.¹⁷³ Moreover, the Prophet also resorted to tahkim in his dispute with the Banu Qurayza tribe.¹⁷⁴ Not only is tahkim approved of by the Qur'an and evident in the Sunnah of the Prophet, the two main sources of Islamic law, but the ijma or consensus has also confirmed its use as an Islamic dispute resolution tool.¹⁷⁵

V. ARBITRATION IN THE MIDDLE EAST

The historical acceptance of arbitration is also evident from more contemporary times as Bahrain was a center of international commercial arbitration before Paris and London.¹⁷⁶ In Saudi Arabia for instance, until the 1950s, arbitration was the primary tool for resolving oil concession agreement disputes.¹⁷⁷ Despite this

170. EL-AHDAB, *supra* note 168, at 11.

171. Qur'an 4:35.

172. EL-AHDAB, *supra* note 168, at 13.

173. *Id.* at 12.

174. *Libyan Am. Oil Co. (LIAMCO) v. Libyan Arab Republic* (1977), 20 I.L.M. 1, 41 (1981).

175. EL-AHDAB, *supra* note 168, at 13.

176. In the early 1900s, European merchants and traders made use of the commercial arbitration center located in Bahrain. Hassan Ali Radhi, *State Courts and Arbitration in the Gulf Cooperation Council (GCC) Countries*, ICC INT'L L. CT. ARB. BULL. 57 (1992).

177. See generally SAMIR SALEH, *COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST: A STUDY IN SHARI'A AND STATUTE LAW* 3 (1984); Salah Hejailan, *National Reports: Saudi Arabia*, 4 Y.B. COM. ARB. 162, 163 (1979).

history and tradition, international commercial arbitration in the Islamic world in recent history can best be summarized as a troubled, or “roller coaster”-like, experience.¹⁷⁸ Charles Brower and Jeremy Sharpe identify three phases in the Middle East when it comes to international commercial arbitration in the mid-1900s.¹⁷⁹

The first phase, from the end of World War II to the 1970s, was a time when Islamic domestic laws were undermined and negated and the “superior” Western laws were imposed in the arbitration of long-term oil concession disputes.¹⁸⁰ In the case of *Petroleum Development (Trucial Coasts) Ltd. v. Sheikh of Abu Dhabi*, Lord Asquith, the arbitrator, acknowledged that given the contract was executed in Abu Dhabi and was to be performed there, the applicable law ought to be the laws of Abu Dhabi.¹⁸¹ But, he then went on to undermine Abu Dhabi laws, which were grounded in Islamic law, because “it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.”¹⁸² Lord Asquith applied principles of English law since they were the “common practice of the generality of civilized nations.”¹⁸³ The thrust of the rejection was that there was no general law of contract in the Shari'a.

The same arrogance is evident in the case of *Ruler of Qatar v. International Marine Oil Co. Ltd.*, where the arbitrator held that Qatar law, which was based on Islamic law, was the proper law to apply, but then dismissed it by stating, “I am satisfied that the [Islamic] law does not contain any principles which would be sufficient to interpret this particular contract.”¹⁸⁴ Both arbitrators ignored the extensive Islamic legal scholarship which had set out clear principles of contract law based on the primary and secondary sources of Islamic law.¹⁸⁵

178. Charles N. Brower & Jeremy K. Sharpe, *International Arbitration and the Islamic World: The Third Phase*, 97 AM. J. INT'L L. 643, 643 (2003).

179. *Id.*

180. *Id.* at 643-44.

181. *Petroleum Dev. (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi*, 1 INT'L & COMP. L. Q. 247, 250-51 (1952).

182. *Id.*

183. *Id.* at 251.

184. *Ruler of Qatar v. International Marine Oil Co. Ltd.*, 20 ILR 534 (1953).

185. See William M. Ballantyne, *The Shari'a and its Relevance to Modern Transactional Transactions*, First Arab Regional Conference (Feb. 15-19, 1987), in 1

This alienation and distrust of international arbitration was reinforced by a 1963 arbitration decision. In *Saudi Arabia v. Arab American Oil Co. (ARAMCO)*, the panel ruled against the Saudi's.¹⁸⁶ The panel held that Saudi laws had to be "interpreted or supplemented by the general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence," because ARAMCO's rights could not be "secured in an unquestionable manner by the law in force in Saudi Arabia."¹⁸⁷ In the wake of this decision, the Saudi Council of Ministers passed Resolution No. 58 which prohibits government agencies from participating in arbitration.¹⁸⁸ The hostility and distrust of arbitration was not limited to Saudi Arabia and still colours the perception of many in the region when it comes to transnational arbitration.¹⁸⁹

The second phase, according to Brower and Sharpe, is characterized with many Middle Eastern nations, as well as the developing world in general, gaining more confidence as a result of a number of factors including, *inter alia*, the end of colonialism, rise in nationalism, challenge to capitalism, and increasing oil wealth.¹⁹⁰ The firm belief in many of these nations that the entire international arbitration framework was developed without any consideration being given to their culture, values, and legal traditions gave impetus to a growing challenge to the international arbitration regime's legitimacy.¹⁹¹

ARAB COMP. & COM. L. 3, 12 (1987) (discussing the various forms of Muslim contract law in existence).

186. *Saudi Arabia v. Arab Am. Oil Co. (ARAMCO)*, 27 ILR 117 (1963).

187. *Id.*

188. For a discussion of Resolution No. 58, see Hejailan, *supra* note 177, at 169-73.

189. In general, the legal community throughout the Arab world is still manifesting its hostility to transnational arbitration mainly as a result of the great publicity devoted to the criticism of certain unfortunate arbitral awards rendered as of 1951 by western arbitrators who excluded, with terms of a humiliating nature, the application of the national applicable legal systems of countries like Abu Dhabi or Qatar.

Amed Sadek El-Kosheri, *Is There a Growing International Arbitration Culture in the Arab-Islamic Juridical Culture?*, in INTERNATIONAL DISPUTE RESOLUTION: TOWARDS AN INTERNATIONAL ARBITRATION CULTURE 47-48 (Albert Jan van den Berg ed., 1998).

190. Brower & Sharpe, *supra* note 178, at 645.

191. *Id.* at 645-46. The Libyan nationalization cases represented the mood during this phase, which was characterized by legal, ideological, and political clashes between the Western world and the developing world. See Robert B. von Mehren & P. Nicholas Kourides, *International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476, 483-87 (1981).

The third and current phase is characterized by growing participation in, and promotion of, the international arbitration movement by Islamic countries.¹⁹² As part of this growing “global adjudication system,” these two authors suggest more and more Islamic nations are becoming parties to international arbitration conventions, are adopting “arbitration-friendly” domestic arbitration laws, and are even setting up arbitration centers.¹⁹³ The best evidence that arbitration is coming back into favour in the region is that more than half of the members of the Organization of Islamic Conferences and fourteen of the twenty-two League of Arab States have acceded to the New York Convention of 1958 and many of them have acceded to the ICSID Convention.¹⁹⁴

Two other developments indicate that arbitration is becoming more acceptable in the Middle East: over the last two or three decades we have witnessed the modernization of arbitration laws in a number of countries, and a number of new arbitration centers have been established in the region.¹⁹⁵ The modernization initiatives have ranged from adoption of Western models (ex. Lebanon and Qatar) to adoption of the UNCITRAL Model Law (ex. Bahrain, Iran, Jordan, Oman, Tunisia).¹⁹⁶ In Saudi Arabia, although reforms in 1983 and 1985 clarified and simplified some elements of the traditional tahkim system, a number of restrictions remain in place including religious and gender differences.¹⁹⁷

The United Arab Emirates (“UAE”), a federation consisting of Abu Dhabi, Dubai, Sharjah, Ras Al Khaimah, Umm Al Quwain, Fujairah and Ajman, also witnessed the enactment of federal arbitration laws in 1992.¹⁹⁸ The laws were part of the new Federal Code of Civil Procedure.¹⁹⁹ The section on “Arbitration” is contained in Book II, Part III, Articles 203 to 218.²⁰⁰ These provisions supersede the individual Emirate laws, and they apply

192. Brower & Sharpe, *supra* note 178, at 646.

193. *Id.* at 647. See generally Charles N. Brower et al., *The Coming Crisis in the Global Adjudication System*, 19 ARB. INT’L 415 (2003) (discussing the growing international arbitration movement).

194. Brower & Sharpe, *supra* note 178, at 647.

195. *Id.* at 650-53.

196. *Id.* at 650.

197. *Id.*

198. EL-AHDAB, *supra* note 168, at 712, 714.

199. *Id.* (Law No. 11 of 1992).

200. *Id.*

to both domestic and international arbitration.²⁰¹ Article 1 of the Civil Code provides:

In the absence of a text in this Code, the Courts shall resort to Moslem Shari'a and choose the most adequate solutions amongst those taught by the Hanbali and Maleki doctrines. Failing them, they shall resort, as need may be, to the Shafi'i and Hanafi doctrines.²⁰²

Notwithstanding this provision, the UAE arbitration laws, unlike their Saudi counterparts, have done away with some of the stringent restrictions such as stipulating the religion and gender of the arbitrator.²⁰³

The region is also witnessing the growth of arbitration centers.²⁰⁴ These centers promote the concept of international commercial arbitration in the Middle East.²⁰⁵ Establishing such centers is an uphill struggle, particularly since the resurgence of Islam in the region will challenge some of the norms sought to be introduced there.²⁰⁶ Indeed, some Islamists may see the international arbitration movement in the same light as many opponents see it in the developing world: essentially as "the removal of a vast sphere of dispute settlement" from domestic judicial control, the undermining of domestic laws and the elevation of "supranational laws of uncertain origins . . . inimical to developing states."²⁰⁷

It is undeniable that the Shari'a has a profound impact on the psyche of most Middle Easterners, but the impact on actual legislation varies from nation to nation. A number of writers have

201. *Id.* at 715-16.

202. Reproduced in *id.* at 714.

203. Federal Law No. 11 of 1992 Issuing the Law of Civil Procedure, ch. 3, art. 206(1), reprinted in BUSINESS LAWS OF THE UNITED ARAB EMIRATES - VOLUME IV (Marjorie J. Hall & Dawoud Sudqi El Alami trans. 1998) [hereinafter Federal Law No. 11].

204. These include the Cairo Regional Centre for International Commercial Arbitration jointly set up by Egypt and the African-Asian Legal Consultative Committee; the Arab Centre for Commercial Arbitration in Rabat, Morocco set up by the Amman Arab Convention on Commercial Arbitration; the Arbitration Centre at the Chamber of Commerce and Industry of Beirut, Lebanon; the Conciliation and Arbitration Centre of Tunis, Tunisia; The Bahrain Centre for International Commercial Arbitration; the Kuwait Centre for Commercial Arbitration; the Abu Dhabi Centre for Conciliation and Arbitration; and the Dubai Centre for Arbitration and Conciliation. Brower & Sharpe, *supra* note 178, at 653-54.

205. *Id.*

206. See *id.* at 656.

207. M. Sornarajah, *The UNCITRAL Model Law: A Third World Viewpoint*, 6 J. INT'L ARB., Dec. 1989, at 7, 20.

attempted to group countries according to the level of influence of both the Shari'a and Western legal systems.²⁰⁸ The legal systems in the Middle East can be loosely grouped based on the influence of Western and Islamic principles. These three groupings are: (1) countries which have adopted Western laws, including the civil law tradition (ex. Lebanon, Syria, Egypt, Algeria, Bahrain, Kuwait, Libya, Morocco, and Tunisia) and the common law tradition (ex. Iraq, Jordan, Sudan and the UAE); (2) countries that have drawn more substantially—though not completely—from the Shari'a (ex. Saudi Arabia, Qatar, Oman and Yemen); and (3) countries which Westernized their commercial laws but still are strongly influenced by Shari'a principles, such as Iraq, Jordan, and Libya.²⁰⁹ The UAE can also be included in this latter category.²¹⁰ Obviously, there are no discrete groups, but these loose categories provide us with a macro view of the situation as it exists today and also give us a sense of what direction the region's arbitration discourse may take.

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

Article 1(2). In the absence of an applicable legal provision the judge shall decide in accordance with the principles of the Islamic Shari'a, and in the absence of these, in accordance with custom. In the absence of custom, the Judge will apply the principles of natural law and the rules of equity.²¹¹

Meanwhile in Egypt and Iraq, there is less recourse to Shari'a and only after reference to customs, which in turn may form part of the fiqh rules.²¹² In the UAE, Bahrain, Kuwait, and Qatar, the constitutions provide that the Shari'a is "a primary source of law."²¹³ Moreover, the Egyptian Constitution was amended in 1980

208. Some writers break it down into two groups: those influenced by the Napoleonic Codes and those influenced primarily by the Shari'a. See, e.g., Julian D.M. Lew, *The Recognition and Enforcement of Arbitration Agreements and Awards in the Middle East*, 1 ARB. INT'L 161 (1985).

209. See NAYLA COMAIR-OBEID, *THE LAW OF BUSINESS CONTRACTS IN THE ARAB MIDDLE EAST: A THEORETICAL AND PRACTICAL COMPARATIVE ANALYSIS (WITH PARTICULAR REFERENCE TO MODERN LEGISLATION)* 119 (1996); Shaaban, *supra* note 6, at 158.

210. COMAIR-OBEID, *supra* note 209, at 119.

211. Syrian and Libyan Code (1953), reprinted in DAVID PEARL, *A TEXTBOOK ON MUSLIM LAW* 198 (1979).

212. DAVID PEARL, *A TEXTBOOK ON MUSLIM LAW* 198 n.6 (1979).

213. Ballantyne, *supra* note 6, at 271-74.

to reflect the Shari'a was *the* rather than *a* principle source of law.²¹⁴

VI. COMPARATIVE ANALYSIS

Though there is some evidence of the acceptance of arbitration (*tahkim*) in the Islamic legal tradition, it has had a checkered track record during the last century in the Islamic world.²¹⁵ While there is no disagreement about *tahkim* being an acceptable form of dispute resolution,²¹⁶ there are significant historical and conceptual differences with the Western concept of arbitration. The differences can be analyzed under five broad headings: (1) Nature of Arbitration, (2) Scope of Arbitration, (3) Uncertainty in the Rules and Regulations Regarding Arbitration Under the Shari'a and in the Various Middle Eastern Jurisdictions, (4) Choice of Law,²¹⁷ and (5) Scope of Judicial Review and Enforcement.

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

A. Nature of Arbitration

One characteristic of arbitration in the West is its binding nature.²¹⁸ This explains the emphasis on ensuring the finality of arbitral decisions. In fact, one of the objectives behind the web of international laws, treaties, national laws, and arbitration rules which attempt to regulate international commercial arbitration is to ensure that arbitral decisions are binding.²¹⁹

The issue is not as clear-cut in the Shari'a and the Middle East.²²⁰ There is much debate in Islamic jurisprudence around the question of whether *tahkim* is more than a simple conciliation.²²¹ Commentators who favor the view that arbitration is simply

214. *Id.* at 271.

215. Brower & Sharpe, *supra* note 178, at 643.

216. *See id.* at 643, 656 (noting arbitration is deeply rooted in Islamic culture).

217. This Article's analysis is restricted to a brief look at the arbitration laws in Saudi Arabia and the UAE.

218. BORN, *supra* note 23, at 1.

219. *Id.* at 3.

220. George Sayen, *Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia*, 24 U. PA. J. INT'L ECON. L. 905, 924 (2003).

221. EL-AHDAB, *supra* note 168, at 16.

conciliation point to verse 35 of *Surah* (chapter 4).²²² They point to the language used, as well as the even number of arbitrators, to argue that is no more than conciliation.²²³ The majority view on the matrimonial dispute resolution verse in the Qur'an is that any decision made by the two spousal representatives would not be final or binding, unless both parties agreed to accept it.²²⁴ On the other hand, those who advocate arbitration as a mechanism with a binding character also find their basis in the Qur'an:

God doth command you to render back your trusts to those whom they are due; And when ye judge between people, that ye judge with justice; Verily how excellent is the teaching which He giveth you! For God is He who heareth and seeth all things.²²⁵

This verse authorizes those who judge to make decisions that are binding.²²⁶ Arbitrators must, therefore, be appointed with this understanding, and so the practice is to appoint an odd number of arbitrators.²²⁷ Some judges of the state fear their power may be challenged or undermined if arbitrators are given the ability to make binding decisions.

There is no clear position on this question in any of the four leading Sunni schools.²²⁸ Hanafi fiqh suggests that arbitration is closer to conciliation, though some jurists have held that an arbitrator has the same function as a judge.²²⁹ In the Shafi'i School, arbitrators have a lesser status than judges because their appointment can be revoked while a judge cannot be removed.²³⁰ Indeed, Imam Shafi'i, the founder of this school of jurisprudence, also believes that arbitration is closer to conciliation.²³¹ Maliki fiqh holds that a decision of an arbitrator is binding unless there is a "flagrant injustice,"²³² while the Hanbali jurists believe that an

222. *Id.* (quoting Qur'an 4:35); see also Sayen, *supra* note 220, at 926 (noting this is the only verse in the Qur'an referring to tahkim by anyone other than the Prophet).

223. EL-AHDAB, *supra* note 168, at 16.

224. *Id.*

225. Qur'an 4:58.

226. EL-AHDAB, *supra* note 168, at 17.

227. *Id.*

228. *Id.* The same is true for the Shiite tradition, but our focus remains on Sunni fiqh.

229. *Id.* at 18.

230. *Id.*

231. See Al Mawardi, *Adab Al Kadi*, T. II, 382.

232. EL-AHDAB, *supra* note 168, at 19.

arbitral award has the same binding force as a court judgment, and that an arbitrator must have the same qualifications as a judge.²³³

The Ottoman Turks, influenced by the civil law tradition, began an initiative in 1869 to codify Hanafi fiqh.²³⁴ The "Medjella of Legal Provisions" dealt with civil law matters and contained an entire section on tahkim.²³⁵ The provisions confirmed the conciliatory nature of arbitration, and considered arbitral awards of lesser force than court judgments (since arbitral decisions could be set aside by judges).²³⁶ However, the Medjella did note that arbitral decisions would still be binding between the parties just as a contract would be binding under the Shari'a.²³⁷

Though both concepts of arbitration existed in the Shari'a, the view of arbitration as conciliation was the prevalent one.

The Saudi arbitration law over time appears to have selected the view of arbitration as binding, as reflected in the Hanbali school.²³⁸ Again, this speaks volumes about the flexible and evolutionary nature of the Shari'a and allows for any Muslim nation to adopt the current international binding approach to arbitration.

B. Scope of Arbitration

As noted earlier, arbitration was explicitly provided for in the Qur'an for family disputes and the Companions of the Prophet used it to resolve disputes involving goods and chattels.²³⁹ The question of the scope of arbitration remained open for debate. Legal scholars, who favour its broader use, point to the use of arbitration to resolve the dispute between Muawiyat Bin Abu Sufiyan and Ali Bin Abu Talib, when Muawiyat refused to accept the Caliphate of Ali after the demise of the third Caliph Othman Bin Affan.²⁴⁰ It is reported that Muawiyat suggested to Ali that the matter be resolved as follows:

I wish to choose a man amongst my men and that you choose a

233. *Id.* at 19.

234. *Id.* at 21.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 552. "Thus the Saudi legislator, by adopting one trend rather than the other in order to adapt to the economic evolution of the country and to facilitate commerce, stayed within the framework of the Shari'a." *Id.*

239. Qur'an 4:35.

240. EL-AHDAB, *supra* note 168, at 14.

man amongst yours so that both of them settle the dispute between us and make their award in compliance with the provisions of the Holy Book.²⁴¹

The suggestion was accepted, and the two camps selected their arbitrators and drafted the first formal Islamic arbitration agreement in AD 659, which extended by *qiyas* (analogy) the Qur'anic directive of arbitration in the family setting to the political arena.²⁴² The disagreements about Ali's acceptance of arbitration led to serious bloodshed and paved the way for "Islam's enduring split into the Shiite and Sunni branches."²⁴³

Notwithstanding its use in the political arena, the common view among the four Sunni schools of Islamic jurisprudence is that arbitration is applicable primarily in financial matters.²⁴⁴ This does not appear to pose any serious issues from the perspective of international commercial arbitration, as such disputes will revolve mostly around finances and property.

Article 1 of the Rules for the Implementation of the Saudi Arabian Arbitration Regulation states: "Arbitration in matters wherein conciliation is not permitted, such as *hudoud*²⁴⁵ *laan*²⁴⁶

241. *Id.*

242. *Id.* at 15. The following excerpts from the agreement clearly illustrate that the parties had fully considered arbitration:

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

Id. (quoting After Al Balaziri, *Al-Dainury*, 206-08).

243. Brower & Sharpe, *supra* note 178, at 643.

244. See SAYED HASSAN AMIN, *COMMERCIAL ARBITRATION IN ISLAMIC AND IRANIAN LAW* 74 (1988).

245. *Hudoud* is a category of crimes in the Shari'a which include murder, assault, adultery, drunkenness, theft, and robbery.

246. *Laan* is a Shari'a procedure whereby the married couple terminates their marital relationship upon one party accusing the other of adultery.

between spouses, and all matters relating to the public order, shall not be accepted.²⁴⁷

A similar provision is found in the Arbitration Rules of the UAE: "Arbitration shall not be permitted in matters in which settlement is not permitted. An agreement to arbitration shall only be valid if made by someone who has the capacity to act with regard to the right which is the subject of the dispute."²⁴⁸

There is also uncertainty about a number of federal laws in the UAE, which give jurisdiction over certain issues to the national courts, such as commercial agencies.²⁴⁹ In fact, there are conflicting court decisions on whether a commercial agency contract can be the subject of arbitration.²⁵⁰

The Saudis exclude arbitration not only in areas in which no compromise is possible but also those areas in which tahkim would be contrary to public order which allows Saudis to exclude many matters from arbitration.²⁵¹ In addition to these limitations, Saudi law has the following provisions: (1) it prohibits the Services of the Commercial Registrar ("the Registrar") from registering (without special authorization) any company which refers any dispute between the company and the Registrar to arbitration outside of Saudi Arabia, (2) it requires that all disputes dealing with commercial agency contracts be brought before the Diwan Al-Mazalem and not be resolved through arbitration,²⁵² and (3) it stipulates that the Diwan Al-Mazalem have exclusive jurisdiction over disputes among foreign contractors or companies and their Saudi sponsor. Moreover, given that Decree No. 58 is still on the books, there is debate about the status of the prohibition against state agencies participating in arbitration without the approval of the Council of Ministers.²⁵³ Abdul Hamid El-Ahdab, for instance, argues that given the Kingdom's execution of the Overseas Private

247. Rules for the Implementation of the Saudi Arabian Arbitration Regulation (27 May 1985), *reprinted in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Annex II (Jan Paulsson ed., 2005).

248. Federal Law No. 11, *supra* note 203, ch.3, art. 203(4).

249. EL-AHDAB, *supra* note 168, at 719.

250. *Id.*

251. For instance, no compromise would be permitted under the Shari'a when a spouse seeks a divorce for the other spouse's adultery. More relevant to international commercial disputes, interest provisions in contracts would not be enforceable since it would be contrary to the public order under the Shari'a (see below for a more detailed discussion).

252. Decree of 13.03.1399 (H.) (31 October 1980) directed to the Services of the Commercial Register.

253. See Sayen, *supra* note 220, at 910.

Investment Corporation (“OPIC”) convention and its accession to the ICSID Convention, “[t]he scope of the prohibition became extremely restricted and one may now say that if, previously prohibition under Decree No. 58 was the rule, this has now been reversed and today arbitration is the rule.”²⁵⁴ Others are not so confident.²⁵⁵

The question of what matters can be arbitrated becomes problematic when you consider the public policy implications. Consider for instance that the UNCITRAL Model Law Article 36 provides that recognition and enforcement of an arbitral award may be refused, *inter alia*, “if the court finds that: the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or the recognition or enforcement of the award would be contrary to the public policy of this State.”²⁵⁶

A similar provision is found in the New York Convention, where Article V(2) provides that recognition and enforcement may be refused if: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.²⁵⁷

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

C. *Uncertainty in the Rules and Philosophical Differences*

The fact that the Shari'a attempts to regulate the secular as well as the spiritual realms, and the fact that much of classical jurisprudence was formulated in a cultural setting long ago, leads to many areas of conflict within the current international

254. EL-AHDAB, *supra* note 168, at 563.

255. See, e.g., Sayen, *supra* note 220, at 910.

256. UNCITRAL Rules, *supra* note 28.

257. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

framework. These differences are reinforced and augmented by the underlying Shari'a theme of attaining the common good, as seen within the Islamic worldview, in this world and the hereafter.²⁵⁸ The following is a brief overview of a number of these areas for illustrative purposes.

1. Public policy

A primary objective of the Shari'a is to help mankind attain the benefits "both in this world and the next."²⁵⁹ *Maslahah* or public interest (known alternatively as the common good of humanity) is an important factor in the development of the Shari'a.²⁶⁰ One of the great scholars, al Shatibi, singled out *maslahah* as the only overriding objective of the Shari'a which encompasses all measures beneficial to people.²⁶¹ The question of what is in the public interest will generate different answers depending on one's worldview.²⁶² Indeed, according to the Islamic philosopher, al-Ghazali, the public interest essentially revolves around protecting the six *maqasid al-Shari'a*, as discussed earlier.²⁶³ These parameters, as well as the reference to life after death, produce results significantly different from Western conceptions.

On a practical level, the fact that Saudi Arabia is a signatory to the New York Convention provides no security to foreign corporations who have entered into contracts in or with Saudi Arabian entities, in terms of enforceability of arbitral awards.²⁶⁴ As discussed above, pursuant to Article V(2)(b) of the Convention, signatories who have availed themselves of this reservation, including Saudi Arabia, are not required to recognize an arbitral

258. Bassiouni & Badr, *supra* note 116, at 158.

259. See Kamali, *supra* note 5, at 228.

260. See, e.g., THE OXFORD DICTIONARY OF ISLAM, *supra* note 89, at 195.

When a new rule is needed to regulate a novel situation and cannot be derived from *qiyas*, *ijma*, or *urf*, resort to *maslahah* is permissible. It is, in some respects, equivalent to the common law's equity, though it is much broader because it extends beyond the parties to a given conflict.

Bassiouni & Badr, *supra* note 116, at 158.

261. Kamali, *supra* note 5, at 228.

262. See Bassiouni & Badr, *supra* note 116, at 158.

263. Kamali, *supra* note 5, at 229. See earlier discussion, section III(B)(iii). Note: some scholars consider there to be five *maqasid al-Shari'a*.

264. Kristin T. Roy, Note, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?*, 18 FORDHAM INT'L L. J. 920, 923 (1995).

award that is contrary to its public policy.²⁶⁵ Public order in Saudi Arabia is determined by reference to the Shari'a (including its measure of the common good of humanity), and not just the parties involved in a dispute.²⁶⁶

Article 2 of the UAE Civil Code provides that "one shall resort to the rules and principles of the Moslem Fiqh in the construction of the laws."²⁶⁷ It further states in Article 27 that those laws which are contrary to the "Shari'a, public order or good morals of the State of the United Arab Emirates shall not be applied."²⁶⁸

Indeed, national courts of a number of Islamic nations have refused to recognize "foreign arbitral awards on domestic public policy grounds, including precepts of Islamic law."²⁶⁹ They have refused to recognize foreign awards even though the public policy referred to in the Convention is international public policy.²⁷⁰

There will be clear differences between public policy in Islamic nations and public policy in the West. In addition to the philosophic differences arising from the Shari'a's focus on collective rights,²⁷¹ as opposed to the West's focus on individual

265. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 259.

266. See EL-AHDAB, *supra* note 168, at 608 (citing Hassan Mahassani: "Moslem Law is a Main Part of Saudi Public Order" Conference in Jeddah, 20 January 1977).

267. Federal Law No. 11, *supra* note 203.

268. *Id.*

269. Samir Saleh, *The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 340, 341-42 (Julian D. M. Lew ed., 1986).

270. See ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 361 (1981). Interestingly, Islamic nations such as Algeria, Djibouti, Lebanon, and Tunisia have expressly incorporated international public policy into their arbitration laws. See Brower & Sharpe, *supra* note 178, at 649.

271. As the late Islamic legal scholar A. K. Brohi pointed out, "Collectivity has a special sanctity attached to it in Islam." A. K. Brohi, *The Nature of Islamic Law and the Concept of Human Rights*, in Human Rights in Islam, Report of a Seminar Held in Kuwait, Dec. 1980, at 43, 48. This no way implies that Islam is devoid of consideration for individual rights. On the contrary, the Islamic system "is inherently individualistic . . . it is designed first . . . to defend and protect the basic dignity of the human person against imposition by the society and the state." Mohammad Hashim Kamali, *Freedom of Religion in Islamic Law*, 21 CAPITAL U. L. REV. 63, 64 (1992). This is not a contradiction as a number of writers, including Harry Triandis, have shown that individualism and collectivism can coexist. See Harry C. Triandis, Christopher McCusker & C. Harry Hui, *Multimethod Probes of Individualism and Collectivism*, 59 J. PERSONALITY & SOC. PSYCHOL. 1006, 1007 (1990).

rights, there will also be conflicts in interpretation and implementation of laws and treaties.

2. Interest, Speculation, and Unfair Trade Practices

Interest or *riba* is a contentious issue in Islamic jurisdictions.²⁷² The Shari'a prohibits *riba*,²⁷³ and there have been no court cases or arbitral awards to address the question of whether an award would be enforced against parties in Islamic nations which prohibit interest in its domestic law.²⁷⁴

Riba literally means "an excess."²⁷⁵ It is defined as "any unjustifiable increase of capital whether in loans or sales."²⁷⁶ It is essentially any unlawful or unjustified gain.²⁷⁷ Any contracts which include an excessive profit margin will also be considered as a form of *riba* if it is exploitative, oppressive, or unconscionable.²⁷⁸

The UNCITRAL and ICC Arbitration rules do not contain any explicit reference to the awarding of interest.²⁷⁹ However, other arbitration rules including those of the World Intellectual Property Organization ("WIPO"), LCIA, and AAA provide for the awarding of simple and even compound interest.²⁸⁰ In fact, even the United Nations Conventions on Contracts for the International Sale of Goods ("CISG")²⁸¹ provides: "If a party fails

272. T.S. Twibell, *Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) Under Shari'a (Islamic Law): Will Article 78 of the CISG be Enforced When the Forum is in an Islamic State?*, 9 INT'L LEGAL PERSP. 25, 78 (1997).

273. *Riba* has been interpreted by some to mean interest while others say it is usury and distinguish commercial interest from *riba*. The prohibition of *riba* is stated in five different places in the Qur'an. See THE OXFORD DICTIONARY OF ISLAM, *supra* note 89, at 264, 266; Twibell, *supra* note 272, at 75.

274. Twibell, *supra* note 272, at 71.

275. Zamir Iqbal, *Islamic Financial Systems*, FIN. & DEV., June 1997, at 42, 43.

276. *Id.*

277. NABIL SALEH, UNLAWFUL GAIN AND LEGITIMATE PROFIT IN ISLAMIC LAW: *RIBA, GHARAR AND ISLAMIC BANKING* 13 (Cambridge Univ. Press 1986).

278. See C.G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE* 67 (MacMillan Press 1988).

279. Natasha Affolder, *Awarding Compound Interest in International Arbitration*, 12 AM. REV. INT'L ARB. 45, 51 (2001).

280. WIPO Arbitration and Mediation Rules, art. 60(b), WIPO Arbitration and Mediation Center; International Arbitration Rules, art. 28(4), American Arbitration Association, available at <http://www.adr.org> [hereinafter IAR] (as amended and effective Sept. 1, 2000); New London Court of International Arbitration Rules, rule 26.6 [hereinafter LCIA Rules] (effective January 1, 1998).

281. United Nations Conventions on Contracts for the International Sale of Goods, Apr. 11, 1980, 19 I.L.M. 668 (1980).

to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.”²⁸²

The fact that interest will meet with strong opposition in many Islamic jurisdictions²⁸³ is borne out by the negotiations leading up to the drafting of the CISG. There, Islamic nations rejected proposals to set an interest rate because interest was banned in their domestic law.²⁸⁴ Again, as with the other Shari'a rules, there are differences in the domestic laws of Muslim nations.²⁸⁵ Some countries have legalized it, while still others have not. In Egypt, for instance, the constitutionality of interest was challenged, but the Supreme Court upheld the interest because the interest law predated the Constitution which made the Shari'a the principle source of law.²⁸⁶ Similarly, in Morocco interest was legalized through some questionable legal distinctions between human and artificial entities.²⁸⁷ The rationale was that the Qur'an only prohibited charging interest in “transactions between Muslim individuals . . . whereas artificial entities such as banks, corporations, public agencies or the like may freely charge interest in commercial transactions since they have no religion.”²⁸⁸

In the UAE, a court authorized the collection of interest in a case of delayed payment, and was not apologetic in any way.²⁸⁹ On the other hand, Saudi Arabian legislation prohibits interest as being contrary to the Shari'a.²⁹⁰

A related concept is that of *gharar* or gambling.²⁹¹ This legal principle will mean that “any contract containing speculation, or contract clauses that turns on the happening of a specified but

282. *Id.* art. 78.

283. If not at the present time, then over time as the Islamic perspective gains more influence.

284. Statement of Mr. Shafik (Egypt), First Committee Deliberations, 34th Meeting, Doc C(4) (A/Conf.97/C.1/SR.34), OR 415, 416 (1980), *reprinted in* JOHN O HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES, THE STUDIES, DELIBERATIONS AND DECISIONS THAT LED TO THE 1980 UNITED NATIONS CONVENTION WITH INTRODUCTIONS AND EXPLANATIONS 637 (1987).

285. See Daniel Klein, *The Islamic and Jewish Laws of Usury: A Bridge to Commercial Growth and Peace in the Middle East*, 23 DENV. J. INT'L L. & POL'Y 535, 546 (1995).

286. Akaddaf, *supra* note 13, at 54.

287. *Id.* at 55.

288. *Id.*

289. Shaaban, *supra* note 6, at 171.

290. COMAIR-OBEID, *supra* note 209, at 194.

291. Peter D. Sloane, *The Status of Islamic Law in the Modern Commercial World*, 22 INT'L LAW. 743, 746 (1988).

unsure event, is void."²⁹² For instance, under this doctrine, insurance contracts as we know them in the West would be void under the Shari'a.²⁹³

The prohibition of unlawful trade practices under the Shari'a includes a positive duty to disclose defects.²⁹⁴ Though in line with the CISG duty of good faith, it would be interesting to see how this positive duty will impact the *caveat emptor* maxim and the related concept of due diligence in common law jurisdictions.

3. Capacity of arbitrator

The classical rules under the Shari'a seriously restrict the ability to appoint arbitrators; candidates require the same qualifications as a judge, including being male and Muslim.²⁹⁵ This is the position, for instance, in Oman and Saudi Arabia.²⁹⁶ But interestingly, as we noted above, even though the UAE arbitration laws give primacy to the Shari'a,²⁹⁷ there are no requirements for arbitrators to be Muslim or male.

Obviously, restrictions along gender and religious lines would not only violate the international norms in the field of international commercial arbitration but would also be contrary to international human rights norms. The fact that these restrictions are ostensibly derived from the Shari'a raise some serious issues for those concerned with bringing uniformity between the Islamic law and international commercial arbitration. Imposing any standards from outside would be counterproductive and any reform initiatives must come from within using the methodology and mechanisms for evolution inherent within the Shari'a. Many scholars argue that the fundamental principle of equality in Islam, the historical evidence, and the emphasis given to freedom to contract and contractual obligations provide sufficient justification

292. Roy, *supra* note 264, at 947.

293. *Id.*

294. Akaddaf, *supra* note 13, at 33.

295. EL-AHDAB, *supra* note 168, at 40. A judge had to be of the age of majority, wise, free, Muslim and capable of being a witness.

296. Brower & Sharpe, *supra* note 178, at 651. The Saudi Arbitration Regulation provides: "The arbitrator shall be a Saudi national or Muslim expatriate from the free profession section or others." Rules for the Implementation of the Saudi Arabian Arbitration Regulation, Section 3, *reprinted in* (vol. XI) Y.B. COM. ARB. 370 (A. J. van den Berg ed., 1986). Though there is the view that there is nothing precluding women and non-Muslims from being arbitrators. *See, e.g.*, EL-AHDAB, *supra* note 168, at 579 n.7.

297. Federal Law No. 11, *supra* note 203.

to reassess the Islamic position when it comes to non-Muslims and women.²⁹⁸

With respect to women, the prohibition derives from the lesser weight given to their testimony in classical jurisprudence.²⁹⁹ These countries falsely reason that women's alleged lack of memory, incompetence, and general weakness in character make their testimony less credible.³⁰⁰ It is interesting to note that the same jurists who took this position found no problem accepting many of the Sunnah, the bulk of which were transmitted by the Prophet's wives, particularly Aisha. Some jurists limited women's inability to give testimony in business transactions because women were not involved in commerce and could not be trusted to understand its complexities.³⁰¹ It is also worth noting that though the majority of scholars have a restrictive view of women's testimony, the position is not unanimous in classical Islamic law.³⁰² "This limitation of testimony exclusively to men appears to be an incorporation into Islamic law of an antiquated custom which has now changed, and in Islamic law, 'all rules in the *shari'ah* . . . that are based upon customs change when customs change.'"³⁰³

With respect to women there is a clear disconnect between the *Qur'anic* spirit³⁰⁴ and the actual Islamic legal rules, or fiqh, which developed over time.³⁰⁵ In fact, scholars have pointed out that women's marginalization from equal participation in society resulted from cultural and patriarchal attitudes as well as their

298. See, e.g., Najib Ghabbian, *Islamists and Women in the Arab World: From Reaction to Reform?*, 12 AM. J. ISLAMIC SOC. SCI. 19, 27 (1995).

299. Asifa Quraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective*, 18 MICH. J. INT'L L. 287, 307 (1997).

300. *Id.*

301. See generally Quraishi, *supra* note 299, at 307.

302. See generally Mohamed Fadel, *Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought*, 29 INT'L J. MIDDLE E. STUD. 185 (1997) (describing the various views of women's testimony in Islam).

303. Quraishi, *supra* note 299, at 308 (quoting SOBHI MAHMASSANI, *FALSAFAT AL-TASHRI FI AL-ISLAM* 116 (Farhat J. Ziadeh trans., 1987)). It is interesting to note that this is not an issue restricted to Islamic law. In fact, Jewish law and other religious laws, as well as secular laws in Switzerland and even French law, at one point treated testimony of men and women differently. See EL-AHDAB, *supra* note 168, at 580.

304. See generally AMINA WADUD, *QUR'AN AND WOMAN: REREADING THE SACRED TEXT FROM A WOMAN'S PERSPECTIVE* 15-27 (1992) (explaining the Qur'an's description of the creation of woman).

305. Khan, *supra* note 15, at 330.

exclusion from participation in the Shari'a's development.³⁰⁶ This is reinforced by the fact that there is historical evidence indicating that women were appointed judges.³⁰⁷ Indeed, there are authentic juristic interpretations to support this position.³⁰⁸

The objection to a non-Muslim being an arbitrator is based on the classical view that only a Muslim can judge between two Muslims by applying the Shari'a.³⁰⁹ Again, there are differences on this position expressed by other scholars: some claim this applies to only Muslim countries, while others point out there is no express prohibition of non-Muslim arbitrators in the primary sources of the Shari'a.³¹⁰ As in the case of women, similar contextual, historical, and political arguments can be made with respect to non-Muslims. David L. Neal and Dr. Ashraful Hasan note, "Islam is very much built on a principle of human equality; and in nearly every respect, a *dhimmi's* [non-Muslim] legal capacity is intended to match that of a Muslim peer."³¹¹ This is borne out by contemporary scholarship, which attempts to differentiate between the actual Shari'a principles and the culturally and historically contextualized classical fiqh rulings.³¹² Professor Hasan Askari sums up this position nicely:

306. Quraishi, *supra* note 299, at 307-08. This is a position endorsed by a growing number of prominent Islamic scholars including Hasan Turabi of Sudan, Rachid al-Ghanouchi of Tunisia, and Muhammad al-Ghazali and Yusuf al-Qaradawi of Egypt. *Id.* at 309. For instance, Dr. Hassan al-Turabi notes: "[T]he basic religious rights and duties of women have been forsaken and the fundamentals of equality and fairness . . . enshrined in the Shariah, have been completely overlooked The greatest injustice visited upon women is their segregation and isolation from the general society." Hassan al-Turabi, *The Real Islam and Women*, THE MESSAGE, July 1993, at 23, 24.

307. Quraishi, *supra* note 299, at 308 n.85.

308. Ghadbian, *supra* note 298, at 27.

309. EL-AHDAB, *supra* note 168, at 40.

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

311. David L. Neal & Ashraful Hasan, *Distinctions Between Muslims and Dhimmis: The Human Rights of Non-Muslims Under Islamic Law*, in HUMAN RIGHTS DILEMMAS IN CONTEMPORARY TIMES: ISSUES AND ANSWERS 9, 32-33 (Ashraful Hasan ed., 1998) (footnote omitted).

312. Sincere efforts have been made to determine the *Qur'anic* intent with regard to the role of women. Motivated largely by belief in the basic justice of Islam, some of these efforts have raised serious objections to the traditionally accepted, but often 'sexist' conclusions and opinions of earlier scholars. However, one major methodological shortcoming is caused by an equation which places those opinions and conclusions of scholars on an equal footing with the *Qur'an*, resulting in a contaminated definition of connection with the primary sources of Islam.

It seems unmistakably clear that with regard to the Muslim attitude towards non-Muslims, both globally and within a Muslim society, the classical juristic position is not only irrelevant but also misleading, for the historical situation in which that tradition originated is no longer the same. In other words, we are called upon to derive fresh values and rules from both the explicit and over-all normative framework of the Qur'an and the Sunnah. It appears that these values and rules, irrespective of the specific details, would actualise the potentiality for a universalist perspective already present in the Islamic sources.³¹³

4. Sanctity of Contract

In Islamic society, a contract is very different from what we know in the West.³¹⁴ Under Shari'a principles, a contract is divine in nature, and there is a sacred duty to uphold one's agreements: "O you who believe fulfill any contracts [that you make] Fulfill God's agreement once you have pledged to do so, and do not break any oaths once they have been sworn to. You have set God up as a Surety for yourselves."³¹⁵

Shaikh Ismail al Jazaeri commenting on the above verse concludes that this would apply to any and all agreements reached by parties except on matters that the Qur'an has deemed void or unenforceable.³¹⁶ This special position of contracts is best summed up by the Islamic maxim *Al Aqd Shari'at al muta'qqidin* which essentially states, "[t]he contract is the Shari'a or sacred law of the parties."³¹⁷ This makes it clear that the contractual relationship is viewed much more strictly under the Shari'a and clearly would disapprove of the "efficient breach" theory.³¹⁸ Indeed, all contractual obligations must be specifically performed, unless it

Amina Wadud-Muhsin, *Understanding the Implicit Qur'anic Parameters to the Role of Woman in the Modern Context*, 36 ISLAMIC Q. 125, 126 (1992).

313. Hasan Askari, Dir., Inter-religious Found., Comment on AbdulHamid AbuSulayman's Book *Al Dhimmah and Related Concepts in Historical Perspective*, in 10 J. INST. MUSLIM MINORITY AFF. 112, 112 (1989).

314. See generally Nabil Saleh, *The Law Governing Contracts in Arabia*, 38 INT'L & COMP. L. Q. 761 (1989) (describing the concept of a contract in Islamic society).

315. Qur'an 5:1; see also Qur'an 16:91.

316. Shaikh Ismail al Jazaeri, *Ayat-al-Ahkam* (Arabic text), 124.

317. Twibell, *supra* note 272, at 28.

318. See SAYED HASSAN AMIN, *COMMERCIAL LAW OF IRAN* 64-65 (Vahid Publications 1986) (explaining that the Shari'a views a breach of contract as a religious breach, and thus, it is a very serious matter).

would contravene the Shari'a or some legitimate public policy devised in conformity with the Shari'a.³¹⁹

This approach is manifested in contemporary legislation in much of the Muslim world.³²⁰ The practical effect is that so long as it was not contrary to Islamic norms,³²¹ all agreements are enforceable. The position in Saudi Arabia is derived from the Hanbali jurist Ibn Taymiya, who wrote: "The rule in contracts and provisions is that anything is permitted which is valid and that only that which is forbidden or set aside by one of the text or the 'Qiyas' (reasoning by analogy) is forbidden."³²²

The duty to act in good faith is the essence of Islamic contract law, but over and above this there is extensive legal scholarship elaborating clear principles of Islamic contract law.³²³ In fact, commentators have highlighted the inherent flexibility in Islamic contracts law to take into consideration modern transactions.³²⁴ Therefore, contrary to the view expressed by arbitrators in the *Abu Dhabi* and *Qatar* arbitrations, Islamic law has the capability to resolve modern contractual disputes.

Contractual provisions in the Qur'an have also been interpreted to extend to international treaties.³²⁵ In fact, the Shari'a does not distinguish between a treaty and contract law.³²⁶ Indeed,

319. *Id.* at 64.

320. *See, e.g.*, CODE CIVIL [C. CIV.] art. 89 (Egypt) ("[A] contract is created, subject to any special formalities that may be required by law for its conclusion, from the moment that two persons have exchanged two concordant intentions."). Similar provisions are contained in the legislation in other Middle Eastern nations. *See* Nudrat Majeed, *Good Faith and Due Process: Lessons from the Shari'a*, 20 ARB. INT'L 103-04 (2004).

321. Determined by reference to the Qur'an, legislation or by public policy or public interest. Majeed, *supra* note 320, at 103.

322. The Fatawa of Ibn Taymiya, III, 326.

323. Ballantyne, *supra* note 185, at 12. Al-Majallah also codified some of these principles. Majeed, *supra* note 320, at 103.

324. Majeed, *supra* note 320, at 102 (outlining examples of arbitrators refusing to apply Islamic law in favor of modern law).

325. Gamal M. Badr, *A Survey of Islamic International Law*, 76 AM. SOC'Y INT'L PROC. 56, 59 (1982); *see also* Qur'an 9:4 ("Fulfill any treaty [you have] with them until their period is up. God loves those who do their duty!"). This Islamic duty to fulfill one's commitments is illustrated in this statement made in 1950 by the founder of Saudi Arabia, the late King Abdul Aziz Ibn Saud to F. A. Davies, chairman of the Board of Directors of the Arabian American Oil Company (ARAMCO): "You can have confidence in us because our religion and our law make it our bounden duty to keep our compact with you. I have given you my pledge and my peace ('ahdi wa amani). You walk in the length and breadth of my land and enjoy the same security and protection as my own subjects." J.N.D. ANDERSON, *ISLAMIC LAW IN THE MODERN WORLD*, at xii (1959).

326. *See* MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 204 (Johns Hopkins Univ. Press 1955).

“the principle of *pacta sunt servanda* . . . is recognized by all Muslim jurist-theologians.”³²⁷ The acceptance of this principle may serve as a crucial element in encouraging Islamic nations to exert their best efforts to comply with international conventions and treaties. Again, this can only work if there is mutual respect between the proponents of Western international commercial arbitration and advocates of the Shari'a.

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

5. Liability of Arbitrators

The Saudi arbitration laws are silent on the liability of an arbitrator.³²⁸ In view of the silence it is suggested that general principles of the Shari'a would hold the arbitrator liable for any “fault he commits which results in damage to any party.”³²⁹ In addition an arbitrator may also be liable pursuant to a contractual obligation.³³⁰ This appears to be the approach taken in the UAE where Article 207(1) provides that the arbitrator must accept his or her appointment in writing or it must be recorded in the minutes of the sessions.³³¹ Article 207(2) then provides: “If an arbitrator, after having accepted his appointment, withdraws without a good reason, he may be held liable for compensation.”³³²

The Islamic approach is consistent with the civil law approach but differs from the common law, which focuses on the tortious

327. *Id.*

328. EL-AHDAB, *supra* note 168, at 585.

329. *Id.*

330. *Id.* at 581, 583, 585; *see also* Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 1, 3 (2000) (providing a background on the various liability arbitrators can incur).

331. Federal Law No. 11, *supra* note 203, ch.3, art. 207(1).

332. *Id.* art. 207(2).

concept of a duty of care.³³³ In short, in all three legal systems, there is potential liability on the arbitrator, even though the basis and extent of the liability may vary.

The national laws differ in their treatment ranging from absolute and qualified immunity to unlimited liability.³³⁴ For instance, in the United States, arbitrators have absolute immunity for all acts related to the function of decision-making.³³⁵ However in a number of other countries including Islamic nations, there is qualified immunity.³³⁶ The broadest liability is in countries which are closest to the traditional Islamic principles, including Saudi Arabia, where arbitrators can be liable for negligence for such things as "failing to take note of important documents, in losing or damaging important documents, or in failing to take note of a vital statement made by one of the [parties]."³³⁷

The UNCITRAL Model Law is silent on liability or immunity of arbitrators because it was deemed too controversial to be addressed.³³⁸ The arbitral rules of some of the leading arbitral institutions do address this issue. The LCIA rules provide that an arbitrator shall not be liable except for "conscious or deliberate wrongdoing."³³⁹ Similar wording is used in the AAA international arbitration rules.³⁴⁰ The ICC rules provide absolute immunity by stipulating that arbitrators will not "be liable to any person for any act or omission in connection with the arbitration."³⁴¹

6. Statute of Limitations

There is a need for a statute of limitations period to ensure predictability and certainty. In contrast to the Western

333. Franck, *supra* note 330, at 4.

334. See generally *id.* (outlining the range of liability different countries impose upon arbitrators).

335. Howard M. Holtzmann & Donald Francis Donovan, *United States*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 30 (2005). Though there are exceptions to this immunity and debate about what acts will constitute decision-making.

336. See Franck, *supra* note 330, at 33-40 (illustrating the various countries that have qualified immunity).

337. Hejailan, *supra* note 177, at 167.

338. HOWARD M. HOLTZMAN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 1119 (1989).

339. LCIA Rules, *supra* note 280, art. 31.1.

340. IAR, *supra* note 280, art. 35.

341. ICC Rules, *supra* note 44, art. 34.

perspective, the notion that an action or claim may be barred as a result of time limitations is not a widely accepted concept in the classical Shari'a.³⁴² This position is based on a *hadith*, where the Prophet Muhammad stated that "[a] Muslim's right cannot be abolished even if it is remote in the past."³⁴³ In fact, the Iranian Council of Guardians applying a *Shia* interpretation of the Shari'a rejected the idea of a statute of limitations.³⁴⁴

Despite the aversion to limitation periods, two *Sunni* schools of jurisprudence (Maliki and Hanafi) do provide that a time limitation may bar certain claims.³⁴⁵ The practice in Sunni nations vary; some countries—including Saudi Arabia—follow the Maliki and Hanafi view in the area of commercial and labour laws.³⁴⁶

Interestingly, the only Islamic country which is a party to the United Nations Convention on the Limitation Period in the International Sale of Goods of 1974, as amended by Protocol in 1980, is Egypt.³⁴⁷

D. Choice of Law

One of the advantages of international commercial arbitration is the freedom that parties have to negotiate their choice of law provisions. Article 28 of the UNCITRAL Model Law provides that the tribunal shall decide in accordance with the choice of law selected by the parties.³⁴⁸ In the event the parties did not provide for this, then the tribunal "shall apply the law determined by the conflict of laws rules which it considers applicable."³⁴⁹ The tribunal is also authorized to consider the "usages of the trade applicable to the transaction."³⁵⁰

Article 17 of the ICC Arbitration Rules similarly provide:

- 1) The parties shall be free to agree upon the rules of law to be

342. SAYED HASSAN AMIN, *ISLAMIC LAW IN THE CONTEMPORARY WORLD* 71, 86 (1985).

343. *Id.* at 94.

344. *Id.* at 96.

345. Shaaban, *supra* note 6, at 164.

346. Akaddaf, *supra* note 13, at 44. In corporate matters, the Saudi Arabian Companies Regulations of 1965 govern and in employment matters, the Labor and Workmen Regulations of 1969 apply. *Id.* at 44-45; see also Mahir Jalili, *Time Bar Clauses in Saudi Arabian Contracts*, 13 INT'L CONSTRUCTION L. REV. 488 (1996) (summarizing Saudi Arabia's views on time bars).

347. Akaddaf, *supra* note 13, at 42.

348. UNCITRAL Rules, *supra* note 28, art. 33.

349. *Id.*

350. *Id.*

applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.

2) In all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages.³⁵¹

Article 28 of the AAA rules also provides that the parties can agree on the choice of law to be applied.³⁵²

This choice does not exist when it comes to the Shari'a, according to fiqh rules.³⁵³ The very concept of a divinely inspired system of laws precludes the choice of any other law by the parties to a dispute.³⁵⁴ In fact, Qur'anic injunctions urge believers to have their disputes judged "by what God has revealed."³⁵⁵ This explains why Saudi courts and regulations do not recognize Western conflict of laws principles and automatically apply Saudi laws.³⁵⁶ The situation in the UAE is very similar.³⁵⁷ Pursuant to the UAE legislation, unless the arbitrator was authorized to reconcile the parties, the arbitral award must "be in conformity with the provisions of law."³⁵⁸ UAE law states that a main source of law is the Shari'a.³⁵⁹

This area needs further scholarship to determine whether there are ways to comply with the Shari'a while ensuring that parties can exercise their contractual freedom when it comes to the determination of the choice of law.

E. Scope of Judicial Review and Enforcement of Foreign Judgments

Although international arbitration is a voluntary mechanism, decisions rendered by arbitral tribunals are expected to be binding due to the interplay of a web of national and international laws discussed above.³⁶⁰ It is worth noting at this point that the twin

351. ICC Rules, *supra* note 44, art. 17.

352. IAR, *supra* note 280, art. 28.

353. Sloane, *supra* note 291, at 762.

354. Sayen, *supra* note 220, at 924.

355. Qur'an 4:60, 5:49 ("Judge between them by what God has revealed and follow not their vain desires.")

356. David J. Karl, *Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know*, 25 GEO. WASH. J. INT'L L. & ECON. 131, 131 (1992).

357. Lew, *supra* note 208, at 161-78.

358. Federal Law No. 11, *supra* note 203, ch.3, art. 212(2).

359. See Ballantyne, *supra* note 6, at 274.

360. BORN, *supra* note 23, at 1.

objectives of the legal framework are to ensure enforceability of arbitration agreements and clauses and arbitral awards, and to insulate the arbitration process as much as possible from interference by domestic courts and other national or international institutions.³⁶¹

The first truly international arbitration treaties were the 1923 Geneva Protocol on Arbitration Clauses and 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.³⁶² These two precursors to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards³⁶³ (“the New York Convention”) failed to live up to their expectations in terms of facilitating the enforcement of foreign arbitral awards.³⁶⁴ The main goal of the New York Convention was to remedy the limitations of the Geneva treaties and to pave the way for a more liberal enforcement of foreign arbitral awards.³⁶⁵ As Jane L. Volz and Professor Roger S. Haydock note, “Without the guarantee of enforceability, the arbitration becomes meaningless, a mere prelude to frustrating litigation.”³⁶⁶

In principle, the Convention applies to all arbitral awards.³⁶⁷ However, Article I, paragraph (3) allows states to make reservations:

When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that

361. *Id.*; Volz & Haydock, *supra* note 2, at 873 (“Regardless of what laws govern, the critical issue in an international arbitration is whether the award can be easily enforced.”).

362. Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. [hereinafter Geneva Protocol]; Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301 [hereinafter Geneva Convention].

363. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 259.

364. Volz & Haydock, *supra* note 2, at 875. The Geneva Protocol did not facilitate enforcement of foreign arbitral awards because ratifying nations only had to enforce decisions rendered in their own jurisdiction. While the Geneva Convention was an improvement over the Protocol, the difficulty of satisfying Article I(d) that “the award . . . become final in the country in which it has been made,” created enough interpretational and applicational problems, and provided enough of a loophole, to refuse enforcement. *Id.* at 876-77.

365. See VAN DEN BERG, *supra* note 270, at 4.

366. Volz & Haydock, *supra* note 2, at 873.

367. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 257, art. I(1), (2).

it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.³⁶⁸

This has led to two reservations. First, the reciprocity reservation allows a state to declare that arbitral awards will only be recognized and enforced if made in the territory of another contracting state.³⁶⁹ The second reservation, known as the commercial reservation, allows a state to limit the application of the Convention exclusively to commercial disputes as interpreted by its own domestic law.³⁷⁰

The party seeking to enforce an award only needs to produce the award, and the arbitration agreement under which the award was made, for it to be recognized and be enforceable.³⁷¹ The onus is then on the opponent to establish the existence of grounds to deny recognition and enforcement.³⁷² The Convention provides a limited series of grounds for refusal of recognition and enforcement of foreign arbitral awards.³⁷³ However, no review of the merits of an award to which the Convention applies is allowed.

To prevent recognition and enforcement, the opposing party must establish one of the following grounds: incapacity of the party or invalidity of the arbitration agreement, denial of a fair hearing, excess of authority or lack of jurisdiction, or procedural irregularities.³⁷⁴ There are two other circumstances in which an award may be deemed invalid and which can be considered *ex officio* by the judicial authority requested to recognize or enforce the decision: if the subject matter which formed the basis of the arbitration was not capable of settlement by arbitration according to the law of that country, or recognition and enforcement of the award would be contrary to the public policy of that country.³⁷⁵

The Convention has been ratified by more than 130 nations³⁷⁶ and applies not only to arbitral awards but also to arbitration

368. *Id.* art. I (3).

369. *Id.*

370. *Id.*

371. *Id.* art. IV.

372. *Id.* art. V.

373. *Id.*

374. *Id.*

375. *Id.*

376. See The 1958 New York Convention: List of Contracting States (January 2003), http://www.chamber.se/arbitration/english/laws/1958_New_York_Convention_2003.pdf.

agreements. The Convention sets out the general principle that arbitration agreements must be in writing and that a tribunal in one contracting state must refer the parties back to arbitration when it is served with an arbitration agreement, which indicates the subject of the dispute must be referred to arbitration.³⁷⁷ The objective is obviously to ensure that disputes are resolved without resort to domestic courts.

There are also other international conventions which impose similar comparable obligations on member states with respect to particular categories of disputes or to particular bilateral or regional relationships.³⁷⁸

Consistent with the twin objectives of trying to attain binding decisions and universal enforceability, the UNCITRAL Model Law, as well as the rules of the major arbitral institutions (including the LCIA, the ICC, and the AAA), provide that decisions shall be binding and enforceable.³⁷⁹ The international framework severely limits and precludes assessment of the merits of arbitral decisions. The Western concept of arbitration recognizes and accepts that an arbitral award may not be consistent with the law.³⁸⁰

Many Middle Eastern countries have ratified the New York Convention, including Saudi Arabia.³⁸¹ However, the UAE has not acceded to the Convention as of the writing of this Article.

Limited judicial review is something alien to the Middle East.³⁸² In fact, in Oman, Qatar, and Saudi Arabia, prior to their accession to the New York Convention, the merit of a dispute was

377. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 257, art. II.

378. See, e.g., Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336 [hereinafter Panama Convention]; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, [hereinafter ICSID Convention]; European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 349; Arab Convention on Commercial Arbitration, available at <http://www.jurisint.org/pub/01/en/155.htm>.

379. See UNCITRAL Model Law, *supra* note 80, arts. 34, 35; LCIA rules, *supra* note 280, art. 29; ICC Rules, *supra* note 44, arts. 27, 28; IAR, *supra* note 280, art. 27.

380. Sayen, *supra* note 220, at 924.

381. See The 1958 New York Convention: List of Contracting States (January 2003), http://www.chamber.se/arbitration/english/laws/1958_New_York_Convention_2003.pdf.

382. Sayen, *supra* note 220, at 924.

reviewed in the domestic courts prior to enforcement of foreign arbitral awards.³⁸³

Saudi Arabia's hostility to the recognition and enforcement of foreign arbitral awards appears to have given way to the country's interest in increasing its attractiveness to foreign investors.³⁸⁴ One Saudi official explained the accession to the New York Convention as a "curative remedy for a problem affecting Saudi foreign trade relations."³⁸⁵ The logic essentially being that "non-Saudi Arabian investors may be more confident that the courts of Saudi Arabia will honor a dispute adjudicated by a non-Saudi Arabian tribunal."³⁸⁶ This may be too optimistic of a view, because all indications are that Saudi courts will continue to review the merits of arbitral decisions to ensure that decisions are consistent with Saudi public policy as determined in accordance with the Shari'a.³⁸⁷ In fact, some writers even suggest that "the enforcement of an arbitral award depends upon the belief of the governor of the region in which enforcement is sought as to the fairness of the award."³⁸⁸

A similar situation prevails in the UAE: in the absence of a multilateral or bilateral convention, a foreign arbitral award can only be enforced in the UAE if it meets the conditions for the enforcement of a foreign judgment, the most essential condition being reciprocity.³⁸⁹

VII. CONCLUSION

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

383. Brower & Sharpe, *supra* note 178, at 648.

384. Roy, *supra* note 264, at 921.

385. *Saudi Arabia's Decision on New York Convention Praised*, RIYADH DAILY, Feb. 8, 1994.

386. Roy, *supra* note 264, at 923.

387. *Id.* at 953.

388. EL-AHDAB, *supra* note 168, at 605.

389. *Id.* at 736. The UAE is party to a number of regional and bilateral treaties as well as the ICSID Convention.

speculative contracts, which will be much more difficult, if not impossible, to overcome if the Shari'a rules are adhered to.

There is no doubt that international commercial arbitration is becoming increasingly accepted, but concerns are still being voiced from the developing world and the Islamic world.³⁹⁰ Even so, the opposition has evolved from an economically based one to one asking for more cultural inclusion:

Today, cries of foul play over arbitration are neither as vociferous nor as troubling as they were up to the end of the last decade. Why they occur now, as they occasionally do in the Arab Middle East, the oppositional claims are articulated increasingly in terms of a demand for incorporating the Islamic legal tradition in the international practice of arbitration.³⁹¹

Many of the developing nations most opposed to arbitration, such as Iran and China, have now adopted variations of the UNCITRAL Model Law.³⁹² And while there may be some accuracy to Professor Chibli Mallat's conclusion that "Middle Eastern commercial law as found in legislation or court cases reads for both practitioners and scholars as a direct transposition of European law,"³⁹³ the fact remains that the Shari'a cannot be totally marginalized, particularly given the growing calls for a return to Islamic principles echoing from all corners of the Muslim world.³⁹⁴ As some of these nations move toward democracy and

390. See, e.g., Sornarajah, *supra* note 207, at 7; Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419 (2000) (exploring the "paradigm shift" in the Third World's opposition to international commercial arbitration from one based on demands for a New International Economic Order (NIEO) in the 1970s and early 1980s to one based on claims for cultural recognition); MOHAMMED BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* (1979); Khizr Khan, *International Commercial Arbitration in the Legal Systems of Developing Countries* (1986) (unpublished LL.M. thesis, Harvard Law School) (on file with the Harvard University Library).

391. Shalakany, *supra* note 390, at 420; see also Ibrahim al-Astal, *Arbitration under Islamic Law* (1986) (unpublished Ph.D. dissertation, Cairo University) (on file with Cairo University); Mohammed Bedjaoui, *International Commercial Arbitration in the Arab World*, 3 *ICC Int'l Ct. Arb. Bull.* (Spec. Supp. May 1992); Hassan Mahassni, *General Principles of Islamic Law Relating to International Commercial Arbitration*, 3 *ICC Int'l Ct. Arb. Bull.* (Spec. Supp. May 1992).

392. Shalakany, *supra* note 390, at 421.

393. Chibli Mallat, *Commercial Law in the Middle East: Between Classical Transactions and Modern Business*, 48 AM. J. COMP. L. 81, 81 (2000).

394. See Sayen, *supra* note 220, at 906 ("Islamic reaction and general political unrest in the Middle East exert increasing pressure on these countries to adhere more closely to traditional values as expressed in their ancient religious law, the *Shari'a*.").

their populations call for a return to some Shari'a principles, the demands for a more inclusive international regime will also grow louder. Indeed, even some nations which were believed to have been moving away from the Shari'a now appear to be returning to it. This is evident from the developments in many of the Muslim nations, particularly in the UAE, which saw the introduction of the UAE Law of Civil Transactions of 1985 signify "a virtual return to the Shari'a."³⁹⁵

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

The question for the proponents of the Shari'a is whether it will be reformed from within to meet new and expected challenges and to take into consideration the present era and its modern institutions and customs. The question for the advocates of international commercial arbitration is whether they are prepared to engage in dialogue for a more inclusive and reflective international arbitration framework.³⁹⁶

The rich legal tradition of the Shari'a clearly reveals that it has many moral, ethical, and legal commonalities with the civil law and common law traditions.³⁹⁷ More importantly, it is a sophisticated system with its own methodology and mechanism for evolution to meet the needs of contemporary society. The dismissal of the Shari'a as an archaic and irrelevant system will not be conducive to developing the mutual respect required to fashion an inclusive international system. Interestingly, the undermining of

395. See Ballantyne, *supra* note 6, at 274. He also notes that the "various Courts Laws made under the (new) Constitution give stronger emphasis to the Shari'a and, as has been said, that emphasis is further stressed by the new code." *Id.*

396. See Brower & Sharpe, *supra* note 178, at 652 n.79 (according to M. Sornarajah even the "so-called *lex mercatoria* is a creation of a coterie of Western scholars and arbitrators who have loaded it with norms entirely favourable to international business").

397. M. McCary, *supra* note 9, at 320.

the Shari'a is not something restricted to Western writers. In his review of Samir Saleh's seminal work on commercial arbitration in the Middle East, Professor Ballantyne cautions against this attitude found even among Middle Eastern writers:

The author refers to the Shari'a as a primary source of law of the UAE (Article 7, UAE Provisional Constitution 1971) but goes on to say, '. . . it should be noted that the judges who preside over the courts are generally from Egypt, Jordan and Syria, and are strongly influenced by their national laws rather than by the Shari'a doctrine.' True, but the various Courts Laws made under the Constitution give stronger emphasis to the Shari'a and, as has been said, that emphasis is further stressed by the new code. Thus one must increasingly question whether, particularly in the circumstances of the new code, the practice described by the author that 'as a result, the impact of Shari'a on commercial contracts, which are mainly drafted by Western lawyers, appears to be minimal', is not a dangerous one.³⁹⁸

It is not desirable and may no longer be possible for us to continue to impose our dominant position and values on others and to continue to judge other societies using our own standards. As Mona Abul-Fadl points out, "Dominance cannot be equated with truth, although it no doubt benefits from the old confusion of right with might."³⁹⁹ Indeed, one of the most vocal critics of international commercial arbitration, Singapore's legal scholar M. Sornarajah, while commenting on third world concerns about arbitration, notes:

[Those] latter views [third world objections and oppositions] are regarded as polemical and the Western views are regarded as acts of high scholarship which are to be repeated as often as possible despite the mythical foundations on which they rest.⁴⁰⁰

As I have demonstrated in this Article, the Shari'a is not an obstacle to international commercial arbitration. In fact, as Abdul Hamid El Ahdab points out, "[t]he problem is not the Shariaa,

398. Ballantyne, *supra* note 6, at 269-74.

399. Mona Abul-Fadl, *Beyond Cultural Parodies and Parodizing Cultures*, 8 AM. J. ISLAMIC SOC. SCI. 15, 16 (1991).

400. Shalakany, *supra* note 390, at 428-29 (quoting M. SORNARAJAH, INTERNATIONAL COMMERCIAL ARBITRATION: THE PROBLEM OF STATE CONTRACTS 17 n.12 (1990)). Mr. Sornarajah argues that the price of capitulating to the historically biased international commercial arbitration mechanism prejudices national judicial sovereignty. He further argues that the developing world is forced to accept arbitration if they wish to receive any long-term foreign investment.

since the Arab countries have their specific modern arbitration laws. The problem is the biased attitude of the European centers of arbitration and the inner circle of arbitrators towards the so-called developing countries and in particular the Arab countries.”⁴⁰¹

Notwithstanding the foregoing, there may be those who view the Shari'a as too obscure, archaic, and too different to be taken seriously.⁴⁰² The proponents of international commercial arbitration cannot afford to alienate people whose experiences, socio-economic predicaments, and cultural and religious norms may not align completely with Western conceptions.⁴⁰³ In the case of the Islamic nations, we have seen that there is no inherent opposition to the concept of international commercial arbitration. Yet, there are areas of tension and concern. As Abdul Hamid El-Ahdab notes, “The answers given by Moslem Law to the problems raised by arbitration have been given before the commercial and economic evolution had reached today's stage. However, they are not unalterable and do not constitute an exception to the universal rule that ‘the laws must change over the times.’”⁴⁰⁴

We have also seen that there are different interpretations, as evidenced by the different schools of thought, and, in fact, these differences were seen by Islamic jurists as a mercy from God, “because these disagreements injected Islamic laws with the degree of flexibility necessary for a religion which proclaimed itself suitable for all times, all people and all societies.”⁴⁰⁵ It may not be very realistic to expect that international commercial arbitration rules will be consistent with all Islamic interpretations. Yet, given

401. Letter from Abdul Hamid El-Ahdab to Faisal Kutty (June 12, 2006) (in which Mr. El-Ahdab invites the author to review the outcome of the arbitral awards of the last ten to fifteen years as they relate to the so-called Islamic countries and the repeated nomination of the same arbitrators monopolizing the arbitration process to exploit.)

402. McCary, *supra* note 9, at 320; David F. Forte, *Islamic Law in American Courts*, 7 SUFFOLK TRANSNAT'L L.J. 1, 10 (1983) (“In point of fact, however, American judges have never held that Islamic legal principles were ‘uncivilized’ and therefore not amenable to enforcement in American courts.”).

403. See Daniel S. Sullivan, Note, *Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Democracy*, 81 GEO. L.J. 2369 (1993), as a prime example of the arrogance which many in the developing world, including the Islamic world, may find offensive. Also, it is interesting to note that even the United States was opposed to international arbitration at one time. See Roy, *supra* note 264, at 926 n.41.

404. EL-AHDAB, *supra* note 168, at 19.

405. Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 7 (1997).

the flexibility inherent in the Shari'a, it is equally unrealistic to expect that international commercial arbitration rules and practice will continue to have legitimacy in the Middle East and the larger Islamic world if Shari'a principles and methodology are completely ignored or undermined.⁴⁰⁶ And, even if commercial principles and pragmatism are expected to dampen the zeal to return to Shari'a principles, arbitrators will still require an understanding and appreciation of these very principles as well as the cultural and religious differences they have instilled in the people in determining intent, choice of wording, linguistic anomalies, as well as in analyzing the negotiation and drafting of contracts.⁴⁰⁷

The assumption and belief that the Shari'a is being sidelined, and that the current international commercial arbitration framework is exclusively derived from the Western legal heritage, may create obstacles in the acceptance and continued legitimacy of international commercial arbitration in the Middle East, and even beyond in the other Islamic nations.⁴⁰⁸ This is clearly not acceptable if we recall that the twin objectives of the legal framework underpinning international commercial arbitration are to ensure enforceability of arbitration agreements and clauses and arbitral awards, and to insulate the arbitration process as much as possible from interference by domestic courts and other national or international institutions. This can only be achieved when there is mutual respect and understanding of the various laws, practices, cultures, and religious worldviews prevalent in the world today.

There is a need to reform Islamic law from within to deal with contemporary norms, transactions, and institutions, but there is an equal need to better accommodate and address the issues of concern from an Islamic perspective. There is a clear need for dialogue in this regard and proponents of both the Western and Islamic perspectives should reflect on the following: "Minds fed on the myths of the dominant culture need to be provoked into rethinking their complacencies, and weaned to the idea that

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

407. See generally *Breard v. Greene*, 523 U.S. 371 (1998).

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

whatever the culture which might prevail at any given moment, there is always another possibility, an alternative to understanding and to virtue.”⁴⁰⁹

The aim of such a dialogue will be to help develop an international commercial arbitration regime in which the business community can have confidence, while staying true to the core principles of *tahkim* under the Shari'a.⁴¹⁰ This will help remove a potential crutch that may be used by those who oppose the international commercial arbitration movement as being one of purely Western import.

409. Abul-Fadl, *supra* note 399, at 16.

410. Sayen, *supra* note 220, at 906.